BEFORE THE POLICE BOARD OF THE CITY OF CHICAGO

IN THE MATTERS OF CHARGES FILED AGAINST	**)**	
	)	
POLICE OFFICER JASON VAN DYKE,	**)**	**No. 16 PB 2908**
STAR No. 9465, DEPARTMENT OF POLICE,	**)**	
CITY OF CHICAGO,	**)**	
	)	
SERGEANT STEPHEN FRANKO,	**)**	**No. 16 PB 2909**
STAR No. 1537, DEPARTMENT OF POLICE,	**)**	
CITY OF CHICAGO,	**)**	
	)	
POLICE OFFICER JANET MONDRAGON,	**)**	**No. 16 PB 2910**
STAR No. 4364, DEPARTMENT OF POLICE,	**)**	
CITY OF CHICAGO,	**)**	
	)	
POLICE OFFICER DAPHNE SEBASTIAN,	**)**	**No. 16 PB 2911**
STAR No. 2763, DEPARTMENT OF POLICE,	**)**	
CITY OF CHICAGO,	**)**	
	)	
POLICE OFFICER RICARDO VIRAMONTES,	**)**	**No. 16 PB 2912**
STAR No. 10590, DEPARTMENT OF POLICE,	**)**	
CITY OF CHICAGO,	**)**	
	)	
	)	**(CR No. 1081772)**
RESPONDENTS.	**)**	

MEMORANDUM AND ORDER ON MOTIONS TO STAY

The Board has before it two Motions to Stay the proceedings in these cases until the pending criminal case against Officer Van Dyke and the pending grand jury process involving the other officers are completed. Judge Vincent Gaughan, who is presiding in the criminal case filed against Officer Van Dyke, has also entered an order recommending that the Board stay its proceedings. The Motions and Judge Gaughan's order raise important issues about the relationship between the Board's discharge cases and the pending criminal proceedings. The Board's highest duty is to ensure that justice is done in cases where officers are accused of

misconduct, and thereby instill public confidence in the Board's disciplinary proceedings and in the criminal justice system.

As will be explained in more detail below, the constitutional issue raised by the Motions arises from having police disciplinary proceedings and criminal proceedings related to the same set of facts going ahead at the same time. The Superintendent has made it clear that he intends to introduce into evidence in the Police Board proceedings statements taken from the Respondents when questioned during the course of administrative investigations into the officers' conduct related to the shooting of Laquan McDonald. In order to keep their jobs, the officers are required to cooperate with these investigations and provide such statements. However, as discussed below, those statements cannot be used in any criminal proceedings without violating the Respondents' constitutional rights. As is suggested by the Motions, and the case law cited below, there is a substantial risk that if the Police Board cases were to go ahead, media reporting of the evidence in those cases will make it more difficult for criminal prosecutors to prosecute the criminal proceedings and may result in a violation of the Respondents' constitutional rights.

If the Board goes forward with its cases against these officers at this time, without regard to the pending criminal proceedings, the Board is convinced that it will prejudice and potentially jeopardize the criminal proceedings and the Respondents' constitutional rights. The Board believes that the entire City of Chicago is best served by having criminal cases decided on their merits (one way or the other) rather than on technical grounds related to the public disclosure of police officer statements protected by the Supreme Court's decision in *Garrity v New Jersey*, 385 U.S. 493 (1967), as has occurred in other noteworthy cases, *e.g.* that of Oliver North. *See, U.S. v Oliver North,* 910 F.2d 843, 854-873 (D.C. Cir. 1990), *partially withdrawn in non-relevant part by* 920 F.2d 940 (D.C. Cir. 1990) (requiring the dismissal of criminal charges against Oliver

North in the Iran-Contra affair because his coerced, immunized testimony before Congress was publicized to witnesses in his criminal trial). As such, the Board is granting the Motions to Stay these cases. The cases against all of these officers will remain pending on the Board's docket and will be taken up once proceeding with the Police Board cases will no longer prejudice or jeopardize any criminal case or constitutional right.

