STATE OF NEW YORK
SUPREME COURT

APPELLATE DIVISION
THIRD DEPARTMENT

JASON W. LONGTON, JR.,

Petitioner,

-against-

VILLAGE OF CORINTH and VILLAGE OF CORINTH BOARD OF TRUSTEES, and ROBERT KANE, as Chief of Police for the Village of Corinth, and JAMES BOWEN in his official capacity as Sheriff of Saratoga County and SARATOGA COUNTY,

Respondents.

APPLICATION OF PETITIONER-APPELLANT FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

Appellate Division, Third Department Docket No. 504768
Saratoga County Index No. 20061989

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QUESTIONS PRESENTED

1. Did the Appellate Division err as a matter of law in upholding the decision finding Longton guilty of the stated charges where the record facts do not support such a finding.

2. Did the Appellate Division abuse its discretion as a matter of law in failing to modify the punishment of termination as shocking to the conscience.

APPELLATE JURISDICTION AND APPLICABLE LEGAL STANDARD

This Court has jurisdiction to grant permission to appeal pursuant to CPLR §5602(a)(1)(i).

Here, permission to appeal, or in the alternative, reargue, is appropriate because the Court ignored overwhelming record facts and in the process allowed government officials to harbor and protect criminal activity. Such a ruling is likely to have a chilling effect on all police officers who are compelled by constitutional oath to act to uphold the law and protect the public. Because the Decision is likely to have a chilling effect on other police officers, this case has importance beyond the parties and warrants review by the Court of Appeals.

While it is true that a "substantial evidence" review does allow for deference to be given to a hearing officer's determination, it does not

require it, particularly where, as here, there are overwhelming record facts. Here, the overwhelming facts reveal that Jason Longton did not disobey a lawful direct order, but rather took a rational and reasonable step to preserve evidence that corroborated that a local business owner was molesting minor employees.

The act of preserving evidence was a lawful and appropriate exercise of Longton's duty to protect the public consistent with his oath of office.

The decision here ignores that even the Chief of Police knew full well that Longton's motivation was solely to protect the public and that Longton's conduct was not contumacious. Under the facts of this case, it was and is shocking to impose a penalty of termination.

RELEVANT PROCEDURAL HISTORY

On September 23, 2004, Officer Longton was suspended without pay by the Village of Corinth (R26, 45-47).[1] At the same time, he was served a Notice and Statement of Charges with five counts of misconduct and incompetence citing the Corinth Police Department Policy and Procedure Manual (R26, 45-47). A post-suspension hearing was held on October 12, 2004, before Hearing Officer Stephen Conners ("Conners") (R26, 48). On

[1] Numbers in parenthesis preceded by the letter "R" (R47) refer to pages of the Record on Review submitted as part of the underlying proceeding.

October 15, 2004, Conners issued a Report and Recommendation that Officer Longton's employment be terminated (R48-53). No reviewable record was created at that hearing (R27, 56). On October 20, 2004, the Village Board adopted Conners' Report and Recommendation and terminated Officer Longton (R55).

With a Decision dated June 21, 2006, the State Supreme Court (the Honorable Thomas D. Nolan, Jr.) held that the failure to prepare a transcript of a disciplinary hearing violated the requirement for a reviewable record (R56-59). Judge Nolan annulled the Resolution and ordered the Village to hold a *de novo* hearing[2] (R56-59).

On August 16, 2006, the Village Board reappointed Conners to conduct a new hearing on the charges against Officer Longton (R851). On May 7, 2007, Conners again recommended that Officer Longton's employment be terminated (R69-81). The decision sustained all five of the charges except for Charge 3, Specification 1, which was dismissed, and specifically held that no discipline was warranted for the conduct alleged in

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[2] In a separate proceeding, Officer Longton challenged the Village's refusal to issue him back pay for the periods October 23, 2004 to November 9, 2006 and from January 16, 2007 to the date that Officer Longton was either reinstated or lawfully terminated (R60-63). With a Decision dated March 13, 2008, the Appellate Division unanimously held that Officer Longton must be returned to the payroll with back pay pending a re-determination of the September 23, 2004 charges consistent with the Civil Service Law Section 75 and the Village Law Section 8-104. See, Longton v. Village of Corinth, 49 AD3d 995 (3rd Dep't 2008).

Charges 1, 2, 3 and 4. The recommended decision sustained charge 5 and

denied Longton's affirmative defense pursuant to Civil Service Law §75-b (R81).

On May 21, 2007, the Village Board adopted the Recommended Decision in its entirety and terminated Officer Longton's employment (R82).

