



• (904) 293-3917 • MAIL: 52 TUSCAN WAY, STE: 202-303 ST. AUGUSTINE, FL 32092 •
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March 5th, 2021

Crescent City
Attn: City Manager Michael Esposito
3 Summit St.
Crescent City, FL 32212

Re: Internal Investigation of Ofc. Ward and Ofc. Burger

Dear City Manager Esposito:

As you already know, I have the privilege of representing Ofc. Chad Ward and Ofc. Thomas Burger regarding a variety of legal issues they are having with the City. The purpose of this letter is to inform you that the manner in which the City has chosen to proceed with its internal investigations against my Clients has deprived them of their rights to due process, and as a result, they are asking that these investigations be immediately placed on hold until these issues can be properly addressed.

For example, Section 25.2(b) of the CCPD Policy Manual states that internal investigations "Shall be completed within 30 days from the time of their receipt, unless extenuating circumstances dictate otherwise". This section has been violated because the investigations have now been pending for 80-days, and the City has failed to meet the required deadline or provide my Client's the "extenuating circumstances" for the extension.

Another example of my Client's rights being violated is Section 25.3(a) of the CCPD Policy Manual, which states that "The Chief of Police will be responsible for investigating all complaints involving members of the Department" and "The office of the Chief may designate Senior Officers or Supervisory Officers to investigate offenses of a minor nature". The Policy Manual gives no authority to delegate the investigation outside the police department, which the City has done. This Policy is in line with the Florida Statutes that indicate that the Legislature did not intend for persons outside the employing agency to participate in the investigation and formulation of initial findings concerning a complaint against a law enforcement officer. If the basis for your referral is Florida Statute 112.533(1)(b)(2), please note that the City is required to document the

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"conflict", which it has failed to do, or if it has documented the conflict, it has failed to provide my Client's copies.

Another example of my Client's rights being violated is Section 25.5 (a) of the CCPD Policy Manual which states that:

The Chief of Police shall:

- a. Notify the complainant, as soon as practical, that the Department acknowledges receipt of the complaint, that the complaint is under investigation, that the investigation will be completed within 30 days. If the investigation exceeds 30 days, the Chief of Police shall notify the complainant.

With regards to this section, not only did the City fail to notify my Client's that the investigations will be completed within 30-days, it also failed to notify them when the 30-days expired that the investigation would be exceeding the 30-day deadline and the reasons why.

Still yet another example of my Client's rights being violated is Section 25.5 (a) of the CCPD Manual which states that a:

"Complaint will not normally be accepted more than 30 days after the alleged incident, with the following exceptions:

- a. When the act complained of is a criminal violation in which case the criminal statute of limitations will prevail.
- b. When the complaining person can show good cause for not making a complaint earlier."

The City has violated this section because several of the allegations you requested to be investigated were allegedly done months earlier and outside of the 30-day deadline. If the City's basis for proceeding with the investigations is "good cause", the City has failed to document what it is, and disclose it to my Clients.

It is interesting to note that the City actually referred the internal investigations approximately 12-days after the whole Police Department was shut down and placed on administrative leave. What is even more interesting is that the City is continuing with its investigation even though it appears the City Council will be disbanding the Police Department all together in a couple of days.

Under the current Policy, the Police Chief is solely responsible for all disciplinary investigations and determining the appropriate punishment if any. Also, under the current Policy, these responsibilities have unfortunately fallen upon you because this is what happens when a Police Chief has to "retire" effective immediately because he committed a Battery on a LEO against a fellow officer which has now opened himself

and the City up to a lawsuit. This has created one of many conflicts which will be addressed below.

Another textbook example of my Client's rights being violated is Chapter 14.4,II(c) of the CCPD Policy Manual, which states that "The City manager shall hear appeals in cases involving disciplinary actions of regular employees who have satisfactorily completed their probationary period." This begs the question of how can my Clients receive due process when the City Manager, who is the acting Police Chief, and has asked for an Internal Investigation even though there is conflict because he is a direct witness, gets to determine the punishment if violations are found, and then gets to turn around and hear the appeal on his own decision?

Most importantly, in order to ensure my Clients have due process, all of the issues mentioned herein should have been addressed before the investigation began. Due process requires my Clients the right to have a fair and impartial system in place, before the investigative process begins, so that they know the rules, and can identify their options, and then proceed accordingly. Changing the system, or moving the goal post, or creating the system as the investigation progresses, prevents them from exercising these fundamental rights. Based on the foregoing, it may not be possible to correct these issues because the City has proceeded pre-maturely.

Section (1)(a) of Florida Statute 112.533 states in part that:

"Every law enforcement agency and correctional agency shall establish and put into operation a system for the receipt, investigation, and determination of complaints received by such agency from any person, which shall be the procedure for investigating a complaint against a law enforcement and correctional officer and for determining whether to proceed with disciplinary action or to file disciplinary charges, notwithstanding any other law or ordinance to the contrary."