I. History of These Proceedings

On October 20, 2014, LaQuan McDonald was shot and killed by Officer Van Dyke. On November 24, 2015, Officer Van Dyke was criminally charged with murder in connection with Mr. McDonald's shooting. On August 30, 2016, the Superintendent of Police filed with the Police Board of the City of Chicago Charges against Officer Van Dyke and the other above-named Respondents recommending that the Board discharge all of these officers from the Chicago Police Department for violating various Rules of Conduct in connection with the shooting of Mr. McDonald. Since the filing of these Charges, the Board's hearing officer has proceeded with these cases in a manner consistent with how the Police Board handles all cases. This has involved, among other tasks, presiding over the exchange of voluminous discovery, entering a protective order, ruling on procedural issues, taking briefs on the many legal issues that have been raised, and discussing with the parties the evidence that will be presented at the hearings in these cases.

On July 29, 2016, Chief Criminal Court Judge Leroy K. Martin Jr. appointed Patricia Brown Holmes to broadly investigate possible criminal wrongdoing in connection with the shooting of Laquan McDonald. Ms. Holmes has convened a grand jury and has an active criminal investigation underway into this matter. On August 4, 2016, Kane County State's

Attorney Joseph McMahon was named Special Prosecutor to prosecute the criminal case against Officer Van Dyke.

Thereafter, on January 5, 2017, Special Prosecutor Holmes filed a motion to intervene in these Police Board proceedings, and sought an order staying the Police Board proceedings until the outcome of the ongoing criminal proceedings involving Special Prosecutor Holmes and the criminal trial of Officer Van Dyke ("Special Prosecutor Holmes's Motion to Stay"). She argued that a stay was critical to protecting the constitutional rights of the officers involved, and particularly their right not to have statements they made to investigators, on pain of their discharge, which are inadmissible in criminal court under *Garrity v New Jersey*, 385 U.S. 493 (1967), publicized in connection with the Police Board proceedings. She noted that in her criminal prosecution, these statements cannot be used, nor can information garnered from the coerced statements be used against the officers.[1]

On January 10, 2017, Judge Vincent Gaughan, presiding in *People v Van Dyke*, No. 15 CR 20622, pending in the Cook County Criminal Court, entered an order recommending that the Police Board stay its proceedings against Officer Van Dyke pending completion of the criminal proceedings against him "subject to the due process rights of the police officers involved as well as the due process of the prosecution."

[1]By Order dated February 24, 2017, the Police Board granted Special Prosecutor Holmes's motion to intervene solely for the purpose of considering the motion to stay, as well as a similar motion filed by Special Prosecutor McMahon. Special Prosecutor McMahon had filed with the Police Board a motion to stay the Police Board proceedings, contending that the proceedings before the Police Board may heighten public condemnation of Officer Van Dyke, and statements Officer Van Dyke may have made that are protected by *Garrity v New Jersey*, 385 U.S. 493 (1967), may be publicly aired and thereby taint the pending criminal trial. However, on May 3, 2017, Special Prosecutor McMahon withdrew his motion and shortly thereafter, on May 17, 2017, Respondent Van Dyke filed his own Motion for a Stay, arguing that the Police Board proceedings would prejudice his position in the criminal court case.

On May 17, 2017, Respondent Van Dyke also filed with the Police Board a motion requesting a stay of the Police Board proceedings until an adjudication of his pending criminal case ("Respondent Van Dyke's Motion to Stay"). Van Dyke argues that the publication of *Garrity*-protected statements, which the Superintendent intends to use as evidence in the Police Board cases, would pose a serious or imminent threat of further public condemnation in his case and prejudice him in his upcoming criminal trial.[2]

Respondents Franko, Mondragon, Sebastian, and Viramontes object to a stay of the Police Board proceedings while they remain suspended without pay. They maintain that there are no criminal cases pending against them and, as a matter of constitutional due process, they have a right to a reasonably prompt hearing before the Board on the Charges filed against them. While it is clear that these officers are potential targets of Special Prosecutor Holmes's grand jury proceedings, Special Prosecutor Holmes has provided no time line to indicate when these proceedings will conclude and has understandably declined to indicate whether these officers will be indicted.

