

March 11, 2009

VIA EMAIL (w/o Transcript and Exhibits) AND U.S. MAIL

Mr. Jeff Philpot
Acting City Administrator
City of San Luis
1090 E. Union Street
San Luis, AZ 85349

Re: **HEARING OFFICER'S REPORT:** *Ernest Lugo v. City of San Luis*

Dear Mr. Philpot:

This letter constitutes the report and certified findings of the independent hearing officer in the above-referenced personnel matter. A hearing pursuant to HR-6-03(F), City of San Luis Personnel Policies (version effective July 1, 2008), occurred on February 24, 2009, in the City of San Luis. Attached hereto are a copy of the Hearing Transcript ("Hg. Tr.") and all Hearing Exhibits ("Hg. Ex.").

BACKGROUND

This case arose within a relatively short period of time after the termination of former San Luis Chief of Police Bejarano for conduct similar to the allegations against the Appellant, Ernesto Lugo. This Hearing Officer believes the City of San Luis should be commended for its desire to improve the public image of the San Luis Police Department after the Bejarano case and to reaffirm and enforce high standards of conduct for all Police Officers.

The conduct alleged against Appellant must be viewed in light of the evidence directly applicable to this case. Generally, the discipline invoked in this case (termination) was the result of three alleged instances of misconduct:

- (1) Appellant allegedly pressured Officer Yager to dismiss a traffic citation issued against the mother of the Justice of the Peace of Somerton, Arizona (Judge Lozano);
- (2) Several days after Officer Yager did not dismiss the citation, Appellant allegedly dismissed the Lozano citation, as well as several other citations, under the pretext that Officer Yager's radar gun was unreliable because it did not have its own tuning forks; and
- (3) Appellant allegedly lied during the investigation of the matter by stating that he dismissed the citations due to issues with the radar gun, where his true purpose allegedly was to dismiss the citation against Judge Lozano's mother and cover up his actions.

Specifically, the City terminated Appellant's employment for the following reasons:

- "(1) Acting to dismiss seven tickets without permission of the Captain or Lieutenants [in] violation of Police department policy.
- (2) Failing to realize that two of the tickets [Appellant] dismissed were not for speeding.
- (3) Dismissing the tickets because of an incorrect understanding of the requirements to verify the accuracy of the radar guns.
- (4) Dismissing the tickets because of a personal relationship with Judge Lozano.
- (5) Failure to be forthcoming in an internal investigation."

[Hg. Ex. 4 (Letter to Appellant of 12/15/08 by Gabriel Jimenez); Hg. Ex. 5 (Letter to Appellant of 12/23/08 from Gabriel Jimenez).]

The hearing on this matter consisted of approximately 6.5 hours of testimony and argument. The City called five witnesses and introduced eight exhibits into evidence. Appellant called five witnesses (including Appellant) and introduced six exhibits into evidence. Both the City and the Appellant were represented by counsel. Captain Javier Nuno attended the hearing as the City's representative.

DISCUSSION OF THE EVIDENCE AND THE HEARING OFFICER'S CONCLUSIONS

1. Appellant is the elected Constable of Somerton. [Hg. Tr. at 190-191.]
2. As Constable, Appellant does not work for Judge Lozano, nor does he depend on Judge Lozano for his compensation as Constable. Judge Lozano directs Appellant's duties only to the extent that Judge Lozano issues warrants and other instruments that Appellant serves or executes. [See Hg. Tr. at 101-102; 192.]
3. There was no evidence that Appellant has a social or professional relationship with Judge Lozano's mother.
4. The evidence that Appellant has a social relationship with Judge Lozano was both contradictory and contested. [Hg. Tr. at 138-140; 191-193.] The Hearing Officer finds there is not sufficient evidence of such a relationship to establish a motive for arranging to have the traffic citation of Judge Lozano's mother dismissed.
5. The Investigative Report concluded, and the Hearing Officer agrees that: ". . . because [Appellant] is elected to the constable position, and there is no evidence that Judge Lozano asked [Appellant] to dismiss the ticket, it is likely a court would find that [Appellant] did not receive any pecuniary benefit." [Hg. Ex. 2 (Investigative Report), at 7.]
6. The evidence of Appellant's conduct in respect to dismissal of the tickets must be weighed against evidence of the City's policies as they were understood by police officers at the time.
7. The only evidence of actual police policies regarding dismissal of tickets was an email dated January 6, 2004, stating that all dismissals had to be approved by then-Chief of Police Bejarano or Lieutenant Vazquez. [Hg. Ex. 2 (Investigative Report), at Tab 4, SL/LUGO0022.] Chief Bejarano is no longer employed at the City. There was no evidence that the email was later updated, reaffirmed, or converted to an actual, written Police Department policy.
8. A subsequent memorandum from Judge Rosendo Morales, Jr. of the San Luis Municipal Court, dated September 24, 2007, requires any officer who wishes to dismiss "any civil traffic, Criminal traffic, or Misdemeanor citation" to appear in Court and submit a letter explaining to reasons for dismissal. [See Hg. Ex. 6.] Such memorandum is not the equivalent of a Police Department policy.

