



ATTORNEY-CLIENT PRIVILEGE

TO: Stephen Postema
FROM: Megan P. Norris
RE: Police Department Investigation
DATE: February 20, 2020

Assignment:

On February 10, 2020, Stephen Postema, the Ann Arbor City Attorney, asked Miller Canfield to undertake an investigation into complaints made against Michael Cox, the City's Chief of Police. Specifically, Miller Canfield was asked to review the Chief's behavior related to two internal investigations and whether the Chief had created an abusive or hostile work environment (including potential retaliation).¹

On February 12, 2020, after all conflicts were cleared, the parties entered into a retention agreement regarding the investigation. Beginning on February 12, and continuing throughout the investigation, the City Attorney provided Miller Canfield with requested documents, including Police Department policies, internal notes and memoranda from potential witnesses, and information regarding the particular investigations at issue. Miller Canfield also reviewed public statutes and ordinances.

In the course of the investigation, an additional issue regarding potential insubordination by the Chief arose, and Miller Canfield was provided with the documents it requested on that issue.

Witnesses were interviewed on February 13, 14, 15 and 18, and all witnesses, including the Chief, cooperated fully in the investigation. For the most part, there is no dispute regarding the material facts. Therefore, this report generally does not identify the specific individual(s) or document(s) from which each item of information was obtained. On a few matters, there is a dispute between the Chief and other witnesses, and such incidents are identified. Where credibility was assessed, the basis for the conclusion reached is explained.

¹ The phrase "hostile environment" is used generally, and not specifically as a legal charge, which is limited to a hostile environment based on a protected classification, such as race, sex, age, religion, etc. No witness specifically alleged, and the investigation did not reveal, any action by the Chief based on a protected classification, and the potential retaliation was similarly not based on a complaint regarding discrimination based on a protected classification.

Summary of Findings:

There is no support for the allegation that the Chief has no right to play any role in an internal investigation. By policy, the Chief has the right to do so, and many of the actions to which employees took offense were understandable and legitimate. However, there is ample evidence that the Chief's comments appeared to attempt to convince people not to conduct an investigation into a supervisor, to excuse conduct in clear violation of policies, and to convince an investigator not to conclude that a supervisor was lying.

There is no evidence that the Chief was behaving in such a way (yelling, etc.) as to create a hostile work environment. However, there is evidence that people feared retaliation by the Chief, and they had a legitimate basis for that fear, whether or not that was the Chief's intent.

There is evidence that the Chief was insubordinate both in not following an order to stay out of a particular investigation until it was concluded and in not following an order to stay away from employees after he was placed on administrative leave.

Background:

On October 29, 2019, the Chief Financial Officer for the City of Ann Arbor informed a member of the City Attorney's office that there were reports that an individual was repeatedly parking in front of the Ann Arbor City Hall, and that there were a number of voided tickets for one car. The matter was turned over to the Police Department for investigation. Although the matter appeared to involve both a parking officer (who reports through the Police Department) and his girlfriend (a City employee outside the Police Department), it was agreed that the Police Department would investigate the matter, and it was assigned to the appropriate Lieutenant ("Investigation #1).

The Lieutenant found that the parking officer had taken a number of actions to help his girlfriend not have to pay for parking, including:

- Allowing her to use the placard given to parking officers so that they can park in front of City Hall for a short period of time at the beginning and end of their shifts, before they go to the parking garage to begin their rounds;
- Calling other parking officers to direct them away from the meters where the girlfriend was parking; and
- Getting officers to void any tickets they issued.

During the investigation, the Lieutenant was told that parking officers had complained to their supervisor about the parking officer's actions, and that on one occasion, when an officer refused to void a ticket he had properly issued, the supervisor then ordered him to void the ticket.

In the course of Investigation #1, the Lieutenant had a number of conversations with the Chief of Police, as did other Department and City personnel, as discussed more fully below. The Lieutenant ultimately issued a complete factual report, a separate document summarizing the report and providing a recommendation that the parking officer be terminated, and a disposition sheet noting that the allegations were "Sustained."

