

**Administrative Review of Officer Involved Shooting**

**Eau Claire Police Department Case # 22PD16041**

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## **Administrative Review of Officer Involved Shooting**

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### **Executive Summary**

#### **Introduction**

This administrative review will examine the facts pertaining to the officer involved shooting of Clayton Thomas Livingston. This document contains the facts of the case, which includes Officers Sam Sperry and Tre D'Angelo Johnson's decision to use deadly force.

The facts were gathered from officer reports, Axon Audio and Video, independent cell phone video, a Ring doorbell camera, documents submitted by the Wisconsin Department of Justice-Division of Criminal Investigation (DCI), and the subsequent review conducted by Eau Claire County District Attorney Peter Rindal.

This administrative review will identify specific policies relevant to the use of deadly force by Officers Sperry and Johnson, whether Officers Sperry and Johnson's actions were appropriate under the circumstances and within policy will be examined in the "findings" portion of this review.

This Administrative review concludes that Officers Sperry and Johnson's actions were appropriate and within the guidelines of the Eau Claire Police Department policy manual based on the totality of circumstances. The entry into Clayton Livingston's garage, based on exigent circumstances along with the amount of force used to stop the attack was necessary and objectively reasonable.

#### **Summary of Incident**

On September 4, 2022 at 2337 hours, the Eau Claire County Communications Center received a 911 hang up call from [REDACTED]. The male caller gave the address for himself and his neighbor and advised he had heard a gunshot approximately 20 minutes earlier. The caller said that he was looking out the front window of his house and could see his neighbor (Livingston), arguing in his garage with his wife and waving "guns" around. The caller thought this was happening at 1947 Declaration Dr, Eau Claire. The caller confirmed that all of this was taking place in the open garage at an address later determined to be 1949 Declaration Dr.

The caller further clarified that Livingston turned away from his own residence and had pointed the gun at the caller's residence, across the street. The caller is located across the street from Livingston's residence of 1949 Declaration Dr. The caller said that Livingston "froze" for 10-15 seconds, presumably while he was pointing at the caller's residence, and then placed the gun back on top of his car in the garage. The caller confirmed that the gun he was referring to was a handgun.

Officer Johnson was dispatched as the primary officer on this case. Officer Sam Sperry assisted and arrived on scene approximately the same time as Officer Johnson. Officers Johnson and Sperry both deployed with a department issued rifle, prior to leaving their squad cars. Officers Johnson and Sperry both parked a distance from the residence and approached the 1900 block of Declaration Dr, on foot. Both officers took a position approximately 50 yards away to surveil the residence.

Officer Johnson had the complainant/caller from this case transferred directly to his cell phone as Officer Sperry and him were posted from a distance. Officer Johnson can be heard relaying information to Officer Sperry as is he receiving it from the complainant. Officer Johnson confirms they are looking at the correct address with the complainant by confirming the garage is the one with a "blue car". Officer Johnson then relays to Officer Sperry that the male suspect (Livingston), is leaned up against the blue car in the garage. This information was received from the phone call with the complainant.

From the phone call, Officer Johnson then relays that there is a gun on top of the blue car. Officer Johnson was advised that Livingston had pointed the gun at the caller's house earlier. Officer Johnson continues to relay information that Livingston's wife is somewhere inside of the residence and that Livingston had handed her a shotgun earlier and she had taken it inside of the residence.

Officer Johnson relays that Livingston at this point is still standing in the garage, near the passenger side of the vehicle, with his arms on top of the car and the gun on top of the car. Officer Johnson continues to receive information from the caller that they originally heard a gunshot and noticed Livingston outside in the yard appearing to be "clearing" the yard, which the caller described as being "military style", followed by Livingston handing a shotgun to his wife who brought the shotgun inside.

Officer Johnson continues to relay from the caller, that Livingston is now walking around in the garage, further inside the garage, towards the house. Officer Johnson asks the complainant if he can see if Livingston has anything in his hands. Officer Johnson then relays that Livingston is talking to his wife in the doorway of the home from the garage. Shortly after, Officer Johnson relays that Livingston is walking back to the car and has "the gun in his hand." This is followed by relaying that Livingston is "racking the slide" and "pointing the gun" and "looking down the barrel".

