

SEATTLE POLICE DEPARTMENT MEMORANDUM

TO: John Diaz
Chief of Police

DATE: February 15, 2011

FROM: Clark Kimerer
Chief of Staff

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SUBJECT: FINAL REPORT AND RECOMMENDATIONS, FIREARMS REVIEW BOARD #10-03

In accordance with Seattle Police Department Manual, Section 11.030, a Firearms Review Board (FRB) was convened on Monday, October 4, 2010 at 0900 Hrs. to investigate and review the circumstances surrounding the firearm discharge on August 30, 2010 at Howell Street and Boren Avenue by Seattle Police Officer Ian Birk, #7507.

FIRST CONVENING OF FRB #10-03 ON OCTOBER 4, 2010

Members of FRB #10-03 were as follows:

Deputy Chief Clark Kimerer, Chair
Captain Richard Belshay, Homeland Security Section
Captain James Dermody, East Precinct
Lieutenant Scott Bachler, Training Section
Rebecca Roe, Citizen Observer
Sergeant Rich O'Neill, Bargaining Representative Observer

Also in attendance was SPD Legal Advisor Renni Bispham.

The investigative file was distributed to all FRB #10-03 members in advance of the hearing.

It is the policy of SPD that every officer involved shooting which results in a death will have a Deputy Chief assigned as chair of the Firearms Review Board. As Chair, I personally selected the voting members of FRB #10-03. The nature of this officer involved shooting incident clearly indicated that training, tactics and policy would all be focal points of the inquiry and deliberations of this FRB. Both Captains Dermody and Belshay have extensive tactical experience at both the practitioner and command levels, and have served on the SPD SWAT Team, as have I. In addition, Captain Belshay has commanded the Training Section. Captain Dermody currently commands a patrol Precinct (East). Finally, Lieutenant Bachler has held positions in both the Audit and Policy Section and is currently assigned (as he has been for the last several years) to the Training Section.

In preparation for FRB #10-03, I directed Homicide Lieutenant Steve Wilske, who oversaw the investigation, to undertake a thorough records search to ascertain if there had been any contact

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documented between Officer Birk and John T. Williams in the past. No documented contacts were found. Throughout the investigation by the Homicide Section, Assistant Chief Jim Pugel and I were regularly briefed, and the investigative file – as it was being assembled – periodically reviewed. Both Assistant Chief Pugel and I made various requests for follow-up or clarification.

In addition, I asked Sgt. Tom Ovens of the Training Section to provide a comprehensive overview of the use-of-force training curriculum objectives and philosophy in effect when Officer Birk attended the Basic Law Enforcement Academy, SPD Post-Basic Training and Field Training. Sergeant Ovens supervises use-of-force training for the SPD Training Section. The summary he authored was distributed to all voting members and observers of FRB #10-03, and is attached to this memorandum. Sergeant Ovens provided testimony and responded to FRB member questions at the October 4, 2010 hearing.

FRB #10-03 commenced with a site visit to the intersection of Howell Street and Boren Avenue at 0900. FRB #10-03 members Kimerer, Belshay, Dermody, and Bachler were present, as was Citizen Observer Roe. The site visit was coordinated by SPD Investigating Detectives Jeffery Mudd and Timothy Devore. Other Homicide Unit and CSI Detectives were present to answer FRB #10-03 questions, as was Homicide Unit Lieutenant Steven Wilske. The purpose of this site visit was to walk through the incident scene, obtain perspective and pose questions to investigators. Following this site visit, FRB #10-03 convened at SPD Headquarters, 610 5th Avenue, in the lower-level conference room at approximately 1000 hours. At this time, the investigative summary was presented by Homicide Detectives Jeffery Mudd and Timothy Devore. Crime Scene Investigative Unit (CSI) Detectives were also present to answer questions.

The investigation into this incident, and resulting file, was one of the most exhaustive which I have seen in my career, which included involvement in over 50 Firearms Review Boards. This observation is validated by the peer review undertaken at your direction by the San Diego and Austin Police Departments.

Following presentation of evidence from Homicide and CSI, civilian witnesses Amy Stires and Erica Schmidt were asked to voluntarily testify. (Witness Deanna Sebring was also asked to voluntarily testify, but was unable to attend the hearing). It is within the rules of the SPD FRB process that – at the discretion of the Chair – incident witnesses may be asked to appear before the FRB and provide testimony and information. This is rarely done, as officer involved shooting investigative files include witness statements, most often transcribed from a detective interview. As Chair, I wanted FRB #10-03 to have the most exhaustive range of testimony and information available to the voting and non-voting members. While the testimony of witnesses Stires and Schmidt was entirely consistent with their transcribed interviews, their appearance served the important function of helping validate the accuracy and completeness of the investigative file. As the SPD FRB process is administrative and does not

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include subpoena powers, the willingness of witnesses Stires and Schmidt to voluntarily appear and give testimony was commendable, and the Department extends its sincere appreciation to them.

Following the investigative summary and testimony of two civilian witnesses, Officer Birk was asked to testify. At the conclusion of Officer Birk's testimony, and following extensive questions from the members of FRB #10-03, the Board members relocated to the Chief of Police Conference Room, 8th Floor of SPD Headquarters, to begin discussion and then, following dismissal of FRB #10-03 Observers and the Department Legal Advisor, Renni Bispham, begin formal deliberations.

By policy and past practice, a SPD Firearms Review Board is asked to submit findings in response to a set of standard questions. These questions, as well the overall format of the FRB, were presented to both the voting members and observers at the beginning of FRB #10-03, including distribution of the "Firearms Review Board Protocol" and "Firearms Review Board Procedure Guidelines-Findings-Recommendation" publications (copy attached). I personally went over all facets of the roles and responsibilities of the voting members and observers at the beginning of FRB #10-03, and on several occasions during the process. The preliminary findings and recommendations of the voting members of FRB #10-03 on October 4, 2010 were unanimous, as follows:

- 1. The firearms discharge occurred while Officer Birk was on-duty.**
- 2. The firearms discharge was intentional and directed at a person.**
- 3. The use of the firearm was not necessary to apprehend a person who the officer reasonably believed had committed, was committing or was attempting to commit a felony.**
- 4. The officer did not have probable cause to believe the suspect, if not apprehended, posed a threat of serious harm to the officer or threat of physical harm to others.**
- 5. Reasonably effective alternatives to the use of a firearm appeared to exist.**
- 6. Considering the circumstances known to the officer at the time, it would have been a reasonable alternative to allow the suspect to escape without resorting to the use of a firearm.**
- 7. The actions of the officer contributed to the need to fire.**

The totality of these findings lead to an unequivocal conclusion: The use of deadly force by Officer Birk resulting in the death of John T. Williams was **unjustified**.

I met with Chief John Diaz in person at the conclusion of FRB #10-03, and verbally communicated to him the findings listed above. In my role as both Board Chair and SPD Chief of Staff, I presented Chief Diaz with the following recommendations:

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1. That Officer Birk be relieved of all police authority, and that his Department-issued weapon and badge be surrendered. (It should be noted that Officer Birk was already on administrative reassignment to home, and had not been returned to duty from the time of the incident through October 5th)
2. That the incident be referred to the Office of Professional Accountability (OPA) for investigation of excessive force
3. That the Training Section undertake a thorough review of use-of-force training as it relates to edged weapons, viz. the so-called "21 foot rule" otherwise known as the Tueller Drill.*

As this incident resulted in the death of John T. Williams at the hand of Officer Birk, the hearing conducted on October 4, 2010 was for the purpose of determining preliminary findings concerning the personnel status of Officer Birk, whether the shooting was justified based upon evidence available as of October 4, 2010, and whether immediate policy or training actions were required in light of the circumstances of the incident. As this fatality incident fell under the jurisdiction of King County, pursuant to Executive Order (PHL 7-1-1) mandating an Inquest to investigate "any death involving a member of any law enforcement agency within King County while in the performance of his/her duties", and consistent with Seattle Police Department Policy as detailed in SPD Manual Section 11.030, FRB #10-03 did not issue a final report and recommendations until the King County Inquest process concluded, and a filing decision by the King County Prosecutors Office was finalized.

Chief Diaz concurred with the recommendations. I communicated the preliminary findings and referred the complaint of excessive force in person to OPA Director Kathryn Olson on October 5th. This referral to OPA was for the purpose of opening a misconduct investigation once the Inquest had concluded and the King County Prosecutor issued a filing decision.

