**BEFORE THE POLICE BOARD OF THE CITY OF CHICAGO**

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| **IN THE MATTER OF CHARGES FILED AGAINST** | **)** | |
| **POLICE OFFICER BRUCE ASKEW,** | **)** | **No. 11 PB 2776** |
| **STAR No. 9015, DEPARTMENT OF POLICE,** | **)** | |
| **CITY OF CHICAGO,** | **)** | |
| | **)** | **(CR No. 1000301)** |
| **RESPONDENT.** | **)** | |

## MEMORANDUM OPINION AND ORDER

On November 1, 2011, the Superintendent of Police filed with the Police Board of the City of Chicago charges against Police Officer Bruce Askew, Star No. 9015 (hereinafter sometimes referred to as "Respondent"), recommending that the Respondent be discharged from the Chicago Police Department for violating several Rules of Conduct.

The Respondent filed a motion to strike and dismiss the charges. In his original motion and supplemental motions, the Respondent argues that the charges should be dismissed for the following reasons: (1) the failure to bring timely charges violates the five-year statute of limitations established in 65 ILCS 5/10-1-18.1; (2) the failure to bring timely charges violates the due-process rights of the Respondent; (3) the charges should be barred by laches; (4) the Police Department violated its own General Orders and violated Due Process; and (5) the City failed to follow its own procedure to prosecute the Respondent.

### Statute of Limitations

The first question is whether this case is time-barred under 65 ILCS 5/10-1-18.1, which states in relevant part:

> Upon the filing of charges for which removal or discharge, or suspension of more than 30 days is recommended a hearing before the Police Board shall be held. If the charge is based upon an allegation of the use of unreasonable force by a police officer, the charge must be

> brought within 5 years after the commission of the act upon which the charge is based. The statute of limitations established in this Section 10-1-18.1 shall apply only to acts of unreasonable force occurring on or after the effective date of this amendatory Act of 1992.

Officer Askew is charged with engaging in the following misconduct: On or about October 7, 2006, at approximately 1210 hours, at or near 6408 South Marshfield Avenue, Chicago, while on duty and without justification, he physically struck Greg Larkins about the head and/or about the shoulder and/or about the left leg and/or about the body using a baton, causing Larkins to sustain injuries to his head and/or causing Larkins to obtain seven stitches and/or staples in his head; Officer Askew is also charged with violating General Order 02-08-05 on or about October 7, 2006, or shortly thereafter, by failing to complete and/or submit a Tactical Response Report (TRR) regarding his physical contact with Larkins.

All charges against Officer Askew fall within the category covered by the five-year statute of limitations established in 65 ILCS 5/10-1-18.1. As noted above, the Superintendent filed the charges on November 1, 2011, which is more than five years after the date on which the alleged misconduct took place (October 7, 2006). The charge that Officer Askew, while on duty and without justification, struck Greg Larkins with a baton is "based upon an allegation of the use of unreasonable force by a police officer." The charge that Officer Askew violated General Order 02-08-05 by failing to complete and/or submit a TRR is, as the charge states, regarding his physical contact with Larkins. The TRR charge relates to physical contact that the Superintendent alleges was unreasonable, and thus this charge is also "based upon an allegation of the use of unreasonable force by a police officer" and therefore falls within the ambit of the statute of limitations.

The Superintendent maintains that the five-year statute of limitations does not apply to

this case because the City of Chicago's Collective Bargaining Agreement ("CBA") with the Fraternal Order of Police (FOP) provides otherwise, and the CBA prevails over the statute of limitations. In particular, the Superintendent points to Article 6 of the CBA, the Bill of Rights for police officers, specifically Section 6.1(D), which provides in pertinent part:

> Unless the Superintendent of Police specifically authorizes in writing, no complaint or allegation of any misconduct concerning any incident or event which occurred five (5) years prior to the date the complaint or allegation became known to the Department shall be made the subject of a Complaint Register investigation or be re-opened or re-investigated after five (5) years from the date the Complaint Register number was issued.

The Superintendent's argument raises two questions for the Board. First, can a CBA trump the five-year statute of limitations if the two are in conflict, particularly when the statute itself says the City cannot change it by use of its home rule powers? Second, if the CBA can trump the five-year statute of limitations, is Section 6.1(D) of the CBA in conflict with the statute of limitations?

**Can the CBA Trump the Statute of Limitations?**

In the briefs and argument, the Superintendent acknowledges that the City has not and, due to the home-rule preemption set forth in 65 ILCS 5/10-1-18.2, could not exercise its home rule powers in order to modify the five-year rule. Rather, the Superintendent relies upon 5 ILCS 315/15, part of the Illinois Public Labor Relations Act, to argue that the City and the FOP can negotiate away the five-year statute of limitations. The Superintendent contends that the legislature has put a value or priority on collective bargaining so that bargaining parties can do away with state statutory mandates like the five-year statute of limitations.

