

BEFORE THE POLICE BOARD OF THE CITY OF CHICAGO

IN THE MATTER OF CHARGES FILED AGAINST)
POLICE OFFICER FRANCISCO PEREZ,) **No. 15 PB 2896**
STAR No. 7209, DEPARTMENT OF POLICE,)
CITY OF CHICAGO,)
) **(CR No. 1049811)**
RESPONDENT.)

FINDINGS AND DECISION

On October 30, 2015, the Superintendent of Police filed with the Police Board of the City of Chicago charges against Police Officer Francisco Perez, Star No. 7209 (hereinafter sometimes referred to as “Respondent”), recommending that the Respondent be discharged from the Chicago Police Department for violating the following Rules of Conduct:

- Rule 2: Any action or conduct which impedes the Department’s efforts to achieve its policy and goals or brings discredit upon the Department.
- Rule 10: Inattention to duty.
- Rule 14: Making a false report, written or oral.

The Police Board caused a hearing on these charges against the Respondent to be had before Hearing Officer Jacqueline A. Walker on April 5, April 20, October 18, and October 24, 2016.

Following the hearing, the members of the Police Board read and reviewed the record of the proceedings and viewed the video-recording of the testimony of the witnesses. Hearing Officer Walker made an oral report to and conferred with the Police Board before it rendered its findings and decision.

POLICE BOARD FINDINGS

The Police Board of the City of Chicago, as a result of its hearing on the charges, finds and determines that:

1. The Respondent was at all times mentioned herein employed as a police officer by the Department of Police of the City of Chicago.

2. The written charges, and a Notice stating when and where a hearing on the charges was to be held, were personally served upon the Respondent more than five (5) days before the date of the initial status hearing of this case.

3. Throughout the hearing on the charges the Respondent appeared in person, except for October 18, 2016, when he was not present but did not object to proceeding with the hearing in his absence. The Respondent was represented by legal counsel throughout the hearing on the charges.

4. The Respondent filed a Motion to Strike and Dismiss requesting that the charges filed against him be stricken and the case dismissed for the following reasons: (a) the failure to bring timely charges violates the due process rights of the Respondent; (b) the charges should be barred by laches; (c) the investigation by the Independent Police Review Authority failed to follow General Order G08-01, and (d) the City violated Section 6.11—Mediation—of the Agreement between the Fraternal Order of Police Chicago Lodge No. 7 and the City of Chicago (“Collective Bargaining Agreement”).

The Illinois Appellate Court has in two cases affirmed the Board’s decision denying motions to dismiss that make essentially the same arguments as those described in subparagraphs (a), (b), and (c) above. *Orsa et al. v. Police Board*, 2016 IL App (1st) 121709 (August 9, 2016); *Chisem v. McCarthy*, 2014 IL App (1st) 132389 (December 23, 2014). Based on *Orsa* and *Chisem* and for the reasons set forth below, the Respondent’s Motion to Strike and Dismiss shall be

denied.

a. Due Process. Citing *Morgan v. Department of Financial and Professional Regulation*, 374 Ill. App. 3d 275 (2007), and *Lyon v. Department of Children and Family Services*, 209 Ill.2d 264 (2004), the Respondent claims that the Constitution precludes such a lengthy delay in the investigation of the Respondent's alleged misconduct. *Morgan* and *Lyon*, however, involved a delay in *adjudication* of allegations of misconduct after the respective plaintiffs had been suspended from their jobs—not delay in the *investigation* leading to the initial suspensions. *Morgan* involved a clinical psychologist accused of sexually abusing a patient, where the state took fifteen months to decide the case after the suspension. *Lyon* involved a teacher accused of abusing students where the director of DCFS failed to honor specific regulatory time limits for decision-making.

The Respondent's case before the Police Board is different from *Morgan* and *Lyon*, as the Respondent in his Motion is complaining about the delay from the time of the incident to the bringing of charges, not the time it took to try him once the charges were filed and he was suspended without pay. This difference is important because the due-process analysis in *Morgan* and *Lyon* is triggered by the state's decision to deprive the psychologist and teacher of their jobs, thus preventing them from working for prolonged periods of time before they were accorded the opportunity to have a hearing and decision to clear their names.

