

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 08-324

Complainant: No. 0192210771A

Judge: No. 0192210771B

ORDER

The commission reviewed the complaint filed in this matter and found no clear and convincing evidence of ethical misconduct on the part of the judge. Accordingly the complaint is dismissed pursuant to Rule 16(a).

Dated: March 9, 2009.

FOR THE COMMISSION

\s\ Keith Stott
Executive Director

Copies of this order were mailed to the complainant and the judge on March 9, 2009.

This order may not be used as a basis for disqualification of a judge.

DEC 22 2008

Writer's Direct Dial:

December 3, 2008

U.S. MAIL

Human Resources Director
City of

Re: *Investigation Report and Recommendation*

Dear Mr. :

As you know, the City asked us to investigate the conduct of Sergeant regarding the dismissal of seven citations written by Officer . To ensure a thorough and independent investigation, you hired our firm on November 17. As part of that, we interviewed Officer , Captain , Human Resources Director , Sergeant , and City Attorney in person on November 18. We followed up with telephone interviews with City Prosecutor representative of , and Judge , Municipal Court. We also reviewed many documents and media files and conducted follow up interviews with Captain and Mr.

We have now completed our investigation. As outlined below, we believe that Sergeant 's behavior constitutes a violation of AZ POST standards, though it is questionable if it rises to the level of obstruction of justice. Further, it is clear that his behavior was inappropriate and could create future problems for the City if it continues.

I. Factual Background

The investigation was triggered by the dismissal of a ticket written by Officer to on September 23, 2008. Officer 's shift began at 6:00 a.m. on that day. He immediately set up at and Main Street to run radar near the school zone there. At 6:18, Officer wrote a ticket to for going 24 mph in a 15 mph school zone. At some point in the next few hours, Officer went to the police station and dropped off copies of the ticket for processing.

Later that morning, the dispatcher, _____, called Officer _____ to inform him that _____ is the mother of Judge _____ of the _____ Municipal Court.¹ Sergeant _____ was with _____ when she made the call. He took the phone and told Officer _____ to “do what’s right.” Although Officer _____ responded by saying that Sergeant _____ was putting him between a rock and a hard spot, we are convinced that Sergeant _____ was encouraging Officer _____ to follow through with the ticket at that time. See transcript of phone call between Officer _____, _____, and Sergeant _____, at Tab 1.

Sometime in the next couple of days, Officer _____ and Sergeant _____ talked face to face. Sergeant _____ said that since Officer _____ did not have the corresponding set of tuning forks that went along with the radar gun he was using, the ticket to Ms. _____ was probably based on a bad reading. Although Officer _____ was unaware of this alleged policy that Sergeant _____ described, he told Sergeant _____ that he could get rid of the ticket.² Sergeant _____ said he would follow up on the matter. It made more sense for Sergeant _____ to handle it because Ms. _____’s court date was scheduled to occur after Officer _____ was going to leave for vacation. Sergeant _____ also asked Officer _____ how many more tickets he had issued with this particular radar gun, and that he would take care of all of those tickets. To identify the particular citations that he believed were issued improperly, Sergeant _____ looked at the log book and identified all the tickets Officer _____ had written between September 22 and September 25, believing that these were the only days Officer _____ used that particular radar gun. The evidence demonstrates that these were not the only days that Officer _____ used that particular radar gun, but there is no clear explanation for the discrepancy.³ Sergeant _____ told

¹ Sergeant _____ works as a constable for Judge _____ at the _____ court. This job is totally separate from Sergeant _____’s job with the City of _____. In addition to working with Judge _____, all of the evidence in this investigation demonstrates that Sergeant _____ associates with Judge _____ socially; Sergeant _____ does not deny this social relationship.

² Officer _____ did not want to upset Sergeant _____ because he had a similar negative experience with Sergeant _____. Approximately six years ago, Officer _____ was on duty when a 911 call came into the department. Two back up officers went to the scene and waited for the officer who was supposed to respond. When the responding officer communicated that the call had been taken care of, the officers went to the door and asked the caller if an officer had been there. The caller said no, and the officers dealt with the situation. Officer _____ was the lead officer on duty, and he reported the incident, against Sergeant _____’s wishes. After he reported the incident, Officer _____ feels that Sergeant _____ “made life difficult” for him. Since that time, Officer _____ has tried to avoid any conflict with Sergeant _____.