Pursuant to Article 78, Officer Longton challenged his termination in the Supreme Court, Saratoga County, seeking to vacate and annul the decision terminating his employment with the Village of Corinth, to reinstate him to the position of Police Officer for the Village of Corinth and immediately reinstate him to the payroll with full back pay and benefits, including the right to laterally transfer to the Saratoga County Sheriff's Department[3] (R22-23). In the alternative, Officer Longton requested the Supreme Court issue an Order transferring the Article 78 proceeding to the Appellate Division, Third Judicial Department, pursuant to CPLR §7804(g) (R119-121).

With a Decision and Order dated January 29, 2008, the Supreme Court, Saratoga County (Nolan, J.) granted the petition, in part, dismissing the Village respondents' affirmative defenses and transferring the Article 78 proceeding to the Appellate Division, Third Judicial Department (R3-8).

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[3] On June 1, 2007, the Corinth Police Department was eliminated and replaced with the Saratoga County Sheriff's Department. The Saratoga County Sheriff's Department hired all of the Village of Corinth Police Officers. Thus, the County is named solely to allow for complete relief for Officer Longton once the termination is vacated (R26, 98).

On March 5, 2008, the Village respondents filed a Notice of Appeal from the January 29, 2008 Decision and Order (R10).

On May 13, 2008, Officer Longton filed a motion to dismiss the Village's appeal for failure to prosecute (R2514-15). With a Decision and Order dated June 19, 2008, the Appellate Division, Third Judicial Department dismissed the appeal and ordered Officer Longton to perfect the transferred proceeding (R19).

On December 24, 2008 this court issued a decision upholding the Village's decision sustaining the disciplinary charges, rejecting Longton's whistleblower claims and finding that a penalty of termination does not shock the conscience. It is that decision which we seek leave to appeal from or in the alternative, seek to reargue.

SUMMARY OF THE FACTS

The case involves a dedicated Police Officer who correctly assessed that there was probable cause to believe the owner of a local diner was sexually assaulting women, many of whom were minors. When Officer Longton made the Chief of Police aware of this, an unprecedented meeting was called where the Mayor, a Village Trustee and the Chief instructed Officer Longton that he could not arrest the local businessman and told Longton to "steer clear" of the local businessman. At the time, the Mayor was also a real

estate agent who had recently profited from his representation of the local business owner.

Officer Longton interpreted the meeting as a direction that the owner would not be investigated. History proved that Officer Longton was correct.

Officer Longton legitimately felt the Mayor, Village Trustee and Chief were taking extraordinary steps to protect the local business owner and to improperly halt any investigation.

Within hours after the meeting where Longton was told to "steer clear of Downie", a new witness voluntarily came forward corroborating that the business owner was fondling multiple female employees at his place of employment. Officer Longton was disciplined because he took a statement from that witness.

While the local business owner went on to molest three other minor female employees over a one-year period from August 2004 to August 2005, the Police Department suspended and fired Officer Longton, then did nothing to investigate the business owner. Remarkably, the Hearing Officer found that other officers took over the investigation of the business owner when, in fact, they did not. This Court affirmed that finding despite the overwhelming evidence to the contrary essentially holding that the Hearing Officer made credibility determinations that the Court would not review.

The Hearing Officer ignored these facts when he found Officer Longton guilty of insubordination and recommended termination as the appropriate punishment. He also accepted the Village's concern that Officer's Longton's investigation of the local business owner would subject the Village to a harassment suit. Yet, that concern was based solely on undocumented and unconfirmed allegations from the business owner, the target of Officer Longton's investigation. There is no evidence in the record that the Village made any attempt to confirm the truth of those allegations. Even the Hearing Officer acknowledged this. This Court gave deference to the Hearing Officer's conclusions despite the overwhelming evidence to the contrary.

When Officer Longton was suspended, the Village "piled on" several other technical non-intentional charges to bolster its case. While these other charges did not warrant discipline, and are not at issue here, they still reveal the Village's selective treatment of Officer Longton and attempt to arbitrarily discipline him for engaging in protected activity. In upholding the decision below this Court ignored this telling fact.

ARGUMENT

POINT I

OFFICER LONGTON REASONABLY BELIEVED THAT CHIEF KANE'S ORDER WAS UNLAWFUL AND IN VIOLATION OF THE CONSTITUTIONAL OATH AND DEPARTMENT'S CODE OF ETHICS

The crux of the case is a finding that that Officer Longton was insubordinate when he went to Melinda Marcotte's house at her request to take her voluntary statement that a local business man, "Downie", molested her and several minors. The Appellate Division accepted a finding that Longton took the statement after he was given a direct order to cease all efforts to investigate Downie and turn over the investigation to a different officer. In actuality, the record shows that what the Chief actually said was that Longton "steer clear of Downie" and take no steps to arrest him.

