



The Police Commission

CITY AND COUNTY OF SAN FRANCISCO

September 3, 2020

Chief William Scott
Chief of Police

Dear Chief Scott:

At the meeting of the Police Commission on Wednesday, September 2, 2020, the following resolution was adopted:

DAMALI TAYLOR
Vice President

PETRA DeJESUS
Commissioner

JOHN HAMASAKI
Commissioner

CINDY ELIAS
Commissioner

DION-JAY BROOKER
Commissioner

MALIA COHEN
Commissioner

Sergeant Stacy Youngblood
Secretary

RESOLUTION 20-54

DECISION TO ADOPT ON REMAND THE ADMINISTRATIVE LAW JUDGE'S DECISION IN THE MATTER OF JOSEPH REYES, CASE NO. IAD 2019-0015

WHEREAS, on February 2, 2016, former Chief of Police Gregory Suhr filed and served verified charges against Officer Joseph Reyes, Star No. 2315, for the following misconduct violations of Department Policy: (1) Use of the slur "raghead" (a violation of Rule 9 of Department General Order 2.01), and (2) Sleeping while on duty (a violation of Rule 42 of Department General Order 2.01) and recommendation a penalty up to and including termination; and

WHEREAS, hearings on said charges were held before the Police Commission pursuant to section 8.343 of the Charter of the City and County of San Francisco on January 24, 2017 and on March 1, 2017, and the matter was submitted to the Police Commission for decision of whether to sustain each specification and what disciplinary penalty to impose; and

WHEREAS, on March 1, 2017, the Police Commission sustained the specifications filed against Officer Reyes and terminated Officer Reyes from the San Francisco Police Department; and

WHEREAS, on June 6, 2019, Officer Reyes filed an administrative appeal in Case No. IAD 2019-0015 under the Rules for Administrative Appeals in accordance with California Government Code 3304(b);

WHEREAS on February 26, 2020, the Police Commission Office received the decision of Administrative Law Judge Karen Reichmann, Office of Administrative Appeal, which states as follows:

"The appeal of Joseph Reyes is granted. The Commission's decision terminating appellant is overruled. Appellant shall be suspended for three months. This matter is remanded to the Commission for further action consistent with this Decision."

Chief William Scott
September 3, 2020
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WHEREAS, even though the Commission strongly disagrees with Administrative Law Judge Reichmann's decision, the Commission must, as a matter of law, implement the decision; therefore be it

RESOLVED, that the Police Commission's decision on March 1, 2017 to terminated Officer Joseph Reyes is overturned and the Commission hereby adopts Administrative Law Judge Reichman's decision; and

RESOLVED, that Officer Joseph Reyes's employment with the San Francisco Police Department as a Police Officer is reinstated effective March 1, 2017; and, be it

FURTHER RESOLVED, that per Administrative Law Judge Reichmann's decision Officer Joseph Reyes shall be suspended for three months effective March 1, 2017.

AYES: Commissioners Taylor, DeJesus, Elias, Brookter, Hamasaki

ABSTAINED: Commissioner Cohen

Very truly yours,

#3, #12

Sergeant Stacy Youngblood
Secretary
San Francisco Police Commission

cc: Assistant Chief B. Moser/Chief of Staff
Attorney M. Hinckley
Ret. Captain P. Chignell/POA



OFFICE OF ADMINISTRATIVE HEARINGS

State of California

GENERAL JURISDICTION DIVISION

1515 Clay Street, Suite 206, Oakland CA 94612
(510) 622-2722 phone
www.dgs.ca.gov/OAH

Department of General Services

Governor Gavin Newsom

February 21, 2020

Police Commission
San Francisco Police Department
1245 3rd Street, 6th Floor
San Francisco, CA 94158
Attn: Sargent Stacy Youngblood

Subject: J.R. (SFPD)
OAH No. 2019070227
Agency No. IAD 2015-0338

Enclosed are the following:

- ☐ The original Proposed Decision
- ☐ An agency order of adoption. If the Proposed Decision is adopted, please return a copy of the signed adoption order to the Office of Administrative Hearings.
- ☒ The original Decision
- ☐ Exhibits numbered: 1 – x
Please make sure you have received all listed exhibits. If exhibits are missing, please contact OAH immediately.
- ☐ Email copy of the Proposed Decision to:
- ☐ The above referenced case was resolved prior to conclusion of the hearing. We are returning the enclosed original exhibits 1 – x to you.

