STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: April 27, 2012)

TODD PATALANO	:	
	:	
V.	:	**C.A. No. PC 12-1083**
	:	
MARCO PALOMBO, Individually	:	
and in his capacity as Chief of the	:	
Cranston Police Department;	:	
JOHN SCHAFFRAN, Individually	:	
and in his capacity as a member of	:	
the Cranston Police Department; and	:	
THE CITY OF CRANSTON, by and	:	
through its Treasurer, David Capuano	:	

DECISION

GIBNEY, P.J. At issue is an order issued to Plaintiff police Captain Todd Patalano ("Patalano") to turn over evidence regarding an ongoing investigation into potential wrongdoing on the part of Patalano. Plaintiff received a one-day suspension notice on February 24, 2012, for failing to follow the order to produce evidence for the investigation. The suspension order indicated that it was a "standing order" that would remain in effect until Plaintiff complied with the order to turn over evidence. Plaintiff filed a motion for a declaration that the standing order is unlawful and seeking preliminary injunctive relief enjoining Defendants, Marco Palombo, John Schaffran, and the City of Cranston (collectively, the "City") from carrying out its day-to-day suspension. Defendants filed a Motion to Dismiss Plaintiff's suit for failure to state a claim upon which relief can be granted. Jurisdiction is pursuant to R.I.G.L. 1956 § 8-2-13.

I

Facts and Travel

Plaintiff Patalano is a seventeen-year veteran of the police force and a Captain in the Cranston Police Department ("CPD" or "Department"). Defendant Marco Palombo is the chief of the CPD. See Compl. Defendant John Schaffran is a major in the CPD. See id. Patalano has been an investigator with the Department's Office of Professional Standards since 2005, and its commander since October 2006.

On February 11, 2011, the City issued a disciplinary complaint against Captain Patalano containing eleven charges and specifications relating to Patalano's conduct while working in the Office of Professional Standards, specifically his handling of the Department's civilian complaint reports. See Def's Ex. A, Complaint and Notice. Plaintiff invoked his right to a hearing pursuant to the Law Enforcement Officers' Bill of Rights ("LEOBOR"), R.I.G.L. § 42-28.6-1 et seq., and in accordance with LEOBOR's provisions, a Hearing Committee subsequently held thirteen days of evidentiary hearings. This LEOBOR hearing is currently in abeyance and the parties are attempting to have the hearing reconvene. See Compl.

During the course of the hearings, Captain Sean Carmody of the CPD testified about his experiences working with Patalano in the Internal Affairs Division. Carmody testified that, with respect to a civilian complaint made by a Mark Pezzullo, Patalano told him that he "can't keep [the complaint made by Mr. Pezzullo that a police officer had struck his vehicle with a flashlight] inside the file report. If we do, we have to go to a full investigation . . . ." See Def's Ex. E, Hearing Tr., August 11, 2011. Carmody testified

that he followed Patalano's orders and removed the allegation involving the flashlight from the report. See id.

As a result of Carmody's testimony, Major John Schaffran of the CPD initiated a new investigation into the incident Carmody had testified to and whether Plaintiff had violated CPD Rules and Regulations. Plaintiff objected to the new investigation and petitioned this Court to intervene, arguing that interviewing him in the new investigation was inappropriate as it involved testimony from an ongoing LEOBOR hearing. The Court declined to intervene.

Plaintiff was interviewed for the new investigation. Afterwards, on February 9, 2012, Plaintiff told Major Schaffran that he had evidence that would prove him innocent of any wrongdoing in the investigation. Major Schaffran asked to see this evidence. When Plaintiff did not produce the evidence, Major Schaffran ordered him to do so. Plaintiff responded that his counsel had the evidence. In a letter dated February 13, 2012, Counsel confirmed that he had the evidence but that he would not turn it over to the CPD as the evidence would be used in Plaintiff's defense. See Pl's Ex. 1, February 13, 2012 letter to Colonel Palombo.

Subsequently, on February 24, 2012, Plaintiff was served with a one-day suspension without pay for his refusal to obey Major Schaffran's order to turn over evidence in the investigation. See Pl's Ex. 2, February 24, 2012 letter to Captain Patalano. The order further gave notice that the order to turn over evidence was a "standing order" for which Plaintiff would be suspended each day until he complied with the order.