Based on the information they had received; Officers Johnson and Sperry begin moving towards the open garage. As they arrive near the garage, a gun can be heard being functioned in a "racking" sound as if Livingston is loading the handgun or manipulating the gun slide. Officer Sperry begins to move across the entryway to the garage at which time he yells "Police Department, put the gun down!" Livingston turns towards Officers Sperry and Johnson, with a pistol in his hand, and takes an aggressive posture, aiming the pistol towards officers.

Officers Sperry and Johnson both shoot their assigned rifles at Livingston and he falls in the center of the garage.

## **Initial Response and Subsequent Approach**

### **Facts:**

On September 4, 2022 at approximately 2337 hours, telecommunicator Jocelyn Myers received a 911 hang up call from [REDACTED]. The male caller said that his neighbor across the street was in the garage with a handgun. The male said that he had heard a gunshot approximately 20 minutes before calling. The caller further said that the male and female were arguing in the garage and the male appeared very upset.

- The incident was dispatched as a disturbance, with note of a possible domestic.
- The incident involved a firearm.
- The officers were told the male had fired a round before their arrival.
- The location of the incident was 1949 Declaration Dr, which is in the city of Eau Claire.
- The female half of the domestic had already taken a shotgun inside.
- The officers were told the male had earlier brandished the firearm with the female in the garage.

Officers Johnson and Sperry approach the residence together and take a position across the street. Officer Johnson takes the phone call from the actual complainant, and relayed real time information to Officer Sperry, while the complainant has a direct view into the garage of 1949 Declaration Dr. The complainant continues to give detailed information regarding what the male in this case is currently doing, step by step. The following are direct facts Officer Johnson relays to Officer Sperry while they are a distance away from the garage gathering information:

- The male was still in the garage and a gun was next to the male on top of a vehicle.
- The wife came to the doorway of the garage.
- The officers were told the male was racking the slide to the firearm.
- The officers were told the male was pointing the firearm and looking down the barrel.
- The officers could hear the pistol being “racked” or cycled on approach. (This is the manipulation of the action (slide) of the pistol in a pulling manner, usually consistent with loading a round into the chamber from the magazine.)

## **POLICY 311-SEARCH AND SEIZURE**

### **311.1 PURPOSE AND SCOPE**

Both the United States and the Wisconsin Constitutions provide every individual with the right to be free from unreasonable searches and seizures. This policy provides general guidelines for Eau Claire Police Department personnel to consider when dealing with search and seizure issues.

### **311.2 POLICY**

It is the policy of the Eau Claire Police Department to respect the fundamental privacy rights of individuals. Members of this department will conduct searches in strict observance of the constitutional

rights of persons being searched. All seizures by this department will comply with relevant federal and state law governing the seizure of persons and property.

In accordance with the Training Policy, the Department will provide relevant and current training to officers as guidance for the application of current law as well as local community standards and prosecutorial considerations to specific search and seizure situations as appropriate.

### **311.3 SEARCHES**

The U.S. Constitution generally provides that a valid warrant is required in order for a search to be valid. There are, however, several exceptions to the rule that permit a warrantless search.

Examples of law enforcement activities that are exceptions to the general warrant requirement include, but are not limited to, searches pursuant to the following:

- Valid consent
- Incident to a lawful arrest
- Legitimate community caretaking interests
- Vehicle searches under certain circumstances
- Exigent circumstances
- Statutory authority

Certain other activities are recognized by federal and state courts and by certain statutes as legitimate law enforcement activities that also do not require a warrant. Such activities may include seizure and examination of abandoned property and observations of activities and property located on open public areas.

Because case law regarding search and seizure is constantly changing and subject to interpretation by the courts, each member of this department is expected to act in each situation according to current training and his/her familiarity with clearly established rights as determined by case law.

Whenever practicable, officers are encouraged to contact a supervisor or other available resource to resolve questions regarding search and seizure issues prior to electing a course of action.

## **POLICY 412-RAPID RESPONSE AND DEPLOYMENT**

### **412.1 PURPOSE AND SCOPE**

Violence in schools, workplaces and other locations by any individual or group of individuals presents a difficult situation for law enforcement. The purpose of this policy is to identify guidelines and factors that will assist officers in implementing rapid response and deployment to such situations.

