

## Wait to Investigate and Interrogate to Seal Officer's Fate

On June 21, 2007, the New Jersey Supreme Court decided a case that can be very helpful to police administrations in making administrative, disciplinary charges stick following a criminal investigation which results in acquittal or a decision not to prosecute.

I have observed a common misconception among police administrations that often believe that when an officer is the subject of a criminal investigation, and the determination is made not to prosecute the officer criminally (often through what is commonly known as a "check-off letter"), there is then forty-five days from that determination in which administrative disciplinary charges must be brought. I have argued for years that the forty-five (45) day rule of N.J.S.A.40A:14-147 allows time to continue investigation after receipt of a check-off letter or acquittal in most if not all cases, and the forty-five (45) day "clock" starts ticking only when such an internal administrative investigation is complete, rather than on the date of the check-off letter or acquittal.

In cases involving the State Police, the New Jersey Supreme Court agreed with me, in a case called Roberts v. New Jersey State Police, -- N.J. – (June 21, 2007) and it seems overwhelmingly likely that the same result would be reached in the case of municipal police officers.

The factual scenario is analogous to one that occurs with some frequency, with a potentially criminal matter referred by a police agency to the Prosecutor's Office, and the Prosecutor finding insufficient evidence and returning the matter to the police agency for whatever administrative action is deemed appropriate by the police agency. In Roberts, however, it was in the State Police context.

In considering the time within a police agency must issue disciplinary charges under such circumstances, the starting point is the 45 day rule of N.J.S.A. 40A:14-147<sup>1</sup>. The statute provides (with a number of exceptions) that an administrative disciplinary complaint against a municipal police officer must be "no later than the 45<sup>th</sup> day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based." The statute further applies that "the 45-day time limit shall not apply if an investigation of a law enforcement officer... is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State." The 45 day rule for municipal police officers ends there. For the State Police, the analogous provision of N.J.S.A. 53:1-33 has an additional sentence which reads: "[t]he applicable time limit shall begin on the day after the disposition of the criminal investigation."

Plaintiff Trooper Ronald Roberts was charged by his girlfriend with assault, in March, 2003, which required him to report the incident to the State Police within four

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<sup>1</sup> The analogous provision for the State Police is N.J.S.A. 53:1-33.

hours. Roberts instead waited six days to report it. Roberts' girlfriend's assault complaint, resulting in a domestic violence complaint, alleged that Roberts had broken her arm in an incident the previous October. When the local police reported the charges to the State Police, the resulting State Police investigation led to a statement from the girlfriend indicating that Roberts had planned to file a claim for her broken arm with his homeowners' insurance to obtain insurance coverage for the resulting medical bills, alleging the girlfriend fell down a flight of stairs. The State Police thus halted the administrative investigation and turned the matter over to the Division of Criminal Justice ("DCJ"), Office of Insurance Fraud Prosecutor for a criminal investigation.

The domestic violence charges were dismissed, but the insurance fraud criminal investigation continued. The DCJ issued a check-off letter on December 22, 2003, indicating it found insufficient evidence to prosecute Roberts criminally. The State Police picked up and continued the internal disciplinary investigation, ultimately including an interview of Roberts on January 26, 2004. A final report of the investigation was forwarded to the Superintendent on February 17, 2004, and the disciplinary notice was served on Roberts on March 1, 2004. As such, the disciplinary notice was served within 45 days of the interview and within 45 days of the final internal investigation report, but more than 45 days from the check-off letter.

In analyzing the case, the New Jersey Supreme Court noted that ordinarily, since a complete and thorough investigation into incidents serves the interests of the Trooper, the State Police, and "the people of our State," timeliness is judged not from the date of the event leading to the investigation, but from receipt of the report of investigation by the Superintendent, who has the exclusive authority to file charges. The Court noted that accepting Trooper Roberts' argument and running the 45 days from the check-off letter would prevent the State Police from conducting as thorough an internal affairs investigation as it would if there had not been a criminal investigation. The Court noted that the internal affairs investigation culminated in the interview of Roberts, which was an important component necessary for the investigation to be thorough and complete. Adopting Roberts' argument, the Court noted, would have required charges prior to the time when Roberts would have been interviewed.