Here, the Respondent was working and was being paid his full salary and benefits during the entire period from the time of the incident up to the filing of charges with the Police Board. The Due Process clause precludes a state or local government from "depriving any person of life, liberty or property [i.e. a public job] without due process of law." Here, the Respondent was not suspended without pay from his job until *after* the charges against him were filed. Therefore, the

Respondent was *not* deprived of his job prior to the filing of charges, and any delay in bringing the charges is therefore *not* a violation of the Respondent's due process rights.

b. Laches. The Respondent argues that the doctrine of laches should apply here in supporting the dismissal of charges, for he argues that the delay in bringing the charges against him resulted in prejudice to him.

Laches is an equitable doctrine that is used to prevent a party in litigation from enforcing a right it otherwise has because it has not been diligent in asserting this right and the opposing party has been prejudiced by the delay. Private parties and public agencies are not on an equal footing when it comes to the application of the laches doctrine. Many cases, including *Van Milligan v Board of Fire and Police Commissioners of the Village of Glenview*, 158 Ill.2d 85 (1994), hold that laches can only be invoked against a municipality under "compelling" or "extraordinary" circumstances. In addition, the party that invokes the doctrine of laches has the burden of pleading and proving the delay and the prejudice. *Hannigan v. Hoffmeister*, 240 Ill. App. 3d 1065, 1074 (1992). Under Illinois law, the Respondent must demonstrate that the Superintendent's unreasonable delay caused material prejudice to the Respondent; the Respondent must submit evidence in support of his claims of prejudice (for example, testimony that witnesses could no longer recall what happened, or affidavits stating that records had been lost or destroyed during the intervening years). *Nature Conservancy v. Wilder*, 656 F.3d 646 (7th Cir. 2011).

Here, the Respondent argues that the delay in bringing the charges resulted in prejudice to him because "any of Perez's efforts to remember significant or minute details of the incident are strained due to the length of time between the incident and charges." Motion to Strike and Dismiss, p. 5. However, the Respondent in his testimony before the Board exhibited a thorough recollection of events of the night in question—only rarely did he testify that he could not recall

minute details of the incident, and only once did he imply that his failure to remember a minor detail of the incident was due to the passage of time (Tr. p. 63). The Respondent did not delineate any specific prejudice stemming from the delay during the investigation. On the contrary, his argument that the delay hampered his ability to remember details of the incident is contradicted by his detailed testimony in this case which included specifics about the circumstances of his firing his weapon and the events that preceded and followed.

Therefore, the Respondent has not carried his burden of proving that he was prejudiced by a delay in the bringing of charges, nor has he demonstrated any “compelling” or “extraordinary” circumstances warranting a dismissal of this case due to laches.

c. General Orders. The Respondent argues that the investigation failed to follow Chicago Police Department General Order G08-01, which requires a prompt and thorough investigation.

General Order G08-01 does not set an absolute deadline within which investigations must be completed, but provides that if investigations last more than 30 days, the investigator must seek and obtain an extension of time within which to complete the investigation. Once the investigator completes the process of gathering evidence, the matter is reviewed at several levels to ensure that a thorough investigation was conducted, as required by General Order G08-01.

The Respondent submitted no evidence that the investigation failed to follow the General Order’s policies and procedures. There is no evidence in the record of any violation of the General Order in this case. Even if, however, the General Order was violated, there is no provision in the General Order requiring the extraordinary remedy of dismissal of the case as a sanction for such a violation. The Board declines to extend the reach of the General Order in this manner.

d. Section 6.11 of the Collective Bargaining Agreement. The Respondent appears to argue that, because IPRA first offered to mediate the resolution of this matter, the Superintendent

is barred from subsequently filing with the Police Board charges recommending his discharge from the Department. Section 6.11 includes the following provision: “If IAD/IPRA and the accused Officer agree on a penalty less than separation, it is binding on both parties. *However, the Superintendent retains the right to seek the separation of the Officer.*” Collective Bargaining Agreement, p. 9; (emphasis added). Based on the plain language of the Collective Bargaining Agreement, it is clear that the Superintendent had the right to file these charges seeking the discharge of the Respondent regardless of whether the Respondent and IPRA reached agreement on a lesser penalty. Moreover, pre-hearing settlement discussions are generally irrelevant once the Superintendent has filed charges and the matter has proceeded to a hearing before this Board.