### **412.2 POLICY**

The policy of this department in dealing with a crisis situation shall be:

- a. To obtain and maintain complete operative control of the incident.
- b. To explore every reasonably available source of intelligence regarding the circumstances, location and suspect in the incident.
- c. To attempt, by every means available, to attain any tactical advantage over the responsible individual.
- d. To attempt, whenever practicable, a negotiated surrender of the suspect and release of the hostages through the expertise of the members of this department and others.
- e. When an emergency situation exists, to neutralize the threat as rapidly as reasonably possible to minimize injury and loss to life.

Nothing in this policy shall preclude the use of necessary force, deadly or otherwise, by members of this department in protecting themselves or others from death or injury.

### **412.3 PROCEDURE**

If there is a reasonable belief that acts or threats by a suspect are placing lives in imminent danger, first responding officers should consider reasonable options to immediately eliminate the threat. Officers must decide, often under a multitude of difficult and rapidly evolving circumstances, whether to advance on the suspect, take other actions to deal with the threat or wait for additional resources.

When deciding on a course of action officers should consider:

- a. Whether sufficient personnel are available on-scene to advance on the suspect. Any advance on a suspect should be made using teams of two or more officers whenever reasonably possible.
- b. Whether individuals who are under imminent threat can be moved out of danger with reasonable safety.
- c. Whether the officers have the ability to effectively communicate with others in the field.
- d. Whether planned tactics can be effectively deployed.
- e. The availability of rifles, shotguns, shields, control devices and any other appropriate tools, and whether the deployment of these tools will provide a tactical advantage.
- f. In a case of a barricaded suspect with no hostages and no immediate threat to others, officers should consider summoning and waiting for additional assistance (special tactics and/or hostage negotiation team response).
- g. If a suspect is actively engaged in the infliction of serious bodily harm or other life-threatening activity toward others, the officer should take immediate action, if reasonably possible, to stop the threat presented by the suspect while calling for additional assistance.

### **Findings**

Officer Sperry and Johnson's approach to the residence was proper and fall within the guidelines of ECPD policy.

Officer Sperry and Johnson's approach to Clayton Livingston's residence, followed by the shooting of Livingston inside of his garage from the driveway, constituted a search. In order for a search to be valid,

generally, law enforcement must first obtain a warrant. One of the judicially recognized exceptions to the warrant requirement is exigent circumstances. The information known to Officers Sperry and Johnson at the time of their approach, clearly constituted exigent circumstances.

Officers Sperry and Johnson did not have time to wait and gather additional information prior to acting, without risking injury or loss of life. Their decision to act during this emergency situation was reasonably calculated to minimize injury and loss of life, as the actions of Livingston appeared to be an attempt to cause death to his wife. The officer's actions were reasonable and necessary under the circumstances, to prevent harm to Livingston's wife and the nearby neighbors.

### **Contact with Clayton Livingston and Deadly Force Determination**

#### **Facts**

The decision to contact Livingston and to use deadly force were reasonable, and fall within guidelines of Eau Claire Police Department Policy.

Moments before making their approach, Officers Sperry and Johnson were told that Livingston's wife was back in the garage and that Livingston was brandishing, pointing, and racking the slide, of a pistol. It was reasonable for officers to conclude, given the information that they had received up to this point, that the caller as reporting that Livingston was pointing the gun at his wife.

As has already been established, Officers Sperry and Johnson were already lawfully present in the area of the home at the time they contacted Livingston. A concerned neighbor had called based on Livingston's dangerous actions that could be viewed from his open garage to the nearby neighbors.

Approach to the residence had to happen immediately, to ensure the safety of the wife who had entered the garage. From the information that had been gathered, there was a probable domestic disturbance taking place involving Livingston brandishing two different firearms.

Livingston was positioned between two vehicles in the center of the garage. As officers entered the driveway to further see Livingston in the garage, they immediately identified themselves by yelling "Police Department", followed by "put the gun down!"

