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**IN RE:**

**ALEXANDER KUILAN**

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**CITY OF PHILADELPHIA  
POLICE ADVISORY COMMISSION**

**COMPLAINT NO. 000758**

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Before: P. Uyehara, A. Holloway and R. Nix, Commissioners  
Michael Butler, Esquire, Counsel

## **OPINION**

### **I. BACKGROUND**

On June 7, 2000, Mr. Alexander Kuilan filed a complaint with the Police Advisory Commission (No. 000758) regarding an incident with police officers on June 3, 2000 during which he allegedly suffered physical and verbal abuse. During a fact-finding (panel) hearing on Mr. Kuilan's complaint held at the Commission's hearing room on May 17, 2001, four witness police officers, namely: P/O's Michael DeRose (the target officer), Thomas Galloway, Timothy Linneman and Sgt. Mark Nagy refused upon advice of counsel to properly testify before the Commission hearing panel. The four officers had been subpoenaed to appear before the Commission, and were under oath at the time that each declined to testify. When police misconduct occurs during official Commission proceedings, the Commission can make immediate findings and recommendations as to that misconduct. The Commission makes such findings and recommendations with regard to the four officers' behavior during the May 17<sup>th</sup> hearing. The substantive merits of Mr. Kuilan's complaint will be addressed separately in a subsequent, second opinion.

### **II. DISCUSSION**

On May 15, 2001, the panel heard sworn testimony from the complainant and his wife. Mr. Kuilan alleged that Police Officer Michael DeRose punched him in the jaw, pushed him to the ground, handcuffed him and later pushed him up against a patrol wagon, all for no reason. (the police had apprehended Kuilan as a burglary suspect, but

released him on the street after a witness said he was not involved). Kuilan testified that he was punched in the presence of a second officer.

The panel reconvened on Thursday, May 17<sup>th</sup> at 6 PM, at which time five officers appeared together with counsel provided by the Fraternal Order of Police (FOP). The officers who appeared are: Police Officer Michael Galloway (#1587); P/O Jose Acevedo (#1547); P/O Timothy Linneman (#1779); Sgt. Mark Nagy (#8783); and P/O Michael DeRose (#2584). Each officer was sworn in and given the Garrity “warnings”. Each officer also acknowledged receipt of a subpoena from the Commission as well as an order from a superior officer to appear and testify. Police Officer Jose Acevedo was the first officer to testify. Among other things, Officer Acevedo corroborated the testimony of the complainant that Officer DeRose<sup>1</sup> had punched him in the face for no apparent reason.

Counsel for the officers then requested, and was granted a short recess in the proceedings stating that he needed to make a personal telephone call. When the hearing resumed, counsel then requested that the hearing be discontinued. Counsel stated, Transcript p. 53, that he had just learned that the Police Department had preferred disciplinary charges against Officer DeRose in connection with the Kuilan incident, and that DeRose was scheduled for a Police Board of Inquiry hearing. Counsel argued that the pendency of the PBI hearing meant that the Department was still investigating the incident, and that no officer could be required to testify before the Commission until the Department had concluded its investigation.

The panel denied the continuance with the panel’s Presiding Officer, Mr. Paul Uyehara, Esq., noting that the decision to bring internal administrative charges against an officer, if anything, suggested that the investigation had concluded. The panel further noted that there was no legal reason for the Commission to delay its hearing based upon the pendency of a civil administrative police proceeding.

Thereafter upon being called to testify, each of the remaining four police officer witnesses when addressed personally in the witness chair refused to answer directly the questions of the panel members. Instead, each officer in response to the panel

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<sup>1</sup> In statements to Internal Affairs Division and Police Advisory Commission investigators, P/O DeRose denied having struck Mr. Kuilan

members' questions read verbatim a handwritten statement that had been provided by counsel. The text of the statement was:

“On the advice of my attorney, I am limiting my answers to the single issue of whether my prior written statement was truthful. I base this on the fact that the Police Department has not yet completed its investigation.”

The officers read the statement even when it was not appropriate in light of the question presented. One officer, for example, read the statement when asked to state his badge number, Transcript, p 76. Several of the officers read the statement when asked to identify the “prior written statement” to which they were referring, Transcript, pp. 83-85. No officer provided any explanation for his refusal to answer questions other than by reading the statement, Transcript, p. 70. Officer DeRose read the statement when asked if disciplinary action had been taken against him, and again when asked how he knew the investigation was not complete, Transcript, pp. 99-100. Neither did any of the other officers provide testimony or other evidence in support of counsel's assertion that the Police Department had an open investigation relevant to the matter. Similarly, no officer claimed to be designated the subject of a related criminal investigation by a local law enforcement agency such that his refusal to properly testify would be justified by the Commission's Executive Order, Sec. 4(f).

