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Mayor

Department of Police · City of Chicago  
3510 S. Michigan Avenue · Chicago, Illinois 60653

David O. Brown  
Superintendent of Police

November 23, 2020

Sydney Roberts  
Chief Administrator  
Civilian Office of Police Accountability  
1615 West Chicago Avenue, 4th Floor  
Chicago, IL 60622

RE: Superintendent's Non-Concurrence with COPA's Findings and Proposed Penalty  
Complaint Register Number: #2020-0002121/ Officer Matthew Drinnan/Termination

Dear Chief Administrator:

The Chicago Police Department (CPD) concurs with the sustained finding that Officer Matthew Drinnan (Officer Drinnan) referred to unidentified members of the public as "bitch" and "fucking faggot," however CPD does not concur with the premise that the latter finding provides a sufficient basis for the Civilian Office of Police Accountability's (COPA's) conclusion that cause for discharge exists. CPD, of course, does not condone Officer Drinnan's conduct and nor does CPD intimate that the conduct should go unpunished. CPD, based on past authoritative precedent, maintains an alternative sanction short of discharge should be imposed. As set forth more fully below the Department recommends a suspension for the period of 270 days.

### Facts

On May 29 and 30, 2020, Chicago's downtown area was overwhelmed by protests that became violent resulting in rampant rioting, looting, arson and extreme property damage. Countless stores and vehicles were broken into and burned. To date, the downtown district hasn't fully recovered from the damage that ensued as a result of the civil unrest. On May 29, Officer Drinnan was deployed downtown from the 007<sup>th</sup> district to quell the violence. That day, Officer Drinnan began work at 6:00 p.m. and worked through the night to 1:00 p.m. in the afternoon on May 30, 2020. When he was finally released, Officer Drinnan was ordered to return just five hours later, at 6:00 p.m. During his second tour of duty downtown on May 30, at 7:37 p.m., Officer Drinnan was loading a stop sign into a police car when an unknown individual threw an orange cone and a full-size steel construction horse at him. Officer Drinnan was struck in the leg by the orange cone and the construction horse narrowly missed him. Under the Criminal Code of the Illinois Compiled Statutes this conduct is Aggravated Battery. Immediately after the cone struck Officer Drinnan and the steel construction horse scarcely missed him, Officer Drinnan turned in the direction of the projectiles and reacted by directing profanity and a homophobic slur at an unruly, large crowd of riotous protesters. Officer Drinnan specifically said, "Bitch, fucking faggot, you wait until my back is turned." A short time after this, a video capturing the incident went viral. It was later discovered that [REDACTED] authored the viral video.

## Analysis

Judicial review of an administrative decision to discharge an employee requires the court to determine first, whether the agency's finding is against the manifest weight of the evidence, and second, whether the findings of fact sufficiently support the agency's conclusion that cause for discharge exists. *Lesner v. The Police Bd. of the City of Chicago*, 2015 WL 12020744, at 2 (Ill.Cir.Ct. Jan. 30, 2015).

### **COPA's Sustained Finding is Supported by the Manifest Weight of the Evidence**

Here, COPA's sustained findings for the allegations that: Officer Drinnan directed the words "bitch" and "fucking faggot" at unidentified members of the public; is supported by the manifest weight of the evidence. COPA obtained a video of the conduct at issue as well as properly identified Officer Drinnan as the Officer appearing in the video. The Department does not contest this finding.

### **The Findings of Fact Do Not Sufficiently Support COPA's Conclusion That Cause for Discharge Exists**

Since it is undisputed that COPA's sustained finding is supported by the evidence, the pivotal question is whether under the evidence there is sufficient cause to remove Officer Drinnan from the Department. 65 ILCS 5/10-2.1-17 provides that no officer of the police department may be removed or discharged, except for cause. A board's finding that there is sufficient cause for discharge is subject to judicial review. *Crowell v. Daley*, 336 N.E.2d 573 (Ill. App. 1<sup>st</sup> Dist. 1975), and *Caliendo v. Goodrich*, 340 N.E.2d 560, 562 (Ill. App. 1<sup>st</sup> Dist. 1975).