The Superintendent has made it clear that he intends to use the *Garrity*-protected and coerced statements of all of the respondent officers at the discharge hearings the Board will hold, whether the cases are consolidated for hearing or not.[3] He rightly acknowledges that the content of these *Garrity*-protected statements will be widely publicized, as the Police Board discharge proceedings are always open to the public, and these cases have attracted considerable media attention. The Superintendent has indicated he is unable to agree with or oppose the pending stay

[2]In addition to his motion for a stay, Officer Van Dyke filed a motion *in limine* to bar the introduction of immunized/*Garrity* protected statements at the Police Board prior to the trial of his criminal case.

[3] The Superintendent has requested that all of the respondents' cases be consolidated for hearing. Respondents Franko, Mondragon, Sebastian, and Viramontes have objected to this request.

motions; however, he expressly has acknowledged the danger posed to the Van Dyke criminal proceeding, and other criminal proceedings, if the Police Board cases go forward and the various *Garrity*-protected statements of the officers are put into evidence and publicized throughout the city. See, the Superintendent's Position Regarding Special Prosecutors' Motions to Stay, filed with the Board on January 10, 2017 ("The Superintendent is mindful of the *Garrity* and *Kastigar*- related arguments raised in the Motions and the dangers presented by exposing the Special Prosecutors, the Special Grand Jury and potential trial jurors, and the Respondents and other witnesses to a public dissemination of compelled testimony throughout the Police Board proceedings and merits hearing, and that such concerns, if applicable, are entitled to substantial deference by the Police Board." Page 6, footnote omitted.)

II. The Motions to Stay

There is no question that when a police officer is ordered to submit to administrative questioning about his or her conduct, on pain of losing his or her job if the officer refuses, the officer must comply and answer the questions posed. He or she may not invoke the Fifth Amendment's privilege against self-incrimination. The officer's statements may be used against the officer in Police Board discharge cases but neither the officer's statement nor any evidence derived from knowledge of the officer's statement may be used against the officer in any criminal case brought against the officer. This fundamental rule was established long ago by the Supreme Court in *Garrity v New Jersey*, 385 U.S. 493 (1967). Such statements are regarded as coerced and therefore are treated by the criminal courts like all other immunized statements. Indeed, the Supreme Court later ruled in *Kastigar v United States*, 406 U.S. 441 (1972), that once a police officer shows he or she has made a coerced statement, the burden is on the

prosecutor of the criminal case to affirmatively establish an independent source for all of the information the prosecutor intends to offer in the criminal case.[4] Criminal courts must conduct *Kastigar* hearings in such cases against police officers, to determine that the officers' statements have not been used, directly or indirectly, in order to secure evidence against the officer.[5] The courts have acknowledged that this is a daunting task for any prosecutor. *U.S. v Cozzi*, 613 F.3d 725, 728 (7th Cir. 2010) ("[T]he burden on the prosecution to establish an independent source for evidence against a [police officer] defendant is a heavy one indeed.")

In addition to these protections, the courts have ruled that if a prosecutor, grand juror, jury member, or witness is exposed to the contents of a *Garrity*-protected statement, through the media or otherwise, the police officer's criminal case will be tainted and the charges against him or her must be dismissed. *U.S. v North*, 910 F.2d 843, 854-73 (D.C. Cir. 1990), *partially withdrawn in non-relevant part*, 920 U.S. 940 (D.C. Cir. 1990) (testimony at criminal trial by witnesses who studied, reviewed, or were exposed to compelled testimony, including by refreshing their memories, focusing their thoughts, organizing their testimony, or altering their prior or contemporaneous statements would be tainted and therefore barred under *Garrity* and *Kastigar*); and *U.S. v Poindexter*, 951 F.2d 369, 373 (D.C. Cir. 1991) ("*Kastigar* does not prohibit simply 'a whole lot of use' or 'excessive use', or 'primary use' of compelled testimony, [in *North*] we said, it prohibits 'any use, direct or indirect.'"). Nor can a prosecutor escape the

[4]The Supreme Court, in *U.S. v Hubbell*, 530 U.S. 7, 45 (2000), posed the test as follows: "*Kastigar* requires that respondent's [*i.e.* the police officer's] motion to dismiss the indictment on immunity grounds be granted unless the Government proves that the evidence it used in obtaining the indictment and proposed to use at trial was derived from legitimate sources 'wholly independent' of the testimonial aspect of respondent's immunized conduct...."