5. The Respondent, Police Officer Francisco Perez, Star No. 7209, charged herein, is **guilty** of violating, to wit:

Rule 2: Any action or conduct which impedes the Department’s efforts to achieve its policy and goals or brings discredit upon the Department,

in that the Superintendent proved by a preponderance of the evidence the following charge:

Count I: On or about November 5, 2011, in the vicinity of 1132 North Ashland Avenue, Chicago, Officer Francisco Perez discharged his firearm repeatedly into a blue Chrysler automobile, striking the driver of that vehicle in the back. Officer Perez discharged his firearm repeatedly into the blue Chrysler automobile after shots were fired from a red/burgundy Mitsubishi automobile toward victims on or near the street. In doing so, Officer Perez (a) failed to identify the appropriate target prior to discharging his firearm into the blue Chrysler automobile, and/or (b) failed to take reasonable precautions to ensure that the blue Chrysler automobile and/or its driver would not be struck when he attempted to discharge his firearm toward an appropriate target.

Testimony and evidence, including a video which contemporaneously captured the events immediately before, during, and after the shootings, presented at the hearing on these charges revealed the following.

At or about 3:45 a.m. on November 5, 2011, Officer Perez was off-duty and employed as

security at La Pasadita Restaurant; located at or around 1140 North Ashland Avenue, Chicago.

Officer Perez acknowledged during his testimony that the day before the shooting happened, he worked from 9:00 a.m. to 5:00 p.m. at the Chicago Police Department. Tr. P. 42-43. Perez then reported for work at La Pasadita restaurant at 9:00 p.m. that same day, some four hours after his CPD shift. *Id.* at p.42. Perez could not recall whether he slept during that four hours or otherwise got any rest. *Id.* at 43.

Immediately before 3:45 a.m., Officer Perez was at his personal vehicle parked at or about 1142 North Ashland, just outside and to the north of the entrance of La Pasadita restaurant. The video and witness testimony further establish that several pedestrians were on the sidewalk outside the restaurant at the relevant time. Carlos Rodriguez, a cook at the restaurant, having just finished his shift, got in his blue Chrysler and drove to the front of the restaurant. Rodriguez saw someone he knew in the front of the restaurant, doubled parked and started talking to the individual. A few seconds later, a red Mitsubishi pulled alongside Rodriguez's blue Chrysler, then in front. At that point, multiple shots were fired from the red Mitsubishi striking the pedestrians still gathered on the sidewalk. One individual was killed. The evidence establishes that no one from Mr. Rodriguez's blue Chrysler fired any shots. The red Mitsubishi then sped on, out of sight, southbound on Ashland.

Officer Perez, who was at his personal car, admitted during his testimony that he was not looking in the direction of either the pedestrians or either the red or blue cars "until I started hearing gunshots did I turn around and witness what was going on." *Id.* at p.61. When he turned in the direction of the shooting, Officer Perez immediately started shooting and walked toward the blue Chrysler as he did so. The video shows that at the time Officer Perez started shooting, the red Mitsubishi was almost out of sight, the blue Chrysler was between Perez and the red Mitsubishi,

and pedestrians remained on the sidewalk, albeit in crouched positions. It is undisputed that four of the 16 shots Officer Perez fired struck Mr. Rodriguez's blue Chrysler in the rear area, and at least one bullet struck Rodriguez in the back, causing him serious injury.

After discharging his weapon, Officer Perez called 911 to report the shooting. In that 911 call, Officer Perez described the suspect vehicle as a blue Chrysler. Perez never made any mention of a red Mitsubishi in that 911 call.

Officer Perez further acknowledged that while still on the scene in the early morning hours of November 5, 2011, he viewed the surveillance video that was subsequently admitted into evidence before this Board.

