

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA
COVER SHEET

City of York

PLAINTIFF(S)

2020-SU-001897

CASE NUMBER

VS.

Clayton Swartz

DEFENDANT(S)

Hon. Kathleen Prendergrast

PREVIOUS JUDGE

ASSIGNED JUDGE

RELATED CASE NUMBER(S)

Petition for Review under Local Agency Law
and Sunshine Act

TYPE OF ACTION

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Second Petition for Review under Local Agency Law and Sunshine Act

TITLE OF DOCUMENT

Petitioner City of York

SUBMITTED BY

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

IN THE MATTER OF)	
CITY OF YORK,)	
)	
Petitioner,	)	CIVIL DIVISION - LAW
)	
v.	)	Docket No. 2020-SU-1897
)	
CLAYTON SWARTZ,)	
)	
Respondent.)	

**CITY OF YORK'S SECOND PETITION
FOR REVIEW UNDER LOCAL AGENCY LAW AND SUNSHINE ACT**

Petitioner City of York (the "City"), by its undersigned counsel, hereby files this Second Petition for Review, pursuant to the Local Agency Law, 2 Pa.C.S. § 751, *et seq.*, and the Sunshine Act, 65 Pa.C.S. § 701, *et seq.*, of the "Trial Board Findings, Revised with Findings of Fact on 3/04/21" of the Trial Board convened in this matter, referred to hereafter as the "Revised Trial Board Findings," alleging and averring as follows:

I. INTRODUCTION

1. This Local Agency Law appeal and Sunshine Act violation arise out of a disciplinary hearing before a mandatory "Trial Board," composed of three members of the City of York Police Department, regarding a Notice of Charges issued to Respondent Police Officer Clayton Swartz after three Complainants alleged that Officer Swartz engaged in a mock reenactment of the killing of George Floyd at a May 30, 2020 graduation party.

2. This Second Petition for Review considers the Revised Trial Board Findings, which were issued on March 4, 2021. These followed the Court's remand of this matter back to the Trial Board after it violated the Local Agency Law for failing to issue written findings of fact in its initial adjudication that was issued on September 8, 2020.

3. While the City's first appeal of the initial findings was pending, it attempted to issue a third-party document subpoena to Respondent's labor union, the Fraternal Order of Police, White Rose Lodge #15 (the "FOP"), regarding the FOP's own "investigation" and possible retaliatory action against the City Inspector who investigated the complaints of Respondent's alleged misconduct. Respondent's objections to the subpoena were upheld but, unfortunately, the City's concern that the Trial Board, which is made up entirely of Respondent's fellow FOP members, would issue a tainted decision upon remand was justified.

4. In the time span of just one week from the February 25, 2020 remand order, the Trial Board deliberated in secret and issued the Revised Trial Board Findings without taking any official action or vote at an advertised public meeting. This course of conduct unquestionably violated the advertising and open meetings requirements of the Sunshine Act.

5. Significantly, the Trial Board issued these findings just two days after being informed that the City, in consultation with the FOP, would be appointing an independent Solicitor to assist them with drafting their revised findings in compliance with the Local Agency Law and related statutes. What is more, the Revised Trial Board Findings were issued just four days before one of its members was retiring from the York City Police Department, which would have made him ineligible to continue as a Trial Board Member. Without the required advertised public meeting, none of these issues could be raised on the record by the City and, for these reasons, the Revised Trial Board Findings should be declared void under the Sunshine Act as "business conducted at an unauthorized meeting."

6. The Revised Trial Board Findings are also substantively defective. The "Not Guilty" findings on the charges of misconduct are not based upon the "substantial evidence" in

the record. As is fully set forth below, the evidentiary issues that permeated the first, unexplained decision are equally present in the Revised Trial Board Findings.

II. PARTIES

7. The Petitioner seeking review of the determination at issue is the City of York, Pennsylvania. Petitioner is a Pennsylvania Third Class City with its municipal headquarters located at 101 South George Street, York, PA 17401.

