



COUNTY OF YOLO
OFFICE OF THE DISTRICT ATTORNEY
JEFF W. REISIG, DISTRICT ATTORNEY

FOR IMMEDIATE RELEASE
Date: September 19, 2012

Contact: Michael J. Cabral, Asst. Chief Dep. District Attorney
(530) 666-8406 or Michael.Cabral@yolocounty.org

**UC Davis Pepper Spray Incident
Not Criminal Conduct**

(Woodland, CA) – – No criminal charges will be filed against University of California, Davis officers involved in the November 18, 2011, pepper spraying of students on the University Quad. A 13 page District Attorney report outlines the reasons for the determination.

The report concludes “viewing the incident through the totality of the circumstances, there is insufficient evidence to establish proof beyond a reasonable doubt that the use of force involved in the November 18, 2011, pepper spraying was unlawful and therefore warrants the filing of criminal charges.”

The report defines the legal role of a prosecutor in investigating officer involved misconduct, “The review by Yolo County District Attorney’s Office does not involve an evaluation of administrative, civil or Internal Affairs liability for the participants and it does not involve a review of whether policies and procedures were appropriately followed. In addition, our review does not encompass recommendations concerning how policies and procedures might be altered to minimize potential future risks. The scope of the District Attorney’s review is solely an evaluation of whether the filing of criminal charges is warranted by the events of November 18, 2011.”

The report relies heavily on the factual determinations of the Kroll Report and cites numerous facts and evidence contained within the Kroll Report. Although the Kroll Report concluded that the conduct of Lieutenant Pike was not objectively reasonable, the report acknowledges that the officers in general, “and Lieutenant Pike specifically, believed that they and their prisoners were surrounded by a hostile ‘mob,’ and that the pepper spraying was necessary to clear the pathway so that the officers and their prisoners could leave the Quad safely” and that “a detailed review of the events provides some support for their [the officers] position.” The District Attorney’s report concludes that in light of these conclusions from the Kroll Report and the additional evidence obtained during the District Attorney’s review of the evidence that there is insufficient evidence to warrant the filing of criminal charges.

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE



1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CALIFORNIA 94244-2550

Public: (916) 445-9555
Telephone: (916) 324-5246
Facsimile: (916) 324-2960
E-Mail: Michael.Farrell@doj.ca.gov

September 19, 2012

Jonathan Raven
Assistant Chief Deputy District Attorney
Office of the Yolo County District Attorney
301 Second Street
Woodland, California 95695

Dear Mr. Raven:

This Office has considered the materials you provided regarding the University of California, Davis incident of November 18, 2011. Upon such review of your Office's determination that there is insufficient evidence to warrant a criminal prosecution, no basis appears to place this matter in the category of unusual circumstances in which the decision of the elected local law enforcement official should be set aside as an abuse of discretion.

Sincerely,

A handwritten signature in cursive script, appearing to read "Michael P. Farrell".

MICHAEL P. FARRELL
Senior Assistant Attorney General

For KAMALA D. HARRIS
Attorney General

MPF:drb

REPORT ON THE USE OF PEPPER SPRAY
ON THE CAMPUS OF
THE UNIVERSITY OF CALIFORNIA, DAVIS
NOVEMBER 11, 2011

OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF YOLO
September 19, 2012

Introduction

During the afternoon hours of November 18, 2011, University of California, Davis police officers pepper sprayed seated protesters during a demonstration on the UCD campus. The pepper spraying of the protesters, captured on numerous electronic devices, has been viewed by millions of people throughout the world and has caused public outrage focused on the police conduct. As a result of this incident the Office of the President, University of California, retained the Kroll consulting firm to prepare a report detailing the facts and circumstances that led to the confrontation and to provide analyses and recommendations. In addition, Chancellor Linda Katehi, of the University of California, Davis, formed a task force of students, faculty, and staff to review the events and provide findings and recommendations. The University also retained Van Dermyden Allison Law Corporation to conduct an Internal Affairs investigation into the use of pepper spray by the University police officers. Finally, Chancellor Katehi requested that the Yolo County District Attorney's Office conduct a criminal review of the use of force by University police officers.