Florida Statute 112.532 sets forth othe rights and privileges possessed by law enforcement officers and correctional officers during disciplinary proceedings, including the establishment of complaint review boards; the right of law enforcement officers and correctional officers to bring civil suits; the right of law enforcement officers or correctional officers to have notice of disciplinary action; and the prohibition against retaliatory action being taken against law enforcement officers and correctional officers who exercise their rights.

Section (2) of Florida Statute 112.532, which is also know as the Law Enforcement Officer's Bill of Rights, states in part:

"A complaint review board shall be composed of three members: One member selected by the chief administrator of the agency or unit; one member selected by the aggrieved officer; and a third member to be selected by the other two members.....The board members shall be law enforcement officers or

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correctional officers selected from any state, county, or municipal agency within the county. There shall be a board for law enforcement officers and a board for correctional officers whose members shall be from the same discipline as the aggrieved officer. The provisions of this subsection shall not apply to sheriffs or deputy sheriffs."

In short, both of my Clients have an absolute right to have this review board empaneled as they go through this process. At this time, because of the mess that has been created, my Clients are exercising their rights by respectfully requesting that a review board be empaneled to review at a minimum, whether or not the City has followed its own policies and procedures in bringing their internal investigation complaints, whether a conflict has been created by your being a main witness, whether this conflict prevents you from being able to order the investigations, whether it prevents you from being the one to determine the punishment if any, and whether it prevents you from being the one to hear the appeal all of which you unfairly and inappropriately have the authority to do under current policy.

Section 112.532(2), Florida Statutes, provides that:

"A complaint review board shall be composed of three members: One member selected by the chief administrator of the agency or unit; one member selected by the aggrieved officer; and a third member to be selected by the other two members. Agencies or units having more than 100 law enforcement officers or correctional officers shall utilize a five-member board, with two members being selected by the administrator, two members being selected by the aggrieved officer, and the fifth member being selected by the other four members. The board members shall be law enforcement officers or correctional officers selected from any state, county, or municipal agency within the county. There shall be a board for law enforcement officers and a board for correctional officers whose members shall be from the same discipline as the aggrieved officer. The provisions of this subsection shall not apply to sheriffs or deputy sheriffs."

Furthermore, Florida Statute 112.534 Failure to Comply/ Official Misconduct reads as follows:

(1) If any law enforcement agency or correctional agency, including investigators in its internal affairs or professional standards division, or an assigned investigating supervisor, intentionally fails to comply with the requirements of this part, the following procedures apply. For purposes of this section, the term "law enforcement officer" or "correctional officer" includes the officer's representative or legal counsel, except in application of paragraph (d).

(a) The law enforcement officer or correctional officer shall advise the investigator of the intentional violation of the requirements of this part which is alleged to have occurred. The officer's notice of violation is sufficient to notify the investigator of the requirements of this part which are alleged to have been violated and the factual basis of each violation.

(b) If the investigator fails to cure the violation or continues the violation after being notified by the law enforcement officer or correctional officer, the officer

shall request the agency head or his designee be informed of the alleged intentional violation. Once this request is made, the interview of the officer shall cease, and the officer's refusal to respond to further investigative questions does not constitute insubordination or any similar type of policy violation.

(c) Thereafter, within 3 working days, a written notice of violation and request for a compliance review hearing shall be filed with the agency head or designee which must contain sufficient information to identify the requirements of this part which are alleged to have been violated and the factual basis of each violation. All evidence related to the investigation must be preserved for review and presentation at the compliance review hearing. For purposes of confidentiality, the compliance review panel hearing shall be considered part of the original investigation.

(d) Unless otherwise remedied by the agency before the hearing, a compliance review hearing must be conducted within 10 working days after the request for a compliance review hearing is filed, unless, by mutual agreement of the officer and agency or for extraordinary reasons, an alternate date is chosen. The panel shall review the circumstances and facts surrounding the alleged intentional violation. The compliance review panel shall be made up of three members: one member selected by the agency head, one member selected by the officer filing the request, and a third member to be selected by the other two members. The review panel members shall be law enforcement officers or correctional officers who are active from the same law enforcement discipline as the officer requesting the hearing. Panel members may be selected from any state, county, or municipal agency within the county in which the officer works. The compliance review hearing shall be conducted in the county in which the officer works.

(e) It is the responsibility of the compliance review panel to determine whether or not the investigator or agency intentionally violated the requirements provided under this part. It may hear evidence, review relevant documents, and hear argument before making such a determination; however, all evidence received shall be strictly limited to the allegation under consideration and may not be related to the disciplinary charges pending against the officer. The investigative materials are considered confidential for purposes of the compliance review hearing and determination.

