

STATE OF NORTH CAROLINA

COUNTY OF BUNCOMBE

IN RE:

LIEUTENANT MARK BYRD

CITY OF ASHEVILLE

CIVIL SERVICE BOARD

DECISION

STATEMENT OF PROCEEDINGS

This matter came on for hearing before the Civil Service Board of the City of Asheville (the "Board") at 8:30 a.m. on Wednesday, November 19, 2014, on the request of Lt. Mark Byrd ("Lt. Byrd") of the Asheville Police Department ("APD") alleging that he was transferred against his will from the Lieutenant in charge of the Special Operations Division to the Lieutenant in charge of Logistics and Support within the Administrative Division of the APD. His request for a hearing with the Board was made pursuant to the Civil Service Law, codified at §§ 37(a) and (b) of the Charter and Related Laws of the City of Asheville. The City of Asheville was represented by Robin Currin and John Maddux of the City Attorney's Office and Lt. Byrd was represented by John Hunter of Adams, Hendon, Carson, Crow and Saenger, P.A. The hearing was held in the sixth floor training room in the City Building of the City of Asheville at 70 Court Plaza, Asheville, N.C. All Board members were present.

At the beginning of the hearing, a preliminary Motion to Disqualify Board Chair Marvin E. Rosen was made by City Attorney Currin. The City Attorney argued that Board Chair Rosen had developed an opinion and ultimately a bias related to this matter, by and through his social media activity on Facebook, including "liking" and commenting on a WLOS article regarding the petition of 44 APD officers expressing their lack of confidence in the APD leadership and appearing to be in support of Lt. Byrd. Mr. Hunter opposed the City's Motion since he believed no bias had been shown. Upon motion duly made, seconded and unanimously adopted, the Board went into closed session pursuant to N. C. Gen. Stat. § 143-318.11(a)(3) to consult with

the Board's attorney in order to preserve the attorney-client privilege.

Upon return to open session, Chairman Rosen stated that he believed he could, in fact, render an unbiased opinion in this matter; however, due to the appearance of bias, he chose to recuse himself in the best interest of the litigants. The Board, upon motion duly made, seconded and unanimously adopted, issued the following statement on the record:

We do not believe that the evidence presented by the City has risen to the level of showing that Board Chair Rosen is biased or unable to render a fair and impartial decision in this matter. However, we believe that the appearance of impartiality in this quasi-judicial proceeding is as important a consideration as actual bias and we support Board Chair Rosen's decision to recuse himself.

Thereafter, Vice Chair Alan Coxie assumed the position of acting Board Chair and a quorum of the Board was present at all times, including Vice Chair Coxie and Board Members Virginia Robinson, Lynn Moffa, and Carolyn Worthington.

As an additional preliminary matter, Mr. Hunter brought to the Board's attention his public records request to the City in a letter dated October 24, 2014, made pursuant to N. C. Gen. Stat. § 132-6. He requested that the City furnish the public records to him no later than November 7, 2014, which was ten (10) full business days from the hand delivery of the letter, in order for him to comply with the deadline of ten (10) days before the hearing to submit documents the parties would like for the Board to review at hearing. The City did not produce the public records requested until November 18, 2014, being one day before the hearing. The City stated that it did not object to those documents being offered into evidence, even though the submission did not meet the ten (10) day deadline, subject to the City's right to object to their admissibility, if and when they were offered.

Before the hearing, the City had raised objections to the issuance of subpoenas of witnesses by the Board Chair and not by the full Board and to the method of service used by Mr. Hunter and mentioned the objections to the Board, but did not request that the Board act on the

objections. Mr. Hunter responded to the objections, but did not request that the Board act on the objections. The City, therefore, waived its objections to the issuance and service of the subpoenas. The Board, thereafter, upon motion duly made, seconded and adopted unanimously, and according to its approved procedure, ratified the issuance of subpoenas by the Board Chair prior to the hearing.

Upon inquiry from the acting Board Chair, Lt. Byrd indicated that he did not request a closed hearing, but consented to an open hearing. The City did not object to an open hearing and the Vice Chair announced that the hearing would be open.