On February 22, 2012, Kroll issued a one-hundred and fifty page report setting forth its findings, conclusions and recommendations. This report was supplemented in March of 2012 by a thirty-two page report issued by the University of California, Davis "Pepper Spray Incident" Task Force. The Van Dermyden Allison Law Corporation completed its internal affairs investigation into the actions of UC Davis police officers in March of 2012, and issued two-hundred and twenty-five pages of reports setting forth its conclusions concerning whether administrative sanctions were warranted.¹ The Yolo County District Attorney's Office evaluated

¹ Although all or portions of this report were apparently recently provided to a local media outlet, the contents of the report are confidential and cannot be disclosed without a court order.

the incident solely to determine whether the filing of criminal charges is warranted and now issues the following conclusions.

Materials Reviewed

In the course of this examination we conducted a review of the Kroll Report, the Task Force Report, and the Internal Affairs investigation. Our review included all of the interviews conducted by the Kroll investigators, the interviews conducted by the Internal Affairs investigators, and all of the documents, e-mails, and videos reviewed during their investigations. However, like the Kroll and the Internal Affairs investigations, we did not have access to any of the statements or opinions of the protesters, except to the extent that they have expressed their views in public forums or on the internet. In addition, we conducted additional interviews focused on use of force issues.

In addition, unlike the Kroll report, we had access to the interviews of all officers central to the incident, including Lieutenant John Pike, and Chief Annette Spicuzza. Furthermore, neither the Kroll report, nor the Internal Affairs investigation conducted interviews of the City of Davis Police officers who were called to the scene. Finally, while Retired Deputy Chief Michael Hillman was a member of the Kroll report team, their focus was not on whether the actions were criminal in nature, and neither the Kroll team nor the Internal Affairs investigators interviewed Retired Deputy Chief Hillman on use of force as it relates to criminal charges in this incident.

Standard of Review

It is important that one understand the significant differences between the standards used in the various reports. The Kroll Report was designed to be an independent fact-finding investigation and was not intended to be used for administrative sanctions or an Internal Affairs investigation. Based on the language used in the report it appears that a preponderance of the evidence standard was used when evaluating conflicting evidence concerning the incident. The Pepper Spray Task Force was responsible for making administrative determinations, and making recommendations concerning police, command, oversight and campus policies, procedures and protocols. These recommendations also appear to be based on a preponderance of the evidence standard. The Task Force based its findings and recommendations on the investigation contained in Kroll's report and did not conduct any independent investigation. Finally, the conclusions and findings of the Internal Affairs investigation also used a preponderance of the evidence standard in evaluating conflicting evidence.²

The review by Yolo County District Attorney's Office does not involve an evaluation of administrative, civil or Internal Affairs liability for the participants, and it does not involve a review of whether policies and procedures were appropriately followed. In addition, our review does not encompass recommendations concerning how policies and procedures might be altered to minimize potential future risks. The scope of the District Attorney's review is solely an evaluation of whether the filing of criminal charges is warranted by the events of November 18, 2011.

The Uniform Crime Charging Standards require prosecutors to critically analyze and evaluate all of the available information to ensure a case has been fully investigated and that

² A fact is proved by a preponderance of the evidence if it is more likely than not that the fact is true.

there is legally sufficient, admissible evidence to establish that a crime has been committed. In addition, prosecutors are required to ensure that there is legally sufficient, admissible evidence of the identity of the perpetrator. Finally, the prosecutor must be personally satisfied that the accused is guilty of the crime, and considering the most plausible and reasonably foreseeable defense(s), whether there is legally sufficient evidence to convince a jury of the accused's guilt beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves one with an abiding conviction that the charge is true.

Probable Cause for Initial Police Action³

While concerns have been raised about the legal authority for the police actions on November 18, 2011, for the purposes of our analysis the issue is legal in nature. The question is: Whether the officers had probable cause to arrest individuals for illegal activity at the time they entered the Quad on November 18, 2011? Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a reasonable person to believe that an offense has been or is being committed by the person(s) being arrested.