(f) The officer bears the burden of proof to establish that the violation of this part was intentional. The standard of proof for such a determination is by a preponderance of the evidence. The determination of the panel must be made at the conclusion of the hearing, in writing, and filed with the agency head and the officer.

(g) If the alleged violation is sustained as intentional by the compliance review panel, the agency head shall immediately remove the investigator from any further involvement with the investigation of the officer. Additionally, the agency head shall direct an investigation be initiated against the investigator determined to have intentionally violated the requirements provided under this part for purposes of agency disciplinary action. If that investigation is sustained, the

sustained allegations against the investigator shall be forwarded to the Criminal Justice Standards and Training Commission for review as an act of official misconduct or misuse of position.

Based on the foregoing, and at this time, my Clients are respectfully requesting a Compliance Review Panel be established, in addition to the complaint review board, to review the previous allegations and whether or not the City has followed the proper internal investigation procedures to warrant my Client's interviews.

Please be advised that pursuant to Florida Statute 112.534(1)(a), this letter has also been sent to Investigator Randy Doyle and that his receipt serves as Notice of these violations. Even though Florida Statute requires Inv. Doyle to attempt to cure the violations now that he has been put on Notice, he cannot because these issues are through no fault of his own and were created solely by the City. Inv. Doyle has been nothing short of professional, and courteous during this process and my Client's take no issue with him.

Also be advised that pursuant to Florida Statute 112.534(1)(b), my Client's will not be participating in an interview at this time and that the exercising of their rights does not constitute insubordination or any similar type of violation. If the Panel determines that the City has not violated any of its policies in bringing the Internal Investigations, and that there is no Conflict of Interest in the sole authority the Policy Manual gives you, and that the current disciplinary system in place is fair and impartial to my Client's, then my Client's will reconsider their positions.

Pursuant to Florida Statute 112.533 (2)(a)(2), my Clients have a right review all of the evidence against them before their interview, which they are requesting the opportunity to do, if an interview is completed. Also pursuant to Florida Statute 112.533(2)(a)(3), my Clients have a right to review their complete employee files before the interview. We have previously requested complete copies of both files from the City Attorney on two occasions. We were informed that copies should have been available Thursday afternoon on the 18th of February. We still have yet to hear from the City Attorney that they are ready. If they are, please let me know so my Clients can come and pick them up. If they are not, please let me know when they will be ready.

As if the City's legal woes couldn't get more difficult, there are also the issues of the Police Department being disbanded and closed down. It is my understanding that on February 24th, 2021, the City Commission voted on their second and final vote to close the Police Department. It is also my understanding that the City Commission voted again to disband the Police Department, and that pursuant to the proposed Ordinance, the disbandment was effective immediately at the time of the vote, which means my Clients are no longer employed by the Police Department. This is confirmed by the fact that shortly after the vote, you personally contacted one of my Client's, Officer Chad Ward, and informed him that all officers were no longer employed effective immediately

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as a result of the vote. Because my Clients are no longer employed by the Police Department, they are no longer required to participate in any further investigations.

It is also my understanding that there may have been an issue with the Public Notice. However, this understanding is based on mere speculation because I have yet to be contacted by anyone from the City to confirm any problems. If the City's position is that my Clients are still employed, then I am respectfully requesting a copy of the Ordinance, a copy of the Original Public Notice, a copy of the Amended Public Notice, a copy of the City Charter, and a list of the reasons why the City believes there may be an issue. To add to the complexity of all of this, there is also the issue of whether my Clients have even agreed to be re-employed which will be addressed in the future if necessary.

Finally, there is the issue of the allegations in the First Amendment Foundation letter dated February 19th, 2021 that was sent to you and all City Commissioners. Pursuant to the allegations, which my Clients believe are very serious, you may have had private meetings with each City Commissioner to discuss the issues of the Police Department, which could be a violation of the Sunshine Law. If this is in fact true, then your actions now raise the question of whether your individual discussions included the internal investigations of my two Clients, which would also be a violation. As a result, my Clients have a right to depose you and each City Commissioner individually to see if their due process rights have been further violated.

In conclusion, pursuant to Chapter 25 of the CCPD's Policy Manual regarding internal investigations:

The policy of the Crescent City Police Department is to ensure that integrity is maintained through an internal system where objectivity, fairness and justice are assured by intensive and impartial investigation and review to clear the innocent, establish guilt of wrong-doers, and facilitate fair, suitable and consistent disciplinary action.