SP
Encl.
Transmittal Form
OAH 60 (Rev. 04/09)

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**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of the Administrative Appeal of:

JOSEPH REYES, Appellant.

Case No. IAD 2015-0338

OAH No. 2019070227

DECISION

Administrative Law Judge Karen Reichmann, State of California, Office of Administrative Hearings, heard this matter on January 6, 2020, in Oakland, California.

Michael L. Hinckley, Attorney at Law, represented appellant Joseph Reyes.

Steven M. Betz, Legal Counsel, represented respondent, the San Francisco Police Department.

The matter was submitted for decision on January 6, 2020.

ISSUE

Police officer Joseph Reyes challenges his termination by the Police Commission for using the racial slur "rag head" in a private off-duty text message to another officer.

FACTUAL FINDINGS

1. Appellant Joseph Reyes was employed as a police officer with the San Francisco Police Department, beginning in 2009. During a criminal investigation of another police officer into conduct unrelated to appellant, the Department discovered a private text message conversation between appellant and the other officer which took place on February 17, 2015. Neither appellant nor the other officer is Muslim or of Middle Eastern descent. Appellant was off duty at the time of the text conversation. The other officer wrote:

Is it ironic that countries like Iraq and Libya where dictators were overthrown are now controlled by ISIS and wrecking havoc in the Middle East?

Appellant responded:

It was. We need dictators to keep these radical Muslims oppressed. We need a bad guy in power who wouldn't think twice about using WMD's to wipe out extremists. We could publicly condemn them for their actions but secretly be thankful they are there to do the shit our liberal population would keep us from doing. I think we need to let the rag heads to fight amongst themselves. Once a sect starts becoming dominant, we need to covertly support them and help them defeat the opposition then set them up as a dictatorship just like we did with the Shah of Iran.

2. An Internal Affairs interview of appellant took place on December 8, 2015. When asked about the text message, appellant did not recall sending it. He did not deny sending the text, but stated that he was surprised and embarrassed that he had. He noted that "rag head" is "a very derogatory statement" and that he would not say it in public or while in uniform. He added that he often had political discussions with the other officer who would "get me worked up, maybe my level of thinking will diminish and I'll end up doing something stupid like this, but it's not my normal [modus operandi.]" Appellant added that he does not have negative feelings towards people from the Middle East and has friends from this region. He denied having bias towards any culture or nationality. He noted that he is Filipino and experienced feeling different while growing up.

3. The Chief of Police filed disciplinary charges against appellant on March 4, 2016. Specification No. 1 alleged that appellant used the epithet rag head in a context that was demeaning and suggested bias against a class of people, and commented about the murder and oppression of people in the Middle East in a way that was callous and showed disdain. The Chief added that the Department might have to disclose appellant's text as part of the *Brady*¹ process whenever appellant would be called to testify in cases involving individuals of Middle Eastern descent, and that the disclosures would harm the Department's standing in the community and would tend to discredit appellant's testimony.

¹ *Brady v. Maryland* (1963) 373 U.S. 83. This case established a rule providing that all potentially exculpatory material must be disclosed in criminal proceedings, including evidence that could discredit a witness.

4. The disciplinary charges stated that if the Specifications² were sustained after trial by the Police Commission the penalty "is up to and including termination."

5. Under the heading, "LIMITATIONS PERIOD," the Chief wrote,

None of the misconduct described above was discovered by anyone in the Department with the authorization to commence an Internal Affairs Investigation, as those terms are used in Government Code § 3304(d)(1), #10

#10 the Partner's telephone in August, 2015, and the Internal Affairs Division had the opportunity to analyze them in the fall of 2015. In addition, all of [the] material on the cell phone was, and as of this writing

#10

6. On January 24, 2017, an evidentiary hearing was held before the Commission. Appellant testified #3, #12
[REDACTED], and worked in the telecommunications industry for several years before pursuing a career as a police officer because he wanted to make a difference. He related that he was completely shocked when he learned that he had sent the text. He insisted that he did not harbor bias or prejudice against people in the

#5

Middle East and that he does not use the term "rag head." He believed that he lost control texting with the other officer, and said something outrageous to get him off his back. He added that he knew it was not right and that it did not reflect who he is. He noted that he used the term in reference to militant radical Muslims who were killing Americans and not about Middle Eastern people in general. He added that it was the only use of a racist slur discovered in the numerous text messages he exchanged with the other officer. Appellant also noted that he has been subjected to racism and tries not to inflict it on others.

