

IN RE: : **CITY OF PHILADELPHIA**
GORDY/LAUBER : **POLICE ADVISORY COMMISSION**
: **# 990545**

Before Cannon, Harris and Ray, Commissioners

OPINION

1. INTRODUCTION

This is a final Opinion of the Police Advisory Commission in the matter of Gordy/Lauber, Commission Complaint No. 990545, regarding the issues arising as a result of the responses provided by the police personnel who appeared to answer questions posed by panel members and counsel during the hearing session held on Thursday evening, June 29, 2000. The panel and the Commission continue to reserve judgment concerning findings and recommendations on the allegations of the underlying complaint without prejudice to the cited police officers.

The Presiding Officer of the panel, William Cannon, Esq., with the concurrence of his fellow panel members, Charles Harris and Vivian Ray, together with counsel for the hearing, Michael Butler, Esq., believed that the issues posed by the police officers' responses were serious enough to warrant an immediate decision by the panel and the Commission. The Commission has endorsed this view. The transcript of the hearing session is annexed hereto. As Exhibit A. The exhibits included with the previously forwarded preliminary opinion as Exhibits A to D are incorporated by reference as Exhibits B to E of this Opinion.

In brief, the Commission finds that the six officers who appeared before the panel on June 29th knowingly and willfully refused to answer proper questions posed by Commission counsel and panel members during a properly convened Commission hearing, and as such failed to cooperate and provide appropriate testimony as required by their position.

2. EVIDENCE

Six officers were subpoenaed to testify before the panel on June 29, 2000: Police Officer Diane Haines #2994, Police Officer John Christopher #2488, Police Officer Samer Musallem #4181, Police Officer Steven Gormley #3466, then Police Officer #2614, now Detective #308, William McCusker, and Police Officer Reginald Graham #6214. Officer Graham was the target officer. All six officers appeared as scheduled. Counsel to the Fraternal Order of Police, Jeffrey Kolansky, Esq. represented all six officers.

Each officer was subpoenaed and ordered to appear before the Commission for the fact-finding hearing pursuant to established protocols between the Police Department and the Commission. Copies of the Commission subpoenas with the accompanying cover letter as issued to the police department are included herewith as Exhibit B. Designated as Exhibit A, and also included herewith, are copies of a document known internally as exhibit "A" that was issued to each of the police officers to advise them of the clearance by the District Attorney's office and the limited immunity granted each officer pursuant to Garrity v. New Jersey. The document also states and explains the basis of the officer's obligation to provide information to the Commission and orders each officer to appear. Each officer must sign the exhibit "A"; the superior officer who witnessed the officer's signing and who issued the order for the officer to appear at the Commission hearing countersigns it.

At no time during the hearing did any of the officers object or challenge the Commission subpoenas. Nor had there been any prior objection to the subpoenas by the Police Department. Each officer at the start of his/her questioning by the Commission was read his/her exhibit "A" by Commission counsel. Each officer then acknowledged on the record his/her signature on the document, and stated on the record that he/she understood the contents of the document.

Each officer prior to the start of the hearing was provided a copy of his/her Commission/IAD interview statement. Each police officer, pursuant to IAD practice, had received a copy of the same statement at the time of his/her interview. Neither the police officers nor their counsel requested, and as a result, did not receive a copy of the complaint (the original complaint form) that was the basis of the Commission and IAD's investigations. Each officer had his/her interview statement with him/her when called to testify.

William Cannon, Esq., Presiding Officer of the panel, called the meeting to order at approximately 6:15 PM. He then read the hearing preamble concerning the procedures to be followed during the hearing. See Exhibit C. After the reading of the preamble, Jeffrey Kolansky, Esq., counsel for the police officers, asked for an opportunity to make a statement on the record. All six police officers were present for his statement. He then informed the panel of his clients' intention to offer no testimony beyond the contents of their IAD/Commission statement. He further stated that because the instant matter was still an open IAD investigation, he could not obtain from IAD all of the documents he usually receives in preparation for a Commission hearing, and he therefore could not properly advise his clients. Mr. Kolansky also read into the record portions of three letters, the most recent dated June 29, 2000, the day of the hearing, from Mr. John Gallagher, Esq., Special Advisor to the Police Commissioner, sent to Hector W. Soto, Executive Director of the Commission, regarding a recent

change in the Commission's procedures on the closing of cases.¹ He objected to the change noting that it would prevent him from adequately preparing for hearings.