9. Two police officers testified that they believed they had authority to dismiss traffic citations without approval by their superiors. [Hg. Tr. at 166; 171-172, 174; 181-182.]
10. The City Prosecutor's testimony in this regard was consistent with that of the two police officers. [Hg. Tr. at 58.]
11. Even if the January 6, 2004 email created a policy that was adequately communicated to all police officers, Appellant in fact informed Captain Nuno of his intent to dismiss the tickets. Appellant copied Captain Nuno on two emails that discussed Appellant's intent to dismiss tickets. [Hg. Ex. 2, at Tab 3.]
12. The investigative report stated that "it is well known that [Captain Nuno] regularly misses emails." [Investigative Report, at 3.] However, there was no evidence that Appellant either knew of this fact or purposely sent the emails to Captain Nuno under a belief that Captain Nuno would not read them.
13. Captain Nuno testified that being copied on emails was not a sufficient method of providing him with notice of such an important matter. [Hg. Tr. at 69-70.] The Hearing Officer respects Captain Nuno's concern over Appellant's method of giving notice by email; however, the issue is whether Appellant's notice, by two emails copied to Captain Nuno, was a sufficiently grave breach of policy to justify termination of employment. The Hearing Officer concludes that the lack of clarity in the police policy, and the fact that Captain Nuno received email copies of Appellant's intent to dismiss tickets, together are factors in Appellant's favor.
14. The Investigative Report concluded, and the Hearing Officer agrees: ". . . it is not clear that [Appellant's] actions violate San Luis Police Department policies." [Hg. Ex. 2 (Investigative Report), at 5.]
15. Appellant's conduct in a recorded telephone conversation with Africa Luna and Officer Yager contradicts the allegation that Appellant attempted to persuade Officer Yager to dismiss the Lozano ticket. The only suggestion in that conversation that Officer Yager should consider dismissing the ticket came from Africa Luna, not from Appellant. Appellant argued *against* dismissal, not only by telling Officer Yager to "do the right thing," but also by stating specifically: "... if somebody did something wrong and they deserve a ticket, well they deserve a ticket." [Hg. Ex. 2, Tab 1, at SL/LUGO0011.]
16. Appellant also confirmed in that conversation that doing the "right thing" meant *not* dismissing the ticket:
Yager: OK. Well then we'll just leave it.
Lugo: Well yeah. That's the right thing, right?
- [*Id.*]
17. Appellant further told Officer Yager that Appellant had cited a relative that same morning but had left the relative to dispute the ticket instead of it being dismissed by Appellant: "You know ... I pulled over a relative of mine this morning in a school zone and they're going to fight it." [*Id.*]
18. The Investigative Report further concluded, and the Hearing Officer agrees: ". . . it cannot be definitively proven that [Appellant] lied to a court, nor did he ask Officer Yager to lie to a court." [*Id.*]
19. The City also contends that Appellant's claim that he dismissed several tickets due to improper radar gun calibration is not credible. The evidence was inconclusive whether Appellant was correct in his interpretation of policies related to correlation of specific radar guns with specific tuning forks. Although the Investigative Report found Appellant's reasoning "absurd and completely unfounded" [Hg. Ex. 2 (Investigative Report), at 6], credible evidence at the hearing demonstrated a lack of consistent understanding of radar gun management and control at the San Luis Police Department. Captain Nuno testified that "[w]e don't have a set policy...because we go back to our training." [Hg. Tr. at 73.] Four San Luis police officers testified that, pursuant to *their training*, radar guns must

correspond to specific tuning forks and be re-calibrated at the beginning and end of each shift. [Hg. Tr. at 155; 162; 170-171; 179.] It is not the purpose of this Report to determine which policy is required or preferable. The issue here is whether there was a sufficiently articulated policy to justify termination of Appellant under these facts.