8. The government agency which made the determination sought to be reviewed is the Trial Board, composed of members of the York City Police Department, that was convened in the disciplinary matter of Police Officer Clayton Swartz (the “Swartz Trial Board”) following Notice of Charges issued to Officer Swartz alleging misconduct that could lead to disciplinary penalties up to and including termination. The Swartz Trial Board was convened pursuant to the authority and requirements of the Collective Bargaining Agreement between the City of York and the FOP, which is the exclusive bargaining unit for Police Officers employed by the City of York, and the applicable General Orders of the Police Department of the City of York (“York City Police Department”) regarding Internal Affairs, including the “administration of discipline.”

9. Respondent Clayton Swartz is a natural person currently employed by the City as a Police Officer in the York City Police Department. Officer Swartz is on an unpaid disciplinary suspension pending final determination or resolution of the Notice of Charges against him.

III. STATEMENT OF JURISDICTION AND VENUE

10. Under Title 42 of the Pennsylvania Code, the jurisdiction of the Courts of Common Pleas include “appeals from government agencies” and specifically states that “each court of common pleas shall have jurisdiction of appeals from final orders of government agencies” with certain exceptions that are not applicable to this matter. 42 Pa.C.S. § 933(a).

Accordingly, this Court is vested with jurisdiction to hear appeals of local agency by any person with a direct interest in such adjudication.

11. Subchapter B of the Local Agency Law, “Judicial Review of Local Agency Action,” has a section which allows for “Appeals” and states, “Any person aggrieved by an adjudication of a local agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure).” 2 Pa.C.S. § 752.

12. The City is a “person” under the Local Agency Law, which defines the term as “includ[ing] a government unit or an agency of the Federal Government.” 2 Pa.C.S. § 101.

13. Accordingly, this Court has jurisdiction over this matter because the City is a person aggrieved by an adjudication of a local agency, has a direct interest in such adjudication, and has a right to appeal that adjudication to this Court, which is vested with jurisdiction of such appeals.

14. By its Memorandum Opinion and Order dated February 25, 2021 in this matter, this Court has affirmed that it has jurisdiction over the City’s Local Agency Law appeal and that determinations of the Swartz Trial Board are appealable by the City under the Local Agency Law. *See* RR-001274-1278.

15. Venue is proper because this Court in York County, where the parties are located and where the underlying events took place out of which this Second Petition for Review arose.

IV. DETERMINATION ON REVIEW

16. The local agency determination on review is the Revised Trial Board Findings issued on March 4, 2021 by the Swartz Trial Board, which is annexed hereto in the Reproduced Record. RR-001274-1278.

17. The City had previously filed a September 15, 2020, the City Petition for Review of the September 8, 2020 Trial Board Findings (the “First Petition”).

18. The City incorporates the entirety of the Reproduced Record previously filed in this matter in support of the First Petition, *see* RR-000001-001238, and supplements the Reproduced Record with additional documents and filings since the date of the First Petition that are relevant to this Petition, including the Revised Trial Board Findings. *See* RR-0012391-1279.

19. The City incorporates, as if fully set forth in this Second Petition, all of the factual allegations and legal arguments set forth in the First Petition.

V. FACTS AND PROCEDURAL HISTORY

A. Function of the Trial Board in York City Police Department

20. A York City Police Department Trial Board’s role in the disciplinary process is to determine whether an Officer’s conduct, based upon the facts uncovered during investigation and the testimony of the witnesses before the Trial Board, provide sufficient evidence to sustain the determination by an arbitrator or City Council that the accused Officer engaged in the misconduct set forth in the Notice of Charges. *See* RR-001150-1160.

21. If the Trial Board finds that sufficient evidence exists to move forward on any of the charges against an Officer, it must recommend a penalty to the Police Commissioner consistent with the Department’s Code of Conduct.

22. If discipline is imposed, then Officers have the right to grievance arbitration hearing under the terms of the police collective bargaining agreement, or alternatively to a hearing before City Council under the Civil Service Section of the Third Class City Code, where they can present evidence and testimony in support of their argument to overturn or reduce the penalty for any number of reasons. *See* RR-000931-932; *see also* 11 Pa.C.S. § 14408.