Plaintiff filed a Complaint with this Court seeking a declaration that the standing order is unlawful and preliminary injunctive relief enjoining the City from carrying out its ongoing, day-to-day suspension. See Compl. The Court entered a Temporary Restraining Order on February 29, 2012, restraining the further effect of the discipline until March 27, 2012.

II

Standard of Review

> "There is no power the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, or more dangerous in a doubtful case than the issuing [of] an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, injury impending or threatened, so as to be averted only by the protecting preventive process of injunction; but that will not be awarded in doubtful cases, or new ones, not coming within well established principles; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it. It will be refused till the courts are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act; in such a case the court owes it to its suitors and its own principles, to administer the only remedy which the law allows to prevent the commission of such act." 11 Charles Allen Wright, et al., Federal Practice & Procedure § 2942 (brackets in original) (quoting Bonaparte v. Camden, 3 Fed. Cas. 821, 827 (C.C. D.N.J. 1830)).

The issuance of an injunction is therefore "an extraordinary remedy," Brown v. Amaral, 460 A.2d 7, 10 (R.I. 1983), the purpose of which is not to determine the rights of the parties, but to prevent a threatened wrong and to maintain things in the condition they are presently in until the issues are determined at trial. 11 Charles Allen Wright, et al.,

Federal Practice & Procedure § 2947; see Coolbeth v. Berberian, 112 R.I. 558, 564, 313 A.2d 656, 660 (R.I. 1974); see also In re State Employees' Unions, 587 A.2d 919, 926 (R.I. 1991) (Appendix A) (noting an injunction is warranted when a later judgment on the merits is an "empty victory" for the prevailing party). Whether to issue a preliminary injunction is left to "the sound discretion of the trial justice," City of Woonsocket v. Forte Brothers, Inc., 642 A.2d 1158, 1159 (R.I. 1994), and a justice's decision will not be disturbed unless "it is reasonably clear that the hearing justice illegally exercised or . . . abused his or her discretion." Fund for Community Progress v. United Way of Southeastern New England, 695 A.2d 517, 521 (R.I. 1997); see Jacob v. Burke, 110 R.I. 661, 675, 296 A.2d 456, 464 (1972) (reversing trial justice's issuance of a preliminary injunction where no record of a hearing was made and the trial justice did not provide any findings of fact).

In deciding whether to issue an injunction, this Court is mindful of the magnitude of the remedy and will be guided by four factors. The Court must ask (1) whether the moving party has demonstrated "a reasonable likelihood of success on the merits;" (2) whether the moving party stands to suffer "irreparable harm without the requested injunctive relief;" (3) whether "the balance of the equities, including the possible hardships to each party and to the public interest" tip in the moving party's favor; and (4) whether the granting of an injunction will adequately "preserve the status quo." DiDonato v. Kennedy, 822 A.2d 179, 181 (R.I. 2003) (quoting Iggy's Doughboys, Inc. v. Giroux, 729 A.2d 701, 705 (R.I. 1999)). The first two factors of the analysis are the most important and in most cases, "irreparable harm constitutes a necessary threshold showing for an award of preliminary injunctive relief." See Gonzales-Droz v. Gonzalez-Colon,

573 F.3d 75, 79 (1st Cir. 2009) (quoting Charlesbank Equity Fund II v. Blinds To Go, Inc., 370 F.3d 151, 162 (1st Cir. 2004)).

III

Analysis

At its heart, this action involves a dispute between the rights of a law enforcement officer and a police department in investigating and enforcing its rules and regulations. The Law Enforcement Officers' Bill of Rights ("LEOBOR") "created a protected class of public servants—permanently appointed law enforcement officers who are under investigation or subject to interrogation by a law enforcement agency for any reason which could lead to disciplinary action, demotion or dismissal." Providence Lodge No. 3, Fraternal Order of Police v. Providence External Review Authority, 951 A.2d 497, 505 (R.I. 2008) (internal citations omitted). The LEOBOR sets forth specific procedural rights for law enforcement officers who are subjected to an investigation for misconduct, and is the exclusive remedy for permanently appointed law enforcement officers. See id. at 502. It is within this framework that the Court will turn to the factors governing the motion for a preliminary injunction.

