

The Police Commission of the City and County of San Francisco met in Room 400, City Hall, #1 Dr. Carlton B. Goodlett Place, San Francisco, at 5:06 p.m., in a Regular Meeting.

PRESENT: Commissioners Renne, Campos, DeJesus, Lee, Marshall, Sparks, Veronese

CONTINUATION OF HEARING TO CONSIDER THE RECENT CALIFORNIA SUPREME COURT DECISION IN COPLEY PRESS vs. SUPERIOR COURT, S128603 (AUGUST 31, 2006)

- a. **Further public comment**
- b. **Discussion and possible action to approve a resolution urging the Board of Supervisors and the Mayor to petition the California Legislature to amend state law in response to the California Supreme Court's decision in Copley Press vs. Superior Court, S 128603 (August 31, 2006)**

Vincent Harrington, Attorney for the POA, commented regarding the Commission approaching the legislature to change the law. Mr. Harrington stated that to change the law that has not been applied in the City of San Francisco, to change the law which has been interpreted by the Supreme Court within the month strikes them, the POA, as an extraordinarily precipitous act. Mr. Harrington stated that the POA appreciates the decision because the decision is clear and precise and detailed. The decision is concise, it says what it says and it results in the issues presented. Mr. Harrington stated that this is a statewide statute that applies everywhere in the State of California and that it is important that the same rights and the same remedies that are created by the statute be available to every peace officer who's employed in every jurisdiction in the state. Mr. Harrington stated that it is a false dichotomy to claim that the only way accountability can be achieved is by publicly naming and conducting public hearings about peace officers which sells newspapers. Mr. Harrington suggested that the Commission should make the law work as it was designed to do and then evaluate whether there is a good public policy reason for seeking legislative change rather than assuming that that's the first reaction that should be taken.

Commissioner DeJesus stated that the court did not address the issue of public hearings. Mr. Harrington stated that there were two piece of litigation that was passed. One is that it would be a violation of the officer's right to conduct a public hearing unless the officer waives that right.

Commissioner Campos stated that Copley did address a lot of issues and if they wanted to talk about hearings, they would have done so. Mr. Harrington stated that he can't speculate about that but it is his understanding, based on the way the decision was made, that the Court was responding to a multitude of arguments so they had to address the arguments as they were relevant to the case as presented. If no party presented that case, then the court did not have to decide it. Mr. Harrington stated that the Court says the identity of an officer is a confidential fact and how can you conduct a hearing where the officer's identity is disclosed.

Commissioner Campos asked if the name of an officer in a public records act request is different from talking about it in the context of a public hearing and if those are two separate issues. Mr. Harrington stated that he does not think so because the way the officer vindicates his/her rights is to have a hearing and the court expressly said that if this is a place where you have your hearing there's no waiver with the rights of the officer's confidentiality by exercising his/her rights.

Commissioner Campos asked if the issue of openness cuts both ways in that there is a benefit to the officer in having a public hearing. Mr. Harrington stated that concern is readily addressed in the situation where the officer requests for a public hearing.

Commissioner Sparks talked about patrol specials who do not have the ability to make arrests, to issue warrants, or to issue citations and stated that she agrees with Mr. Harrington in that peace officers are in a different category of teachers and lawyers and doctors and that peace officer truly have the power of life and death over citizens and that she also agrees with Mr. Harrington that citizens do not have the right to shop for their peace officers.

Commissioner Sparks stated that all that put together, there should be a greater level of accountability and asked Mr. Harrington why he believes that officer should not have that level of accountability. Mr. Harrington stated that he didn't say that they shouldn't be accountable. Mr. Harrington stated that what he said is that they have rights to have their personnel matters adjudicated in confidentiality. Mr. Harrington stated that the Commission will hold the officers accountable or not based on the evidence.