UC Davis Policy and Procedures Manual Chapter 270, Section 20 states that the “[u]se of University properties for overnight camping is prohibited.” In addition, California Penal Code §602(e) states, in pertinent part, that “. . .every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (e) Who lodges in any building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to the possession or in control of it.” UC Davis police officers, who were on the Quad during the night of November 17, 2011, confirmed that protesters were camping on the Quad in

³ In arriving at our factual determinations throughout this report we rely on the factual conclusions set forth in the Kroll Report

violation of University policy. Therefore, in light of the administration's invocation of the UC policy prohibiting overnight camping on University property and the information concerning the conduct of the protesters, there was probable cause to believe that individuals who were "Occupying the Quad" were in violation of University policy and California Penal Code §602(e).

Initial Arrest of Protesters

Almost immediately after the tents were erected, the police and administration representatives began efforts to educate the protesters concerning the fact that the encampment was illegal and that the camping protesters were subject to arrest. The Kroll report found that on at least three occasions on the afternoon of November 17, 2011, police officers and administrators advised protesters that the encampment was a violation of University policies and that the protesters could be arrested for camping on campus. In addition, prior to the police action on November 18, 2011, at least two additional advisements concerning the removal of the tents were given to the group of protesters.

At approximately 3:30 p.m. Lieutenant John Pike gave the protesters the first of six dispersal orders. However, after Lieutenant Pike gave the dispersal orders, the crowd continued to grow and it became more difficult to distinguish protesters from spectators. As the skirmish line of officers moved forward toward the protesters, Lieutenant Pike continued to warn the protesters that they would be arrested if they did not disperse. As the officers approached the line of protesters, several students resisted the officers' attempts to enter the circle of protesters' around the tents and were arrested. Officers then entered the line of protesters and began dismantling the tents. However, the officers did not collect any tents as they permitted the protesters to take down the tents and remove them.

The Application of Pepper Spray

As the officers were preparing to leave the area with the arrestees, Lieutenant Pike walked southwest on the sidewalk and appeared to be indicating that he needed the sidewalk cleared. At this moment the protesters remained seated in the area where the tents had been removed. The officers were standing in front of the protesters with the arrestees seated on the sidewalk behind them. As the officers waited for additional patrol cars to arrive to transport the arrestees, the crowd of protesters began to grow very quickly. At this time the protesters began inviting the spectators, who were on the other side of the officers, to join them. As the protesting crowd grew, they began to chant "set them free," and the officers formed a circle around the arrestees to provide a barrier between the arrestees and the protesters.

As the protesters continued to chant, they announced that "[w]e are going- to support our friends -who were unjustly arrested- for participating in their rights-let's march peacefully-as one- towards where they are being held." The protesters then stood with locked arms and walked forward in a southwesterly direction. As they walked forward, one of the protesters noticed that the arrestees were to the west of their location and the line of protesters pivoted to the west which caused the protesters on the eastern end of the line to envelop the officers and arrestees. As the crowd closed in around the officers they continued to chant "Set them Free," and Lieutenant Pike announced "Officers, draw batons," and an urgent request for Davis PD assistance was broadcast.

As the protesters continued to chant "Set them Free" they announced to the officers that "if you let them go, we will let you leave." California Penal Code § 405a states, that "[t]he taking by means of a riot of any person from the lawful custody of any peace officer" is a crime. By

watching the various videos of the incident, one could conclude that the protesters were attempting to free the arrestees from the lawful custody of the police when they enveloped the officers while chanting "Set them Free" and "Set them Free Now."

Faced with a crowd of protesters, who were believed to be engaged in criminal conduct, the officers were faced with three options: (1) try to take the arrestees in a different direction and hope that the crowd did not follow; (2) release the arrestees and hope that the crowd would allow the officers to leave; or (3) use force to move the arrestees in the direction that the officers had planned on traveling. In light of the fact that the crowd had recently enveloped the officers, the first option was not an option likely to result in the officers leaving the area with their arrestees. The second option involving releasing the arrestees in response to the demands of a loud and boisterous crowd is not typically an option used by law enforcement. Therefore, one could infer that officers believed that their only viable option was the application of some level of force to clear a path so that they could exit the area with their arrestees.