In *Fox v. Civil Serv. Comm'n* the Illinois Appellate Court held that a state tax fraud investigator's conduct did not rise to the level of conduct that warranted discharge when she directed several profanities at a suspect. 383 N.E.2d 1201, 1207 (Ill. App. 3<sup>rd</sup> Dist. 1978). Specifically in *Fox*, the fraud investigator said to the suspect "you know damn well what I want;" as well as saying to the suspect "you're a god damn liar" (three times); "go ahead and call the fucking police;" "what the fuck do you think I'm doing out here;" and "you're a four-eyed fat fucking crook." *Id.* The Appellate Court in *Fox* said that it must consider the totality of the circumstances surrounding Fox's employment rather than narrowly focus on the incident. The court reached its holding by considering evidence of: 1) provocation by the suspect and a heated adversary situation capable of precipitating a blow-up as well as overzealous behavior by Fox rather than neglect of duty or intentional or malicious conduct; 2) Fox's good work record; and 3) selective enforcement against use of profanity by the government agency. *Id.* Given *Fox's* similarity to the case at hand *Fox's* holdings are controlling.

#### **1. Totality of the Circumstances: Provocation**

In *Fox*, the Court said that provocation and the tension inherent to the plaintiff's job are circumstances that must be considered in reviewing cause and the substantiality of misconduct. The Court pointed to the fact that the plaintiff's duty to investigate tax violations created a volatile situation because the investigations are accusatory in nature. The Court said "In the heat of excitement which investigators have from day to day, their job should not be in jeopardy if the passion rises to such level that improper language is utilized." *Id.*

The Court was faced with a similar situation in *Dep't of Mental Health & Developmental Disabilities v. Civil Serv. Comm'n*, 431 N.E.2d 1330 (Ill. App. 1<sup>st</sup> Dist. 1982). In that case, the Court held that a Mental Health Technician's punching and kicking of a mental health patient "was not calculated but rather was the result of his sudden loss of control, due to the patient repeatedly charging at him, which under the circumstances may be

understandable although not condoned.” *Id.* The Court held that the conduct did not rise to the level of discharge because of the provocation doctrine. *Id.*

The case at hand is analogous to *Fox* and *Dep’t of Mental Health and Developmental Disabilities*. Like the employees in *Fox* and *Dep’t of Mental Health and Developmental Disabilities*, Officer Drinnan’s role as a police officer was, at the time, adversarial in nature to those people protesting police officers nationwide and the conduct at issue was provoked. In the instant case, Officer Drinnan was loading a stop sign into a police vehicle when he was the victim of an aggravated battery<sup>1</sup> - an unknown suspect threw an orange cone and a full-size steel construction horse at him. Officer Drinnan was struck in the leg by the orange cone and the construction horse only just missed him.<sup>2</sup> Immediately after he was struck, Officer Drinnan turned around and reacted by directing profanity and a homophobic slur at the riotous protesters including the unidentified individual that had just battered him. Officer Drinnan specifically said, “Bitch, fucking faggot, you wait until my back is turned.” Officer Drinnan’s conduct is the direct result of severe provocation as the victim of an aggravated battery in a very heated, intense and unsafe situation.

Here COPA must consider the extreme provocation and the fact that the statements were made in response to being the victim of an aggravated battery. *Fox* and *Dep’t of Mental Health and Developmental Disabilities* afforded the long-standing provocation doctrine significant weight in determining whether conduct rises to the level of cause for discharge.

## **2. Totality of the Circumstances: Good Work Record**

In *Fox* the Court held, Fox’s employment history with the Department also has bearing upon the issue of cause for discharge. *Fox*, 383 N.E.2d at 1208; *see also, Kreiser v. Police Board* 352 N.E.2d 389 (Ill. App. 1<sup>st</sup> Dist. 1976). The Court determined that Fox’s work record was satisfactory. Similarly, Officer Drinnan’s complimentary and disciplinary history is unblemished. Over the course of 3 years, Officer Drinnan has been the recipient of 17 awards and he has never been the subject of a CR number or a SPAR up until this point.

## **3. Totality of the Circumstances: Selective Enforcement Against Verbal Abuse**

The Court in *Fox* held that the final circumstance in mitigation bearing upon the issue of cause for discharge is evidence of selective enforcement by the Department. If it is not clear from the prior decisions of the Police

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<sup>1</sup> “A person commits battery if he or she knowingly without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual.” 720 ILCS 5/12-3(a).

“A person commits aggravated battery when, in committing a battery, other than by discharge of a firearm, he or she knows the individual battered to be a peace officer performing his or her official duties; battered to prevent performance of his or her official duties; or battered for performing his or her official duties.” 720 ILCS 5/12-3.05(d)(4).