The sweep of the Illinois Public Labor Relations Act, however, is not quite so broad.

First, 5 ILCS 315/7 (another part of the Labor Relations Act) provides that:

> The duty "to bargain collectively" shall also include an obligation to negotiate over any matter with respect to wages, hours and other conditions of employment, *not specifically provided for in any other law or not specifically in violation of the provisions of any law*. If any other law pertains, in part, to a matter affecting the wages, hours and other conditions of employment, such other law shall not be construed as limiting the duty "to bargain collectively" and to enter into collective bargaining agreements containing clauses which either *supplement, implement, or relate to the effect of such provisions in other laws*. (Emphasis added.)

Where, as here, the state legislature has adopted a mandatory rule that cannot be changed by a city's exercise of its home rule powers, employees may not bargain about or modify this rule through collective bargaining. *Markham* v. *State and Municipal Teamsters, Chauffeurs and Helpers, Local 726*, 299 Ill.App.3d 615 (1st Dist. 1998) (Markham was bound by state law that gave its board of fire and police commissioners authority to discipline police officers, and therefore §315/7 precluded the union from negotiating a provision that gave police officers an option of arbitrating their cases in lieu of review by the commissioners—a city cannot bargain over matters it has no authority to change); *compare, City of Decatur* v. *AFSCME, Local 268*, 122 Ill.2d 353 (1988) (because Decatur was a home rule unit, it could opt out of the state law rules establishing a civil service system through which discipline was imposed on employees; as such, the city had authority to negotiate a scheme where union employees could opt for arbitration instead of a civil service remedy).

Second, the section of the Illinois Public Labor Relations Act the Superintendent relies upon (5 ILCS 315/15) contains two subsections. The Superintendent originally focused on subsection (b), which states:

> Except as provided in subsection (a) above, any collective bargaining contract between a public employer and a labor organization executed pursuant to this Act shall supersede

> any contrary statutes, charters, ordinances, rules or regulations relating to wages, hours and conditions of employment and employment relations *adopted by the public employer or its agents*…. (Emphasis added.)

This provision, however, is intended to prevent a public employer from bargaining a contract with a union and then undoing a provision of the contract by having the *same public employer* adopt a contrary statute, ordinance, or regulation. That is exactly what happened in *AFSCME* v. *State of Illinois*, 124 Ill.2d 246 (1988), where state mental health workers were discharged for mistreating mental health patients. The workers had a CBA with the Illinois Department of Mental Health that said they could only be discharged "for just cause" and an arbitrator applied this provision to suspend rather than discharge them. The same public employer (the Department of Mental Health) that had negotiated the "just cause" provision of the CBA, however, adopted a state regulation which provided that mistreatment of mental health patients required discharge and argued that the employees therefore could not be suspended but must be discharged. The Illinois Supreme Court ruled that the CBA's "just cause" provision trumped the state regulation. The same result was reached in *Health Employees Labor Program of Metropolitan Chicago* v. *County of Cook*, 236 Ill.App.3d 93 (1st Dist. 1992), where discharged county employees tried to invoke the grievance-arbitration remedy under their CBA, but the county said they were limited to a civil service hearing under the civil service system the county had established as a home rule entity. The Appellate Court ruled that the CBA trumped the civil service system and the employees were entitled to their CBA remedy.

The problem here with the Superintendent's reliance on 5 ILCS 315/15(b) is that the *City of Chicago* did not adopt the five-year statute of limitations—the *State of Illinois* did. In other words, the City did not negotiate a CBA with the police and then turn around and "back door"

police officers by adopting a contrary rule or ordinance.

That leaves 5 ILCS 315/15(a) as a basis for the Superintendent's argument that the CBA provision supplants the state statute establishing the five-year statute of limitations. Section 315/15(a) provides that:

> In the case of any conflict between the provisions of *this Act* [the Illinois Public Labor Relations Act] and any other law, executive order or administrative regulation relating to wages, hours and conditions of employment and employment relations, the provisions of this Act or any collective bargaining agreement negotiated thereunder shall prevail and control…. (Emphasis added.)

But what is the conflict between the provisions of the Illinois Public Labor Relations Act and some other law, executive order, or administrative regulation that triggers subsection (a)? Without such a conflict, one never reaches the clause that provides for the priority of a CBA provision. The Superintendent says the conflict is between the five-year statute of limitations and Section 6.1(D) of the CBA (which permits investigation of complaints received more than five years after the incident). But that is not a conflict between the Labor Relations Act and a state law, order, or regulation. Moreover, we know from Section 315/7 (see above) that if there was a true conflict between a mandatory state statute and a provision of the CBA, the mandatory state law would control.