Lieutenant Pike advised, at least some of the protesters blocking the pathway, that if they refused to move so that the officers could pass, officers would need to use some level of force, specifically the application of pepper spray. From the statements and actions that followed, the protesters seemed to understand what was about to occur as many in the crowd began yelling "protect yourself" and passing scarves and other items to the protesters blocking the pathway. The protesters blocking the pathway began to cover their heads and faces. Lieutenant Pike prepared to apply pepper spray to those individuals blocking the officers' path. He did so in an exaggerated manner, which at least one use of force expert, who was on scene, identified as a tactic used to clearly communicate that he [Lt. Pike] was about to spray the protesters. Lieutenant Pike then pepper sprayed those individuals seated on the pathway and immediately

adjacent areas, and a second officer then sprayed those individuals seated immediately adjacent to the sidewalk. Shortly after the application of pepper spray the pathway was cleared of protesters and the officers left the Quad with their arrestees.

Criminal Conduct

California Penal Code § 15 states that “[a] crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it. . .” All the assaultive crimes potentially applicable to the November 18, 2011, pepper spray incident require proof of two basic elements. The conduct must be both willful and unlawful. The term willful in this context simply means that the application of force was intentional. The fact that officers’ actions were willful is not in dispute. An officer making an arrest or a detention is permitted to use reasonable force to make an arrest, prevent an escape or overcome resistance. Therefore a conviction in this context requires proof beyond a reasonable doubt that the officer’s use of force was unreasonable and therefore unlawful.⁴

The reasonableness of a particular use of force is examined from the perspective of a reasonable officer on scene and not by the 20/20 vision of hindsight. In addition, in the criminal context it must be examined without sympathy, pity, prejudice or public opinion. Furthermore, the reasonableness analysis must account for the fact that police officers often make split second judgments in tense and rapidly evolving circumstances about the amount of force that is necessary in a particular situation. Ultimately, the reasonableness analysis, in the excessive force

⁴ Proof beyond a reasonable doubt is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the mind of the jurors in that condition that they can say they feel an abiding conviction of the truth of the charge.

context, is an objective one involving whether an officer's actions are objectively reasonable under the totality of the circumstances.

Although the Kroll Report concluded that the conduct of Lieutenant Pike was not objectively reasonable, the Kroll Report did not address the question of whether the conduct was criminal. The report acknowledges that the officers in general, "and Lieutenant Pike specifically, believed that they and their prisoners were surrounded by a hostile "mob," and that the pepper spraying was necessary to clear the pathway so that the officers and their prisoners could leave the Quad safely." However, while concluding that "the deployment of pepper spray does not appear to have been an objectively reasonable use of force," the report does acknowledge that "a detailed review of the events provides some support for their [the officers] position."

In addition, the report examines use of force policies and whether protesters seated on the ground with linked arms are engaging in active or passive resistance. The report indicates that while the UC Davis Police Department use of force policy did not provide guidance, UCLA's use of force policy would consider such resistance active. Also, the report recognized that the 2012 California Commission on Police Officers Standards and Training (POST), POST Guidelines: Crowd Management, Intervention, and Control, defines the linking of arms as active resistance. Finally, the report concludes that while there is no standard national continuum on use of force, that most continuums allow the use of pepper spray when confronted by "active resistance and that "[t]hus, the use of pepper spray against seated protesters linking arms may be technically permissible as a general matter."

As part of our review we also interviewed officers from the Davis Police Department. None of the other investigative bodies reviewing the incident, including Kroll, the Pepper Spray Task Force, or the Internal Affairs investigation, interviewed these witnesses. These officers

responded as a result of a request for assistance from the UC Davis PD. The Davis Police Department officers described a scene of total chaos upon their arrival and that they could not locate the bulk of the UCDPD officers who were apparently surrounded by the crowd. The officers described that as they moved north up the walkway and surveyed the crowd, they saw there were some students who looked like they were trying to record the events, intermixed with others who were extremely angry and screaming at them. As they moved up the pathway, the Davis PD officers became concerned that they also would be surrounded by the crowd as the crowd started to envelop them. As they watched the UCDPD officers taking individuals into custody, the Davis PD officers requested for Davis PD swing shift officers to respond with lights and sirens because they did not believe that there were a sufficient number of officers needed for UCDPD to make additional arrests safely and for them to maintain the open walkway.