Carl Olsen, Attorney for SF Chronicle, stated that the Copley Decision, on Page 40, footnote 27, does draw a distinction between the right to attend hearings and the records of completed hearings. He stated that it does so in the context of distinguishing the case called Detroit Free Press which involve the right to attend hearings. Mr. Olsen stated that until and unless there is an explicit ruling saying that the public and the press cannot attend the hearings, the Commission should not end its time honored way of doing business and of having open hearings. Mr. Olsen stated that there is a strong societal benefit to having open hearings.

Commissioner Marshall asked Mr. Olsen if the point he was making is that the ruling is not ruled specifically on disciplinary hearings. Mr. Olsen stated that is the main point that he is making. He also said that it was not an accident that they didn't reach that decision and they dropped the footnote in the context of noting that there are significant differences between hearings at which people historically have a right to attend.

Commissioner Campos asked Mr. Olsen to comment on something that Mr. Harrington said which is that if you look at the analysis of the decision that to read it, it only addresses the issue of public records. It's too narrow and that the general principles of protecting the identity of the officer essentially would apply even in a hearing. Mr. Olsen stated that the pitches statutes that the Court was interpreting in Copley Press refer to police officer personnel records and it didn't do anything about meetings.

Commissioner Lee asked about what constitute an employer, whether it's the agency that directly employs the officer or the Commission and what does Mr. Olsen thinks of that. Mr. Olsen stated that the Commission is not the employer and that's another reason to distinguish what is being talked about tonight from the questions that the Supreme Court did answer in Copley Press. He stated that there are different statutory and disciplinary schemes that work here in San Francisco than in San Diego.

Commissioner DeJesus stated that the case is very broad and it's more personnel records for police officers. She asked Mr. Olsen if he sees a distinction for public member testifying about their recollection or about their grievance against a police officer for whatever that misconduct is and is that set and apart from a police officer's personnel file and/or document as referenced in this case. Mr. Olsen stated that he thinks there is a difference and that is in the sense of a meeting, both sides are there, and you have give and take and the ability to cross-examine.

Commissioner DeJesus stated that the press can go to the legislature and have them make an exception and to clarify whether or not they meant to also exclude the officer's identity. Mr. Olsen stated that yes, anybody can go to the legislature but he thinks that under the existing statutes which have been around for 28 years and have coexisted peacefully with open hearings, there's no need to have closed hearings and Copley Press does not change that.

Commissioner Sparks asked Mr. Olsen if he would see nothing in the decision that would preclude continuing to have public hearings without the defendant present and since it's the right of the defendant to be a public hearing, they could either opt in or opt out but the Commission could have the public hearing with all the evidence, with everything presented, without the defendant present or by not calling the defendant by name and referring by case number, but understanding that the defendant has the right to face their accuser, they would obviously have the right to opt in to that public hearing if they so chose but also based on this decision they would have the right to opt out. Mr. Olsen stated that they don't have to be present but Mr. Olsen stated that their preference is to have the public hearing in which they are identified and, as a fall back position, is to have an open hearing with initials. Mr. Olsen stated that it should not depend on the preference of an individual officer because he thinks

the public has an interest here which outweigh the interest of any police officer and their preference in not having their name published.

Commissioner Marshall asked what if the POA filed a lawsuit and that the process will stop entirely. Mr. Olsen stated that the statutes have been the same and the POA have chosen not to challenge the Commission's procedures in the past years even though the statutes have been in place. He stated that the Commission should have hearings which allow the public to see what officers have done.

Commissioner Renne stated that when you look at the procedural history of the case, it is somewhat complicated. Commissioner Renne stated that what she's having difficulty understanding is if the decision says that the officer's identity cannot be disclosed, how can you have a public hearing when you cannot disclose the officer's identity and asked Mr. Olsen if he could explain that to her. Mr. Olsen stated that the Court doesn't say that the officer's name cannot be disclosed in the context of a hearing and that's again footnote 27, and they're dealing only with records. Mr. Olsen stated that even if you read the decision a little bit broader than that, that would not preclude what the POA has suggested which is to have open hearings using initials.