As is the practice, the Lieutenant turned her report over to the Deputy Chief for Support Services, who then issued her own recommendation, which was consistent with the Lieutenant's, and specifically noted that this matter involved allegations of untruthfulness by the parking officer. Because the proposed discipline was a termination, the Deputy Chief turned the report, recommendation, and proposed disposition over to the Chief, who also affirmed the findings.² The parking officer was terminated on November 25, 2019.³

On December 2, 2019, after discussions with the City Administrator and Assistant City Administrator, the Chief directed the Lieutenant to conduct an investigation into the parking supervisor (Investigation #2). Again, the Chief had numerous discussions with the Lieutenant and other Department and other City personnel regarding this issue.

The Lieutenant again conducted a thorough investigation. However, because of the signals she had been getting from the Chief since the first time the supervisor's involvement had been identified in the course of Investigation #1, the Lieutenant was afraid to conclude that the parking supervisor, whom the Lieutenant found to have lied, should be terminated.⁴ The Lieutenant talked to the City Attorney's office as the investigation was unfolding, and the attorney to whom she spoke advised [REDACTED]. The Deputy Chief would then make a recommendation for the Chief to review.

The Lieutenant then issued her report in which she concluded that the supervisor lied when she denied instructing a parking officer to void a ticket he had written for the accused's personal vehicle and that she lied when she denied knowledge of the misconduct of the parking officer at issue in Investigation #1. However, the Lieutenant issued a disposition form that concluded "NOT SUSTAINED" and noted that there should be a policy review. When she gave the report to the Deputy Chief, the Lieutenant said that the proposed disposition did not match what she thought should occur. The Deputy Chief was concerned that the Lieutenant seemed to feel pressured to reach a result other than where the investigation led her.

On February 6, 2020, the Assistant City Administrator spoke with the Lieutenant directly and asked what conclusion she would have reached if she had not felt pressured by the Chief. The Lieutenant was then asked to review her report and issue whatever report she thought was appropriate.

Because of concerns that the Chief had inappropriately interfered with the investigation such that it appeared that the Lieutenant had initially issued a disposition that she did not believe in, on February 7, 2020, the City Administrator placed the Chief on paid administrative leave to

² The Chief always receives the final report, but where the proposed discipline is less than suspension or termination, the Deputy Chief is usually the final decision-maker so that the Chief can be the decision-maker at Stage 1 of a union grievance.

³ His girlfriend had resigned from her position with the City on November 7, 2019, the day after the parking officer was suspended.

⁴ The basis for this fear is discussed more fully below. Regardless of whether one finds that the fear was well-founded or not, there is no question that the Lieutenant was afraid. She made statements to a number of people in real time, and the Chief himself noted that she was very uncomfortable.

allow the investigation to be completed unimpeded. The Chief was specifically directed, “you are not to ... have any contact with City employees, including any employees of the Police Department.”

The Lieutenant subsequently re-issued her report with a conclusion of “SUSTAINED” and a recommendation of separation.⁵ The Deputy Chief reviewed the report, concluded that there was evidence that the parking supervisor had a clear intent to deceive, and recommended termination. On February 19, 2020, the Acting Chief agreed with the Lieutenant’s conclusions.

Allegations of Misconduct by the Chief:

As indicated above, the allegations of misconduct by the Chief fall into three categories: (1) inappropriate interference with an investigation, (2) creation of an abusive or hostile work environment/retaliation, and (3) insubordination. The following actions gave rise to these allegations:

A. Inappropriate Interference With An Investigation

1. Investigation #1

In evaluating the claim of interference, it is important to understand the context in which the alleged actions occurred from the viewpoints of both the Chief and the Department.