³ It is unclear when exactly Officer _____ was issued the radar gun, but the evidence strongly suggests that Officer _____ checked out the radar gun shortly after August 5, the day that _____ calibrated all the police department radar guns. The latest Officer _____ could have checked out the gun is August 30, because he wrote several speeding tickets that day. See Log Book excerpt, at Tab 2.

The question is why did Sergeant _____ only go back as far as September 22, when the evidence shows that Officer _____ had the subject radar gun since at least sometime in August? Perhaps Sergeant _____’s memory failed him. Or perhaps Sergeant _____ was trying to improperly dismiss the ticket to Ms. _____ by including it with several other tickets, so he manufactured a reason to dismiss them. But, not wanting to dismiss seven weeks’ worth of tickets (August 5 – September 23), he changed the day that Officer _____ checked out the radar gun from some time in August to right before the ticket to Ms. _____. In the end, the timing here is suspect, at best.

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Officer [redacted] not to write any more tickets with that gun, and Officer [redacted] complied with that directive.

Sergeant [redacted] said that after his conversation with Officer [redacted] about the tickets, he went to Captain [redacted]'s office and told him what happened, and told the Captain that they should tell the court not to process the subject citations, and that the Captain agreed. Captain [redacted] does not recall any such meeting, and said that he never would have agreed to this. San Luis has a strong policy against the dismissal of tickets. In March 2007, then-Captain [redacted] was involved in an incident in which he allegedly told another officer to hold back a citation. An investigation occurred that led to a finding that Captain [redacted] acted inappropriately. Officer [redacted] said that after Captain [redacted] subsequently left the police department, the officers were told to stop dismissing tickets. Municipal Court Judge [redacted] confirmed this crackdown, and said that to his knowledge, no tickets have been dismissed by officers since that time.

Four or five days after the alleged meeting with Captain [redacted], Sergeant [redacted] sent an email to the clerks of court, [redacted] and [redacted], and copied Captain [redacted], saying:

[redacted] and [redacted], Per our conversation last week, the following citations were issued for speeding with a radar that does not have tuning forks assigned to it. Let us know what we need to do so that they do not get processed. The use of this radar unit was an internal miscommunication issue that has been corrected.

He wrote a second email to the same parties one minute after the first email because he forgot to list the citation numbers. See emails from [redacted] to [redacted], [redacted], copy to [redacted], dated October 7, 2008, at Tab 3. Captain [redacted] did not see these emails, and it is well known that he regularly misses emails. Captain [redacted] said if he would have seen these emails, he would have intervened and stopped the clerks from acting on them.⁴

Sergeant [redacted] did not follow up on his emails to the court clerks. He assumed they had taken care of the matter. In fact, one of the clerks did dismiss the tickets. One of the tickets involved a domestic violence incident, and another was for driving with a suspended license. See citations, at Tab 5. Sergeant [redacted] said that he was unaware that any of the tickets that he ordered dismissed were for anything other than speeding, and we have no reason to disbelieve him. He said that he did not follow up to determine if any of the tickets were for anything

⁴ The only individuals authorized to dismiss tickets were the Captain or the Lieutenants. See Memo from Chief [redacted] to The Honorable Judge [redacted], dated January 6, 2004, at Tab 4. Captain [redacted] confirmed that this continues to be the policy of the [redacted] police department.

besides speeding, but hoped that since his email just referred to speeding tickets that the clerks would only have dismissed those tickets.

Sergeant [redacted]'s articulated understanding of police department policy and how to operate a radar gun is utterly inaccurate. Captain [redacted] said that it is *not* the policy of the department to require officers to check each radar gun against a set of two tuning forks that are assigned to the particular radar gun. Officers can check the radar gun against any of the tuning forks available,⁵ or they can check the radar gun against their police cruisers because the vehicles have calibrated speedometers. Additionally, a certification of accuracy for the particular radar gun from before and after the issuance of a ticket demonstrates that the gun was functioning. Thus, tickets issued on days when officers do not check their radar guns need not be automatically dismissed.⁶

II. Findings

There are five possible conduct violations to consider:

1. Acting to dismiss the seven tickets without permission of the Captain or one of the Lieutenants, in violation of police department policy;
2. Failing to realize that two of the tickets he caused to be 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 ticket because of a personal relationship with Judge [redacted]; and
5. Failing to be forthcoming during an internal investigation.