A

Reasonable Likelihood of Success on the Merits

The Court begins its inquiry by considering whether the Plaintiff's claim has a reasonable likelihood of success on the merits. The burden is on Patalano to "affirmatively demonstrate that [he] will probably succeed on the merits of [his] claim." In re State Employees' Unions, 587 A.2d 919, 925 (R.I. 1991). Although the moving party is not obligated to show "a certainty of success," Coolbeth, 112 R.I. at 564, 313

A.2d at 660 (1974), it must provide sufficient evidence to "make out a prima facie case." Fund for Community Progress, 695 A.2d at 521. Prima facie evidence is that "amount of evidence that, if unrebutted, is sufficient to satisfy the burden of proof on a particular issue." Paramount Office Supply Co., Inc. v. D.A. MacIsaac, Inc., 524 A.2d 1099, 1101 (R.I. 1987) (citing Nocera v. Lembo, 121 R.I. 216, 397 A.2d 524 (1979)). It is insufficient for the moving party to rely solely on assertions in pleadings and filings. See id. Rather, the court must have an actual, although not necessarily complete, evidentiary record upon which to base its decision. See id. (granting of injunction reversed in an employment dispute where the employer failed to provide evidence of damages he would suffer as a result of his customer list being stolen).

In the instant case, Plaintiff's claim is based on his rights under the LEOBOR. Patalano argues that the head of a law enforcement agency may not lawfully order a law enforcement officer to turn over evidence that will be used in his defense in an ongoing case before a LEOBOR Hearing Committee and in an investigation into other alleged misconduct. Plaintiff emphasizes that the Hearing Committee expressly refused to subpoena the evidence during the hearing, and that the City may not now attempt to circumvent the Hearing Committee's denial of the subpoena by ordering Plaintiff to produce the evidence for a related investigation. Plaintiff contends that the order to turn over evidence violated his rights under the LEOBOR. The City, in contrast, asserts that Major Schaffran's order constitutes a valid exercise of the CPD's authority to investigate misconduct by its police officers.

Plaintiff asserts that Defendants' order to turn over evidence is unlawful, referring to the general provisions of the LEOBOR protecting the rights of law enforcement

officers who are under investigation. However, Plaintiff's reliance on the procedural safeguards provided for by the LEOBOR is misplaced. The LEOBOR protections include, but are not limited to, informing the officer under investigation of the nature of the complaint, the right of the officer to be represented by counsel at all times during the interrogation, and the law enforcement agency providing the officer with its list of witnesses, statements, and documents which it intends to introduce at the hearing. Sec. 42-28.6-2. The Court emphasizes that the safeguards listed in the statute do not encompass the right of an officer to avoid providing evidence in an investigation.

Plaintiff has failed to point to any other provisions of the LEOBOR or to any other authority that would make Defendants' order unlawful. Moreover, the Court emphasizes that several courts, including the Rhode Island Supreme Court, have found that not even the constitutional privilege against self-incrimination provides protection from having evidence produced in an investigation. See In re Denisewich, 643 A.2d 1194 (R.I. 1994) (holding that the Fifth Amendment privilege did not apply in situations where the possible consequences were not criminal in nature but involved only the loss of employment and that, therefore, grand jury testimony was admissible in a LEOBOR hearing); see also Lybarger v. City of Los Angeles,[1] 710 P.2d 329 (Cal. 1985) (holding that a police officer who had asserted his constitutional privilege against self-incrimination could still be suspended for refusing to cooperate in a departmental investigation into possible criminal misconduct).

The Court further notes that the CPD Rules and Regulations state that law enforcement officers are prohibited from withholding evidence. See Cranston Police

[1] The Court notes that in Lybarger, the police officer was also protected by a statute very similar to the LEOBOR. See Lybarger, 710 P.2d at 826-28.