In immediate fashion, Livingston turns, begins to back into the garage as he pushes the pistol out from his chest and towards Officer Sperry and Officer Johnson in a threatening posture. Officer Sperry described this posture as a "shooting stance". Officer Sperry and Officer Johnson both said they feared for their lives and fired rounds at Livingston until the present threat had been stopped. Officer Johnson specifically said that he thought Livingston was going to "shoot and kill" them, referring to Officer Sperry and himself. These conclusions were reasonable based on the facts known to the officers at that time.

In total, there were 17 rounds fired by officers from two different assigned duty rifles (.223). Officer Sperry fired 6 rounds and Officer Johnson fired 11 rounds. All shots ceased as soon as Livingston fell to the ground and the officers deemed the threat had stopped.

Officers Sperry and Johnson's actions, to include their decision to approach, intervene, and use deadly force, were appropriate, immediate, and necessary, under the above-mentioned circumstances and facts.



## POLICY 300-USE OF FORCE

### 300.1 PURPOSE AND SCOPE

This policy provides guidelines on the reasonable use of force. While there is no way to specify the exact amount or type of reasonable force to be applied in any situation, every member of this department is expected to use these guidelines to make such decisions in a professional, impartial and reasonable manner. When safe under the totality of the circumstances, and when time and circumstances permit, officers shall prioritize de-escalation tactics in order to reduce the need for force.

#### 300.1.1 DEFINITIONS

Definitions related to this policy include:

**Deadly force** - The intentional use of a firearm or other instrument that creates a high probability of death or great bodily harm.

**Feasible** - Reasonably capable of being done or carried out under the circumstances to successfully achieve the arrest or lawful objective without increasing risk to the officer or another person.

**Force** - The application of physical techniques or tactics, chemical agents, or weapons to another person. It is not a use of force when a person allows him/herself to be searched, escorted, handcuffed, or restrained.

**Imminent** - Ready to take place; impending. Note that imminent does not mean immediate or instantaneous.

**Totality of the circumstances** - All facts and circumstances known to the officer at the time, taken as a whole, including the conduct of the officer and the subject leading up to the use of force.

### 300.2 POLICY

The use of force by law enforcement personnel is a matter of critical concern, both to the public and to the law enforcement community. Officers are involved on a daily basis in numerous and varied interactions and, when warranted, may use reasonable force in carrying out their duties.

Officers must have an understanding of, and true appreciation for, their authority and limitations. This is especially true with respect to overcoming resistance while engaged in the performance of law enforcement duties.

The Eau Claire Police Department recognizes and respects the value of all human life and dignity without prejudice to anyone. Vesting officers with the authority to use reasonable force and to protect the public welfare requires monitoring, evaluation, and a careful balancing of all interests.

### **300.2.1 DUTY TO INTERCEDE AND REPORT**

Any officer present and observing another law enforcement officer or a member using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when in a position to do so, intercede to prevent the use of unreasonable force.

Any officer who observes another law enforcement officer or a member use force that is potentially beyond that which is objectively reasonable under the circumstances should report these observations to a supervisor as soon as feasible.

### **300.2.2 PERSPECTIVE**

When observing or reporting force used by a law enforcement officer, each officer should take into account the totality of the circumstances and the possibility that other law enforcement officers may have additional information regarding the threat posed by the subject.

### **300.3 USE OF FORCE**

Officers shall use only that amount of force that reasonably appears necessary given the facts and circumstances perceived by the officer at the time of the event to accomplish a legitimate law enforcement purpose.

The reasonableness of force will be judged from the perspective of a reasonable officer on the scene at the time of the incident. Any evaluation of reasonableness must allow for the fact that officers are often forced to make split-second decisions about the amount of force that reasonably appears necessary in a particular situation, with limited information and in circumstances that are tense, uncertain and rapidly evolving.

Given that no policy can realistically predict every possible situation an officer might encounter, officers are entrusted to use well-reasoned discretion in determining the appropriate use of force in each incident.

It is also recognized that circumstances may arise in which officers reasonably believe that it would be impractical or ineffective to use any of the tools, weapons or methods provided by this department. Officers may find it more effective or reasonable to improvise their response to rapidly unfolding conditions that they are confronting. In such circumstances, the use of any improvised device or method must nonetheless be reasonable and utilized only to the degree that reasonably appears necessary to accomplish a legitimate law enforcement purpose.

While the ultimate objective of every law enforcement encounter is to avoid or minimize injury, nothing in this policy requires an officer to retreat or be exposed to possible physical injury before applying reasonable force.