The City next raised the issue of pay to witnesses of Byrd who were employees of the City. Mr. Hunter objected. Board Counsel Patsy Brison read into the record the entire subsection H.8.c. of the Board's Rules of Procedure regarding "Witnesses." No action was requested of or taken by the Board on that matter.

Board Counsel Patsy Brison explained that the City of Asheville had filed three motions to dismiss the grievance of Lt. Byrd for lack of jurisdiction, and that the burden to prove that the Board had jurisdiction would be on Lt. Byrd. If the Board determined that it had jurisdiction, the burden would then shift to the City, pursuant to the Civil Service Law, codified at § 37(e) the Charter and Related Laws of the City of Asheville, to justify the act or omission complained of by Lt. Byrd.

The City, thereafter, requested that two of its written motions to dismiss be presented to the Board. In support of its motions to dismiss, the City of Asheville offered into evidence its Exhibits "A" through "I," including pages 6-112 of the Byrd Exhibits, which both parties stipulated to be City's Exhibit "D". The City and Lt. Byrd, thereafter, stipulated the admissibility of City Exhibits "A" through "I," including as City's Exhibit "D" pages 6-112 of the Byrd Exhibits, and all of Byrd's Exhibits in his Opposition to the City's Motions to Dismiss, including Exhibits "A" through "D".

The City's motions to dismiss and their memorandum in support of their motions to

dismiss state, in part, as follows:

1. On July 21, 2014, Lt. Byrd was reassigned from being the Lieutenant in charge of Special Operations Division, to the Lieutenant in charge of Logistics and Support. In his grievance, Lt. Byrd asserts that, *inter alia*, because of this reassignment, he was "transferred against his will," pursuant to "Section 8(a) of Chapter 757 of the 1953 Session Laws of the North Carolina General Assembly (*sic*), as subsequently amended ("the Civil Service Act")," and is therefore, entitled to a hearing before the Board. However, Lt. Byrd was not "transferred" at all, but was instead only reassigned different duties. Lt. Byrd retains the same rank, pay and other benefits associated with and allowed by his position, which is Lieutenant. The Board does not have jurisdiction to hear grievances based on reassignments; therefore, the Board does not have jurisdiction to hear Lt. Byrd's grievance and this Motion to Dismiss must be granted.
2. In the alternative, assuming *arguendo* that Lt. Byrd's grievance is based on an involuntary transfer, rather than a reassignment, which the City disputes, any grievance from such transfer was required to be filed "within fifteen (15) calendar days of the incident or action giving rise to the complaint," pursuant to Asheville City Code §2-229 and §68, Article 7 of the Asheville City Personnel Policy. The alleged incident giving rise to Byrd's grievance occurred on July 21, 2014, when Lt. Byrd was reassigned by the APD to the Lieutenant in charge of Logistics and Support. Lt. Byrd did not, however, file his grievance with the City until August 27, 2014, thirty-seven (37) days after the incident allegedly giving rise to his grievance. Lt. Byrd, therefore, filed his grievance more than fifteen (15) calendar days after the alleged incident giving rise to the complaint, which deprives the Board of subject matter jurisdiction to hear Byrd's grievance, and thus requires dismissal.

3. Lt. Byrd's request for a hearing before the Board alleges an involuntary transfer and also contains allegations of workplace harassment and several allegations that were not part of his grievance filed with the City on August 27, 2014. According to his request for a hearing, Lt. Byrd alleges that his harassment extends his grievance filing, where such allegations of harassment were "on-going conditions." However, the Civil Service Law does not provide the Board with subject matter jurisdiction over harassment claims; thus, Lt. Byrd's grievance should be dismissed.
4. In the City's second Motion to Dismiss, the City states that, on Wednesday, November 5, 2014, the City formally offered to reassign Lt. Byrd to his old position and duties if he so desired. On Friday, November 7, 2014, Lt. Byrd, through his attorney, rejected that offer. The Board's jurisdiction, if at all applicable to this matter, is limited to hearing the portion of the grievance relating to Lt. Byrd's reassignment, and because the City has offered to "cure" that portion of the grievance, there is no longer any matter in controversy for the Board's consideration. As such, this grievance is moot and should be dismissed.