B. The Graduation Party Attended by Officer Swartz and Complainants

23. On May 30, 2020, Officer Clayton Swartz attended a college graduation party in the City of York (the “Party”), at the home Jeannette Day, the mother of Officer Swartz’s fiancé Zowie Day. RR-000629.

24. Marley Dahlheimer, India Maldonado, and Lexxus Brown (collectively, the “Complainants”) attended the Party. RR-000159:14-160:2.

25. Officer Swartz drank four to six beers and two to three “lemon drop” shots at the Party and admitted that he was intoxicated. RR-000636:13-637:9 and 633:12-14.

26. Jeannette Day’s brother, Christopher Owens, attended the Party, drank 10 or 11 beers at the Party, and was intoxicated. RR-000261:5-11; RR-000659; RR-000670:12-671:8.

27. Complainants, Officer Swartz, and Mr. Owens all acknowledge and agree that an incident involving Officer Swartz and Mr. Owens occurred which referenced the May 25, 2020 killing of George Floyd took place during the Party on the living room couch around 12:01 a.m. on May 31. But they dispute whether this was (1) limited to one exclamation of “I can’t breathe” followed by laughter or (2) a full-scale reenactment of George Floyd’s killing that lasted one or two minutes. *Compare* (RR-000629 and RR-000665-687 (Swartz’s and Owens’ written statements) with RR-000625-628 (Complainants’ signed statements).

C. Complainants File A Complaint that Officer Swartz Reenacted the Killing of George Floyd and the City Inspector Conducts an Investigation

28. On June 1, 2020, Complainants met with City Inspector Michael Davis and jointly lodged a Complaint that, at the Party, Officer Swartz approached Mr. Owens as he was lying asleep on the couch, knelt on his neck, asked Mr. Owens if he could breathe, and laughed. They believed this to be an intentional mock reenactment of George Floyd’s death. RR-000622-624; RR-000625-628; RR-000866-886.

29. Following receipt of the Complaint, Inspector Davis conducted an investigation, which included individual transcribed interviews of each Complainant, two transcribed interviews with Officer Swartz, a transcribed interview with Mr. Owens, transcribed interviews of other Party attendees including Logan Day, Jeanette Day, and Zoe Zambito, and fact gathering conversation with other potential witnesses and Party attendees. *See* RR-000866-886.

30. The investigation materials and report were provided to Police Commissioner Robinson, who, on July 13, 2020, informed Officer Swartz of the conduct uncovered in the investigation that could form the basis of disciplinary action against him, up to and including termination, and provided him an opportunity to respond. *See* RR-000915-920. Officer Swartz responded in writing on July 16, 2020. *See* RR-000918-920.

D. Officer Swartz Issued Notice of Charges and Suspended without Pay

31. On July 16, 2020, after Officer Swartz's response was received and reviewed, Inspector Davis issued Officer Swartz with the Notice of Charges. RR-000921-925. The Notice of Charges identified the three provisions of the York City Police Department Code of Conduct which Officer Swartz was found to have violated – Unbecoming Conduct, Use of Alcohol off Duty, and Truthfulness – and set forth the factual basis for each charge. *Id.*

32. A copy of the Notice of Charges was provided to Police Commissioner Robinson, who suspended Officer Swartz without pay on July 16, 2020. RR-000926.

E. The Swartz Trial Board Held a Hearing on August 19, 2020

33. After receiving the Notice of Charges, Officer Swartz elected a hearing before a Trial Board rather than a hearing before the Police Commissioner or accepting the charges against him, as is provided for in the Internal Affairs General Order. RR-001150-1160.

34. The parties then convened the Swartz Trial Board consistent with the General Order. The Police Commissioner appointed Captain Matthew Leitzel and the FOP appointed Detective Scott Nadzom. Those appointees agreed upon recently retired Lieutenant Derrick Millhouse as the third member of the Swartz Trial Board.

35. The City, FOP, and the Swartz Trial Board agreed to hold a hearing on August 19, 2020 in the City Council Chambers.

36. At the hearing, the FOP was represented by attorney Edward A. Paskey and the City was represented by attorney Joseph C. Rudolf.

37. Twelve witnesses provided testimony during the hearing, the City entered 25 exhibits into the record, comprised primarily of the investigation materials of Inspector Davis, and the FOP entered 27 exhibits into the record.