Commissioner Renne stated that if an officer, under due process, is going to be able to defend themselves, not only do they have to be present, but they have to have the ability to defend themselves and how does one defend themselves without disclosing their identity. Commissioner Renne stated that the Commission is in favor of public hearings but when it says, "Commission records of disciplinary appeals including the officer's name are protected under section 832.7, how does the Commission have a public hearing. Mr. Olsen stated that that's dealing with records and with response to how they defend themselves, they have the choice to have a public hearing.

Commissioner Campos asked what would happen to documents in open hearings to the extent that these documents would be protected under the Public Records Act. Mr. Olsen stated that he thinks that they should be introduced in a public hearing and as to what happens to them, Mr. Olsen stated that that's a different question and the Commission does not need to decide today.

Mark Schlosberg, ACLU, addressed the policy matter about whether or not hearings should be open or not. Mr. Schlosberg stated that Mr. Harrington, in his presentation, said that the mere fact that lawyers have a license and police officers don't is a reason why police officer record should be closed. Mr. Schlosberg stated that that's the wrong way to go. He stated that police officers has a great authority – carry a gun, a baton, have the right to use it in certain circumstances, and take a life under certain circumstances – and that requires some transparency and oversight by the public. Mr. Schlosberg urged the Commission to pass action item b urging the Board and the Mayor pursue changes in the State law with regard to this issue.

Mr. Schlosberg addressed the issue of whether open hearings could be done in a way that allows an officer to exercise his right to confrontation at the same time the rights with regard to identity, Mr. Schlosberg stated that he came up with a couple of ideas. One solution is to have officer's counsel be present and have the officer be in a separate room viewing the proceeding under video.

Mr. Schlosberg stated that what this decision does not address which he thinks need to be look at by the Commission. He stated that it does not address records that have been previously been disclosed to the public are now required to be confidential. He stated that is not required by the Copley decision. Mr. Schlosberg also stated that the Copley decision does not make other police records that are not discipline records any more confidential. He also stated that this does not prevent the Commission from releasing summaries of hearings redacting officer's names and the type of disciplinary action that ensues from various types of misconduct. He also stated that the Copley decision does not prevent complainants from releasing their own complaint.

PUBLIC COMMENT ON ALL MATTERS PERTAINING TO CLOSED SESSION

None

VOTE ON WHETHER TO HOLD CLOSED SESSION (SAN FRANCISCO ADMINISTRATIVE CODE SECTION 67.10)

Motion by Commissioner DeJesus, second by Commissioner Marshall to hold Closed Session. Approved 7-0.

CLOSED SESSION

Pursuant to Government Code section 54956.9(b) and San Francisco Administrative Code section 67.10(d)(2):

CONFERENCE WITH LEGAL COUNSEL - Anticipated Litigation

Supreme Court decision in Copley Press, Inc. v. Superior Court of San Diego County, No. S128603

VOTE TO ELECT WHETHER TO DISCLOSE ANY OR ALL DISCUSSION HELD IN CLOSED SESSION (SAN FRANCISCO ADMINISTRATIVE CODE SECTION 67.12(a))

Motion by Commissioner Campos asking the City Attorney to draft a resolution urging the Board of Supervisors and the Mayor of the City to petition the California Legislature to amend the state law in response to Copley Decision. Second by Commissioner DeJesus. Approved 7-0.

Motion by Commissioner DeJesus, second by Commissioner Marshall for non disclosure. Approved 7-0.

COMMISSION ANNOUNCEMENTS

Sergeant Reilly announced that the Commission will hold its community meeting at the Earl P. Mills Community Auditorium, 100 Whitney Young Circle, San Francisco, at 6 p.m., on Wednesday, September 27th.

SCHEDULING OF ITEMS IDENTIFIED FOR CONSIDERATION AT FUTURE COMMISSION MEETINGS

None

ADJOURNMENT

Motion by Commissioner Veronese, second by Commissioner Sparks to adjourn the meeting. Approved 7-0.

Thereafter, the meeting was adjourned at 8:15 p.m.

Sergeant Joseph Reilly
Secretary
San Francisco Police Commission

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