[5]Indirect use of the statement is forbidden, in that *Garrity's* "protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence." *U.S. v Hubbell*, 530 U.S. 7, 37 (2000).

heavy burden of showing an independent basis for his or her evidence by "canning" a witness's testimony, *i.e.* preserving it in grand jury testimony or in another transcript, before exposure to the coerced statement, *Id.,* at 376.[6]

Here, it is quite clear that when the Superintendent presents his evidence in the discharge cases before the Police Board, he will rely extensively on the *Garrity*-protected and coerced statements all five of the respondents made during the investigation of the shooting of Mr. McDonald. The Superintendent has indicated he will also rely on a *Garrity*-protected statement of a non-charged officer. The Board also finds and acknowledges that its proceedings in these cases will be public and publicized. There is every reason to believe that the prosecutors handling the Van Dyke criminal case, Special Prosecutor Holmes and her staff working on their grand jury proceedings, grand jurors, regular jurors, and/or witnesses in the criminal case or cases will all be exposed to these *Garrity*-protected statements if the Police Board cases go forward. The exposure to these statements may well then require the dismissal of the criminal case against Officer Van Dyke and any other criminal cases later brought by Special Prosecutor Holmes. Given the importance of the criminal cases involving Mr. McDonald to our city, and the need to determine if criminal liability is appropriate, it would be a disservice to all (Mr. McDonald, his family, the citizens of Chicago, and the officers) to go forward with the Police Board discharge cases at this time. As a result, the Board is granting Special Prosecutor Holmes's and Officer Van Dyke's Motions to Stay these proceedings until going forward with the Police Board cases will no longer prejudice or jeopardize any criminal case or constitutional

[6]While some courts have suggested a less onerous burden for prosecutors than the line-by-line, witness-by-witness requirement the D.C. Circuit imposed in *North* and *Poindexter*, and even suggested that exculpatory coerced statements by an officer could be treated separately, *e.g. People v Haleas,* 404 Ill.App.3d 668, 679 (1st Dist. 2010), this appears to be a minority view, and in any event, these courts continue to impose on prosecutors the burden of affirmatively showing an independent source for their evidence in criminal court.

right. The discharge cases against these officers will remain pending on the Board's docket until this stay order is vacated.

III. The Officers' Due Process Rights

In granting the Motions to stay these proceedings, the Board understands that the five officers charged will not receive discharge hearings for a considerable period of time. What is more, upon being served with the Charges, these officers have all been suspended without pay, pending the outcome of the Police Board proceedings, which will now be indefinitely stayed. The law in Illinois provides that where Respondents' property interests are at stake, such as income from a job, they have a right to a reasonably prompt hearing, and an administrative agency may not indefinitely postpone its adjudication of cases, where life, liberty or property are at stake, without offending the Due Process clauses of the U.S. and Illinois constitutions. *See, e.g. Morgan v Department of Financial and Professional Regulation,*374 Ill.App.3d 275 (1st Dist. 2007); and *Lyon v Department of Children and Family Services,* 209 Ill.2d 264 (2004). Here, the officers' livelihood, income from their jobs, constitutes a property interest, within the meaning of these cases, *D'Acquisto v Washington,* 640 F.Supp. 594 (N.D. Ill. 1986), and the prospect of back pay, if the officers prevail on these cases down the road, is not sufficient to overcome the due-process problem associated with an indefinite stay. *D'Acquisto,* 640 F.Supp. at 615.

Sergeant Franko and Officers Mondragon, Sebastian and Viramontes have not yet been charged with any crime. In light of the Board's decision to stay as described above, their discharge cases will be stayed indefinitely. If the Superintendent continues their suspensions without pay during the duration of the indefinite stay of their discharge cases, the Due Process

Clause of the U.S. and Illinois constitutions may be violated, which Respondents may use as grounds to dismiss these disciplinary proceedings and escape any disciplinary punishment whatsoever, without facing the merits of the Charges against them. This would disserve the Chicago Police Department and the citizens of Chicago.