On behalf of Lt. Byrd, John Hunter filed a Memorandum in Opposition to the City's Motion to Dismiss stating, in part, that:

1. Lt. Byrd's movement from Lieutenant in charge of the Special Operations Unit, overseeing an excess of 30 sworn law-enforcement officers, to the Lieutenant in charge of Logistics and Support in the Administrative Division of the APD was not merely a "reassignment" of duties, but rather a retaliatory lateral transfer and is subject to the Board's jurisdiction pursuant to "Section 8(a)" (*sic*).
2. Lt. Byrd's grievance was also timely filed because his transfer was part of an on-going set of conditions imposed on Lt. Byrd by Chief Anderson in retaliation for his memorandum addressing the staffing shortages and increased crime risk in the

City of Asheville. Pursuant to § 2-229 of the City of Asheville Code of Ordinances and § 68 of the Asheville City Personnel Policy, "on-going conditions are not subject to [the 15-day] deadline."

3. Further, Lt. Byrd's grievance is not moot where the City's offer to reinstate Lt. Byrd to his former position is insufficient to address the retaliatory actions of Chief Anderson and creates a potential for further harassment and retaliation.

John Maddux of the City Attorney's Office and Mr. Hunter, on behalf of Lt. Byrd, both made opening statements on the City's motions to dismiss. The City, thereafter, called the City's Human Resources Director, Kelly Dickens and Lt. Mark Byrd as witnesses. During witness testimony, the City offered into evidence its Exhibit "J", which was admitted without objection. Mr. Hunter did not call any additional witnesses on behalf of Lt. Byrd in opposition to the City's motions to dismiss. Closing arguments on the City's motions to dismiss were made by Mr. Hunter and Ms. Currin.

The Board, thereafter, went into closed session, pursuant to N.C. Gen. Stat. §§ 143-318.11(a) (3) and (6), to consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body and to consider the qualifications, competence, performance, character, fitness, conditions of appointment, or conditions of initial employment, of an individual public officer or employee or prospective public officer or employee, or to hear or investigate a complaint, charge or grievance by or against any individual public officer or employee. After deliberation in closed session, the Board, upon motion duly made, seconded, and adopted unanimously, returned to open session.

FINDINGS OF FACT

This matter was decided on a motion to dismiss for lack of jurisdiction and without either party having had a full opportunity to present all the evidence they might have presented on the factual issues raised by Lt. Byrd's complaint and the findings are limited to that determination.

1. The City's exhibits offered in support of their Motions to Dismiss which were admitted into evidence by stipulation of the parties are as follows:

- (a) Exhibit A – July 21, 2014 memorandum from William J. Anderson, Chief of Police to all police personnel entitled "Reassignments," listing all personnel reassignments effective for August 2, 2014, including the reassignment of Lt. Byrd to Support and Logistics in the Administrative Division, and the unsigned July 17, 2014, version of the same memorandum.
- (b) Exhibit B – The Personnel Action Form for Lt. Byrd, prepared by Annette Buckner, signed by Chief Anderson and dated July 22, 2014.
- (c) Exhibit C – Email correspondence on August 27, 2014 between Lt. Byrd and Lt. Wallace Welch, his acting supervisor, City Manager Gary Jackson and City Attorney Robin Currin, attaching Lt. Byrd's Grievance entitled "Work Place Harassment and Involuntary Transfer," with attachments.
- (d) Exhibit D – Correspondence from Lt. Byrd to the Asheville City Clerk dated October 6, 2014, attaching Lt. Byrd's request for hearing before the Civil Service Board, with attachments.
- (e) Exhibit E – Letter from Ms. Currin to Mr. Hunter dated November 5, 2014, regarding the City's offer to restore Lt. Byrd to his prior position in Special Operations.
- (f) Exhibit F – Letter from Mr. Hunter to Ms. Currin, dated November 7, 2014, on behalf of Lt. Byrd, conditionally rejecting the City's offer to restore Lt. Byrd to his prior position in Special Operations.
- (g) Exhibit G – An illustrative chart demonstrating the City's interpretation of a timeline starting with the July 21, 2014, memo from Chief Anderson regarding Lt. Byrd's transfer, the deadline to file the reassignment grievance on August 5, 2014, and the date Lt. Byrd's grievance was actually filed on August 27, 2014.
- (h) Exhibit H – §2-229 of the City of Asheville Code of Ordinances.
- (i) Exhibit I – The Asheville City Personnel Policy Handbook.