Here the unknown suspect committed aggravated battery based on physical contact of an insulting or provoking nature against a peace officer. Certainly throwing and striking a police officer with a cone (and nearly missing him with a steel construction horse) is characterized as physical contact of an insulting and provoking nature and the fact that Officer Drinnan is a police officer is undisputed. In *People v. Henshall*, the Appellate Court held throwing a napkin in the face of the victim two times is a physical contact of an insulting and provoking nature – resulting in an aggravated battery based on the victim’s status. 2020 IL App (2d) 170938-U. Here throwing a cone and striking the victim as well as throwing a steel construction horse in Officer Drinnan’s direction is a physical contact that is more severe when it’s compared to a napkin. In terms of projectiles being thrown common sense dictates that most people would prefer a napkin over a cone and a steel construction barricade. What’s more is Officer Drinnan’s conduct cannot be considered intentional or malicious as it was very clearly an emotionally charged reaction to an attempted aggravated battery against him.

<sup>2</sup> The crashing steel construction horse made a loud noise that would startle, shock and scare the average person. Under the Criminal Code of the Illinois Compiled Statutes this conduct is an Aggravated Assault. *See* 720 ILCS 5/12-2.

Board that the Department views verbal abuse as warranting separation, how can this court arrive at that conclusion? The court determined that there is sufficient evidence regarding arbitrary discipline of verbal abuse to influence their evaluation of just cause. *Fox*, 383 N.E.2d at 1208. In the case at hand, there is an overabundance of evidence regarding arbitrary discipline of verbal abuse. In the past 17 years CPD has recommended termination of one Officer for verbal abuse. In 2018, CPD along with IPRA, recommended that Officer Brian Hansen be fired for posting “racially insensitive, xenophobic, Islamophobic and discriminatory” material on Facebook.<sup>3</sup> Officer Hansen put up a total of 62 shocking, insensitive posts over a two-year period - engaging in a course of conduct that revealed an innate insensitivity toward protected classes.

There are further examples of the wide-ranging, inconsistent discipline that is doled out in verbal abuse cases. On July 3, 2009, Sergeant Matthew O’Brien, during a traffic stop told a group of black men that, “Johnny Cochran’s dead and Obama can’t save your assess.” Officer O’Brien was suspended for ten days.<sup>4</sup>

On October 27, 2015, Sergeant Jack Axium was amid a group of cops preparing for a visit by President Barack Obama to see the Cleveland Cavaliers play the Bulls at the United Center and said, “The head n\*\*\*\*\*r is coming to town.” Sergeant Axium was suspended for 270 days.<sup>5</sup>

Based on the CPD cases of verbal abuse described above it is quite clear that a court would likely find that CPD arbitrarily disciplines verbal abuse.

What’s more is the case at hand is easily distinguished from the cases above which demonstrate a pattern and practice of racially insensitive behavior as well as a complete lack of provocation. In the case at hand, the conduct was an isolated incident that occurred immediately after the Officer was the victim of an aggravated battery. In fact, Officer Drinnan, in his interview with COPA, expressed grave remorse and admits that he should not have made the statements.

Just like the court in *Fox*, a Court reviewing Officer Drinnan’s case will similarly hold that while Officer Drinnan’s verbal abuse of the perpetrator of an Aggravated Battery against him occurred, that same verbal abuse does not rise to the level of cause for discharge in light of: 1) provocation, 2) a good work record, and 3) inconsistent and arbitrary discipline for similar offenses by other CPD employees.

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<sup>3</sup> <https://www.propublica.org/article/chicago-police-officer-john-catanzara-investigation>

<sup>4</sup> <https://www.propublica.org/article/chicago-police-officer-john-catanzara-investigation>

<sup>5</sup> <https://chicago.suntimes.com/2019/6/28/18759928/jack-axium-n-word-barack-obama-chicago-police-department-racial-slur>

## **Conclusion**

The Department concurs with the sustained finding that Officer Drinnan referred to unidentified members of the public as “bitch” and “fucking faggot,” however CPD does not concur with the premise that the latter finding of fact provides a sufficient basis for COPA’s conclusion that cause for discharge exists. Officer Drinnan’s statements were made in response to being the victim of an aggravated battery. Officer Drinnan has a good work record, he has shown no pattern of such behavior, and discipline for verbal abuse has been irregular and inconsistent. Officer Drinnan has shown remorse for the conduct and has apologized. Thus, CPD proposes a sanction of 270 days.



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