Historically, the practice in the Department has been to allow the investigating Lieutenant, whomever that might be, to conduct his or her investigation unimpeded. There have been several reasons for this practice. The Department has wanted investigations to be conducted without pressure to reach a particular result. But in addition, the City of Ann Arbor has an Independent Community Police Oversight Commission, which by Ordinance has the authority to review actions taken by the Police Department (including internal investigations) and, in most circumstances, to hold public sessions regarding the Oversight Commission’s findings. As a result, the Department has set up a process under which a Lieutenant can say that there has been no interference whatsoever in the investigating officer’s ability to conduct a full and impartial investigation. The Chief was, at minimum, insensitive to these concerns. He initially denied knowing about any oversight, then acknowledged that there was a Commission but thought that it was brand new and hadn’t really done anything. Upon further questioning, the Chief acknowledged awareness of the Independent Community Policy Oversight Commission, but thought that the only way anything would become public was through a FOIA request. Ultimately, the Chief acknowledged that the Department’s actions may be subject to public review, and that having an independent investigation could be important in that regard.

As described below, some of the Chief’s statements could be interpreted as suggesting that no investigation of the parking supervisor take place. Ann Arbor Police Policy and Procedure Oder 052-001(IV)(2)(c) states that “all personnel complaints” will be investigated. In addition, the Chief believes that he effectively has no boss when it comes to policing. While he acknowledges that he reports to the City Administrator for purposes of budgeting and other

⁵ The parking supervisor was eligible for retirement, and the Lieutenant was in contact with the supervisor’s union so that the supervisor could leave voluntarily rather than being terminated.

administrative matters, he believes that nobody can tell him how to run the Police Department. Section 5.1(b) of the City Charter clearly states, “It shall be the duty of the City Administrator to: Direct, supervise, and coordinate the work of the Police Department ...” And Section 5.8(a) states, “The Police Department shall be in the immediate charge of the Chief of Police, who shall be responsible directly to the City Administrator.”

On the other hand, all of the other individuals interviewed, both within the Police Department and in City Administration, perhaps because of the longstanding practice, believe that a Chief is prohibited from having any involvement in an investigation whatsoever. This belief is not supported by the City’s own policies. Ann Arbor Police Policy and Procedure Order 052-001 (IV)(1) states, “The office of the Chief bears the ultimate responsibility for the direction and control of the complaint process and for the professional standards of the department.” The Chief comes from a much larger police department, and he expressed legitimate concerns about having just one person involved in investigations. He also understandably views his role as helping to coach and guide members of the Department. There is nothing inherently wrong with the Chief asking an employee how an investigation is going, asking questions about what the investigator is finding in the course of the investigation, or making suggestions, so long as the Chief is not interfering with the investigator’s ability to accurately and honestly report what he or she is finding. And everybody admits that once the Chief receives a report, he has the absolute right to reject its findings and/or its recommendation. So while it is understandable that everybody wants the report to reflect the Lieutenant’s findings, the Chief is not ultimately required to accept them. As such, the Chief asking legitimate questions about the status of an investigation, where he is the ultimate decision-maker, is not undue interference.

On November 4, 2019, early in the course of Investigation #1, the Chief attended a meeting that included the Lieutenant and representatives from Human Resources, the City Administrator’s office, and the law department. In the course of that meeting, the Chief made comments such as “this is just a parking officer,” “voiding tickets is normal,” “are we sure this warrants discipline,” and “people might be misremembering things.” The Chief does not deny these statements. Rather, he says that he uses the Socratic method, so he asks a lot of questions and challenges people to think about what they are doing and where their actions might lead. That is very possibly true. However, the number of questions asked over the course of two investigations, and the context in which they were raised, challenge this assertion.

When, in the course of the investigation, the Lieutenant realized that a supervisor might be involved in the parking issue, she went to the Deputy Chief’s office. Several other people, including the Chief, were present. When the Lieutenant reported that a parking officer said that the supervisor had ordered him to void a ticket, the Chief said, “What’s wrong with that? Supervisors can’t tell people to void tickets?” When it was pointed out that there is a policy about when tickets can be voided, the Chief responded, “Supervisors can void tickets – that’s part of the job.”⁶ In the same meeting, the Chief made comments such as “we don’t want to be going down rabbit holes, chasing other trails,” “don’t believe everything an employee says about their boss,” and “[REDACTED] – how can we expect her to remember what happened 7 months ago?”