The Corinth Police Manual defines insubordination as "failing or deliberately refusing to obey an order given by a supervisory officer" (918). Here, there can be no showing of insubordination.

It is undisputed that Officer Longton complied with the Chief's order to not arrest Downie and to "steer clear" of him (R46, 711, 713, 761). However, the Hearing Officer recast Chief Kane's order as directing Officer Longton to cease his investigation of Downie altogether, relying on the testimony of two politicians who never before participated in an internal

police investigation (R73). The Court's decision here essentially adopts the Hearing Officer's decision recasting the actual order. That is both crucial and wrong. It is crucial because absent that characterization, Longton's conduct can not be viewed as insubordinate but rather a reasonable response to an unsolicited offer from the public to give a written statement documenting criminal conduct. It is wrong because as Chief Kane testified his actual order to Longton was "steer clear" of him. This crucial fact was proven with overwhelming facts, yet the Hearing Officer avoided the facts by recasting the Chief's actual words into something else. This Court then refused the review that error and instead gave deference to the decision despite the overwhelming facts to the contrary.

The Decision here also fails to account for the extraordinary and unprecedented event of the Chief, Mayor and Trustee's meeting with Officer Longton. Such a meeting had never before taken place in the Department and was preceded by a separate meeting involving Downie that was also unprecedented (R180-82, 185-86, 268, 274, 279-80, 530-31). Yet, the Village Mayor, Trustee and Chief could not explain why, when it came to Downie, normal everyday police procedure was ignored. The only reasonable conclusion is that Downie had a strong influential relationship with the Mayor and Trustee. Even the Chief acknowledged that when he

made the remarkable statement that "We can't take these people on", referring to the Mayor, Trustee Lescault and Downie, giving Officer Longton reasonable belief that Downie's conduct would go unabated (R693-94). The Chief also acknowledged that it was reasonable for Officer Longton to believe that Downie was receiving special treatment from the Mayor (R531).

Still, the Hearing Officer credited Chief Kane's testimony that Trevor Downie's position in the community had nothing to do with the order he gave to Longton in the presence of the Mayor and Village Trustee. The Hearing Officer based that finding on two facts: (1) other high profile individuals had been arrested in the Village, and (2) the Chief had earlier encouraged Officer Longton to investigate Downie (R80). The Court here gave deference to the Hearing Officer's conclusions even though they are inconsistent with the record.

The fact that the Department arrested others is irrelevant. In those cases, there is no evidence of improper involvement of Village officials. In fact, we know nothing about the events leading to those arrests (R739-41). In this case, however, there is substantial evidence that the relationship between Downie, the Mayor and the Village Trustee led to Officer Longton's suspension and Downie's continued molestation of minors.

While Chief Kane admittedly encouraged Officer Longton to obtain a written statement from Melinda Marcotte confirming that Downie was inappropriately touching minors, the Hearing Officer omitted the fact that the Chief Kane wanted to use that statement to destroy Downie's credibility with the Mayor (R688-89), and the Court here apparently accepted that omission. This fact further demonstrates that Downie had a strong influential relationship with the Mayor. Further, Chief Kane's characterization of Officer Longton as a rogue cop with a personal vendetta against Downie is supported by speculation and belied by Officer Longton's actual conduct on August 26, 2004 (R. R232, 707-11, 1848-1850, 1883-84). Despite the Hearing Officer's conclusion, the record shows Officer Longton had no intention of arresting Downie without probable cause (R721). Indeed, the Chief admitted that Officer Longton's motives to "protect children" were genuine (R530).

Yet in the face of this the Court still deferred to the Hearing Officer's conclusion that Longton disobeyed a clear and direct order to close all activity related to an investigation.

This Court also accepted the Hearing Officer's finding that the Village intended to re-assign the investigation of Downie to another officer. That is

exactly what the Hearing Officer found (R79). Yet, that finding is inconsistent with the record evidence:

- At a minimum, the Corinth Police Manual required the officer continuing the investigation to confer with Officer Longton to report the status of his investigation (R1204). That never happened. Instead, Officer Longton was immediately removed from the investigation, assigned to desk duty and then suspended (R485-87, 584,731).