7. At the evidentiary hearing, appellant explained the actions that he took after learning about his misconduct. He felt remorse, #3, #12 he felt that he should atone. Appellant reached out to the president of the Islamic Center #1, #3, #12 of San Ramon to discuss security issues. He provided an unmarked decommissioned police car to park outside the center as a deterrence during the Ramadan season. Appellant arranged for a group of volunteers to provide security to a large event in Livermore, but ultimately the Livermore Police Department took over. He planned on continuing to stay in touch with the leader of the Islamic Center to address its security needs.

8. Appellant also explained to the Commission his involvement with the Daylight organization. Appellant assisted this organization in the development of an implicit bias training program for law enforcement. He met with members of the Muslim community as well as members of Black Lives Matter in the development of a video. This video has been used to train district attorneys and defense attorneys. Appellant planned on being involved in further trainings.

#2, a Muslim-American educator and #2 met appellant through Daylight and provided video testimonials in

his support. They do not believe that appellant is racist and they do not believe he is a threat to the Muslim community.

9. On March 1, 2017, the Commission adopted Resolution No. 17-15, sustaining the disciplinary charges and ordering that appellant be terminated effective immediately. The Resolution was served on appellant on March 23, 2017.

10. On June 14, 2017, the Commission adopted Resolution No. 17-30, in which it adopted Findings of Fact in support of its previously issued resolution sustaining the charges against appellant.

11. Appellant filed an appeal on June 18, 2019. Rules for Administrative Appeals pertaining to this appeal were adopted. Pursuant to the Rules, an administrative record was filed, briefs were submitted, and oral argument was heard.

LEGAL CONCLUSIONS

Standard of Review

1. The Rules for Administrative Appeals governing this matter provide that "the hearing officer shall review the Commission's decision for abuse of discretion, as defined in Code of Civil Procedure section 1094.5 and case law construing that statute."

2. Code of Civil Procedure section 1094.5, subdivision (b), sets forth that "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

Appellant's Arguments

DID THE COMMISSION IMPERMISSIBLY RELY ON ALLEGED *BRADY* IMPACT?

3. Appellant contends that the Commission relied on the potential impact of his conduct on its *Brady* obligations in criminal proceedings, as was discussed by the Chief in the original disciplinary charges. Appellant argues that the reliance on *Brady* was speculative and based on hearsay and evidence outside the record.

The Department argues that the Commission did not rely on the *Brady* issue and at hearing stated that the Commission's decision was based solely on the use of the slur and the discredit that would come to the Department due to the perception that it employs racist officers.

Resolution 17-30 contains the Commission's findings. In these findings, the Commission does not mention the potential *Brady* impact of appellant's conduct as a basis for its decision. Accordingly, appellant's contention that the Department impermissibly relied on a speculative *Brady* concern as a rationale for its decision is rejected.

DID THE COMMISSION MISCONSTRUE APPELLANT'S TEXTS?

4. Appellant contends that the Commission's interpretation of his text is not supported. Appellant acknowledged that the term "rag head" is a derogatory and dehumanizing term, but argues that the Commission misinterpreted the term as a disparagement of the people of the Middle East when in fact the text referred specifically to militant Muslims such as ISIS.

The Commission did not rely on a misinterpretation of appellant's text in reaching its decision. The Commission recited the content of the text verbatim and

identified it as a "slur." Appellant has not established that the Commission misconstrued his text or that his use of the slur specifically towards militant Muslims rather than all people from the Middle East would not constitute cause for discipline.

DID THE COMMISSION VIOLATE APPELLANT'S FIRST AMENDMENT RIGHTS?

5. Appellant contends that he was disciplined for constitutionally protected free speech, relying on *Waters v. Churchill* (1994) 511 U.S. 661 and *Rankin v. McPherson* (1987) 483 U.S. 378.

The Department acknowledges that the texts between appellant and the other officer contained protected political opinions. The Department contends that the Commission's decision to terminate appellant did not violate the First Amendment because the Department has an interest in maintaining a bias-free police force which outweighs appellant's interest in using a racial slur. The Department's arguments on this issue are persuasive. The Commission did not violate appellant's First Amendment rights by terminating him for the use of a racist slur.

DID THE COMMISSION VIOLATE GOVERNMENT CODE SECTION 3304?