Mr. Cannon acknowledged Mr. Kolansky's statement, but denied his request to defer the hearing until IAD had completed its investigation. The six officers were then placed under oath, and Commission counsel called the first officer witness. The remaining officers were sequestered. Police Officer Reginald Graham, the target officer, was the first officer called. Mr. Kolansky accompanied Officer Graham. What followed during the questioning of Officer Graham to a greater or lesser extent was what transpired with each officer.

Upon being asked questions by Commission counsel, Officer Graham proceeded to respond with a verbatim reading of excerpts of his IAD/Commission statement. Questions for which there were no verbatim answers in the statement were responded to with an answer such as "upon advice of counsel I will only answer within the confines of my previous statement."

Mr. Kolansky, with or without the permission of the panel, made various statements on the record: sometimes answering for his clients, sometimes explaining or sometimes objecting for his clients. For the most part, Mr. Kolansky either reiterated the position stated at the commencement of the hearing, or tried to clarify his clients' position. Each client directly or through Mr. Kolansky also vouched for the veracity of his/her IAD/Commission statement, and stated his/her willingness to reappear and answer questions posed by the Commission, but only after the IAD investigation had been concluded.

¹The Commission notes with concern the seemingly easy access that FOP counsel had to letters sent by the Police Department to the Commission. During the hearing, FOP had in his possession at least three letters from John Gallagher, Special Advisor to the Police Commissioner, to the Commission. The Commission's Executive Director had received the most recent letter, dated the same day as the hearing (June 29th), by fax only six hours before the hearing. Neither FOP counsel, nor any other person affiliated with the FOP was formally copied on any of the letters.

Each officer stated that he/she would answer no question unless it could be answered by reading a verbatim excerpt from his/her statement. Each officer after stating or making clear his/her intention to respond only by reading excerpts of the previously recorded statement was then informed by the panel's Presiding Officer or Commission counsel that such responses were not considered to be "testimony" by the Commission, and then directed to answer the Commission's questions. Upon further refusal by each witness to answer with other than excerpts read from the interview statement, the witness was then read Police Commissioner Timoney's General Order 7595 of June 15, 1998. See Exhibit D. The officer was then asked whether there was any part of the Order that he/she did not understand. Each officer acknowledged a full understanding of the meaning of the Order. The police officer was then asked if he/she was going to persist in refusing to answer the Commission's questions except by reading verbatim excerpts from their previous statement. Upon an affirmative answer, which each officer gave, the officer was then dismissed and informed that his/her refusal to answer the questions posed would be conveyed to the Police Commissioner the next day (June 30, 2000).

3. FINDINGS

The Commission deems the refusal of the six police officers to respond to the hearing panel's questions other than through verbatim readings of the prior IAD/ Commission statement, and to not answer any question beyond the scope of that previous statement to be non-cooperative, unresponsive, inadequate and a plain refusal to provide testimony. The Commission views this refusal to be knowledgeable, voluntary and deliberate on the part of each officer notwithstanding that he/she was following advice of counsel.

There are multiple bases for these findings. First and foremost each officer was advised of possible individual liability for continuing to refuse to fully

and completely answer the Commission's questions **even if acting pursuant to advice of counsel**. General Order No. 7595 with its admonition that "those who choose to disregard the obligations [referring to cooperation with the Commission] created under these orders, even at advice of counsel, do so at the risk of serious disciplinary action" was read to each officer, and acknowledged by each officer as fully understood. Similarly, exhibit "A" in relevant part states as follows:

"...you [referring to the police officer who received the document] are now required to give statements to PAC Investigators and/or to give testimony to a panel of the Police Advisory Commission."

In addition, exhibit "A" further states that the police officer is required to cooperate and provide truthful testimony in order to avoid sanctions or job dismissal.