**Is the CBA Provision in Conflict with the Statute of Limitations?**

Even if Section 6.1(D) of the CBA could trump the five-year statute of limitations if they were in conflict, we conclude that Section 6.1(D) is not in fact in conflict with the statute of limitations. Section 6.1(D) of the CBA concerns the question of when a police investigation may be initiated. Normally, the rule is that an investigation may not be commenced when the incident

under investigation is more than five years old, but the Superintendent is given the power to make an exception. This provision, however, does not address how long the investigation of the complaint, once initiated, may last, or how long after the incident in question charges before the Police Board may be brought. Indeed, in the case before us, Section 6.1(D) does not even come into play. The police investigation of Officer Askew's conduct began the day after the incident occurred. So, the Superintendent did not have to invoke the Section 6.1(D) exception to authorize the commencement of an investigation.

But if the Superintendent can begin an investigation more than five years after an incident (as Section 6.1(D) of the CBA permits), are all such investigations doomed since the five-year statute of limitations would bar the filing of any charges with the Police Board once the investigation is complete? In other words, is there a theoretical conflict between the CBA and the five-year statute of limitations, even though a conflict does not arise in the specific case of Officer Askew?

The answer is No—the five-year statute of limitations and the CBA provision are not mutually incompatible. While an excessive force investigation opened or re-opened more than five years after an incident could not be the subject of Police Board charges, the Superintendent's right to open or re-open an investigation into an incident that is more than five years old could still lead to meaningful outcomes in several different contexts that would not run afoul of the five-year statute of limitations. For example: (1) if the investigation pertains to an issue other than the unreasonable use of force, such as corruption, theft, or false arrest, then the investigation may lead to Police Board charges that are filed more than five years after the incident (the five-year statute of limitations applies only to charges based upon an allegation of unreasonable force

by a police officer); and (2) if the Superintendent initiates an investigation of an incident that occurred more than five years ago, it may lead to action by the Superintendent other than the filing of Police Board charges—the Superintendent may suspend a police officer under circumstances in which he is permitted to do so without bringing charges before the Police Board, or the Superintendent may turn over the results of the investigation to federal or state law enforcement authorities for criminal prosecution, or the Superintendent may exonerate the officers that are the subject of investigation, or the Superintendent may, with or without disciplinary action, determine that the Police Department's policies or procedures need to be changed. None of these actions by the Superintendent would violate the five-year statute of limitations.

**Conclusion**

For the reasons stated herein, we find and determine that the City's CBA with the FOP does not trump the five-year statute of limitations established in 65 ILCS 5/10-1-18.1 when the two are in conflict.

In addition, even assuming *arguendo* that such a CBA can supersede the five-year statute of limitations, we find and determine that there is no conflict between the CBA and the statute of limitations, for two reasons. First, Section 6.1(D) of the CBA does not apply to the Askew case, for the investigation of Officer Askew began immediately after the complaint was made, not five years or more after the complaint became known to the Department. Second, even in the theoretical case of an investigation being opened or re-opened more than five years after the incident, the CBA provision and the five-year statute of limitations are not mutually incompatible.

**BY REASON OF THE FINDINGS** and determinations set forth above, the Respondent's motion to strike and dismiss the charges shall be granted. All of the charges against the Respondent are time-barred and shall therefore be dismissed. (We need not address the Respondent's other arguments in support of his motion to dismiss.) As a result, cause exists for restoring the Respondent to his position as a police officer, and to the services of the City of Chicago, will all rights and benefits, effective November 3, 2011.

## POLICE BOARD ORDER

**IT IS HEREBY ORDERED** that the Respondent's motion to strike and dismiss the charges is granted, and the charges against Police Officer Bruce Askew, Star No. 9015, in Police Board Case No. 11 PB 2776, are dismissed.

**IT IS FURTHER ORDERED** that the Respondent, Police Officer Bruce Askew, Star No. 9015, be and hereby is restored to his position as a police officer with the Department of Police, and to the services of the City of Chicago, with all rights and benefits, effective November 3, 2011.

DATED AT CHICAGO, COUNTY OF COOK, STATE OF ILLINOIS, THIS 16th DAY OF MAY, 2012.

/s/ Demetrius E. Carney

/s/ Scott J. Davis

/s/ Melissa M. Ballate

/s/ William F. Conlon

/s/ Ghian Foreman

/s/ Rita A. Fry

/s/ Johnny L. Miller

/s/ Elisa Rodriguez

Attested by:

/s/ Max A. Caproni
Executive Director
Police Board

**DISSENT**

The following members of the Police Board hereby dissent from the Order of the majority of the Board.

[None]

RECEIVED A COPY OF

THE FOREGOING COMMUNICATION

THIS _____ DAY OF _____, 2012.

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SUPERINTENDENT OF POLICE