⁶ Policy and Procedural Order 082-011 allows a supervisor within the Police Department to void tickets for three reasons: officer error, emergency situation, and official business. None of these apply to the situation at issue in Investigation #1.

The Chief admits all of these statements except the “going down rabbit holes, chasing other trails” comment, which was reported by the other attendees in the meeting. However, he explained that these are the kinds of questions he typically asks to help an investigator reach well-supported conclusions. That may be true. However, in the context of the information provided by the Lieutenant, it is clear that none of the exceptions applied. The Chief’s statements could reasonably be interpreted as suggesting that the Lieutenant ignore the actions of the supervisor, either because parking tickets are no big deal, supervisors shouldn’t be challenged, or it is too difficult to make a case when the allegation is lying. The Chief again explained that some of this is his use of the Socratic method. He also reiterated in his interview that proving dishonesty is difficult. However, he acknowledged that he had approved the termination of another employee, unrelated to the parking issues, for dishonesty, and that if a supervisor is lying, “that would be really bad.”

Under the circumstances, it is totally understandable that the Lieutenant and others interpreted the Chief’s comments as a suggestion that the Lieutenant drop the investigation or conclude that there was no violation. The Chief may not have meant this. But his explanations – there are circumstances where parking tickets can be voided, people’s memories may not be perfect, and the like – do not make sense where he knew the underlying matter (a parking officer had parking tickets voided and there was a complaint that the supervisor was aiding and abetting this practice), the situations in which voiding a parking ticket would be allowed were wholly inapplicable, and the supervisor had affirmatively denied any involvement.

Another statement which the Chief made repeatedly was “we need to land the plane.” The Chief’s explanation of this is credible: this is a phrase he uses to say that a matter needs to be wrapped up and brought to conclusion. There is nothing wrong with that statement; even if he is wholly supportive of an investigation, he can push his people to get it done in a timely manner. Others interpreted this as a suggestion that the investigation be aborted. Based on the above, it is understandable that they would be sensitive about this issue, but there is nothing inherently wrong with the Chief’s use of the phrase, and nobody asked him what he meant by it.

At the point that the Lieutenant had completed her investigation and was in the process of writing her report, there was another meeting with the Chief, the Deputy Chief, and several administrators. In that meeting, the Chief again made comments about the mention of the supervisor’s actions in the upcoming report of Investigation #1: “When you start doing that, everybody’s going to get questioned.” However, the Chief did not direct anybody to change the report, and when such information was included in the report that was ultimately given to him, he did not change it, although he had that right.

The Lieutenant alleges that after the completion of Investigation #1 (but before the report was finalized), the Chief said to her, “What was that all about? You turned on me like a Doberman.” The Chief admits this comment but has a believable explanation. According to the Chief, he often talked to the Lieutenant late in the day because she was a hard worker and usually the only person left in the office. In the course of one of the conversations, which we now know was one where the Lieutenant felt that she was being pressured, the Lieutenant reacted negatively and the Chief noticed it. He thought the conversation had been friendly, and it suddenly became much colder, so he wondered what had happened. The Lieutenant interpreted the statement as the Chief saying that she had somehow betrayed him by reaching the

conclusions she had in Investigation #1. This is one of a number of situations where both parties are almost certainly telling the truth; in separately relating the interaction and responding to questions, they were highly credible. The Lieutenant was in a high state of discomfort, confirmed by her contemporaneous statements to others, and, for the reasons set forth above, understandably believed that the Chief was trying to pressure her. She therefore reasonably believed that the “Doberman” statement was the Chief expressing unhappiness with her actions with regard to the investigation. But the Chief was unaware of both the fact that he was significantly departing from past practice and that the Lieutenant was as a result very afraid. His questioning of what caused the Lieutenant to suddenly change was legitimate, albeit perhaps not worded in the most sensitive way.