The Commission accepts the use of prior interview statements during hearings for purposes of refreshing a witness' recollection. However, the Commission cannot and will not accept as a substitute for sworn testimony based on present day recollection, the verbatim reading of excerpts of a past statement in response to proper questions especially if coupled with an outright refusal to answer any question unless the answer resides within the corners of that previous statement.

And while the strict rules of evidence need not be followed in Commission hearings, the companion Executive Orders 8-93 and 9-93 dealing with the investigation of civilian complaints against police by the Commission and the Police Department/IAD respectively, both contain the same relevant language, and by implication, the same standard concerning hearings: "Testimony under oath shall be received from all persons who appear and purport to have

information which is material to the complaint.” The Commission thinks it doubtful that the Police Department during a Police Board of Inquiry (PBI) hearing (or if not the Police Department, a cross-examining party) would ever accept a mere reading into the record of previously given statements from a police officer having material information as satisfying the need to receive testimony from that witness. The fact that the nature of the Commission’s hearing is fact-finding as opposed to the PBI’s adjudicatory nature merely underscores the Commission’s need for meaningful testimony based to the greatest extent possible on present day witness recollection.

The Commission afforded the six police officers called to testify all protections and safeguards available under the scheme established by the Executive Order. Indeed, FOP counsel was granted great latitude in his ability to object, ask for recesses, advise his clients, etc. However, as stated on the record by Commission counsel during the hearing, there is nothing in the Executive Order or in law that requires the Commission to wait until IAD concludes its investigation before conducting and concluding its own investigation. The objection also fails as a justification or excuse for the six police officers herein to refuse to cooperate and testify before the Commission.

That each officer vouched for the validity of his/her prior IAD/Commission statement is a nullity given that the expectation and legal standard at the time the interviews were conducted was, and continues to be, honesty and truthfulness. Similarly, each police officer’s assertion that he/she would return after conclusion of IAD’s investigation to provide assumedly more complete answers merely bolsters the Commission’s finding that these officers refused to cooperate and answer relevant questions properly posed.

4. RECOMMENDATIONS

The Commission is cognizant of the fact that the police officers involved followed counsel's advice in answering the panel's questions in the manner that they did. However, the Commission does not find that to be persuasive as a mitigating factor since each officer was given the opportunity to do otherwise, and chose knowingly and willingly not to do so.

The Commission recommends that each officer be suspended for 10 days subject only to such mitigation as may be applicable because of the individual officer's service record including, but not limited to the officer's disciplinary history, and such other criteria established by the Police Department's disciplinary code.

The Commission also notes in connection with its recommendations the statements made by FOP counsel implying that he already knew that no discipline would be imposed on any of these officers if they followed his advice:

“Now, I must tell you that my personal opinion is that if you testify solely to the contents of your statement – you have heard the letters I have read from the Commissioner – that the Commissioner will not penalize you in any way because you have cooperated. That is just my opinion”. (Transcript, p. 17)

The Commission believes that these statements, personal opinion or otherwise, serve to undermine the intent and plain language of Commissioner's General Order, and underscore the need for prompt and meaningful discipline in this matter.

5. CONCLUSION

The Commission considers the acts of these officers to be very serious violations. The acts of these officers go to the core of what the Commission does, and how it goes about doing it. Each officer acknowledged that he/she was aware that they were under a mandate from the Police Commissioner (see Exhibit D) to testify truthfully and completely at hearings. Yet each officer chose to deliberately ignore the Police Commissioner's General Order 7595, and the directives of the Commission's Executive Order merely at the urging of their legal counsel. The language of the Commissioner's General Order 7595 is very explicit as to the risk a police officer assumes by following advice of counsel in derogation of his/her obligations to the Commission.

The Commission believes the failure of the officers to provide proper testimony in response to the relevant questions posed during the hearing is also a violation of Police General Order 1256 of August 18, 1995, the Order of the Honorable Russell M. Nigro, dated October 23, 1995, Police Department Duty Manual, Article I, Section 1.75, and the specific direct order "to answer any questions posed by the Police Advisory Commission and/or its counsel" as stated in each officer's exhibit "A", and issued by the superior officer who signed the exhibit "A".

The Commission fears that failure to discipline these officers promptly and forcefully will send a message through the ranks that police officers may ignore with impunity the directives of the Commissioner as well as those of the Commission.