The Roberts Court concluded that the 45 days is measured from the Superintendent's receipt of the investigative report, following a complete and thorough investigation. The Court also noted that important to its decision was the fact that the internal investigation was not unnecessarily delayed or protracted, but held in abeyance only because of the criminal investigation.

Considering the decision's applicability to municipal police, the Roberts Court noted that the New Jersey Supreme Court had not had the opportunity to consider the same issue under the municipal police 45 day rule statute. However it seems overwhelmingly likely that the result would be the same. In fact, unlike the State Police 45 day rule statute, the municipal police 45 day rule statute does not include the language stating that the 45 day rule in the case of a criminal investigation "begin[s] on the day after disposition of the criminal investigation." That is, with the Court determining that

the 45 day clock still does not begin to tick for the State Police until the investigation is complete and the Superintendent gets the report *despite that language*, the same conclusion seems even easier to draw in absence of that language.

Moreover, just like the Court noted with respect to the Superintendent being the only one who can file the charges against a State Police Trooper, only the Chief of Police (in those municipalities that have a Chief) can file administrative disciplinary charges against a municipal police officer. Gauntt v. Bridgeton, 194 N.J.Super. 468, 491 (App. Div. 1984). As such, contrary to another common misconception about the 45 day rule, in absence of unnecessary delay, the 45 days should not be measured from the time the investigating internal affairs officer has “sufficient information” for the disciplinary charges, but from the time the Chief of Police has that information, typically after a complete and thorough investigation by internal affairs and complete internal affairs investigation report as required by the Attorney General’s Internal Affairs Guidelines.

Finally, another aspect of the Roberts decision not to be overlooked is the Court’s recognition of the administrative interview of Roberts as an important component of a complete and thorough internal affairs investigation. While under criminal investigation, Roberts had a Fifth Amendment right not to answer questions. Once the matter was returned to the State Police for administrative, however, the State Police was at liberty to compel an interview with Roberts, and Roberts could be disciplined and even terminated for insubordination if he refused to answer questions, if given appropriate admonishments. The only caveat is that any answers he gave when compelled for such an interview could not be used against him to resume criminal prosecution, but could only be used against him for administrative disciplinary charges. Roberts could also be disciplined and most likely terminated if he gave answers in such an interview that were found to be untruthful.

Such interviews are a powerful tool for municipal police administrations as well. In my opinion, internal administrative interviews should be compelled and recorded and/or transcribed in all or at least almost all administrative disciplinary investigations. For one thing, administration can ascertain, in advance, an officer’s purported defense to the allegations. In some cases, this may lead administration to pass on disciplinary charges altogether, where an officer is actually not guilty and has a reasonable explanation for the circumstances. In other cases, such interviews can disclose weaknesses in the proofs that may warrant additional investigation. In still other cases, an officer may tell untruths in trying to cover for his behavior. No matter what the outcome, there is virtually no downside to conducting such interviews prior to, or even after, issuing administrative disciplinary charges. With respect to the 45 day rule, the conduct of such interviews can extend the time to investigate and keep the 45 day clock from beginning to tick.

The lesson from Roberts seems to be simply this: Do not let the 45 day rule rush you into the decision of whether or not to charge an officer with administrative disciplinary charges following a check-off letter after a criminal investigation, or an acquittal. Review the criminal investigation reports if available. Conduct additional

investigation as warranted. Always, or almost always, require the officer to sit for an internal interview. Make sure comprehensive internal affairs summary investigation reports are prepared and submitted to the Chief on a timely basis, summarizing and evaluating all of the evidence against and in support of the officer's behavior. If all of this is done without unnecessary delay, and the Chief of Police issues charges within 45 days of his or her receipt of the comprehensive internal affairs summary investigation report, the result in most cases should be charges that will not be subject to 45 day rule attack. The result will also lead not only a complete picture of the strengths and weaknesses of the case, but full awareness of the officer's proffered defense, and the strengths and weaknesses thereof, before the charges are even issued.