The Chief is adamant that he did not really care what happened in Investigation #1, and that he accepted the Lieutenant’s and Deputy Chief’s findings without hesitation. This may be true. However, all of the witnesses stated that the Chief was more involved in this case than other much more serious investigations, and when it came time to terminate the parking officer, the Chief attended the meeting but did not actually conduct the termination, which was done by the Assistant City Administrator. This is one instance where there are no other witnesses and there is a factual disagreement. The Chief said he expected the Assistant City Administrator to communicate the termination. The Assistant City Administrator said that in his Human Resources role he always attends termination meetings, but he has never before terminated someone from the police department, and the Chief told him, “this was YOUR approach, so you get to do it.”

2. Investigation #2

On December 2, 2019, the Chief met with the several administrators, including the City Administrator. Although the Chief denies it, all others present confirm that the Chief was resistant to beginning a second investigation to follow up on the allegation that the parking supervisor ordered a parking officer to void a ticket that had been issued to the girlfriend of the subject of Investigation #1. According to others present, the Chief was told that if he did not want the Police Department to conduct the investigation, Human Resources could do it because the supervisor was not a sworn officer. The Chief ultimately agreed that the Police Department would conduct the investigation (Investigation #2).

The Chief then had a 15-20 minute conversation with the Lieutenant in which she alleges he said a number of things that she interpreted as discouraging her from doing an investigation, such as “apparently my investigator decided to put all kinds of details in the report that they had a lot of questions about next door,” “there were lots of little red flags that were picked up on,” and “I guess you can go ahead and fuel the plane back up.” The Chief admits having a conversation with the Lieutenant in which he directed her to start Investigation #2 and using the “plane” analogy, with the same meaning described above. He denies that he discouraged the Lieutenant in any way. It is undisputed that the Lieutenant felt pressure to either not pursue the investigation or to sweep the allegations under the rug, but it is important to note that the Chief formally directed that the investigation go forward.

During Investigation #2, the Lieutenant had a number of conversations with the Deputy Chief regarding the investigation, including updates on what the witnesses were saying and seeking permission to interview the parking supervisor a second time. There is no evidence that

the Deputy Chief was in any way trying to interfere with the results of the investigation, but these communications undermine any argument by many witnesses that the Chief was inappropriate simply because he also asked questions.

During the second investigation, the Chief made a number of comments to the Lieutenant that were understandably difficult for her to interpret. For example, he told her the story of an officer who worked for him in Boston who accused the Chief of corruption, and another story about a kid playing with matches. The Lieutenant had no idea what the Chief was driving at and wondered if he was saying that she was accusing him of something or that she was playing with fire by continuing the investigation. A number of witnesses reported that the Chief sometimes speaks obliquely and has said that he does so, dropping hints or joking, so that he can avoid saying anything directly, but that he expects people to pick up on his hints and that his jokes are not always really jokes. Whether the Chief has made such a comment regarding the intent of his statements is in dispute. But it is not in dispute that he told the Lieutenant these stories with no context, at a time when she was already very sensitive to him being displeased with her, and the stories make no sense except in a negative way.

The Chief also continued to make comments to suggest that he did not think having a parking supervisor lie about voiding parking tickets was a big deal, continued to make comments about how it is reasonable that she might not remember things (“You know [REDACTED], and you expect her to remember things back in April”), that lying is difficult to prove, and “this whole parking thing is more City Hall’s issue.” The Chief does not deny these comments but again explains that he does legitimately believe that “lying” cases are difficult to prove, although he also recognizes that they can be the most important cases when they involve the police department. The Lieutenant reports that the Chief said he thought the whole thing ought to be handled as a policy issue (which is one of the choices for a disposition). The Chief denies this, but in fact the Lieutenant originally wrote her report as a recommendation that policies be reviewed because that is what she thought the Chief wanted, so her allegation on this issue is credible.