Sergeant Franko and these three officers were initially suspended without pay by the Superintendent. In accordance with Article IV(D) of the Police Board's Rules of Procedure, a hearing officer of the Board reviewed the Superintendent's order of suspension and the reasons therefore, with respect to each of these police officers, and determined that further suspension pending disposition of the charges against these officers was warranted given the timeframe in which the Police Board typically handles its cases. Given the due-process concerns related to suspending these officers without pay during the period of an indefinite stay of their cases, the Board now finds that there is no basis for their continued suspension pending the hearings on the charges against them, and therefore vacates the determinations by the hearing officer that suspension pending the disposition of charges is warranted. The Board, however, reserves the right to reconsider this decision if any of these four officers are charged criminally, and further stands ready to try their cases once going forward with the Police Board cases will no longer prejudice or jeopardize any criminal case or constitutional right. Their cases will remain on the Board's docket of cases.

Officer Van Dyke presents a different case. Unlike the other officers, he has been indicted. As a defendant in criminal court, Officer Van Dyke has the right to demand a speedy trial and obtain a trial within 160 days of that demand under *725 ILCS 3/103-5*. He has not done so. He cannot be heard to complain about the delay in his Police Board case, caused by the pending criminal proceeding, where he has taken no steps to expedite the criminal case. *Edwards*

v Illinois Racing Board, 187 Ill.App.3d 287, 291-92 (1st Dist. 1989) ("where the delay [in the administrative adjudication] is attributable to the party seeking the hearing, there is no violation of the timely hearing requirement."). Officer Van Dyke has also sought a stay of the Police Board case against him, while the other officers have opposed a stay. Nor has Officer Van Dyke sought reinstatement. Finally, Officer Van Dyke's attorney represented that Officer Van Dyke has been stripped of his ability to carry a weapon, as a condition of his bond in criminal court, and this disqualifies him from serving as an active police officer, even on a desk job. As such, the suspension of Officer Van Dyke will continue until the disposition of the case against him at the Police Board.

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POLICE BOARD ORDER

NOW THEREFORE, IT IS HEREBY ORDERED that Special Prosecutor Holmes's Motion to Stay and Respondent Van Dyke's Motion to Stay are **GRANTED**.

IT IS FURTHER ORDERED that the Motion to Withdraw Motion to Stay Proceedings filed by Special Prosecutor McMahon is **GRANTED**.

IT IS FURTHER ORDERED that Officer Van Dyke's Motion *in Limine* to Bar Introduction of Immunized/*Garrity* Protected Statements at the Police Board prior to his criminal trial is **DENIED** as moot, given the Board's order granting the motions to stay.

IT IS FURTHER ORDERED that the Hearing Officer's determinations that the suspensions of Respondents Franko, Mondragon, Sebastian, and Viramontes pending the disposition of the Charges are warranted are **VACATED**.

IT IS FURTHER ORDERED that a ruling on the Superintendent's request to consolidate these cases for hearing is reserved until these matters are set for hearing.

This Order is adopted and entered by a majority of the members of the Police Board: Ghian Foreman, Eva-Dina Delgado, Michael Eaddy, Steve Flores, Rita A. Fry, John P. O'Malley Jr., John H. Simpson, and Rhoda D. Sweeney.

Police Board President Lori E. Lightfoot has recused herself from these cases; she took no part in the Board's consideration of these matters.

DATED AT CHICAGO, COUNTY OF COOK, STATE OF ILLINOIS, THIS 12th DAY OF JUNE, 2017.

Attested by:

/s/ GHIAN FOREMAN
Vice President

/s/ MAX A. CAPRONI
Executive Director

DISSENT

The following members of the Police Board hereby dissent from the Order of the majority of the Board.

[None]

RECEIVED A COPY OF THIS

MEMORANDUM AND ORDER

THIS _____ DAY OF _____, 2017.

_____
EDDIE T. JOHNSON
Superintendent of Police