Department General Order 130.00 Rules and Regulations ("CPD Rules and Regulations"). Moreover, in the instant case, the evidence that is sought is evidence that Plaintiff himself brought to the attention of the CPD while Major Schaffran was conducting the investigation into the allegation of fraudulent concealment made in Captain Carmody's testimony. It is undisputed that the CPD has the authority to investigate allegations of misconduct by its employees. The CPD Rules and Regulations explicitly state that officers "shall cooperate fully in all phases of [any judicial, departmental, or other official] investigations, hearings, trials and proceedings." This Court can find no authority to support an assertion that Plaintiff need not cooperate with the internal investigation to produce evidence. The First Circuit recently held that a police officer may be dismissed for a failure to cooperate in a situation where the officer's duty compels the cooperation. See Dwan v. City of Boston, 329 F.3d 275, 279-80 (1st Cir. 2003) (stating that "a negative inference may be drawn by a public employer—and adverse action taken—'because of' an employee's refusal to answer questions about job-related misconduct, so long as the inference is plausible.").

Moreover, the Court emphasizes that even were Defendants' order unlawful, the unlawfulness of the order does not exempt Plaintiff from the necessity of complying. The CPD Rules and Regulations are clear and unambiguous in stating a law enforcement officer's obligation to comply even with unlawful orders. See CPD Rules and Regulations. The procedure for responding to an unlawful order is to "notify the ordering officer of the illegality of his order" and further that the officer "shall be strictly required to justify their action." With regard to unjust or improper orders, the Rules and Regulations are yet more explicit, stating

> "Unjust or Improper Orders – Lawful orders which appear to be unjust or improper shall be respectfully called to the attention of the ordering officer or employee. If the order is not corrected, then the order shall be carried out. After carrying out the orders, the officer or employee to whom the order was given may file a written report to the Chief via the chain-of-command indicating the circumstances and the reasons for questioning the orders, along with his request for clarification of departmental policy . . ."

In the instant case, Plaintiff's belief that the order to produce his evidence was unlawful does not provide a justification for refusing to follow the order. A police officer does not have the prerogative to actively disobey an order from a superior while the police officer seeks a determination as to the validity of the order. See 16A Eugene McQuillin Municipal Corporations, § 45.105 (3rd ed. 1996).

Plaintiff asserts that Defendants' issuance of a one-day suspension until Plaintiff complies with the allegedly unlawful order violates his rights under the LEOBOR. The LEOBOR states that "[s]ummary punishment of two (2) days' suspension without pay may be imposed for minor violations of departmental rules and regulations." Sec. 42-28.6-13. The CPD Rules and Regulations define a Suspension as "[t]he official act of removing an officer from all police duties, without pay for a specified period of time, for violation of Department rules, regulations, orders or directives." See CPD Rules and Regulations. The Court notes, however, that the LEOBOR is silent on the effect of continuing violations of the department's rules and regulations. In the instant case, every day in which Plaintiff does not comply with Major Schaffran's order to produce the evidence is a new violation of the CPD Rules and Regulations mandating compliance with orders from a superior officer. While the Court recognizes the punitive nature of the ongoing suspensions, this Court will not second-guess the CPD in a matter of internal discipline where both the LEOBOR and the Department's Rules and Regulations are

silent. See Providence Lodge No. 3, Fraternal Order of Police, 951 A.2d at 504-505 (finding that in enacting the LEOBOR, the General Assembly did not intend to fully occupy the field of police officer discipline); see also Cranston Home Rule Charter ch. 9, § 9.02 (granting to the chief of police the responsibility to ensure the "efficiency, discipline and good conduct of the department").

For the foregoing reasons, this Court cannot find that Plaintiff has demonstrated that Defendants' order to turn over evidence was unlawful or that he had a right to withhold the evidence. Therefore, Plaintiff has not demonstrated that he has a reasonable likelihood of success on the merits.

B

Irreparable Harm

A finding of irreparable harm is proper when the moving party stands to suffer an imminent or threatened harm for which no legal remedy is available to restore it to its rightful position. See Brown v. Amaral, 460 A.2d 7, 10 (R.I. 1983); see also In re State Emps.' Unions, 587 A.2d 919, 926 (R.I. 1991) (noting irreparable injury occurs when later success on the merits is an "empty victory"). R.I. Turnpike & Bridge Authority v. Cohen, 433 A.2d 178, 182 (R.I. 1981) ("Irreparable injury must be 'presently threatened' or 'imminent'; injuries that are prospective only and might never occur cannot form the basis of a permanent injunction."). It is a well-settled principle that "a claim for monetary damages will ordinarily not invite injunctive relief, as there is an adequate remedy at law." See In re State Emps.' Unions, 587 A.2d at 926.