Pursuant to Chapter 14.4 of the Policy Manual, "it is the Department's policy to impose disciplinary action fairly and impartially and to offer adequate appeal procedures to ensure that the rights of employees are protected". Based on the previous issues that have been created by the City, it is clear that this process has not been fair and impartial, and the current disciplinary system in place has violated my Client's due process rights. The purpose of this letter is not to frustrate, hinder, tamper, or interfere with any investigations concerning my Clients. Its sole purpose is to ensure that they receive due process, which they haven't thus far.

Please be advised that if the basis for the City's moving the internal investigations outside the Police Department was in part due to your being a "Witness", then your being a "Witness" has created a direct conflict with this whole process. As such, and for the purpose of avoiding the appearance of any impropriety, this conflict should prevent you from having the authority to discipline my Client's if the investigation finds any violations, it should prevent you from hearing their appeals, and it should even prevent you from calling for the investigation to begin with. Due to the fact that for some

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strange reason, the CCPD Policy Manual makes no provision for "Conflicts", even though they are bound to happen with such a small agency, we are requesting that the internal investigations involving my two Client's be immediately suspended until these issues can be brought to the attention of the City Commission, and the two boards we are asking to be created, so they can be properly addressed if at all possible.

If the City Attorney would like to forward a proposed resolution to these issues, my Client's would be more than happy to take it under consideration. I look forward to your quick response. If you have any questions, or need any more information, please have the City Attorney contact me at his earliest convenience. Thank you for your time and consideration.

Sincerely,

Scott C. DuPont

Scott C. DuPont

Attorney and Counselor at Law

Cc: Investigator Randy Doyle at rdoyle@flaglersheriff.com

Cc: City Attorney Jay Asbury at jaydasbury@gmail.com

Cc: City Commissioner Harry Banks at hazel40@windstream.net

Cc: City Commissioner Judith West at jwesol@windstream.net

Cc: City Commissioner Lisa DeVitto at lisadevitto@gmail.com

Cc: City Commissioner Cynthia Burton at CBurton@crescentcity-fl.com

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Due Process Letter to City Manager

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Crescent City Police Department

Notice of Obtaining a Statement for Internal Investigation

Date: February 26, 2021
 To: Ofc. Thomas Burger
 From: Detective Randall Doyle FCSO
 Re: Internal Investigation #:2020-1208CC/2020-001FCSO

You are ordered to report to 1769 E. Moody Blvd. on March 8, 2021 at 0900 hours to answer questions in reference to the aforementioned internal investigation.

This investigation may or may not lead to disciplinary action against you, and you are entitled to bring a representative (an attorney or another representative of your choice). If you chose to be represented at the interview by an attorney, please advise me so that arrangements can be made with the city's attorney to also be present. Please be aware that your representative:

- May attend.
- May assist in counsel.
- May not disrupt or bargain over the purpose of the interview during the interview process.
- It must be emphasized that as long as the Weingarten Rules are followed, a representative has no right to tell you not to answer questions, or to advise you to provide false answers. You can be disciplined if you refuse to answer questions or are untruthful with your answers.

Digital recordings of all sworn witness statements, as well as digital copies of document/exhibits that may or may not be used as part of this investigation, will be available for your review immediately prior to your statement being taken. Please make the appropriate arrangements with your supervisor to attend this mandatory meeting.

Thomas R. Burger CPO-5
 Employee's Signature

3/5/21
 Date

9:30 am
 Time

Served By	Date	Time

Witness:

Distribution: Original to investigative file. Copy to employee.
 Linked to: General Order #021
 Form # 025 (10/19)



Crescent City Police Department

Notice of Obtaining a Statement for Internal Investigation

Date: February 26, 2021

To: Sgt. Walter "Chad" Ward

From: Detective Randall Doyle FCSO

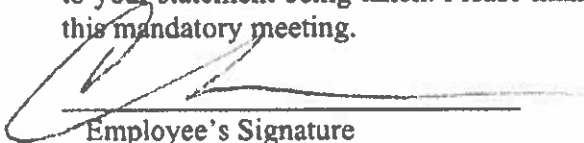
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Employee's Signature

3/5/21
Date

0930
Time

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Thomas Burger CPO-5
 Employee's Signature

3/5/21
 Date

9:30 am
 Time

Served By	Date	Time

Witness:

Distribution: Original to investigative file. Copy to employee.
 Linked to: General Order #021
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Crescent City Police Department

Notice of Obtaining a Statement for Internal Investigation

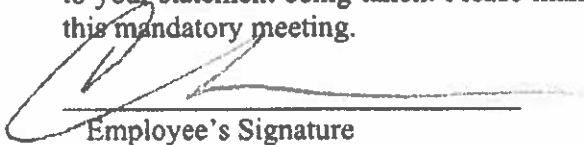
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 Employee's Signature

3/5/21
 Date

0930
 Time

Served By	Date	Time

WITNESS: 

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