The Respondent's witness, John Farrell ("Farrell") was called in mitigation of the charges. He testified that he visited the scene at about the same time in the early morning, but on a different day. From his observations, he noted that it would have been difficult for Officer Perez to see clearly while the incident was occurring, because of darkness. He also concluded that the positioning of the video camera resulted in a view of the vicinity different from what one would observe on the ground.

Notwithstanding Farrell's testimony, it was concluded that with the viewing of the video, coupled with live testimony of the witnesses, the depiction of the video was accurate.

Unrebutted testimony from Emmanuel Ramos ("Ramos"), one of the persons in the group of individuals standing on the sidewalk adjacent to the first double-parked vehicle, and an occurrence witness, revealed that the first double-parked car was a blue Chrysler.

Ramos's testimony further corroborated the scenes on the video when he stated that a burgundy Mitsubishi Gallant traveling south on Ashland Avenue stopped when it got close to where they were standing, adjacent to the blue Chrysler, the car window was rolled down and

about 5-6 shots were fired from the vehicle into the group of persons where he was standing. He testified that when the shots were fired, he threw himself into the open door of the blue Chrysler, and then about 10 seconds later he heard another set of shots, and heard the statement “Stop, Chicago Police.”

There was also credible testimony from Mr. Rodriguez, the driver of the blue Chrysler automobile, who stated that on the evening of the incident, he was seated in the driver’s seat of the vehicle when a red Mitsubishi, which drove up and stopped adjacent to his vehicle, fired several shots at a group of pedestrians who were standing on the sidewalk. Mr. Rodriguez testified that he was not injured as a result of the shots fired from the red Mitsubishi. He testified further that following the shots fired from the red Mitsubishi, additional shots were fired into his blue vehicle, hitting him in his right back and resulting in his being hospitalized for his injuries.

Based on the overwhelming evidence of the video-recording coupled with the testimony of Carlos Rodriguez and Emmanuel Ramos, the Superintendent has proven Officer Perez guilty of this charge.

6. The Respondent, Police Officer Francisco Perez, Star No. 7209, charged herein, is **guilty** of violating, to wit:

Rule 10: Inattention to duty,

in that the Superintendent proved by a preponderance of the evidence the following charge:

Count I: On or about November 5, 2011, in the vicinity of 1132 North Ashland Avenue, Chicago, Officer Francisco Perez discharged his firearm repeatedly into a blue Chrysler automobile, striking the driver of that vehicle in the back. Officer Perez discharged his firearm repeatedly into the blue Chrysler automobile after shots were fired from a red/burgundy Mitsubishi automobile toward victims on or near the street. In doing so, Officer Perez exhibited inattention to duty by (a) failing to identify the appropriate target prior to discharging his firearm into the blue Chrysler automobile, and/or (b) failing to take reasonable precautions to ensure that the blue Chrysler automobile and/or its driver would not be struck when he

attempted to discharge his firearm toward an appropriate target.

See the findings set forth in paragraph no. 5 above, which are incorporated here by reference.

7. In addition to the above charges, the Superintendent brought the following charges against the Respondent (“False-Statement Charges”):

Rule 2 charge (Count II): On or about November 7, 2013, at the offices of the Independent Police Review Authority, Officer Francisco Perez made a false statement regarding the police-involved shooting that took place on or about November 5, 2011, in the vicinity of 1132 North Ashland Avenue, Chicago. Officer Perez falsely stated that after witnessing shots fired from a medium-sized, dark-colored vehicle initially located in the eastern southbound lane of Ashland Avenue, he proceeded to discharge his weapon exclusively at that vehicle.

Rule 2 charge (Count III): On or about January 20, 2015, at the offices of the Independent Police Review Authority, Officer Francisco Perez made a false statement regarding the police-involved shooting that took place on or about November 5, 2011, in the vicinity of 1132 North Ashland Avenue, Chicago. Officer Perez falsely stated that after witnessing shots fired from a medium-sized, dark-colored vehicle initially located in the eastern southbound lane of Ashland Avenue, he proceeded to discharge his weapon exclusively at that vehicle.