- Pursuant to the Corinth Police Manual, in a sexual assault and child abuse case potential witnesses can be contacted and interviewed (R.1232, 1236). However, no witnesses were interviewed and the suspect was never questioned (R243-45, 247-48, 486-88, 493, 597-602, 615-16, 1853, 2453).

- Pursuant to the Corinth Police Manual, the assigned Officer must prepare a Supplemental Report at the conclusion of his/her investigation or within 10 days of being assigned the investigation (R1205). That Supplemental Report was never created.

- Pursuant to the Corinth Police Manual, the assigned Officer must periodically prepare and submit reports concerning the status of an ongoing investigation including its final disposition (R1205-06). No such reports were created.

- Pursuant to the Corinth Police Manual, allegations of sexual assault of a minor must be reported to the Child Abuse Hotline and the New York State Child Abuse Register (R474, 475, 1233, 1236). That never happened (R488, 493).

- Chief Kane admitted that he had direct knowledge that Downie was allegedly molesting female employees, including minors. With that knowledge, Chief Kane never questioned Downie or any witness, and returned the only piece of sworn evidence corroborating Downie's sexual contact of minors to a victim who later destroyed her statement (R243-45, 247-48, 254, 486-87, 493, 1848-50, 1853).

- According to the Chief, the extent of the Department's investigation included dining at Jack's Place each morning for breakfast waiting for an employee to voluntarily disclose that Downie was molesting minors (R486-87).

Officer Longton's investigation uncovered several possible criminal offenses all of which Chief Kane ignored. Those offenses included the following:

- Penal Law §260.10(1) Endangering the Welfare of a Child[4];
- Penal Law §130.52 Forcible Touching[5]; and
- Penal Law §130.55 Sexual Abuse in the Third Degree[6].

We know Chief Kane ignored these possible criminal offenses because he wrongly told Crandall to contact the New York State Department of Labor, an agency which has jurisdiction over child labor hours of work violations (see, e.g., NYS Labor L. §21 and §§130 et seq.), but has no jurisdiction over sexual touching cases involving adults or minors. What is

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[4] A person is guilty of endangering the welfare of a child when ... he knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old ....

[5] A person is guilty of forcible touching when such person intentionally, and for no legitimate purpose, forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person; or for the purpose of gratifying the actor's sexual desire.

[6] A person is guilty of sexual abuse in the third degree when he or she subjects another person to sexual contact without the latter's consent....

worse than giving Crandall the wrong information is that as the Chief of Police, Kane surely knew that unlike an adult, a minor cannot consent to sexual touching. See, Marmelstein v. Kehillat New Hempstead, 2008 WL 2510623, n.4 (2008). Thus, there is a crime, not a civil offense, that must be investigated.

As of August 26, 2004, Chief Kane knew that Downie allegedly repeatedly groped an adult female's breasts without her consent, molested several minors, and made lewd comments to one of those minors (R294-95, 298, 470-71, 687-89, 696-697, 711, 712, 1610, 1885). These facts alone demonstrate potential criminal activity that warranted further discovery of the facts. See, People v. Fuller, 845 NYS2d 594 (3rd Dep't 2008) (subjecting an individual to nonconsensual sexual contact sufficiently demonstrates Sexual Abuse in the Third Degree); People v. Sumpter, 190 Misc.2d 115 (Sup. Ct. App. Term 2001) ("the intentional and sexually motivated touching of a person's covered buttocks constitutes Sexual Abuse in the Third Degree); People v. Morbelli, 144 Misc.2d 482 (NYC Criminal Court 1989); People v. Hitchcock, 98 NY2d 586 (2002) (proof that the defendant was aware that his conduct would endanger a child is sufficient evidence of endangerment).

The Decision here accepts as true the Village's alleged concern that the Village was motivated by Downie's threatened harassment suit. That is simply inconsistent with the record. The fact is, the Village took no step to investigate Downie's unfounded claims made in a series of unusual calls to the Mayor at his place of employment and residence (R494-500, 512-13). The Hearing Officer acknowledged this in the first disciplinary hearing (R52).

The Department's Police Manual is quite clear on the procedures that must be followed whenever a civilian registers a complaint (R396, 928-34). None of these steps were taken (R323, 386, 396-98, 494-500, 512-13).

Indeed, as Chief Kane admitted, it is quite common for a suspect to seek to deflect attention from his own misdeeds by claiming police misconduct (R.517). That is why following the civilian complaint procedure is so important. If the procedure is followed baseless claims are revealed and honest police officers are vindicated (R516-18).