2. The City's Exhibit J – The City of Asheville Administrative Policy-Workplace Harassment Policy, was admitted, without objection, during the testimony of the City's HR Director, Kelly Dickens.

3. Lt. Byrd's exhibits in support of his Memo in Opposition to the City's Motion to Dismiss which were admitted by stipulation of the parties are as follows:

- (a) Exhibit A - The City of Asheville Administrative Policy- Compensation Policy.
- (b) Exhibit B - The Personnel Action Form for Lt. Byrd, prepared by Annette Buckner, signed Chief Anderson, and dated July 22, 2014.
- (c) Exhibit C - Letter from Ms. Currin to Mr. Hunter dated November 5, 2014, regarding the City's offer to restore Lt. Byrd to his prior position in Special Operations.
- (d) Exhibit D – Letter from Mr. Hunter to Ms. Currin, dated November 7, 2014, on behalf of Lt. Byrd, conditionally rejecting the City's offer to restore Lt. Byrd to his prior position in Special Operations.

4. On July 14, 2014, Lt. Byrd, as Lieutenant in charge of the Special Operations unit for downtown Asheville, wrote a memorandum entitled "Part 1 Violent Crime Increase" to APD Sergeant Chuck Sams ("Sgt. Sams") with corresponding copy to APD Captain Tim Splain in response to a request in June of 2014 from Sgt. Sams for more information about the increase of violent crimes in the Downtown area. In summary, Lt. Byrd's memorandum indicated that he believed the increase in violent crimes was a direct result of a shortage of sworn officers assigned in the Downtown area.

5. On July 16, 2014, Chief Anderson, in response to Lt. Byrd's memorandum to Sgt. Sams sent an email to "Police Command Staff," with copy to Lt. Byrd, which stated "Placing rookie cops with veteran officers. Wow, what a novel idea" and included a link to a CBS article entitled "NYPD Changes Policy Pairs Rookie Officers with Veterans." Lt. Byrd is not a member of the "Police Command Staff," and testified that he felt the email as written by Chief Anderson was degrading to him.

6. Chief Anderson issued a memorandum to all Police Personnel signed July 21, 2014, entitled "Reassignments." The unsigned version of the same memorandum is dated July 17, 2014, which was three days after Lt. Byrd's memo to Sgt. Sams. The "Reassignment" memo lists a number of personnel reassignments, including Lt. Byrd's reassignment to Lieutenant in charge of Support and Logistics in the Administrative Division. The memorandum indicates that the reassignments would be effective on August 2, 2014.

7. On July 22, 2014, a Personnel Action Form was generated by the APD for Lt. Byrd. The box on the Form next to the pre-printed term "Lateral Transfer" is checked; however, the pre-printed term "Lateral Transfer" is marked through and replaced with the handwritten word "Reassignment.". The Form explanation states: "Employee transferring from Patrol to Administration division, change in MUNIS batch also."

8. Lt. Byrd testified that when he began his new position on August 2, 2014, his responsibilities included the supervision of the APD evidence room ("Evidence Room"). He was not provided with a copy of the 2011 audit of the Evidence Room, but was required to develop a plan to address immediately the findings in the audit. According to Lt. Byrd, his review of the Evidence Room found it to be a "disaster." He testified that he believed he would become a "scapegoat" for what he characterized as the APD's continued violations and inadequate supervision of the Evidence Room. Lt. Byrd also discovered while in his new position that APD radar guns had not been recalibrated and recertified. This discovery, he testified, led to the dismissal of a large number of speeding tickets by the District Attorney.

9. On August 12, 2014, Chief Anderson sent a memorandum to Lt. Byrd, with copies to Deputy Chief Wade Wood, Captain Stony Gonce, and Captain Chris Reece-Young, in response to Lt. Byrd's July 14, 2014 memorandum regarding "Part 1 Violent Crime Increase." Chief Anderson's August 12, 2014 memorandum stated that Lt. Byrd's July 14, 2014 memorandum contained a number of inaccuracies and that it was improper for Lt. Byrd to share "misleading information" with members of the Department below his rank, without first researching the information, communicating his concerns through the proper channels, and doing proper research prior to disseminating the information. This was a disciplinary action since it was a written reprimand.