Rule 2 charge (Count IV): On or about March 19, 2015, at the offices of the Independent Police Review Authority, Officer Francisco Perez made a false statement regarding the police-involved shooting that took place on or about November 5, 2011, in the vicinity of 1132 North Ashland Avenue, Chicago. Officer Perez falsely stated that after witnessing shots fired from a medium-sized, dark-colored vehicle initially located in the eastern southbound lane of Ashland Avenue, he proceeded to discharge his weapon exclusively at that vehicle.

Rule 14 charge (Count I): On or about November 7, 2013, at the offices of the Independent Police Review Authority, Officer Francisco Perez made a false statement regarding the police-involved shooting that took place on or about November 5, 2011, in the vicinity of 1132 North Ashland Avenue, Chicago. Officer Perez falsely stated that after witnessing shots fired from a medium-sized, dark-colored vehicle initially located in the eastern southbound lane of Ashland Avenue, he proceeded to discharge his weapon exclusively at that vehicle.

Rule 14 charge (Count II): On or about January 20, 2015, at the offices of the Independent Police Review Authority, Officer Francisco Perez made a false statement regarding the police-involved shooting that took place on or about November 5, 2011, in the vicinity of 1132 North Ashland Avenue, Chicago. Officer Perez falsely stated that after witnessing shots fired from a medium-sized, dark-colored vehicle initially located in the eastern southbound lane of Ashland Avenue, he proceeded to discharge his weapon exclusively at that vehicle.

Rule 14 charge (Count III): On or about March 19, 2015, at the offices of the Independent Police Review Authority, Officer Francisco Perez made a false statement regarding the police-involved shooting that took place on or about November 5, 2011, in the vicinity of 1132 North Ashland Avenue, Chicago. Officer Perez falsely stated that after witnessing shots fired from a medium-sized, dark-colored vehicle initially located in the eastern southbound lane of Ashland Avenue, he proceeded to discharge his weapon exclusively at that vehicle.

The votes of the Board on the False-Statement Charges are four Board members (Foreman, Flores, Fry, and Sweeney) voting to find the Respondent guilty of these charges, and four Board members (Lightfoot, Delgado, Eaddy, and Simpson) voting to find the Respondent not guilty of these charges. A majority of the members of the Police Board did not concur as to whether the Superintendent proved by a preponderance of the evidence that the Respondent willfully made the above false statements. The Board is unanimous in finding that there is no doubt, based on the evidence in the record of this case, that the Respondent made the above statements, that they are material to the incident under investigation, and that they are false. However, a majority of the Board does not concur as to whether the Respondent's false statements were made willfully.

The Municipal Code of Chicago states: "A majority of the members of the police board must concur in the entry of any disciplinary recommendation or action." §2-84-030. Because a majority of the members of the Police Board did not concur in a disciplinary recommendation or action on the False-Statement Charges—the vote is four to four, as noted above—the Respondent is not guilty of those Charges.

8. The Police Board has considered the facts and circumstances of the Respondent's conduct, and the evidence presented in defense and mitigation.

The Respondent offered the following evidence in mitigation, which the Board has considered thoroughly. Several witnesses testified credibly regarding the Respondent's positive job performance, character, and reputation. The former director of the Police Department's

Human Resources Division supervised the Respondent and found him to be honest and stated that he had a good reputation for honesty and integrity. A lieutenant who supervised the Respondent in Human Resources and in the Department's Violence Reduction Initiative testified that he was honest and dependable. A sergeant who supervised the Respondent on movie details testified that he was a dedicated and hard worker with a reputation for honesty, and a lieutenant who worked with the Respondent in the Tenth District testified that he was a good worker and trustworthy. Several of these witnesses also testified that they had no reservations about working with the Respondent as a police officer in the future. The Respondent joined the Police Department in 1999 and has a complimentary history of 48 total awards, including one Department commendation, 33 honorable mentions, and 9 emblems of recognition for physical fitness. He has no sustained complaints on his disciplinary history.

However, the Respondent's accomplishments as a police officer, his reputation and character, his complimentary history, and the lack of prior disciplinary history do not mitigate the seriousness of his misconduct. The Board determines that the Respondent must be discharged from his position due to the serious nature of the conduct of which it has found him guilty.