After failing to answer the panel member's questions, each officer was then read a portion of the order signed by his superior to appear and answer any questions posed by the Commission. See documents labeled “Exhibit A” for each witness officer annexed hereto as Exhibit B. Thereafter, each officer was read excerpts from the Mayor's Executive Order 8-93, former Commissioner Neal's General Order 1253 of 1995, and current Commissioner Timoney's General Order 7595 of 1998. Exhibit's C, D and E respectively. Those orders made it clear that the officers were required to cooperate with the Commission's investigation and hearing. Commissioner Timoney's order, issued in 1998 after three police officers refused to testify at a Commission hearing (Matter of Megan Kile), further specifies that the advice of counsel does not

shield an officer for his/her failing to cooperate. All of the officers were also specifically admonished that they could be subject to harsh discipline should they fail to obey the orders. In addition, the three non-target officers were warned by the panel that although there was no indication in the record of the case that any of them had engaged in any misconduct in connection with the incident underlying the Kuilan complaint, they could nonetheless be subjected to discipline for failure to cooperate in the investigation of the incident. After being read the relevant sections of the orders from the subpoena, the Mayor, and the Police Commissioner, each of the officers continued to answer all questions by strictly reading from the statement.

### **III. FINDINGS**

The Commission finds that each of the four officers failed to properly answer a number of questions from the panel or its counsel, failed to testify fully before the panel and failed to cooperate during the hearing. The Commission further finds that the actions of each officer as a witness before the panel were undertaken deliberately and knowingly. Each officer persisted in his failure to cooperate despite his being told that his conduct violated the Mayor's Executive Order and the orders of the Police Commissioners. Each officer acted with the understanding that he could be subject to severe discipline for his behavior at the hearing, even if he had engaged in no misconduct with regard to the underlying complaint of Alexander Kuilan.

The Commission has authority to investigate incidents of police misconduct without the filing of a civilian complaint, Executive Order 8-93, Secs 4(b) and (c). When police misconduct occurs during a Commission hearing, the Commission has the discretion and authority to undertake a review of the misconduct, and as appropriate, to make recommendations to the Police Commissioner. Following the conclusion of the hearing in this matter, the panel decided to review the conduct of the officers during the proceeding.

The conduct of the four officers in failing to fully testify and cooperate with the hearing process while under subpoena violates requirements imposed on them as police officers and city employees. Executive Order 8-93, as amended, provides:

The Commission shall have the authority vested in the Executive and Administrative branch of City government under Section 8-409 of the Philadelphia Home Rule Charter to compel the attendance, interview, and/or testimony of any witness and the production of documents and other evidence relating to any and all matters properly before it and, for that purpose, it may issue subpoenas requiring the attendance, interview and/or testimony of persons and the production of documents and other evidence and cause them to be served in any part of the City.

All employees within the Executive and Administrative branch of City government as contained in Article III of the Home Rule Charter are hereby directed to fully cooperate with the Commission by promptly producing documents, records, files and any other information that the Commission may request. In addition, as provided for in this Executive Order, these employees, on request of the Commission, shall be available to meet with, and be interviewed by the Commission, or its representatives, and to testify before the Commission. Section 4(f).

Former Police Commissioner Richard Neal in August 1995 issued General Order 1253, which is still in effect, that in pertinent part provides as follows:

2. The Executive Order [8-93] also requires that all City employees, including sworn and unsworn members of the Police Department, cooperate with the Commission and make themselves available to be interviewed by the Commission and to testify at public hearings.

3. All sworn and unsworn members of the Police Department are expected to comply with all provisions of Executive Order 8-93, including interviews and hearings, as they are with all pertinent Executive Orders and the City Charter. Failure to do so may result in the imposition of disciplinary action.

The police officers are also under a general legal duty, as are all citizens, to comply with a lawfully issued subpoena requiring testimony before a Commission hearing panel.

The Commission finds that the four officers violated the requirements of the Executive Order, PD General Order 1253 and the requirements of the their individual subpoenas by failing to answer questions, failing to testify and failing to cooperate during the panel hearing. The actions of the four officers, which the Commission also finds to be deliberate and willful, are not excused on the ground that the officers' attorney advised them to answer all questions by reading from a statement that was not responsive to the questions posed by the hearing panel members. Present Police Commissioner John Timoney issued an order more than three years ago that states as follows:

All employees are reminded of their obligation to cooperate with the Police Advisory Commission and testify before the Commission when called. This obligation exists pursuant to Mayor's Executive Order 8-93 and Police Commissioner's General Order 1253 of 1995. Personnel who choose to disregard the obligations created under these orders, even at the advice of counsel, do so at the risk of serious disciplinary action. General Order 7595 issued June 1998.