20. The City contends that Appellant's reliance on the tuning fork issue was a ruse to justify his desire to dismiss the Lozano citation. However, in addition to the insufficient evidence of a personal relationship or other motivation to dismiss the traffic ticket, there also was insufficient evidence to demonstrate why Appellant would have developed and executed such an elaborate plan. After having unambiguously counseled Officer Yager not to dismiss the ticket, there was no plausible explanation suggested by the evidence as to why Appellant would then have discussed the matter again with Officer Yager, researched tickets issued in the relevant time period, and then communicated the pertinent information to the Court (with a copy to Captain Nuno), all for the sole purpose of obtaining the dismissal of the Lozano ticket. It is unlikely that Appellant would have gone to such lengths in light of the heightened scrutiny of police officers after the recent Bejarno case. Notwithstanding that Captain Nuno did not read the emails, Appellant's conduct was transparent. An improper purpose seems unlikely under the totality of these facts. Perhaps Appellant was wrong in his interpretation of both the dismissal policy and the radar policy, but the Hearing Officer concludes that the evidence does not support the allegation that he engaged in intentional misconduct for an improper purpose, or that he lied to the City's independent investigators.

21. The City contends that Appellant would have dismissed tickets from as far back as August 5, 2008, if he had been truly concerned about the viability of tickets due to improper calibration of the radar gun. [See Hg. Ex. 2, at 2, fn. 3.] However, Officer Yager did not issue any speeding tickets until August 30. [Hg. Ex. 2, Tab 2, as SL/LUGO0018.] On August 30, Officer Yager issued two speeding tickets. No evidence was presented concerning those tickets, so it cannot be determined whether they were issued as a result of the same radar gun. There was undisputed evidence that Officer Yager told Appellant how many tickets he had issued using that radar gun, and that Appellant relied on Officer Yager's statement. [Hg. Tr. at 146-147.]

22. Whether or not Officer Yager was required to have specific tuning forks that were intended for his radar gun, the evidence was undisputed that his radar gun did not have *any* tuning forks. Judge Morales testified that the lack of any tuning fork would be grounds for dismissing a ticket. [Hg. Tr. at 49.] Thus, the general issue of a lack of tuning forks for Officer Yager's gun was relevant.

23. The City terminated Appellant, in part, because two of the tickets identified for dismissal were not for speeding. [E.g., Hg. Ex. 4, at 1, item (2).] However, those tickets were not dismissed. [Hg. Exs. A and B.]

24. No evidence was introduced related to Appellant's employment record prior to the conduct alleged in this case. However, the testimony at the hearing was uncontested and that Appellant is a "trustworthy and honest officer." [Hg. Tr. at 48; 156-157; 175; 182-183.]

RECOMMENDATION

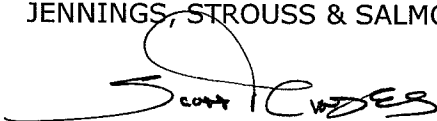
The Hearing Officer reiterates his respect for the efforts of the City of San Luis and the City of San Luis Police Department to set and enforce high standards of conduct in the aftermath of the Bejarno matter. Those efforts should be applauded and continued. However, the evidence presented at the hearing is, in the Hearing Officer's opinion, insufficient to warrant discipline against Appellant. It is extremely important to earn the public's respect for the Police Department through rigorous enforcement of policies and

procedures. It is of equal importance to establish high standards through clearly articulated policies accompanied by adequate training and communication. Here, the evidence did not prove that Appellant had the motive to engage in improper conduct, that he did engage in such conduct, or that he lied in the course of the investigation.

For the reasons stated above, the Hearing Officer respectfully recommends reversal of Appellant's termination.

Very truly yours,

JENNINGS, STROUSS & SALMON, P.L.C.

A handwritten signature in black ink, appearing to read "J. Scott Rhodes". The signature is stylized and includes a large loop at the beginning.

By

J. Scott Rhodes

SR1/sr1
Enclosures

cc: Gabriel Jimenez, Human Resources Director, City of San Luis (w/o encls.)
Justin S. Pierce, Esq., Attorney for City of San Luis (w/o encls.)
Martin A. Bihn, Esq., Attorney for Ernesto S. Lugo (w/o encls.)