Plaintiff claims that he will be subject to two separate irreparable harms should this Court not grant his motion for a preliminary injunction. The first is the economic

impact of being suspended without pay for an indefinite time period. The second is that the evidence would give Defendants an unfair tactical advantage with respect to the ongoing LEOBOR hearing and the investigation.

This Court is not unsympathetic to the potential financial hardship that will be suffered by Plaintiff and his family from a loss of Plaintiff's wages. However, in the end, the loss of wages and any resulting hardship would be both temporary and amount to a claim for monetary damages. The case law of this state and of the U.S. Supreme Court make it clear that financial hardship alone will not generally rise to the level of irreparable harm. See In re State Emps.' Unions, 587 A.2d at 926. Plaintiff argues that in the instant case, the effect of the daily suspension means that Plaintiff is effectively being discharged but that he is also ineligible to collect the unemployment benefits he might otherwise be able to claim if he were being discharged in fact, and not merely by effect. The Court notes as a preliminary matter that Plaintiff's assertion regarding ineligibility for unemployment benefits appears to be true. See G.L. § 38-44-1 et seq. The U.S. Supreme Court acknowledged in Sampson v. Murray that "cases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found." 415 U.S. 61, 92 n. 68 (1974). However, the Supreme Court made it clear that only "genuinely extraordinary situation[s]" would suffice to meet the irreparable harm standard. See id. This Court cannot find that the financial hardship Plaintiff will suffer from his temporary loss of income will meet this standard.

With regard to Plaintiff's other claim that giving up the evidence would provide Defendants with an unfair tactical advantage, the Court finds that Plaintiff's assertion is

highly speculative. The Court is uncertain as to how the evidence which Plaintiff possesses could be related both to the ongoing LEOBOR hearing and the investigation. Major Schaffran testified that prior to Captain Carmody's testimony in the LEOBOR hearing, he was not aware of the incident regarding the complaint made by Mark Pezzullo. Plaintiff has not made it clear how the evidence would provide Defendants with an unfair tactical advantage nor has he supported the assertion that it would do so. Moreover, if the evidence proves Plaintiff innocent of wrongdoing in both the LEOBOR hearing and the investigation into Carmody's testimony as Plaintiff claims it does, the Court fails to see how exculpatory evidence of this kind could provide Defendants with an unfair advantage. The law of this state is clear that injuries that are prospective only cannot form the basis for an injunction. See R.I. Turnpike & Bridge Authority, 433 A.2d at 182.

Accordingly, the Court finds that Plaintiff has failed to show that he will suffer an irreparable injury as a result of a denial of injunctive relief.

C

Summary of Findings

Because Plaintiff has failed to demonstrate that he has a reasonable likelihood of success on the merits and irreparable harm, this Court will not proceed further in its analysis of the factors justifying the grant of an injunction. The Court notes briefly that the balancing of the equities in this case favors Defendants because issuing a preliminary injunction would involve interfering in an internal police investigation. As has been consistently recognized, members of a police force constitute a quasi-military organization and, as such, may be "subject to disciplinary methods peculiarly incident to

the efficient functioning of police departments." Howland v. Thomas, 98 R.I. 470, 476, 204 A.2d 640, 644 (1964). Therefore, individual police officers may not refuse to obey a direct order even where the officer believes that the order is unlawful. See Municipal Corporations, § 45:36 at 225. This Court may not second-guess the internal disciplinary procedures of the police department. See Driebel v. City of Milwaukee, 298 F.3d 622, 638 (7th Cir. 2002) (emphasizing that with respect to how a police department treats its officers as employees, courts will not "act as super-personnel boards and that the judiciary should defer . . . to the superior expertise of law enforcement professionals in dealing with their respective personnel.").

IV

Conclusion

After due consideration of the arguments advanced by Counsel and the testimony and other evidence submitted by the parties, the Court denies Plaintiff Todd Patalano's motion. The Court finds that Plaintiff does not have a reasonable likelihood of success on the merits of his challenge to the lawfulness of Major Schaffran's order, and Plaintiff has not demonstrated that he will suffer irreparable injury if an injunction does not issue. Accordingly, the Motion is denied. Counsel shall submit an appropriate Order for entry.