### **300.3.1 ALTERNATIVE TACTICS - DE-ESCALATION**

When circumstances reasonably permit, officers should use non-violent strategies and techniques to decrease the intensity of a situation, improve decision-making, improve communication, reduce the need for force, and increase voluntary compliance (e.g., summoning additional resources, formulating a plan, attempting verbal persuasion).

### **300.3.2 USE OF FORCE TO EFFECT AN ARREST**

A law enforcement officer may use reasonable force to arrest a person or execute a warrant. Additionally, a law enforcement officer making a lawful arrest may command the aid of any person, and such person shall have the same power as that of the law enforcement officer (Wis. Stat. § 968.07; Wis. Stat. 968.14).

### **300.3.3 FACTORS USED TO DETERMINE THE REASONABLENESS OF FORCE**

When determining whether to apply force and evaluating whether an officer has used reasonable force, a number of factors should be taken into consideration, as time and circumstances permit. These factors include but are not limited to:

- a. Immediacy and severity of the threat to officers or others.
- b. The conduct of the individual being confronted, as reasonably perceived by the officer at the time.
- c. Officer/subject factors (e.g., age, size, relative strength, skill level, injuries sustained, level of exhaustion or fatigue, the number of officers available vs. subjects).
- d. The effects of suspected drug or alcohol use.
- e. The individual's mental state or capacity.
- f. The individual's ability to understand and comply with officer commands.
- g. Proximity of weapons or dangerous improvised devices.
- h. The degree to which the individual has been effectively restrained and his/her ability to resist despite being restrained.
- i. The availability of other reasonable and feasible options and their possible effectiveness.
- j. Seriousness of the suspected offense or reason for contact with the individual.
- k. Training and experience of the officer.
- l. Potential for injury to officers, suspects, and others.
- m. Whether the individual appears to be resisting, attempting to evade arrest by flight, or is attacking the officer.
- n. The risk and reasonably foreseeable consequences of escape.
- o. The apparent need for immediate control of the individual or a prompt resolution of the situation.
- p. Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the officer or others.
- q. Prior contacts with the individual or awareness of any propensity for violence.
- r. Any other exigent circumstances.

### **300.4 DEADLY FORCE APPLICATIONS**

When reasonable, the officer shall, prior to the use of deadly force, make efforts to identify him/herself as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.

Use of deadly force is justified in the following circumstances involving imminent threat or imminent risk:

- a. An officer may use deadly force to protect him/herself or others from what he/she reasonably believes is subject behavior which has caused or imminently threatens to cause death or great bodily harm to the officer or another person or persons.
- b. An officer may use deadly force to stop a fleeing subject when the officer has probable cause to believe that the individual has committed, or intends to commit, a felony involving the infliction or threatened infliction of great bodily harm or death, and the officer reasonably believes that there is an imminent risk of great bodily harm or death to any other person if the individual is not immediately apprehended. Under such circumstances, a verbal warning should precede the use of deadly force, where feasible.

Imminent does not mean immediate or instantaneous. An imminent danger may exist even if the suspect is not at that very moment pointing a weapon at someone. For example, an imminent danger may exist if an officer reasonably believes that the individual has a weapon or is attempting to access one and intends to use it against the officer or another person. An imminent danger may also exist if the individual is capable of causing great bodily harm or death without a weapon, and the officer believes the individual intends to do so.

### **300.4.1 IMMINENCE**

An officer intending to use deadly force must reasonably believe all of the following criteria of "imminent threat" are present:

- INTENT: The displayed or indicated intent to cause great bodily harm or death to you or another person, and;
- WEAPON: A weapon capable of inflicting great bodily harm or death (conventional or unconventional weapon), and;
- DELIVERY SYSTEM: The delivery system for utilization of that weapon. The subject must have a means of using the weapon to inflict harm.

### **300.4.2 TARGET REQUIREMENTS**

When an officer has determined that deadly force is necessary and all other reasonable alternatives having been precluded, the officer must fulfill certain "target requirements." These include the following:

- TARGET ACQUISITION: Does the officer have a target?
- TARGET IDENTIFICATION: Even if the target has been "acquired," the officer cannot shoot until the target has been identified as an individual placing the officer and/or others in "imminent danger", and;

- **TARGET ISOLATION:** The officer must make every reasonable effort to isolate the target from other innocent persons. An exception to the target isolation requirement arises when withholding the application of deadly force results in a greater danger than the use of deadly force itself.