Additionally, as part of our review of the incident, we interviewed Los Angeles Police Department Retired Deputy Chief Michael Hillman. Retired Deputy Chief Hillman was a part of the Kroll Report team, and had read all documents pertaining to the Kroll investigation; however, he was not the author of the published Kroll Report. Retired Deputy Chief Hillman was also a member of the Guidelines Development Committee of the 2012 California Commission on Police Officers Standards and Training (POST), POST Guidelines: Crowd Management, Intervention, and Control, and has testified as a subject matter expert in both Federal and state courts as an expert on SWAT, Use of Force, Tactics, and Crowd Management.⁵

Retired Deputy Chief Hillman stated that his opinion is that while in hindsight the facts do not support the force application by Lieutenant Pike, when viewed at the moment of the application, and considering Pike's state of mind, the force was reasonable. He views the matter

⁵ Retired Deputy Chief Hillman, and the other members of the Kroll team, was not asked to review the incident to determine whether officers committed a crime.

as administrative and an area for the administrative protocols for the UC system to examine. Retired Deputy Chief Hillman stated that Lieutenant Pike's report, along with the reports of other officers, indicated that they believed that they were surrounded by a hostile crowd, and that Lieutenant Pike in particular believed that the only way to clear a pathway through the crowd and move the prisoners was the use of pepper spray. In addition, Retired Deputy Chief Hillman stated that in his opinion Lieutenant Pike believed he was faced with active resistance as the protesters were sitting with locked arms and refused to move. Lieutenant Pike believed that the crowd would not allow officers to move the prisoners, would attempt to take the prisoners back, and were chanting for their release. Finally, while Retired Deputy Chief Hillman believed that Lieutenant Pike made a faulty decision, which was then badly executed, and also used pepper spray that the department had not been trained on, upon examination of the use of force under the applicable legal standards, he believes the conduct does not rise to the level of criminal behavior.

Conclusion

Lieutenant Pike's pepper spraying of the seated protesters has been seen by and has outraged millions of viewers throughout the world. Based on the thirty seconds of video that most people have seen the pepper spraying may look like unreasonable force, however, whether or not the force was unreasonable and criminal cannot be judged solely on that brief moment in time. The conflict that resulted in the pepper spraying had been evolving for several days before November 18, 2011, and must be examined in the light of the totality of the circumstances.

Unlike in a criminal prosecution, the reports of Kroll, the Pepper Spray Task Force, and the Internal Affairs investigation were all conducted under a preponderance of the evidence standard. In addition, those reports were not bound by the constitutional and evidentiary

limitations concerning the admissibility of evidence, the requirement that the evidence establish proof beyond a reasonable doubt, nor the constitutional presumption of innocence and other rights afforded to all those suspected or accused of crimes.

In evaluating the totality of the circumstances under a reasonable doubt standard, we have considered and given substantial weight to the opinions and conclusions set forth in the Kroll Report. The report reflects that on balance they believe that the use of pepper spray was unreasonable. They also acknowledge the following: (1) that there is some support for the officers' determination that they were faced by a "hostile mob and that the pepper spraying was necessary;" (2) that the statewide manual on use of force defines the linking of arms as active rather than passive resistance; and, (3) that as a general matter the pepper spraying of seated protesters, linking arms, may be permissible by most use of force continuums. We have also given weight and consideration to the statements of Davis Police Department officers, and the expert opinion of Kroll team member and Retired Deputy Chief Michael Hillman, information that was not available for any of the other investigative bodies. In light of this additional evidence, and viewing the incident through the totality of the circumstances, there is insufficient evidence to establish proof beyond a reasonable doubt that the use of force involved in the November 18, 2011, pepper spraying was unlawful and therefore warrants the filing of criminal charges.