A police officer's single violation of a rule of conduct has long been held to be a sufficient basis for termination. *Siwek v. Police Board of the City of Chicago*, 872 N.E.2d 87 (2007), citing *Kinter v. Board of Police and Fire Commissioners*, 194 Ill. App. 3d 126 (1990), *King v. City of Chicago*, 60 Ill. App. 3d 504 (1978), and *Moriarty v. Police Board of the City of Chicago*, 7 Ill. App. 3d 978 (1972).

Officer Perez made a grievous mistake which could have easily resulted in the loss of life. Perez opened fire in response to shots fired, but failed to ascertain the actual identity of the assailant before he started shooting. By his own admission, at the time that shots were fired from

the red Mitsubishi, Officer Perez was not looking in the direction of the two cars. He had to turn around, and when he did, rather than pause to determine what was actually happening, he just started shooting at the blue Chrysler who he reported to 911 was the offending car. He was gravely wrong.

Officer Perez admitted that his use of force training as a CPD officer required him to:

- be sure of the target before he fired;
- be aware of the target;
- take care to minimize the risk to bystanders; and
- be aware if there is someone standing between him and the intended target.

Id. at 521. Because as a threshold matter Officer Perez failed to take reasonable steps to understand who was the actual shooter, he then fired at the wrong car and in so doing, violated his use of force training.

Based on the evidence in the record, the Board finds that the Respondent's conduct is sufficiently serious to constitute a substantial shortcoming that renders his continuance in his office detrimental to the discipline and efficiency of the service of the Chicago Police Department, and is something that the law recognizes as good cause for him to no longer occupy his office.

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POLICE BOARD DECISION

The Police Board of the City of Chicago, having read and reviewed the record of proceedings in this case, having viewed the video-recording of the testimony of the witnesses, having received the oral report of the Hearing Officer, and having conferred with the Hearing Officer on the credibility of the witnesses and the evidence, hereby adopts the findings set forth herein by the following votes:

By a vote of 8 in favor (Lori E. Lightfoot, Ghian Foreman, Eva-Dina Delgado, Michael Eaddy, Steve Flores, Rita A. Fry, John H. Simpson, and Rhoda D. Sweeney) to 0 opposed, the Board **denies** the Respondent's Motion to Strike and Dismiss; and

By votes of 8 in favor (Lightfoot, Foreman, Delgado, Eaddy, Flores Fry, Simpson, and Sweeney) to 0 opposed, the Board finds the Respondent **guilty** of violating Rule 2 (Count I) and Rule 10.

As a result of the foregoing, the Board, by a vote of 8 in favor (Lightfoot, Foreman, Delgado, Eaddy, Flores, Fry, Simpson, and Sweeney) to 0 opposed, hereby determines that cause exists for discharging the Respondent from his position as a police officer with the Department of Police, and from the services of the City of Chicago.

NOW THEREFORE, IT IS HEREBY ORDERED that the Respondent, Police Officer Francisco Perez, Star No. 7209, as a result of having been found **guilty** of charges in Police Board Case No. 15 PB 2896, be and hereby is **discharged** from his position as a police officer with the Department of Police, and from the services of the City of Chicago.

This disciplinary action is adopted and entered by a majority of the members of the Police Board: Lori E. Lightfoot, Ghian Foreman, Eva-Dina Delgado, Michael Eaddy, Steve Flores, Rita A. Fry, John H. Simpson, and Rhoda D. Sweeney.

DATED AT CHICAGO, COUNTY OF COOK, STATE OF ILLINOIS, THIS 16th DAY OF FEBRUARY, 2017.

Police Board Case No. 15 PB 2896
Police Officer Francisco Perez

Attested by:

/s/ LORI E. LIGHTFOOT
President

/s/ MAX A. CAPRONI
Executive Director

DISSENT

The following members of the Police Board hereby dissent from the Findings and Decision of the majority of the Board.

[none]

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THESE FINDINGS AND DECISION

THIS ____ DAY OF _____, 2017.

EDDIE T. JOHNSON
Superintendent of Police