I directed Officer Birk and his bargaining unit representative to meet me in the Human Resources office at 1400 hours on October 5th, at which time I informed him of the Board's preliminary findings and recommendations, and relieved him of all police authority.

*This analysis preceded the convening of FRB #10-03. In point of fact, COP Diaz directed that the Training Section undertake a top to bottom review of all use of force training - with particular attention paid to the so-called "Tueller Drill" - immediately following the Williams shooting. It is important to emphasize at this juncture that FRB #10-03 found (see Page 3, above) that the "Tueller Drill" was properly taught and has relevance and utility to police officers, but that Officer Birk misapplied it and gave it undue importance in his decision-making process.

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RECONVENING OF FRB #10-03

This final report and recommendation is submitted following announcement that the decision of the King County Prosecutor on whether to file criminal charges concerning the actions of Officer Birk would be announced on February 16th. The reconvening of FRB #10-03 was not predicated upon whether the King County Prosecutor intended to file criminal charges, or not. In either event, the conclusions of FRB #10-03 would be the same. Consequently, the voting members of FRB #10-03 – SPD Lieutenant Scott Bachler, SPD Captains Richard Belshay and James Dermody, and myself as Board Chair – reconvened to complete our responsibilities to issue a final report and recommendations

As in the case of the initial, preliminary hearing and review into this incident, non-voting FRB #10-03 members Rebecca Roe, Citizen Observer and Rich O'Neill, SPOG President were provided an opportunity to voice their opinions concerning the evidence and testimony presented during the course of the FRB, but were not involved nor present during either the deliberations undertaken by the voting FRB members assigned to the preliminary review and hearing on October 4, 2010, nor when the voting FRB members reconvened for final deliberations following the decision of the King County Prosecutor to decline the filing of criminal charges.

ANALYSIS

The following analysis of the voting members of FRB #10-03 represents a synthesis of both the October 4, 2010 hearing, the King County Inquest into the death of John T. Williams, and the reconvening of the FRB to finalize the review process. Captain Richard Belshay was assigned by me to attend the King County Inquest, and was present in the courtroom. Captain Jim Dermody also attended the majority of the Inquest. A complete transcript of the Inquest was provided to FRB #10-03 voting members, OPA Director Kathryn Olson and was made available on request to FRB #10-03 observers.

Incident Summary [Provided by Captain Jim Dermody]

To provide context to the analysis and conclusions of FRB #10-03 voting members, a brief summary of the August 30, 2010 incident is in order. As the facts and circumstances of this incident have been presented in various forums in detail, and – moreover – are not in dispute, this summary will be concise.

On August 30th, 2010 Officer Ian Birk #7505 was assigned to the West Precinct, Second Watch David Sector. He was working Unit 2-David-33 as a one-officer car, in uniform and in a marked patrol vehicle, and was patrolling in the area of Boren Avenue & Howell Street just after 4pm.

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While facing s/b on Boren Avenue in the curb lane and stopped for the red light with no other car in front of him, Officer Birk took notice of a pedestrian walking in the crosswalk from east to west. Birk noted the pedestrian, later identified as John T. Williams, was approximately ten feet in front of him. Birk reportedly observed a knife in Williams' right hand, while holding a piece of wood in his other and either stabbing or scraping the wood. Birk's impression was that Williams appeared to be under the influence of alcohol or possibly some other substance. Birk also described Williams as he passed in front of Birk's patrol car as either oblivious to his presence or showing complete disregard for it.

Birk's above description of his observation of Williams led Birk to believe Williams' behavior was unusual, causing Birk to be "immediately concerned that [Williams] might be the cause of a disturbance, or pose a potentially lethal threat to other citizens who might be in the area." Birk made the decision to contact Williams in order to "attempt to determine whether or not he might be a risk to himself or others."

Officer Birk activated his emergency lights, notified SPD Radio (Dispatch) he was on a "shake" (which is shorthand for officer contact of suspicious person) and exited his patrol car. Birk drew his weapon, held it in the "Sul" position (a tactical weapon placement, drawing the duty weapon from the holster and positioning it in a "low ready" position in front of the officer's belt to facilitate immediate raising of the weapon to be on-target) and approached Williams as he walked w/b on Howell St. At this point, Williams' back was facing Birk and Birk stated that he could not see Williams' hands.

Officer Birk called out to Williams and Birk later reported that Williams initially ignored or failed to acknowledge his efforts to stop him. In his FRB #10-03 testimony, and again at the Inquest, Birk stated that after multiple attempts to verbally stop Williams, Williams turned towards him "slowly and deliberately." Birk reported that the way that Williams turned toward him "led [Birk] to believe [Williams] was either seriously detached or knew [Birk] was trying to stop [Williams] and [Williams] was attempting to avoid contact with the police." At that point, Birk had closed to approximately ten feet between him and Williams. Birk stated that when Williams began to turn toward him, he was still holding the knife in his right hand and was "brandishing" it in a "very confrontational posture." Birk then noted that Williams' "jaw was set" and his "expression was stern." After ordering Williams to drop the knife at that point, Williams continued to look in Birk's direction with a "serious expression on his face." Birk reported that he again ordered Williams to drop the knife.

Williams did not drop the knife at that point, according to Birk, and Birk testified that Williams' demeanor continued to become more aggressive, noting Williams' fist was tightly clenched around the knife and Williams kept holding it up in front of him as if were preparing to fight. Birk perceived Williams' expression as either noncompliance, defiance or a "thousand yard stare." Birk then notes in his written statement that all of the above are what he learned in training were "pre-attack indicators."

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Birk states that at that point Williams "might be considering or formulating a plan to close the distance between [Williams and Birk] and attack [Birk] with the knife." Birk then describes in his statement the "Tueller Drill" (described below) which he calls the "21-foot rule" and notes that he is aware that he is at approximately half the distance described in the above named training drill.

Birk reports that at that moment, he orders Williams a third time to drop the knife, almost yelling at that point. Birk then wrote in his compelled statement the following:

"Knowing that he could attack at any moment, that he had failed to comply with my lawful orders, and that he was so close that he could attack me before I could react, I made the decision to fire. This decision was based on my immediate concern for my own life and the previously mentioned training I have received."

After firing and seeing Williams collapse, Birk notified SPD Radio that shots had been fired and added "The subject wouldn't drop the knife."

Backing Officers soon arrived and an arrest team was assembled with Officer Birk in the lead. Once Williams was secured, SPD EMT Officer Oshikawa-Clay provided First Aid until SFD Medics arrived to take over medical aid.

While on-scene, Officer Birk provided information to an SPD Sergeant for what is called a "Public Safety Statement" as required by Department policy. Homicide & Assault detectives and supervisors as well as CSI (Crime Scene Investigations) were called to the scene to investigate as prescribed by Department policy.

Key Conclusions

The initial decision to stop and speak with John T. Williams based upon the circumstances observed by Officer Birk on August 30, 2010 was justified, appropriate and warranted. Officer Birk was assigned to the patrol sector wherein the fatal encounter with John T. Williams occurred. His observations of a man with a knife on a public street, apparently suffering from some form of impairment, was sufficient justification for any Seattle Police Officer to initiate contact to determine if there was a crime, or a threat to the public. It is central to the duties of a police officer – and a stated priority of the Seattle Police Department – to confront suspicious circumstances and take appropriate steps to ascertain the nature of what he/she observes, and whether a threat exists. Officer Birk has been consistently credible in his belief that it was his duty to determine if John T. Williams constituted a threat to himself or others. His precise observations, which have not been substantively contradicted, include the facts that John T. Williams had an exposed knife, was in a cross walk amidst pedestrians

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crossing his path, and that his behaviors were out of the ordinary and suggested impairment. The knife he was using appeared to have an exposed blade. Whether the blade was of a certain length, or was fixed or collapsible, was not known to Officer Birk, and were facts of little material relevance. Officer Birk's intentions, based upon the scant information he had available to him at the time, were honest and appropriate, and in keeping with the mission of the Seattle Police Department. We now know that John T. Williams was a First Nation's carver, and other details of his life which contribute to our understanding of the tragedy of his death, but Officer Birk did not know, nor should he be expected to know, facts and circumstances which came to light only after the incident ended. The community expects that police officers will initiate contacts and put themselves in harm's way to keep them safe, in spite of every reasonable human inclination to avoid risk. Hindsight does not change that essential expectation.