However, the Chief also made comments to try to make the Lieutenant more comfortable, asking if she was okay, whether she was upset with him, and the like. He was aware that she seemed unsettled, and it is clear that he did not at any time mean to upset her in any way. And during this time, the Chief gave the Lieutenant a very favorable evaluation. Both in the fact that he was asking the questions of her and in his demeanor during the interview, the Chief seemed genuinely surprised at how his comments had been taken and the effect they had on the Lieutenant. There is no evidence that he was intentionally trying to make her feel threatened or was unreasonably critical of her work.

3. Conclusion

Ultimately, the Chief allowed both investigations to go forward, and he approved the termination of the parking officer implicated in Investigation #1.⁷ And, as discussed above, there was nothing inherently wrong with the Chief asking for progress reports regarding the investigations, asking questions regarding the Lieutenant’s approach, or making suggestions.

⁷ The Chief was on leave at the conclusion of Investigation #2.

However, there is strong evidence that the Chief made a number of comments which could reasonably be construed as saying that he did not think matters involving parking tickets warranted discipline, that he was unhappy that the matter did not end with Investigation #1, that he was not happy that the Lieutenant mentioned the supervisor in Investigation #2 such that it was required that Investigation #2 go forward, and that he was discouraging of a finding against the supervisor based on the fact that she lied. Given the policy that all complaints are investigated and the seriousness of having a supervisor in the Police Department both knowingly violate the parking ticket policy and lie about it, this was understandably alarming.

B. Abusive/Hostile Environment Work Environment/Retaliation

There is no question that many employees within the Police Department, as well as administrative employees who work with the Police Department, were made very uncomfortable by the Chief's actions and that they fear retaliation.

As discussed above, some of this comes from a misunderstanding or overreaction to the Chief's involvement in the investigation process – something that was not historically done but is well within the Chief's purview. However, some of this also comes from statements the Chief made that don't make sense except in a threatening way. For example, telling a noticeably nervous subordinate about playing with matches or comparing her to someone who accused the Chief of corruption would understandably make the employee fearful.

In addition, the Chief "joked" a lot, and it was often interpreted as belittling. In his interview during the investigation, the Chief was absolutely professional. But during the interview he did make statements regarding individuals he thought might be participating in the investigation in an attempt to undermine what they might have said, whether questioning [REDACTED] or their motives. Because almost everything alleged by the witnesses was admitted by the Chief, these allegations by the Chief are unfounded; there is no evidence that anybody was making up anything. The allegation that the Chief might try to use various tactics to pressure people into a certain result is credible under the circumstances.

There is no evidence that the Chief has actively retaliated against any employee in the sense of taking an adverse action against them (such as discipline). However, the Chief was very interested in knowing who made the allegations against him. If the Chief is allowed to return from leave, it will be imperative to understand that this investigation was not instigated by one or two people, but by a number of people, in a number of different positions, who had similar, credible, and often admitted, experiences with the Chief.

C. Insubordination

When he was placed on administrative leave, the Chief was specifically instructed not to have any interaction with City employees, including employees in the Police Department. After being told he was on leave, the Chief went back to his office to get his things. During that time, he called the two Deputy Chiefs into his office and made a number of comments about what was going on. The Chief denies the allegation that he raised his voice and denies that he was there for quite some time, but he admits many of the statements alleged and that he had a substantive conversation with the Deputy Chiefs. Quizzing the Deputy Chiefs regarding the reasons for his

being placed on leave, arguing about the accusations against him, and venting about the situation are in violation of the directive.

In addition, while reasonable minds can differ regarding the role of the Chief in an investigation, as discussed above, once concerns were raised, the Chief was given a specific directive not to interfere. The Chief admits he got that directive but does not believe the City Administrator had the authority to tell him what to do, and in fact ordered that the City Administrator not interfere with him. The City Administrator had the power to issue the directive, and the Chief violated the directive. This is insubordination.

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