6. Appellant contends that the Commission is time-barred from imposing discipline on him for his February 2015 text message, which was discovered no later than December 2015. The notice of disciplinary charges was filed on March 4, 2016, but did not specify the level of discipline. Appellant was not informed of the level of discipline (termination) until he was served with the Commission's Resolution 17-15 on March 23, 2017.

Government Code section 3304, subdivision (d)(1), provides:

No punitive action . . . shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct. In the event that the public agency determines that discipline may be taken, it shall complete its investigation and notify the public safety officer of its proposed discipline by a Letter of Intent or Notice of Adverse Action articulating the discipline that year, except as provided in paragraph (2). The public agency shall not be required to impose the discipline within that one-year period.

Paragraph (d)(2)(A) provides that if the act is the subject of a criminal investigation or a criminal prosecution is pending, the one-year time period is tolled. The Department contends that the tolling provision applies because the text messages #10 [REDACTED]

[REDACTED] The Department further contends that appellant has waived his contention related to the statute of limitations because he did not raise it before the Commission.

7. The tolling provision of Government Code section 3304, subdivision (d)(2)(A), is applied broadly and provides for tolling when, as here, the officer being terminated was not the subject of the criminal investigation. (See *Daughtery v. City and County of San Francisco* (2018) 24 Cal.App.5th 928.) #10 [REDACTED]

#10

#10

Therefore, the statute of

limitations continued to be tolled and the Commission was not precluded from taking punitive action.

8. Relying on *Morgado v. City and County of San Francisco* (2017) 13 Cal.App.5th 1, appellant contends that the failure of the disciplinary charges to include notice of the specific penalty sought violated his rights under Government Code section 3304. In *Morgado*, the officer was not notified of the level of discipline until it was imposed by the Commission and he had no administrative appeal process available to challenge it. Here, unlike in *Morgado*, appellant has been provided with an administrative appeal process and has availed himself of it. Accordingly, *Morgado* does not invalidate the Commission's decision.

Discussion

9. The Commission concluded that appellant's February 17, 2015 text message violated Rule 9 of Department Order 2.01, which reads:

9. MISCONDUCT. Any breach of peace, neglect of duty, misconduct or any conduct by an officer either within or without the State that tends to subvert the order, efficiency or discipline of the Department or reflects discredit upon the Department or any member, or is prejudicial to the efficiency and discipline of the Department, although no specifically defined or set forth in Department policies and

procedures, shall be considered unofficer-like conduct subject to disciplinary action.

The Commission did not abuse its discretion in its conclusion. The Commission's decision that appellant engaged in misconduct is supported by the uncontroverted evidence, namely that appellant used a racial slur in a text message. Use of a racial slur reflects discredit on the Department, which is expected to exercise its functions free from racial or ethnic animus.

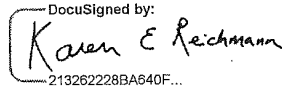
10. The Commission's decision to terminate appellant for his misconduct was an abuse of discretion. Appellant is being disciplined for a single slur in a private text, sent while he was off-duty and with no expectation that it would be made public, and not directed to an individual with a Muslim or Middle Eastern background. Appellant has never denied or attempted to defend his conduct. He immediately acknowledged that the language he used was derogatory and expressed remorse. Appellant understands that his conduct was not consistent with the Department's values. Appellant sought opportunities to serve the Muslim community and to learn more about implicit bias and help to educate others. There was no evidence that appellant harbors racial animus or has engaged in racial discrimination in performing his duties as a police officer. The decision to terminate appellant is not supported by the Commission's Findings.

11. The Rules for Administrative Appeals provide that the hearing officer may reverse the Commission's decision or reduce the discipline imposed. San Francisco Charter section A8.343 provides that an officer guilty of any violation of the rules and regulations of the Department "shall be liable to be punished by reprimand, or by fine not exceeding one month's salary for any offense, or by suspension for not to exceed

three months, or by dismissal." Appellant's misconduct in violation of Rule 9 of Department Order 2.01 warrants the imposition of three months' suspension.

ORDER

The appeal of Joseph Reyes is granted. The Commission's decision terminating appellant is overruled. Appellant shall be suspended for three months. This matter is remanded to the Commission for further action consistent with this Decision.

DocuSigned by:

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DATE: February 21, 2020

KAREN REICHMANN

Administrative Law Judge

Office of Administrative Hearings