Officer Birk failed to properly identify the circumstances of his attempt to contact John T. Williams, or to follow proper procedures of logging out via radio and requesting back-up. Officer Birk logged out with 911 dispatch on a "shake" - shorthand for contacting a suspicious person - at Boren Avenue and Howell Street. He provided no other details of why he initiated this contact, nor did he convey urgency in his voice or other "clues" in his routine-sounding dispatch. In his testimony at both the FRB and Inquest, Officer Birk suggested that this was in keeping with Department policy and procedures, as well as his training. FRB #10-03 emphatically disagrees. Contacting a possibly impaired man with a knife on a public street demands a full and conscientious description of the situation via radio, both to the inform the 911 dispatcher of the nature of the call (and risk), begin the process of dispatching other units to the call, and broadcast to other officers the nature of the stop, with a view towards eliciting back-up response. Officer Birk intimated in his testimony to FRB #10-03 that patrol officers have some kind of intuition or "sixth sense" whereby they would know the situation he was confronting, based on his elliptical and calm broadcast of being on a "shake". FRB #10-03 concluded that nothing in policy or training would lead a Seattle Police Officer to depend upon this formulation, and the fact that Officer Birk was in the relative safety of his patrol vehicle when the broadcast was made confirms that this omission was inexcusable, and contributed to the tragic events which unfolded. Proper procedures dictate that Officer Birk should have clearly stated that he observed a man with a knife, provided a description and direction of travel, and requested a back-up unit. If this situation originated as a dispatched 911 call, two officers at a minimum would be dispatched, and - training and policy dictate - an arriving officer will wait for the back-up unit to arrive prior to initiating contact. Oftentimes, a dispatched call of this nature would include a request for a Crisis Intervention Team officer and a TASER officer. The realities and expectations of the Department concerning situations of this kind do not change dependent upon whether 911 dispatches a call, or an officer initiates contact (called on "on-view" incident). We now know, and Officer Birk - as a district patrol officer with at least a year on the street - should have known that there were other patrol officers and bicycle officers immediately adjacent to his location (as the aftermath of the shooting incident demonstrated, within 20 seconds);

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that there were TASER officers immediately adjacent to his location; that there were Crisis Intervention Team officers immediately adjacent to his location; and that there were Supervisors immediately adjacent to his location. Moreover, the 911 dispatch center tracks the location of all patrol units via Automatic Vehicle Locator (AVL) technology continuously. Back-up will respond quickly if they know the nature of a contact, or if requested. Neither event occurred, and it was within Officer Birk's power and responsibility to affirmatively initiate these events, and not assume they will occur absent explicit information being provided by him via radio broadcast.

Officer Birk did not appropriately assess the potential risks inherent in his attempt to contact John T. Williams, and did not employ proper tactics in light of this risk. The representations of Officer Birk about his view of the threat posed by John T. Williams have been inconsistent. On the one hand, Officer Birk conveyed that he simply wanted to address a suspicious circumstance, with the expected result of a peaceful resolution. At various times he testified that his attempt to contact John T. Williams was part of a community caretaking function. On the other hand, Officer Birk emerged from his patrol vehicle with his handgun at the low ready position, which is not consistent with an assessment that he was confronting a non-threatening scenario. Officer Birk's actions – rather than his testimony alone – are contradictory, specifically his decision to close the distance between himself and John T. Williams, and not assess the cover options immediately available to him (e.g. the substantial signal control box a few steps from the location he fired, as well as the raised parking lot containing numerous vehicles which could be used for cover). FRB #10-03 concludes that these decisions were inappropriate and not consistent with training and proper procedures. Moreover, Officer Birk's actions were incongruous with his characterization of this "shake" as being part of a "community caretaking" function.

Officer Birk did not properly identify himself as a Seattle Police Officer, or provide sufficient direction to John T. Williams to control the situation. Both the in-car video evidence and Officer Birk's testimony establish that at no time did Officer Birk clearly state that he was a Seattle Police Officer, and direct that John T. Williams follow his explicit instructions (viz. "Seattle Police: Stop; Keep your hands visible" ... etc.). The fatal encounter, which lasted about 7 seconds, consisted of Officer Birk using a hand gesture and saying "Hey...") to an individual he suspected of being impaired, and who had his back to him, followed by the statement "Put the knife down" repeated quickly three times before 4-5 shots were heard. At the Inquest and FRB #10-03, Officer Birk represented that he had success with a more casual, non-authoritarian approach to contacting suspicious persons. This account is unacceptable, and inconsistent with training and standard patrol procedures. As noted above, this situation was not properly assessed by Officer Birk, and was certainly not (as Officer Birk's actions demonstrated) a low-risk, community caretaking, social contact. Not wanting to appear authoritarian does not negate the fact that Officer Birk was exercising authority, and that his authority derives from being recognized as a uniformed police officer.

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During both the Inquest and FRB #10-03, Officer Birk testified that John T. Williams turned his head and looked over his shoulder at him (Officer Birk) prior to and separate from the turn Williams made when he was shot, leading to Officer Birk's conclusion that John T. Williams recognized that he was being summoned by a Seattle Police Officer. (This testimony, by the way, was not consistent with Officer Birk's written statement, which made no mention of William's prior turn towards him, only stating that "I called out to the individual, who initially ignored or failed to acknowledge my efforts to stop him). Whether this belief was correct – and there are ample grounds to doubt it – Officer Birk was not excused from the very basic responsibility to take reasonable steps to ensure that John T. Williams was given sufficient warning that he was being directed by a Seattle Police Officer. Whether or not Williams had the capacity to understand this warning is a question FRB #10-03 is not in a position to answer.

The so-called "21 foot rule" does not constitute a sufficient defense for Officer Birk's decisions. The concept of the "21 foot rule" is a part of virtually every police officer's training, Seattle being no exception. The crux of this training centers upon the well researched and verified phenomenon that an ordinarily capable individual armed with an edged weapon* can cover the distance of 21 (or more) feet faster than an ordinarily capable police officer can mentally process the attack, draw his/her weapon, attain target acquisition and fire two accurate shots. This "rule" is also called the "Tueller" drill, and was authored by Lewinski, now with the Force Science Institute. In point of fact, this is not a "rule" at all - a fact which Lewinski himself acknowledges - rather, it is the description of a well demonstrated physical reality. It is important information for every police officer, and is intended to inform the totality of an officer's decision-making process about the use of force. It was never intended to provide an absolute defense for a use of force directed at any person within 21 feet of an officer. Officer Birk testified the "21 foot rule" was a critical element of his decision-making, both at FRB #10-03 and the Inquest. This

*The questions concerning the functionality of William's knife and its status (i.e. whether it was open or closed) at various points of the incident on August 30, 2010 have been the subject of intense scrutiny. At FRB #10-03, testimony based upon forensic testing was presented which established that the locking mechanism of this collapsible (or "folding") knife was flawed, and that the knife was subject to closing without engaging the spring release mechanism. Testimony at the Inquest, and Birk's own statements, establish more likely than not that the knife was "closed" when secured following Williams being shot. FRB #10-03 heard testimony which satisfied the Board that due care was given to protecting the incident scene, to the point of an officer being assigned to stand guard over the closed knife until relieved by crime scene detectives. While the debate over the status of the knife resulted in various speculations, FRB #10-03 found that Officer Birk based his decisions on the reasonable belief that at the time he first observed John T. Williams, he had in his possession a knife which appeared to be open and that this knife was a potentially deadly weapon. The Board concluded that Birk had no reason to believe that this dynamic had changed at the time he used deadly force. Other theories and conclusions are not materially relevant to FRB #10-03, and are speculative, at best.

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being said, FRB #10-03 did not find the essential elements of this so-called "rule" – actually a guideline, or, more properly, an informative description of statistically probable outcomes – were applied in an inconsistent and contradictory manner by Officer Birk to explain his decision to use deadly force. First, it was Officer Birk who closed the distance between himself and John T. Williams - including a voice command and gesture for Williams to come towards him even as he was advancing on Williams - stopping at a little under 10 feet; second, William's back was turned to Officer Birk, and consequently he did not have the element of surprise which makes up a substantial part of the reaction phenomenon which underpins the 21-foot guideline; third, Officer Birk had his weapon drawn and in a low-ready position, which is designed to quickly facilitate the process of obtaining target acquisition; and fourth, the actions of John T. Williams did not materialize to the point of moving from "pre-attack" to a fully developed attack. (This last point will be discussed in the next, and final, statement of Key Conclusions) FRB #10-03 was unable to justify the employment of this guideline by Officer Birk in light of the fact that Officer Birk, fully aware and articulate in his recounting of this guideline (as evidenced by his reliance on it to explain his decisions) apparently chose to ignore it in his decision to close the distance between himself and John T. Williams. Disregarding a guideline and then relying upon it as a defense is contradictory. In a real sense, Officer Birk created the situation which he claims he had to use deadly force to get out of. The fact should be reemphasized that relying upon the "Tueller Drill", "21 foot rule" or other such practical guidelines to explain and defend the actions of Officer Birk, is inconsistent with training and sound patrol procedures.