The stated policy of the Commissioner not to allow officers to use their attorney to immunize misconduct during a hearing is consistent with the Commission's previously established position on this matter. General Order 7595 was Police Commissioner Timoney's response to the refusal of three police officers, upon advice of counsel, to not

testify at a Commission hearing (Matter of Megan Kile, Complaint No. 960260, April 1998).

Delaying Commission proceedings only serves the interests of those who oppose civilian review of police matters. In an earlier Commission matter, In Re: Gordy/Lauber, Complaint No. 99-0545, police witnesses at a hearing, following advice of counsel, asserted that officers could not be compelled to testify before the Internal Affairs Division had completed its investigation. In the present matter, with disciplinary charges seemingly already lodged, the subpoenaed officers extend their claimed right to refuse to cooperate with the Commission's process at least through the PBI process<sup>2</sup>. Of course, the further the Department proceeds in its disciplinary process, the less likely it is to adopt a Commission finding or recommendation that does not comport with the Department's internal findings and decisions. Hence, after an investigation is completed, and the internal disciplinary process has run its course, the Department tends to respond as if it has a stake in defending the validity of the result. To do otherwise would implicitly acknowledge the shortcomings of the Police Department's disciplinary process, and the benefit of civilian review. Advocates for target police officers seek to delay Commission proceedings as much as possible in order to then utilize the Department's internal disciplinary process as a shield.

The conduct of the uncooperative officers in this case need not unreasonably delay a decision on the merits of the underlying complaint. The conduct does serve, however, to put into question whether the Executive Order and the Police Commissioners' orders are to be taken seriously<sup>3</sup>. A continuing failure to sanction officers for refusing to testify at a Commission hearing undermines not only the Commission's authority, but that of the Police Commissioner as well.

The ability of the Commission to accomplish its vital mission will be severely undermined if it is unable to compel the timely attendance and testimony of police

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<sup>2</sup>The logic of the argument might well extend through arbitration of the disciplinary decision, and perhaps any resulting civil litigation arising out of the incident.

<sup>3</sup>The uncooperative officers in this case were willing to ignore the orders. Their attorney observed at the hearing that "despite your indirect threats to any of the officers of discipline, the Police Commissioner has never followed those recommendations [to discipline officers for refusal to testify before the Commission]". Transcript, p. 104.

officers at its hearings. The Commission's role as a neutral hearing board to determine the facts when police misconduct is alleged will be greatly compromised if the Commission is forced to rely solely upon the testimony and statements of civilians. Allowing or causing unnecessary delay in the Commission's decision-making process also diminishes the chances for the Commission to provide meaningful civilian review before a final decision is rendered by the Police Commissioner.

The City and the Police Department cannot allow police witnesses to dictate the point in the process when they will cooperate. The contemptuous and considered behavior of the four officers before the hearing panel deserves rebuke. Only a suspension without pay for a substantial period of time will appropriately penalize these officers for their intentional failures to testify and deter future obstruction of investigations by police officers.

#### **IV. RECOMMENDATIONS**

The Commission has found that Police Officers Michael Galloway, Timothy Linneman, Michael DeRose and Sgt. Mark Nagy, violated the provisions of Executive Order 8-93, General Orders 1253 and 7595, and the mandate of subpoenas duly served upon them in that each of the officers persistently failed to cooperate by fully testifying and responding to questions during the panel hearing in the matter of Alexander Kuilan. The Commission recommends that the Police Commissioner impose a ten-day suspension without pay on each officer for these acts of misconduct, and that the officers not be permitted to forfeit paid leave time in lieu of the unpaid suspension.

#### **V. CLOSING**

The findings and recommendations, as modified, set forth in this Opinion were reviewed and endorsed by the Police Advisory Commission during its regular monthly meeting on June 14, 2001. A second Opinion on this matter dealing with the substantive allegations underlying the complaint will be issued soon. Pursuant to the Executive Order, the Police Commissioner has 30 days from the date of delivery of this Opinion to respond to the Commission's findings and recommendations. Also pursuant to the Executive Order, a copy of this Opinion will be delivered to the Mayor and City



Managing Director, and mailed to the complainant on the same day of delivery to the Police Commissioner.