A. Potential AZ POST Violations

We first turn to analyze whether Sergeant [redacted]'s conduct may give rise to an AZ POST violation. The pertinent section of the AZ POST rules provides:

⁵ The tuning forks that come with the radar guns come in two "speeds," 35 mph and 55 mph. Therefore, it would not make sense to only allow officers to check their radar gun against a particular set of tuning forks since they're all the same. Moreover, Sergeant [redacted] stated that only two of the police department's radar guns have their corresponding tuning forks. Under Sergeant [redacted]'s understanding, only the two officers with those radar guns should be writing speeding tickets.

⁶ All of the department's radar guns were certified on August 5, 2008. See Certificates of Accuracy for Doppler Radar Units, at Tab 6.

The Board may deny certified status or suspend or revoke the certified status of a peace officer for:

- ...
7. The commission of a felony, an offense that would be a felony if committed in this state, or an offense involving dishonesty, unlawful sexual conduct, or physical violence;
 8. Malfeasance, misfeasance, or nonfeasance in office; or
 9. Any conduct or pattern of conduct that tends to disrupt, diminish, or otherwise jeopardize public trust in the law enforcement profession.

A.A.C. § R13-4-109. In determining whether there has been a violation of these AZ POST rules, we looked to previous AZ POST decisions. Following is an analysis of the decisions we found relevant to the situation at hand.

1. *Malfeasance, Misfeasance or Dishonesty*

The AZ POST rules do not define malfeasance or misfeasance, and there are very few decisions that pertain to situations like the one before us. However, there are two cases that may provide some guidance as to whether Sergeant 's conduct rises to the level of malfeasance or misfeasance.

In the first case, an officer issued a civil traffic citation to the spouse of a police department employee. A second officer, who was a friend of the citing officer and the police department employee, asked the citing officer to dismiss the ticket, even though it was against department policy. The citing officer agreed to ask the judge to dismiss the ticket and told the judge that he could not remember the incident well. The officers were terminated and their certifications were suspended for one year. *See* AZ POST Integrity Bulletin, Volume No. 26, Case No. 4, at **Tab 7**.

This case is different in several respects, and therefore, the City should be cautious in using this case to determine whether an AZ POST violation has occurred. First, this case differs from the AZ POST decision in that the action of the officers in that case was a violation of policy. In the present case, it is not clear that Sergeant 's actions violate Police Department policies. The department policy allows the Captain to authorize the dismissal of a ticket, and Sergeant claims to have received the permission of the Captain. He copied Captain on his email directing the clerks to dismiss the tickets, and claims to have met with him face to face to discuss the matter. Captain denies meeting with Sergeant and denies ever giving him permission to dismiss these tickets. Given the totality of the circumstances as outlined above, we believe Captain 's account. If AZ POST makes a similar conclusion, AZ POST would clearly find Sergeant in violation of its regulations. *See* A.A.C. § R13-4-109.

Second, this case differs from the AZ POST decision because it cannot be definitively proven that Sergeant lied to a court, nor did he ask Officer to lie to a court. Sergeant has an explanation for everything that he did in this case, and some of his explanations are

plausible. Some of his explanations are not plausible, though (using only assigned tuning forks that each radar gun), and the circumstantial evidence could be used to find that Sergeant dismissed the tickets improperly and lied during the investigation. To wit:

- Sergeant [redacted] had the motive to dismiss the ticket to Ms. [redacted] because he works for, and associates socially with Judge Lozano;
- The reason for dismissing the tickets was absurd and completely unfounded;
- The timing of Sergeant [redacted]'s realization that Officer [redacted] was writing tickets with a "bad" radar gun coincided with the ticket to Ms. [redacted];
- Sergeant [redacted]'s recollection of the date that Officer [redacted] had checked out the "bad" radar gun was off by about a month, which coincidentally led to a much smaller number of tickets needing to be dismissed.

This case is different that the cited AZ POST Integrity Bulletin because Sergeant [redacted] has not admitted his dishonesty. But, given the circumstantial evidence above and our interview with Sergeant [redacted], we do not believe that he was being truthful during this investigation. Dishonesty is a violation of AZ POST standards. See AZ POST Integrity Bulletin, Volume No. 39, Case No. 3, at Tab 8.