At the point Officer Birk decided to use deadly force, FRB #10-03 concluded that John T. Williams had initiated, but had not fully completed, actions which would have predicated a justifiable use of deadly force. The Board could not concur with the perspective of Officer Birk that John T. Williams was in the process of initiating an attack which could plausibly lead to an imminent threat of death of serious bodily injury. This conclusion was reached even though FRB #10-03 could not dispute that the so-called "pre-attack" indicators described by Officer Birk were perceived by him to be immediate and credible, inasmuch as that 1. Board cannot presume to enter Officer Birk's mind at the time of the incident; and, 2. the RCW allows that "a peace officer shall not be held criminally liable for using deadly force without malice and with a good faith belief that such act is justifiable pursuant to this section". (It is important at this juncture to note that FRB #10-03 did not find that Officer Birk acted with malice, although it should be emphasized that the purpose of this review is administrative, and the FRB is not charged with determining criminal fault) The question which was the focus of the Board's attention was whether John T. Williams's actions crossed the threshold between being "pre-attack" and *actual* attack. Forensic evidence provided during FRB #10-03 established that John T. Williams was likely perpendicular to the stance of Officer Birk, or just initiating a turn to face him. Four rounds from Officer Birk's duty weapon struck John T. Williams at points of impact and trajectories which indicate that Williams presented his profile – or right side – to Officer Birk. In Officer Birk's testimony, this orientation,

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coupled with William's apparent refusal to drop the knife, was sufficient to establish an imminent threat requiring the use of deadly force. In the view of FRB #10-03, however, Officer Birk's decision to use deadly force was premature.

The above findings, and the last key conclusion in particular, find their basis in the overarching Seattle Police Department guideline concerning necessary use of force, which is taken verbatim from the Revised Code of Washington: "No reasonably effective alternative to the use of force appeared to exist, and the amount of force used was reasonable to effect the lawful purpose intended."

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As stated above, on February 14, 2010, following review of the transcripts of the King County Inquest, and upon being informed that the King County Prosecutor was going to announce a filing decision on February 16, 2010, the voting members of FRB #10-03 reconvened to conduct final deliberations. Based upon this review, and in light of the Key Conclusions listed above, FRB #10-03 unanimously concluded that the discharge of a firearm by Officer Ian Birk to be **unjustified and outside of policy, tactics and training**. The initial findings of the October 4th convening of FRB #10-03, found on P. 3 of this memorandum, remain unchanged.

My final thoughts are intended to provide context for the next steps in this investigation. First, and foremost, as a result of these findings and recommendations, **Officer Birk must remain stripped of all Seattle Police powers and authority**, as he was on October 5th, 2010 when he surrendered his gun and badge.

At this point in the investigation of the actions of Officer Birk by the Department, only two steps remain: First, to allow Officer Birk the opportunity to provide a statement to the Office of Professional Accountability, and for Officer Birk to have the opportunity to speak with you at a Loudermill hearing. It is important to emphasize these long-standing and well-established constitutional protections are matters of law, not Departmental preference, and that the consequence of not adhering to these rules is the risk of having your decision overturned. However frustrating this process has been, due process and adherence to law must prevail. I doubt that these tasks will consume more than several more weeks. Therefore I recommend that the Department undertake the last remaining due process requirements concerning the OPA investigation into the actions of Officer Ian Birk, and complete them with all deliberate speed and thoroughness.

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CHIEF OF POLICE REVIEW/COMMENTS/CONCURRENCE/DATE:

Attachments: Overview of SPD Force Training
"Firearms Review Board Protocols" et al.

Cc: FRB Voting Members, SPOG and Civilian Observers
Assistant and Deputy Chiefs
Legal Advisor
Kathryn Olson, OPA Director
file

Report of Sgt. T. Owens
Re: Training of a Seattle Police Officer

At the request of Chief Kimerer, I have reviewed police training as it pertains to a relatively new Seattle police officer. I have also compared this training or knowledge to state and local standards of training to the best of my ability based upon my training and experience. I have limited this review to patrol procedures, defensive tactics, use of force and the use of firearms.

Training Summary:

1. A new police officer for the Seattle Police working uniformed patrol has undergone a multi-step process of selection and training before being released to work on their own. Once selected, the new Seattle police recruit attended limited training prior to attending the Basic Law Enforcement Academy, BLEA. Once the recruit successfully graduated from BLEA, they entered into Post BLEA training with the advanced training unit of the Seattle Police Department. Once, the recruit completed POST BLEA training, they entered into the field training program.
2. BLEA is located in Burien and run by the Washington State Criminal Justice Training Commission. BLEA staff is comprised of a combination of civilian personnel and police officers. The officers come from various law enforcement agencies within the State. Academy curricula and lesson plans are set by personnel who work at the CJTC site and are instructed by the police officers that make up the BLEA staff.
3. A new police officer received 720 hours of training at the BLEA. The basic academy consisted of thirteen modules of training. The modules were as follows:

<u>Module Name:</u>	<u>Hours:</u>
Module 01-Academy Orientation	54
Module 02-Suspicious Circumstances	42
Module 03-Disturbances	54
Module 04-Traffic Enforcement	91
Module 05-Property Crimes	66
Module 06-Crimes Against the Elderly	31
Module 07-Crimes Against Persons	52
Module 08-Sex Crimes and Crimes Against Children	31
Module 09-Unusual Occurrences	47
Module 10-Administrative	19
Module 11-Force and Fitness Training	107
Module 12-Firearms Training	86
Module 13-Emergency Vehicle Operators Course	40
	720

4. A new recruit received several different types of force training at the BLEA. This force training involved physical training in empty hand techniques, using an expandable baton, OC spray, using firearms and class room training in use of force, defensive tactics, and firearms. The force and fitness module covered defensive tactics, OC spray, expandable baton and use of force. In the force and fitness module the officers received four hours of classroom instruction on "Use of Force Decision Making." They received 36 hours of skill training on control tactics, striking, handgun retention, ground control, and ground survival. They received 6 hours of training in using the expandable baton and 8 hours in the use of OC spray. The remaining hours of the 107 hours in the force and fitness module was devoted to physical fitness training, physical fitness testing, defensive tactics scenarios, skill testing, and a written exam.
5. Additionally, in the orientation module the new recruits received three hours of training on handcuffing and three hours of instruction on the legal use of force, self-defense and control tactics.
6. In Module 12, Firearms Training, a new recruit received a four hour orientation, training on the fundamentals of marksmanship, low light shooting, using cover, using the firearm with one-hand, close quarter battle training, simulator training and they used simunitions in dynamic training. In my experience, simulator training and training with simunitions typically involves decision making as well as the physical skills involved with using the firearm. Simunitions training involves the use of modified firearms that fire a marking cartridge instead of regular ammunition and allow an officer to conduct training against role players in a more realistic manner than without simunitions.
7. BLEA classroom instruction on use of force decision making focused on teaching the recruit a decision making model that emphasized several key concepts. Essentially, the new recruit was taught to evaluate their use of force options using the following four part criteria: tactically sound, feasible, permissible and timely.

A tactically sound use of force option enhances officer safety, enhances the safety of bystanders, gives the officer(s) an advantage and creates a disadvantage for the suspect(s) within the limitation that police work is dangerous. New recruits were also taught that a poor tactical choice is not necessarily the use of unreasonable force. The recruit was also taught that it is generally a poor tactical choice to use less than reasonable force. For example, if the officer had a reasonable belief that the suspect was about to punch them it would be a poor tactical choice to continue to use only verbal commands.

A feasible force option is one which the recruit has the skills necessary to perform the force options, they also have the physical capability to perform the force option, they are in the correct environment for that particular force option, they have the necessary tools or equipment, it is practical, and it achieves the desired law enforcement objective.