### **Findings**

The amount of force used by Officers Sperry and Johnson, was necessary and objectively reasonable under the circumstances. The incident was extremely fast, rapidly evolving, tense, and uncertain. Officer Johnson and Sperry were forced to make a split-second decision based on the facts known to them at that time. Under these circumstances, alternative tactics or de-escalation tactics would have been ineffective and unsafe. In addition, retreating or formulating a different plan was not an option given the fact that Officers Sperry and Johnson had an obligation to protect nearby neighbors as well as Michaela Livingston, who was thought to be the potential victim of domestic violence. Officers Sperry and Johnson were dressed in a full and complete Eau Claire Police Department uniform. Officer Sperry announced their presence as police officers prior to firing.

Officers Sperry and Johnson were within close proximity of Livingston at the time of contact, well within effective pistol range of Livingston. Livingston posed an immediate and imminent threat from his previous actions leading up to contact as well as his immediate defensive and shooting posture to which he aimed a pistol at Officers. From this distance, there was an immediate need to control Livingston's actions to protect not only Officer Sperry and Officer Johnson, but also to ensure the safety of Michaela Livingston.

Livingston's continued alarming and dangerous actions with a firearm, as well as pointing his loaded firearm directly at officers, proved intent. The loaded pistol Livingston was holding constituted a weapon capable of inflicting great bodily harm or death. Livingston also had a delivery system, or means with which to use this weapon as evidenced by his actions, racking of the pistol slide, and his aggressive body stance in a shooting position pointing the weapon at both officers. Deadly force, or the intentional use of a firearm that creates a high probability of death or great bodily harm, was justified under the totality of circumstances.

As soon as Officers Sperry and Johnson cleared the first car in the garage, they were able to acquire Livingston standing in the center of the garage. Based on information that they had at that time, Officer Sperry and Officer Johnson were able to identify Livingston as the subject placing, Michaela Livingston, nearby neighbors, and both officers, in imminent danger. Lastly, due to Michaela not being located directly behind Livingston at the time of contact, Officers were able to isolate Livingston in the center of the garage.

### **Conclusion**

This administrative review is a comprehensive report intended to evaluate Officer Sperry and Johnson's use of deadly force. The facts used as a basis for these findings included the Criminal Investigation case file completed and submitted by Special Agent Adam Frederick with the Wisconsin Department of Justice-Division of Criminal Investigation (DCI), Eau Claire Police Department Officer reports, Axon video/audio, Communication Center audio, Ring doorbell audio and video, and many other resources.

Specific Eau Claire Police Department policies, pertinent to the use of deadly force, were identified and used to evaluate Officer Sperry and Johnson's actions and decision making during this incident.

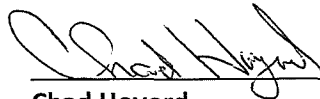
Eau Claire County District Attorney Peter Rindal conducted a criminal review of this incident and concluded that Officers Sperry and Johnson's use of deadly force was justified as a reasonable act of self defense and defense of others.

This Administrative review concludes that Officer Sperry and Johnson's actions were appropriate and within the guidelines of the Eau Claire Police Department Lexipol policy and procedure manual based on the totality of circumstances. The approach to Livingston's residence, based on exigent circumstances along with the amount of force used to stop the attack were necessary and objectively reasonable.

Respectfully submitted,

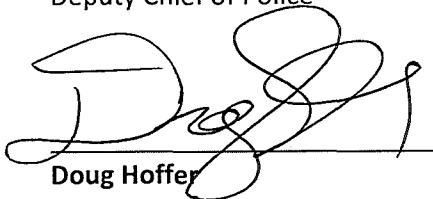
Lieutenant Jesse Henning

*Reviewed by:*



**Chad Hoyord**  
Deputy Chief of Police

Date: 1/4/2023



**Doug Hoffer**  
Deputy City Attorney

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**Matt Rokus**  
Chief of Police

Date: 01/04/2023