We do not believe Sergeant [redacted] was being truthful regarding his belief about tuning forks being assigned to specific radar guns because that opinion is implausible, especially given Sergeant [redacted]'s long tenure with the police department. We do not believe Sergeant [redacted]'s statement that he met with Captain [redacted] about the dismissal of the ticket because Captain [redacted] said that he would never have agreed to Sergeant [redacted]'s suggestion to dismiss the tickets because of the City's strong policy against the dismissal of tickets in this fashion. Indeed, the reason this investigation began was because of a suspected violation of this policy.

In addition to a possible AZ POST violation based on dishonesty and the unauthorized dismissal of tickets, there are at least two additional AZ POST violations that might exist. The dismissal of the two non-speeding citations, including the domestic violence ticket, is a far more serious matter than a civil traffic citation. AZ POST could very well determine that Sergeant [redacted]'s failure to investigate the nature of the tickets he was trying to dismiss, or his failure to follow up on the action taken by the court clerks, could constitute malfeasance or misfeasance. We found no AZ POST decisions regarding analogous cases.

Additionally, Sergeant [redacted]'s dismissal of the tickets because of an incorrect understanding of the requirements to verify the accuracy of the radar guns may also be troublesome to AZ POST. At best, if Sergeant [redacted] genuinely believed this was required, such a fundamental misunderstanding of police procedure by a senior, experienced officer is problematic. At worst, it shows that Sergeant [redacted] was lying to the police department and the court about the reason for trying to get rid of Ms. [redacted]'s ticket. Again, we found no AZ POST decisions regarding analogous cases.

B. Obstruction of Justice

As a part of our investigation, we also researched whether Sergeant [redacted] 's conduct could constitute obstruction of justice. Following are the two provisions of the Arizona Criminal Code that we believe are most applicable:

A person commits compounding if such person knowingly accepts or agrees to accept any pecuniary benefit as consideration for:

1. Refraining from seeking prosecution of an offense; or
2. Refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to the offense.

A.R.S. § 13-2405.

A person who knowingly attempts by means of bribery, misrepresentation, intimidation or force or threats of force to obstruct, delay or prevent the communication of information or testimony relating to a violation of any criminal statute to a peace officer, magistrate, prosecutor or grand jury or who knowingly injures another in his person or property on account of the giving by the latter or by any other person of any such information or testimony to a peace officer, magistrate, prosecutor or grand jury is guilty of a class 5 felony.

A.R.S. § 13-2409.

It is arguable that Sergeant [redacted] is in violation of both of these statutes. That said, the evidence is not strong.

With respect to Section 2405, Sergeant [redacted] arguably received a pecuniary benefit by trying to help out Judge [redacted], the person to whom Sergeant [redacted] reports as constable for the City of [redacted]. However, because Sergeant [redacted] is elected to the constable position, and there is no evidence that Judge [redacted] asked Sergeant [redacted] to dismiss the ticket, it is likely that a court would find that Sergeant [redacted] did not receive any pecuniary benefit. It is difficult to predict which way a court would decide this issue.

With respect to Section 2409, we believe that Sergeant [redacted] knowingly attempted to prevent the communication of information relating to the speeding tickets by misrepresenting the validity of the radar gun. However, since the speeding violations were not criminal, the statute would not apply. The statute would apply to the two criminal violations that were dismissed, though. The issue that would have to be resolved by a court is whether Sergeant [redacted] 's dismissal of the two criminal violations was done "knowingly," as required by the statute. The evidence demonstrates that Sergeant [redacted] did not consciously act with the purpose of obstructing justice with respect to anything other than speeding tickets. However, his conduct in dismissing the tickets generally was intentional, so it is possible a court could find Sergeant [redacted] in violation of the statute. Again, it is difficult to predict which way a court would decide this issue.

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We believe that disciplining Sergeant _____ on the grounds that he violated either of these statutes is not advisable given the uncertainty of the application of the statutes to his conduct.

C. The Appropriateness of Sergeant _____'s Conduct

While we do not believe that Sergeant _____'s conduct rises to the level of obstruction of justice, we do find Sergeant _____'s conduct inappropriate, particularly for a high-ranking police official. If we are incorrect and Sergeant _____ was telling the truth during this investigation, he is guilty of not having the correct understanding of basic police department procedure and failing to follow through on the dismissal of the tickets, two which turned out to be unrelated to the use of the radar gun at issue. This conduct is certainly problematic.

This concludes our legal analysis of this matter. Please do not hesitate to contact us after you have had a chance to review this.

Sincerely,

Attachments