A permissible force option is one that is allowed by department policy, state law and federal law. The new recruit was taught that they must learn their department policy on use of force. They were taught that the following about department policy: that it may be and often is more restrictive than the law, that a violation of policy may lead to discipline and liability, that it cannot replace the law and is not intended for external use, that they need to know both the policy and the law and that it may be out of date or negated by new case law.

The new recruit was taught RCW 9A.16.020, Use of force when lawful, RCW 9A.16.010 which defines both necessary and deadly force, and RCW 9A.16.040 Justifiable homicide or use of deadly force by public officer, peace officer, person aiding. A considerable amount of time was spent emphasizing the relationship between criminal procedure and use of force decision making.

The new recruit was taught the two seminal federal cases regarding use of force: *Graham v Connor* and *Tennessee v Garner*. Under *Graham v Connor* they learned that use of force, deadly or not, during an arrest, Terry stop, or other seizure of a free citizen must be objectively reasonable. The analysis is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The analysis of reasonableness must embody an allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving about the amount of force that is necessary in a particular situation. They were also taught that the analysis must include a careful analysis of each particular case including the following: including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. Additionally, new recruits learned that they could consider the following: tactical considerations, feasibility, officer and suspect comparisons; suspect Intoxication-drugs and/or alcohol, officer injury or exhaustion, weapons including theirs, third party involvement, consequences of inaction, special knowledge about the suspect, location, environment and nature of the police operation.

Under *Tennessee v Garner* a new recruit learned that apprehension by the use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement. That to determine whether such a seizure is reasonable, the extent of the intrusion on the suspect's rights under that Amendment must be balanced against the governmental interests in effective law enforcement. This balancing process demonstrates that, notwithstanding probable cause to seize a suspect, an officer may not always do so by killing them. They learned that where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to

prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

The recruits learned that there are two federal standards for the use of deadly force: objectively reasonable under *Graham v Connor* and "fleeing felon" under *Tennessee v Garner*. In evaluating the reasonableness of using deadly force, the recruits were trained to look at three main factors: ability, opportunity and jeopardy. Does the suspect have the physical capacity, ability, to inflict serious bodily injury to the officer or another person? Does the suspect or subject have the opportunity to use their ability to seriously injure the officer or another person? Does the suspect's ability and opportunity place the officer or another person in imminent physical danger of serious bodily injury or death? Imminent is defined as pending action and is not the same as immediate or instant. The recruits were trained to take into account the time lag between recognizing the deadly attack, responding to it and stopping it. Recruits were trained that they should not use deadly force if a reasonably safe alternative was available. Reasonable safe alternatives in certain situations might include the use of non-deadly force or less lethal force options, verbal commands or seeking cover. A reasonable officer knows that they are not required to consider alternatives that are not available to them within the time constraints posed by the situation or that would place them in jeopardy. In most cases, a solo patrol officer will not be able to deploy and has been trained not to deploy less lethal force, OC spray or a Taser, or non-deadly force against a perceived deadly threat because if those force options fail someone's life including the officers may be lost. Similarly, seeking cover may not stop the threat to the officer based upon the facts and circumstances of a situation and it will not stop a deadly threat to another person. Verbal commands are used when feasible. A reasonable officer knows that verbal commands are feasible when there is time to employ them before someone gets hurt and they may actually stop the threat.

The last criteria the recruits learned was that use of force decisions are made within the time allowed for the decision. The recruits learned: that the failure to make a decision in the time allowed is in fact a decision to let the suspect(s) dictate the situation, that a force option cannot work if it is preempted by suspect actions, that threatening force you cannot or will not use may be dangerous and allows the suspect(s) to formulate counters to those force options. They also learned that the more time you have to make a decision the more choices you will be able to evaluate and the greater the scrutiny will be on your decision.

8. BLEA training in a different module covered police liability under the public duty doctrine. This training emphasized that if the officer has a duty and fails to perform the duty the officer will be liable for the failure to perform the duty.

9. Once a Seattle police recruit graduated from the BLEA they entered into Post BLEA training as student officers. Post BLEA training consisted of about 200 hundred hours of training. The purpose of this training was to train them on Seattle specific policies, procedures, practices, report writing and to supplement their basic academy training. The relevant training covered integrated combat and control, tactics, firearms, search and seizure and use of force. Post BLEA tactics consisted of forty hours of training. The training covered tactical concepts, high risk vehicle stops, multiple officer building searches, barricaded suspects, deployment of less lethal force options, and active shooter/rapid intervention. Post BLEA integrated combat and control training consisted of forty hours of training which covered: control tactics, handcuffing, use of the police baton, striking, clinch work, ground survival and ground control. Post BLEA firearms training consisted of three twenty four hours of training which covered: an evaluation shoot, escalation of readiness drills, shooting from and around a patrol car, fundamental shooting techniques, flashlight techniques, one handed shooting, class room training on firearms policies, shooting at moving targets, front sight only shooting, shooting while moving, low light shoot/don't shoot drill, off-duty guns, shooting in a gas mask, draw and speed shooting drills, long distance shooting, and shooting while fatigued. New officers received six hours of instruction on search and seizure and use of force.
10. Upon completion of Post BLEA, a new officer entered into at least 14 weeks of field training. During field training, the new officer was trained, observed and evaluated daily by their field training officer. The purpose of field training was to translate the classroom training into performance in the field. Almost, every agency in the United States uses a field training program with their new officers.
11. Street Skills is in-service training conducted by trainers from the advanced training unit. This year street skills consists of eight hours of ICC training, eight hours of tactical training, eight hours of firearms training and eight hours of perspectives on profiling training. The eight hours of ICC training is skill training split between counter striking and clinch grappling. The eight hours of firearms training is broken down into two four hour blocks covering speed shooting and long distance shooting. Tactics training is broken down into a skills training and drilling. In the skills training officers practice skills they already know and are introduced to new skills such as the tactical pause in room clearing. In the drilling, the officers perform building searches, high risk vehicle stops, rapid intervention and contact/cover exercises. Some of the exercises include: contact with an armed person, removing a person causing a disturbance, handling a fight disturbance, handling a suicidal subject call, handling a suspect who exhibits signs of excited delirium, and handling a DV disturbance with a gun.
12. A new police officer at the Seattle Police Department is typically assigned to uniform patrol once they complete their field training program. During their training they have learned that they have two general duties: respond to calls for service and conduct proactive patrol. While conducting proactive patrol the

officer is expected to enforce traffic and criminal laws as well as protect the public from hazards.

13. Police officers are trained to observe many indicators of suspicious, criminal and dangerous behavior that are often not noticed or observed by the public. The ability of officers to observe subtle indicators of criminal activity or to perceive a threat to their safety or to public safety becomes more acute with additional training and experience. Often times the public may be completely unaware of the crime in progress or the threat to their safety and it may seem as if the police acted for no reason.
14. A reasonable officer knows that their general law enforcement objectives are: life safety, incident stabilization, preservation of property and criminal investigation. A reasonable officer knows that these objectives are not static or approached in a strictly linear manner. A reasonable officer knows that life safety includes their own life and the life of any bystanders that may be endangered. In my experience, a police officer may leave a position of cover and concealment seemingly to place themselves in more danger when in fact they may be consciously or unconsciously moving to reduce the threat to the public by confronting the threat directly or to get a better angle or back drop. One of the key components of incident stabilization is to isolate the threat and control the threat or suspect.
15. A reasonable officer has been trained that between 11-20% of the officers killed or seriously assaulted in the line of duty were investigating suspicious persons or circumstances according to studies conducted by the FBI. This is also shown by a 1991 NYC study of over three hundred police shootings. The study showed that about 16.5% of their officer involved shootings both where the officers shot a suspect or were shot by the suspect involved suspicious circumstances or investigations, on views, started by the officer.
16. Officers may detain a person to investigate their involvement in suspected criminal activity based upon reasonable suspicion to believe that the person being detained is involved in criminal activity. An investigative detention does not require probable cause to arrest. Reasonable suspicion requires less evidence than probable cause. An officer develops reasonable suspicion through witnesses, their observations, investigation and their interpretation of the facts and circumstances based upon their training and experience.
17. During an investigative detention an officer may control the detainee and the scene of the detention. As the detention becomes more intrusive the officers should have facts or circumstances that balance the additional intrusion on the rights of the detainee with the need for the additional intrusion.
18. Law enforcement officers are trained that certain non-verbal behaviors, body language and circumstances are indicators of a threat to the officer's safety and

may also be resistance to the officer's procedures and/or commands. These have commonly been referred to as pre-attack indicators. Since at least 2003 BLEA Control and Defensive Tactics training has subdivided "pre-attack indicators" into two subsets. First, are pre-attack indicators which are the following: conspicuous ignoring, repetitive inquiry, excessive emotional attitude or display, looking around, cessation of all movement, known violent history, intoxication, unreasonable, total cooperation, and physical crowding. Second, are pre-attack postures which are the following: hand set, shoulder shift, target glance, thousand yard stare, head drop and taking a bladed stance. Academy training defines pre-attack indicators as early warning signs and pre-attack postures as the attack is imminent.