Under these circumstances it is apparent that the original direction to Longton to back off was to protect Downie. Surely that is not a lawful order and one cannot be insubordinate absent a lawful order.

In addition, the other four charges, which did not warrant discipline, demonstrate that the asserted reason for Officer Longton's discharge is

pretextual. First, it is undisputed that the Village introduced altered documents to support its third charge (R438, 443-47, 1575-79, 1891). At Officer Longton's hearing, the Village introduced a police blotter entry for August 26, 2004 recording odometer readings for that day to show that Officer Longton did not properly record his starting mileage (R1575-79). Chief Kane's father, Sergeant Kane, also did not record his starting mileage on that day (R1891). That proof was introduced in the first hearing. However, the Village apparently made up a starting mileage for Sergeant Kane and added it to the blotter sometime after the first proceeding but in time to introduce this altered blotter in the second proceeding (R1575-79). Chief Kane admitted that this would constitute a serious violation of Department rules to alter a blotter entry later without some reference to when it was added (R447). Yet, there was no explanation why the Village felt justified in using an altered document to support the charges. What the Village does admit is that no investigation has been conducted to ferret out who violated Department policy and altered an official police record knowing that the record would be relied on in a pending disciplinary proceeding (R447).

The Chief also admitted that charges 1, 2 and 3 amounted to no more than technical non-intentional errors that had no consequence whatsoever (R435, 457-63). Further, the Chief could not explain why the Village waited

several months to seek discipline for these technical, non-intentional inconsequential omissions. He could also not explain why other officers were not disciplined for exactly the same conduct (R457-63). The Chief even acknowledged that Officer Longton had already been disciplined for one of the charges (R338-41, 461).

Together, these facts demonstrate that the Village knew the Chief's order to Officer Longton was unlawful and simply "piled on" every technical infraction it could find to bolster its case. Thus, Officer Longton has satisfied his burden of proving that his discharge was in bad faith and in retaliation for refusing to obey an unlawful order. All of this was ignored by the Court.

These facts also demonstrate that Longton's conduct is protected by Civil Service Law §75-b.

Here, Longton had disciplinary acts taken against him because he was disclosing to the Chief, Mayor and Village Trustee that he had a reasonable basis to believe Downie was violating the law, i.e., sexually molesting female employees, including minors.

Civil Service Law §75-b provides:

> A public employer shall not dismiss or take other disciplinary or other adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a governmental body information: (i) regarding a

> violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety....

Longton has shown each element of this defense. Officer Longton correctly assessed that Downie was molesting several female employees, including minors, in violation of New York State Penal Law. Officer Longton's protected activity, as defined by §75-b, included advising the Chief, Mayor and Village Trustee of this criminal conduct. There is no dispute Officer Longton suffered an adverse personnel action as he was immediately removed from the investigation and then suspended.

The Decision of the Court incorrectly failed to address these undisputed facts and instead affirmed the Hearing Officer's dismissal of the §75-b defense as based on a credibility determination. A decision dismissing a 75-b defense on this record will almost certainly have a chilling effect on other police officers seeking to protect the public.

POINT II

OFFICER LONGTON'S PENALTY OF TERMINATION IS EXCESSIVE

Termination under these facts is a particularly inappropriate penalty. That penalty is excessive and shocking to the conscience for the following reasons:

- Officer Longton complied with Chief Kane's order to not arrest, and to stay away from, Downie (R46, 711, 713, 761).

- Officer Longton did not approach Marcotte for a statement. Rather, she contacted Officer Longton to inform him that she was now ready to give him a voluntary statement (R631, 632, 1883).

- Marcotte's statement was provided to Officer Longton with the understanding that he would keep it confidential. Officer Longton complied with that request (R708).

- Officer Longton immediately turned over the Marcotte statement when the Chief ordered him to do so (R711-12).

- Officer Longton correctly assessed that Downie was a threat to the health and safety of Village residents while the Village merely enabled criminal behavior (R75, 549, 569-580, 690-91, 1848-1850).

- Officer Longton has an otherwise distinguished career as a Police Officer for the Village of Corinth (R713, 2433-2436)

This is not the type of contumacious conduct that warrants a penalty of discipline.

Based on the foregoing, Officer Longton's penalty of termination is excessive and should be voided. It was error for the Court to hold otherwise.

CONCLUSION

For the reasons set forth above, Petitioner-Appellant respectfully requests permission to appeal the Memorandum and Judgment to the Court of Appeals. Alternatively, Petitioner-Appellant respectfully requests reargument on these same bases.

Dated: February 9, 2009
Albany, New York

Respectfully submitted,

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