10. Lt. Byrd filed his grievance on August 27, 2014, by sending correspondence to Lt. Wallace Welch, his acting supervisor, City Manager Gary Jackson and City Attorney Robin Currin, attaching his grievance entitled "Work Place Harassment and Involuntary Transfer," with

attachments.

11. Pursuant to the grievance procedure, as outlined in §2-229 of the Asheville City Ordinances, after the receipt of the written grievance, the Division Head and/or Department Head "shall respond, in writing, within ten calendar days of the receipt of the written grievance." The City failed to comply with its own mandatory requirement. Following an investigation and/or hearing of the grievance, the City Manager is required to reduce his or her decision to writing and transmit "to the aggrieved employee by hand delivery or certified mail, return receipt requested." That has never been done by the City Manager. Kelly Dickens, the City's HR Director, said that the City staff had been busy and that she had forgotten to note the deadline for the response. She added that, as of the hearing on November 19, 2014, she was still investigating the workplace harassment portion of the grievance, filed with the City on August 27, 2014. She stated that there is no deadline for filing a grievance on workplace harassment.

12. Section 37 of the Asheville Civil Service Law states, in pertinent part, that after a grievant has "exhausted his or her remedy provided by the grievance procedures established by ordinance or policy of the city," the "grievance procedure shall be concluded within 30 days," and "[i]f the grievance procedure is not concluded within 30 days, the [grievant] may proceed [to request a hearing before the Civil Service Board] as provided in this section." On October 6, 2014, Lt. Byrd sent correspondence to the Asheville City Clerk requesting a hearing before the Board pursuant to this provision.

13. By consent of the parties, the hearing before the Board was set for November 19, 2014.

14. On November 5, 2014, the City offered to restore Lt. Byrd to his prior position in the Special Operations Unit, under the supervision of Captain Stony Gonce, with a deadline for a response from Lt. Byrd of November 7, 2014. On November 7, 2014 Lt. Byrd, through his attorney, Mr. Hunter, conditionally rejected that offer since Lt. Byrd would be supervised by Capt. Stony Gonce. Lt. Byrd testified that he did not want to return to his prior position because

he did not want to be supervised by Captain Gonce. Captain Gonce had been reassigned to a supervisory position in the Special Operations Unit at the same time as Lt. Byrd had been reassigned out of the Special Operations Unit. Prior to this reassignment, Captain Gonce had been the APD officer in charge of the Evidence Room and radar guns. Lt. Byrd testified that he feared that if he returned to his old position, which was now under Captain Gonce's command, Captain Gonce would retaliate against him for his role exposing the problems with the Evidence Room and radar guns.

15. Pursuant to § 37 of the Civil Service Law, the Board may hear grievances "[w]hensoever any member of the classified service of the city is discharge[d], suspended, reduced in rank, transferred against his or her will, or is denied any promotion or raise in pay which he or she would be entitled to." Workplace harassment is not specifically listed.

16. The Board was unable reach a decision as to whether the City's action of which Lt. Byrd complains was a "transfer" or a "reassignment."

17. The Board also was unable to reach agreement as to whether Lt. Byrd's grievance was mooted by the City's offer to restore him to his previous position in the Special Operations Unit.

18. The Board nevertheless finds that Lt. Byrd's grievance was not timely filed. Lt. Byrd began his new position on August 2, 2014, but he filed his written grievance with the City on August 27, 2014, which was more than fifteen (15) calendar days after August 2, 2014.

CONCLUSIONS OF LAW

WHEREFORE, having made the foregoing Findings of Fact, the Board concludes as follows:

1. The grievance of Lt. Byrd about a transfer against his will should be dismissed because it was not filed within fifteen (15) calendar days of the incident or action giving rise to the complaint, pursuant to §2-229 of the City of Asheville Code of Ordinances.

motion.

This the 30th day of November, 2014.

CIVIL SERVICE BOARD OF THE
CITY OF ASHEVILLE

By: _____

A. Alan Coxie, Vice Chair

Margaret Buller
Secretary to Civil Service Board