19. Law enforcement officers have been trained that a suspect holding a weapon which is not a firearm are in jeopardy of suffering serious bodily harm or death from that weapon when the suspect is at 21 feet or less if the suspect attacks the officer with the weapon. This is often referred to as the "21 foot rule" in police training. The 21 foot rule has been a valid concept in police training for over 20 years. The original rule was based upon research done by Dennis Tueller and popularized by Calibre Press in their Street Survival Seminar and Edged Weapons videos. According to the Force Science Research Center, FSRC: "The general premise of the 21-Foot Rule, when accurately stated, says that in the time it takes the average officer to recognize a threat, draw his sidearm and fire 2 rounds at center mass, an average subject charging at the officer with an edged weapon can cover a distance of 21 feet. Thus, when dealing with an edged-weapon wielder at anything less than 21 feet you need to have your gun out and ready to shoot before he starts rushing you or else you risk being set upon and injured or killed before you can draw your sidearm and effectively defeat the attack." The rule has been evaluated nationally, FSRC, by police researchers as recently as 2005. Here are some of the relevant findings in regards to the 21-Foot Rule. "Once an officer perceives a signal to do so, the AVERAGE officer requires 1.5 seconds to draw from a snapped Level II holster and fire one unsighted round at center mass. Add 1/4 of a second for firing a second round, and another 1/10 of a second for obtaining a flash sight picture for the average officer." "The fastest officer tested required 1.31 seconds to draw from a Level II holster and get off his first unsighted round. The slowest officer tested required 2.25 seconds." "For the average officer to draw and fire an unsighted round from a snapped Level III holster, which is becoming increasingly popular in LE because of its extra security features, takes 1.7 seconds." "Meanwhile, the AVERAGE suspect with an edged weapon raised in the traditional "ice-pick" position can go from a dead stop to level, unobstructed surface offering good traction in 1.5-1.7 seconds." A reasonable law enforcement officer has been trained that an edged weapon attack poses a real and serious threat to law enforcement and that a blade less than three inches in length can inflict a deadly wound or disabling wound. Additionally, while most people assume that an edged weapon as being a knife, it can be a razor blade, screwdriver, ice-pick or a piece of broken glass or anything else capable of cutting or stabbing.

20. Some of the resulting training strategies to deal with the potential threat posed by edged weapons can be broadly classified as unarmed or armed tactics. The first basic tenet of surviving an edged weapon attack as stated above is to be armed. Therefore, a reasonable officer when investigating a situation which may pose a threat to their safety would draw their weapon. Carrying the weapon in the "Sul" position is both accepted and trained at the Seattle Police Department and nationally. Most of the unarmed tactics involve using physical force as an intermediate step to drawing the firearm. For example, in The Tactical Edge by Charles Remsburg, he states: "empty-hand techniques are not the preferred force against knives. In skilled hands, knives can inflict as much or more damage than a bullet....If you see a knife and have time and distance, your sidearm should be out; you are facing deadly force. But at a short distance you may have to perform an intermediate step in order to draw."
21. A reasonable officer has been trained about the effects of their body's natural response to a critical incident on their ability to perform motor skills. A reasonable officer may suffer from a loss of fine motor control, auditory exclusion, tunnel vision, a more rapid pulse, higher respirations, diminished ability to perform higher reasoning, and a temporary inability to recall the events of the critical incident or to put them in the correct sequence.
22. A reasonable police officer has been trained that: "suspect action beats officer reaction." This is true because while the suspect is acting, the officer must perceive the action, formulate a response to that action and then execute the response. According to one law enforcement trainer: "Dynamic training exercises have repeatedly demonstrated that a suspect in a deadly force confrontation can bring a weapon to bear and fire it before the officer can respond by squeezing the trigger of a weapon already drawn and aimed at the suspect. Quite simply, action is faster than reaction. Furthermore, police handgun rounds do not reliably incapacitate suspects immediately, and officers encounter many situations with inadequate or unavailable cover."
23. A reasonable officer has been trained to shoot until the threat has been stopped even if they have to shoot multiple times. A reasonable officer has been trained that the threat has been stopped when the suspect posing the threat is no longer capable of carrying out the deadly threat either because they have dropped the weapon or are physically incapable of a deadly attack. A reasonable officer has been trained to shoot for the center of mass of the available target for multiple reasons: it is the largest target, vital organs that allow the body to function may be located there, and shooting for the center of the available target limits the chances of striking bystanders. A reasonable officer has been trained that in certain situations that they should shoot at alternate targets such as the pelvic girdle or head. Alternate targets are chosen because shooting center of mass has been or appears to be ineffective. Once the threat has been stopped then officers are to cease firing. It is unsafe to shoot once, evaluate, and then shoot again because

during the evaluation phase of this method of shooting, the suspect may be able to carry out the deadly attack.

24. Once a Seattle police officer has used deadly force to stop an attack they have several reasonable options for placing the suspect into handcuffs. Nationally and within the State of Washington many police trainers advocate immediately placing the suspects into handcuffs. At the Seattle police department in tactics training we advocate waiting for additional officers to assist in the handcuffing.
25. Handcuffs are an inherently uncomfortable but necessary form of restraint used by law enforcement throughout the country to control subjects when they are uncooperative or to transport compliant subjects who are under arrest or imprisoned. Handcuffs are made of metal to prevent escape of the suspect by breaking the handcuffs. Suspects are handcuffed behind their back to prevent escape and assault on the Officers. However, handcuffs are a temporary mechanical restraint that does not totally prevent an escalation of violence or the escape of the suspect. For example, handcuffs do not control the legs. Additionally, subjects who are uncooperative and resisting move and behave in a manner which often leads to them injuring themselves with the handcuffs.
26. Officers are trained to evaluate several things after a suspect is taken into custody through the use of force. Officers are taught to evaluate the scene for second suspects; themselves, their equipment and their partners; to insure the safety of bystanders; and the suspect for injuries. Once an evaluation is done and unless someone needs immediate first aid for life threatening injuries, the officers will search the suspect for weapons and contraband with the scope of the search being dependent on the totality of the circumstances. Once the search is completed officers will arrange for transport of the suspect either to a holding facility or a medical facility as necessary.
27. Officer involved shootings may result in significant trauma to the involved officer(s). It is a reasonable response by the supervisors on scene to obtain a basic version of events from the involved officer(s) and then to isolate the involved officer(s) and to provide them with support as necessary. Officers involved in using deadly force generally have the same rights as any citizen who has used deadly force. It would be unreasonable and an abdication of their supervisory and management responsibilities to not afford the involved officers their rights.

Firearms Review Board Protocol

Instructions to Board Members:

The Chair should instruct the Board that the questions they ask of witnesses (sworn and civilian) should be specifically directed and narrowly related to the events that led to the discharge of a firearm by Seattle Police Personnel. This may include questions regarding equipment, training, and safety issues that relate to the incident under review.

Protocol regarding witness appearances:

1. The Chair should introduce the Board Members to the officer/witness and briefly explain the role of the observers on the board.
2. The Chair should cite a statement of purpose to the officer/witness:
 - *Per Seattle Police Department Policies and Procedures (Section 11.030) whenever there is an intentional discharge of a firearm by an officer and after each additional discharge resulting in injury or death, the Firearms Review Board convenes to investigate and review the circumstances of that discharge, making findings and recommendations to the Chief of Police.*
 - *(When applicable): Although the discharge was accidental and did not result in injury or death in this incident, the Deputy Chief of Administration had the discretion to convene a Firearms Review Board, "when appropriate".*
 - *(When applicable): Since an inquest will be held, the Firearms Review Board will delay final recommendations until after the inquest is concluded.*
3. Whenever a sworn SPD employee appears as a witness before the Firearms Review Board, as ordered by the Chair, the Chair must advise the officer in person at the hearing of the following before they testify:
 - *"You have been ordered by the Department to appear and give testimony regarding the matter currently under review by the Firearms Review Board".*

Other Protocol Items

1. When the Chair completes the Firearms review Board Report and the Chief of Police approves it, the Firearms Review Board is available for Public Disclosure requests. The Chair should ensure that the affected officer(s) Bureau Commander receive the Board's determinations, findings and recommendations as soon as possible, once the Chief of Police approves the Firearms Review Board Report. The affected officer(s) Bureau Commander should then verify with the Chair that

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the officer(s) has received notification of the Board's determinations, findings and recommendations prior to the Chair authorizing the release of the Firearms Review Board Report for Public Disclosure.

Additional Reminder for Bureau Commanders:

Bureau Commanders are reminded that when a Firearms Review Board is not convened in those instances of a non-injury accidental discharge of a firearm, the affected officer's Bureau Commander shall make a recommendation to the Chief of Police as to whether or not discipline or corrective training is necessary (Section 11.030 V.B.).

Seattle Police Department
Firearms Review Board
Procedure Guidelines – Findings – Recommendations

Firearms Review Board No _____ Date Convened _____

The following are recommended procedures to be used during each Firearms Review Board to assist in the decision and recommendation process as outlined in Seattle Police Department Manual Section 11.030. Each step in these procedures should be considered relative to the case under review and the potentiality of further action, such as: criminal charges, coroner's inquest, widespread publicity, or addressing serious attitude or training deficiencies.

I. Procedure

A. The Deputy Chief of Administration shall:

1. Provide board members with all applicable reports and other documentation prior to the convening of the board, and
2. Designate the date, time, and location of board.

B. The Board Chair shall:

1. Review case material and evidence,
2. Determine witness to be interviewed, and
3. Request further investigation if needed.
4. Complete and forward Firearm Review Board Summary memo, Procedure Guidelines form, and Weapon Summary form to the Deputy Chief of Administration.

C. Board members shall review the provided information prior to convening of the board.

D. The Firearms Review Board shall:

1. Review and discuss all reports and evidence available,
2. Interview investigation detectives/officers,
3. Interview witnesses in logical order,
4. Listen to radio and communication center telephone calls pertaining to the incident,
5. Examine the scene in person as directed by the Board Chair,
6. Evaluate pertinent background information on the suspect, and
7. Discuss and review all information provided to the Board.

II. Determinations

A. The discharge occurred while the officer was: On Duty Off Duty

Comments: _____

B. The discharge was: Intentional Unintentional (If Unintentional or accidental, proceed to Part III, Page 4)
 Accidental (Weapon Malfunction)

Comments: _____

C. If the discharge was intentional and not directed at a person, was the action in accordance with Department guidelines (if applicable): Yes No

D. The discharge was intentional and directed at a person? Yes No _____

E. The use of the firearm was necessary to:

- Arrest or apprehend a person who the officer reasonably believed had committed, had attempted to commit, was committing or was attempting to commit a felony, or
- Prevent the escape of a person from a federal or state correctional facility or in re-taking a person who had escaped from such a facility, or
- Prevent the escape of a person from a county or city jail or a holding facility where the person had been arrested for, charged with, or convicted of a felony, or
- Lawfully suppress a riot where the actor or another participant was armed with a deadly weapon.

F. Did the officer have probable cause to believe that the suspect, if not apprehended, posed a threat of serious physical harm to the officer or a threat of serious harm to others?

Yes No

Comments: _____

G. Did reasonably effective alternatives to the use of force of a firearm appear to exist?

Reasonably effective alternatives include, but are not limited to:

- a. Allowing suspect the opportunity to surrender.
- b. Physically subduing the suspect.
- c. Containing the suspect and calling for assistance.
- d. Using tear gas or other available less lethal weapons.
- e. Other: _____

Yes No

Comments:

H. Considering the circumstances known to the officer at the time, would it have been a reasonable alternative to allow the suspect to escape without resorting to the use of firearm(s)?

Yes No

I. Did the actions of the officer contribute to the need to fire? Yes No

Comments:

From the answers to the preceding questions and all evidence presented, make findings and recommendations to the Deputy Chief of Administration. The Deputy Chief of Administration will ensure that involved personnel receive written notification of the Board's conclusion in a timely manner.

III. Findings

A. The firearm discharge was found by the Board to be:

- 1. Justified,

- 2. Not Justified,
- 3. Unintentional,
- 4. Accidental (Weapon Malfunction), or
- 5. Finding delayed until inquest or court action in this case is concluded.

IV. Recommendations

A. Justified

- 1. No further action.
- 2. With Recommendations. (Specify below)

B. Not Justified

- 1. Recommend referral to Office of Professional Accountability to be processed in accordance with Department disciplinary procedures.
- 2. Recommend re-training in the following areas. (Specify below)

C. Unintentional/Accidental

- 1. No discipline or training recommended. (Evidence Indicates an Accidental Firearm Malfunction)
- 2. Mandatory re-training in the following areas. (Specify below)
 - Recommendation of Discipline by Chain of Command, or referral to Office of Professional Accountability in accordance with Department Disciplinary Procedures.
- 3. Professional Accountability in accordance with Department Disciplinary Procedures.

D. Officer should be returned to street duty (if applicable):

- 1. Immediately
- 2. Only after re-training
- 3. Other (Specify below)

Recommendations:

MEMORANDUM OF AGREEMENT

WHEREAS, the City of Seattle (hereinafter referred to as the "City") is a first class charter city, organized in accordance with Washington Constitution Article XI, §10 and Chapter 35.22, RCW; and

WHEREAS, the City and the Seattle Police Officers' Guild (hereafter referred to as "SPOG") have been signatory to a collective bargaining agreement setting forth the wages, hours, and other terms and conditions of employment for members of the bargaining unit represented by SPOG; and

WHEREAS, the City and the Seattle Police Management Association (hereafter referred to as "SPMA") have been and are signatory to a collective bargaining agreement setting forth the wages, hours, and other terms and conditions of employment for members of the bargaining unit represented by SPMA; and

WHEREAS, on or about January 27, 1997 the City Council passed Ordinance Number 118482 creating a "Firearms Review Board Citizen Observer position (hereinafter "Citizen Observer") with authority to attend each meeting of the Seattle Police Department Firearms Review Board as a non-voting observer, to report annually to the Mayor and Council on the proceedings of the Firearms Review Board; and to increase the confidence of the general public in the review process"; and

WHEREAS, on or about February 6, 1997, the Mayor signed Ordinance Number 118482; and

WHEREAS, on or about February 4, 1997, SPOG, in response to the adoption of Ordinance Number 118482 and amendments to the Seattle Police Department Policies and Procedures Manual Section 1.305, filed an unfair labor practice complaint against the City with the Public Employment Relations Commission (hereinafter referred to as "PERC") that was docketed as *Seattle Police Officers' Guild vs. City of Seattle*, Case 13234-U-97-03218; and

WHEREAS, the City denied committing any unfair labor practice(s); and

WHEREAS, on or about June 11, 1997, SPMA, in response to the adoption of Ordinance Number 118482 and amendments to the Seattle Police Department Policies and Procedures Manual Section 1.305, filed an unfair labor practice complaint against the City with the PERC that was docketed as *Seattle Police Management Association vs. City of Seattle*, Case 13306-U-97-03245; and

WHEREAS, the City denied committing any unfair labor practice(s); and

WHEREAS, on or about April 27, 1999, Hearing Examiner Walter M. Stuteville issued Consolidated Findings of Fact, Conclusions of Law, and Order in the cases docketed as *Seattle Police Officers' Guild vs. City of Seattle*, Case 13234-U-97-03218

and *Seattle Police Management Association vs. City of Seattle*, Case 13306-U-97-03245; and

WHEREAS, the City, SPOG and SPMA have all appealed from Hearing Examiner Walter M. Stuteville's Consolidated Findings of Fact, Conclusions of Law, and Order; and

WHEREAS, the City, SPOG, and the SPMA wish to resolve the unfair labor practice proceeding without resort to further litigation; it is therefore

AGREED BY AND AMONG THE PARTIES HERETO, in consideration of the mutual promises contained herein and other good and valuable consideration, that:

1. As part of the appointment process contemplated by Section 3 of Ordinance Number 118482, the President of SPOG and the President of SPMA and/or their designee(s) will be allowed to sit in on the interviews of the final candidates for Citizen Observer and provide input during the interview process.

2. Any bargaining unit employees involved in a Firearms Review Board investigation and review (hereinafter referred to as the "subject employee") will be afforded his/her Weingarten and Garrity rights.

3. The Seattle Police Department Policies and Procedures Manual Section 1.305, ¶I(A)(5) will be revised to read:

A bargaining unit representative shall be permitted to attend the Firearms Review Board, if requested by the subject employee, to provide representation in accordance with RCW 41.56.¹

4. The Seattle Police Department Policies and Procedures Manual Section 1.305, ¶V will be revised to read:

VI Citizen Observer

A. The Mayor shall appoint a Citizen Observer to the Firearm's review Board to observe and report on the Proceedings of the Board.

1. In addition to possessing the qualifications set forth in Section 3E of Ordinance Number 118482, the Citizen Observer shall possess the following qualifications and characteristics:

¹ The parties agree that Appendix A reflects the current state of the law with respect to representation in accordance with RCW 41.56.

- a. demonstrated professional experience in criminal justice and/or constitutional law, and,

- b. some experience in fact-finding.

2. The Citizen Observer shall be a non-voting observer and shall comply with all of the provisions of Ordinance 118482.

- a. The Citizen Observer shall be excused during the deliberations and voting of the Firearms Review Board.

B. The Mayor shall appoint an alternate Citizen Observer who will serve in place of the Citizen Observer where the Citizen Observer is unavailable and/or is unable to serve.

- 1. The alternate Citizen Observer shall be selected in the same manner as the primary Citizen Observer.

C. The subject employee or the subject employee's bargaining representative may request that the Citizen Observer not attend and/or observe the proceedings of the Firearms Review Board in a particular case if there are concerns related to an appearance of fairness, or if the Citizen Observer is demonstrated to have violated the confidentiality provisions of the Ordinance, or if there are other concerns of similar gravity.

- 1. Such a request shall be made within five days after receiving notification of the hearing.

- 2. When such a request is timely made, the alternate Citizen Observer shall be used for the hearing.

5. The Seattle Police Department Policies and Procedures Manual Section 1.305, will be revised to add a §VII that will read:

VII Bargaining Representative Observer

A. A representative of the subject employee's bargaining unit shall serve as a non-voting member of the Firearms Review Board, in the same capacity, and subject to the same limitations, as the Citizen Observer.

1. The representative of the subject employee's bargaining unit will be excused during the deliberations and voting of the Firearms review Board.

B. The representative of the subject employee's bargaining unit who serves as the non-voting member of the Firearms Review Board shall not be the same representative who represents the subject employee before the Firearms Review Board in accordance with RCW 41.56.

6. When records relating to the Firearms Review Board are requested pursuant to a public disclosure request, the subject employee's bargaining representative will be notified of the request and be allowed a reasonable period of time, not to exceed two weeks from date of notification of the request, in which to seek a court order prohibiting disclosure of such records.

7. Hearing Examiner Walter M. Stuteville's April 27, 1999 Consolidated Findings of Fact, Conclusions of Law, and Order in the cases docketed as *Seattle Police Officers' Guild vs. City of Seattle*, Case 13234-U-97-03218 and *Seattle Police Management Association vs. City of Seattle*, Case 13306-U-97-03245 shall not be used as precedent in any other proceeding(s) involving the City and SPOG and/or the City and SPMA.

8. The City, SPOG, and SPMA will ask the PERC to suspend enforcement of Walter M. Stuteville's April 27, 1999 Consolidated Findings of Fact, Conclusions of Law, and Order in the cases docketed as *Seattle Police Officers' Guild vs. City of Seattle*, Case 13234-U-97-03218 and *Seattle Police Management Association vs. City of Seattle*, Case 13306-U-97-03245.

9. The City, SPOG, and SPMA will ask the PERC to agree that the Walter M. Stuteville's April 27, 1999 Consolidated Findings of Fact, Conclusions of Law, and Order in the cases docketed as *Seattle Police Officers' Guild vs. City of Seattle*, Case 13234-U-97-03218 and *Seattle Police Management Association vs. City of Seattle*, Case 13306-U-97-03245 shall have no precedential effect in any PERC proceedings involving the City and SPOG and/or the City and SPMA.

10. The City, SPOG, and SPMA will ask PERC to suspend the briefing schedule pending completion of the settlement discussions and the PERC approval process.

11. If the PERC does not agree to suspend enforcement of Walter M. Stuteville's April 27, 1999 Consolidated Findings of Fact, Conclusions of Law, and Order and/or to agree that Walter M. Stuteville's April 27, 1999 Consolidated Findings of Fact, Conclusions of Law, and Order shall have no precedential effect in any PERC proceeding(s) involving the City and SPOG and/or the City and SPMA, this Memorandum of Agreement shall be null and void and the parties will either continue discussing other alternatives to achieve the same goals and/or will request a new briefing schedule so that the appeals can be completed.

12. If the PERC agrees to suspend enforcement of Walter M. Stuteville's April 27, 1999 Consolidated Findings of Fact, Conclusions of Law, and Order and agrees that Walter M. Stuteville's April 27, 1999 Consolidated Findings of Fact, Conclusions of Law, and Order shall have no precedential effect in any PERC proceeding(s) involving the City and SPOG and/or the City and SPMA, then the parties shall withdraw their appeals.

IN WITNESS WHEREOF, we have set our hands this 10th day of April, 2000.

CITY OF SEATTLE

Frank J. [Signature]

SEATTLE POLICE OFFICERS' GUILD

SEATTLE POLICE MANAGEMENT ASSOCIATION

[Signature] 4/10/00

APPENDIX A

The parties agree that the following is the scope of a bargaining representative's right to provide representation to an subject employee in a Firearms Review Board proceeding in accordance with RCW 41.56 as of the date of the execution of the Memorandum of Agreement:

1. The bargaining unit representative can counsel the subject employee, complying with all applicable bargaining agreements.

2. The subject employee may consult with the union representative before commencing an investigatory interview.

3. Once the Board asks the subject employee to give his/her version of what occurred, there will be no interruption from the bargaining unit representative.

4. Once active questioning begins of the subject employee, the bargaining unit representative may alert the officer to problems with the phrasing or scope of a question.

a. Examples of the type of assistance which might be provided by the bargaining unit representative include: noting when questions are ambiguous or misleading; noting when questions invade a statutory privilege that the officer has the right to invoke; or interceding when questions become harassing or intimidating.

i. The right of the bargaining unit representative to participate during the questioning process does not necessarily allow that representative to confer with the subject employee before every answer.

5. When a statutory privilege is not at issue, the representative cannot delay the subject employee's responses while the representative advises the officer whether or how to answer a question.

a. Also, the representative and the subject employee is not free to interject comments whenever he/she wishes during the interview.

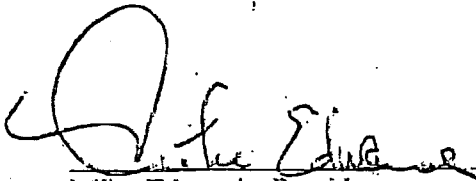
6. In the interest of maintaining an orderly process, the Board may reasonably require the bargaining unit representative to wait until the conclusion of questioning before seeking clarification of previous officer answers, bringing to light favorable facts the officer might have overlooked, suggesting other individuals who may have relevant knowledge, describing relevant practices, or advancing extenuating circumstances for the Board to consider.

Letter of Understanding


In order to avoid any current or future misunderstanding concerning the use of the term "deliberations" in the Firearms Review Board ("FRB") Memorandum Of Agreement ("MOA"), the purpose of this Letter of Understanding is to explain that it was and continues to be the parties' intent to have the FRB operate much like a jury. As such, it was and continues to be the parties' intent to have the Chair of the FRB exclude observers (union and civilian) only after all evidence has been presented, the observers have been given a full opportunity to provide input, and the record has been closed. After exclusion of the observers (union and civilian) there will be no further opportunity for anyone to present any further testimony or evidence for the FRB's consideration.

This Letter of Understanding shall be attached to the MOA and each of the party's signature below shall signify its agreement to the Letter of Understanding.

SEATTLE POLICE OFFICERS' GUILD


Mike Edwards, President

SEATTLE POLICE MANAGEMENT ASSOCIATION


Dan Oliver, President

CITY OF SEATTLE

Labor Relations

Law Department

Letter of Understanding

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