38. The hearing testimony relevant to this Second Petition for Review and to the underlying charges, as well as the evidence gathered during Inspector Davis' investigation, is described in detail below and in the City's Proposed Findings of Fact that were submitted to the Swartz Trial Board. *See* RR-000966-987 (City's Proposed Findings of Fact).

F. The Record Closed at 4:00 p.m. on Tuesday, September 8 and Trial Board Findings Issued at 11:06 a.m. on Thursday, September 10

39. At the close of the hearing, the Swartz Trial Board afforded the City and the FOP an opportunity to submit proposed findings of fact by no later than 4:00 p.m. on Tuesday, September 8, 2020.

40. At 11:06 a.m. on Thursday, September 10, 2020, less than 44 hours after the close of the record, which included hundreds of pages of exhibits, hundreds of pages of hearing testimony, and thorough briefing by the City and the FOP, the Swartz Trial Board issued its one-page Trial Board Findings. *See* RR-000001.

41. Despite the title of the document, the Trial Board Findings contained no findings of fact or reasoned explanation as to why or how the Swartz Trial Board reached its conclusions.

42. Instead, the Trial Board Findings stated that a hearing occurred, listed the charges and members of the Swartz Trial Board, reiterated the General Order's requirements of the Trial Board's findings (which are subsequently ignored), and issued findings that state: "MAJORITY VOTE – NOT GUILTY" for the charge of Unbecoming Conduct; "UNANIMOUS VOTE – NOT GUILTY" for the charge of Use of Alcohol off Duty; and "MAJORITY VOTE – NOT GUILTY" for the charge of Truthfulness. *Id.*

G. The City Appealed the Trial Board Findings and Sought to Subpoena FOP Records Relevant to Possible Issues following a Potential Remand

43. On September 15, 2020, the City filed the First Petition seeking to overturn the Trial Board Findings, along with a complete Reproduced Record, pursuant to the Local Agency Law, 2 Pa.C.S. § 751, *et seq.*

44. The basis for the City's appeal in the First Petition was two-fold. First, the Trial Board Findings failed to comply with the statutory requirement of the Local Agency Law that the decision be supported by written findings of facts and reasons for the adjudication. Second, the Trial Board Findings were not supported by "substantial evidence" in the record. *See generally*, First Petition.

45. On October 14, 2020, after opposition and reply briefs were filed, the matter was assigned to Hon. Kathleen J. Prendergast for disposition.

46. While the decision was pending, the City became aware of possible retaliatory action being considered or being taken against Inspector Davis by the FOP, who remains in the FOP despite his title and duties, based upon his investigation of Respondent and his testimony before the Trial Board. Specifically, upon information and belief, the FOP conducted its own

“investigation” into Inspector Davis’ investigation of the multiple complaints about Respondent and considered expelling Inspector Davis from the FOP or taking some other punitive act against him.

47. Accordingly, on October 28, 2020, the City served on Respondent a notice of intent to serve a document subpoena pursuant to Rule No. 4009.21. RR-001255-1260.

48. After Respondent objected to the subpoena, on January 7, 2021, the City moved for a Ruling upon Respondent’s Objections so that it could serve the subpoena to ascertain the extent of the action taken or contemplated against Inspector Davis. Any such action would have had a direct bearing on possible relief that on the City’s appeal: remand back to the Swartz Trial Board to cure the procedural defects. *See* RR-001239-1265.

49. Following presentment in motions court on January 21, 2021, Judge Menges denied the City’s motion and upheld the objections in a summary order. RR-001266.

50. As set forth further below, and despite its efforts, the City’s concern that the Swartz Trial Board would not comply with its obligations upon remand came to fruition.

H. The Court Overturned the Trial Board Findings and Remanded Back to the Trial Board for New Findings in Compliance with the Local Agency Law

51. On February 25, 2021, the Court issued a Memorandum Opinion and Order that granted the First Petition, in part, and also dismissed it in part, without prejudice. RR-001267-1271.

52. The Court determined that it had subject matter jurisdiction over the First Petition and that “decisions made by a police disciplinary trial board are subject to appeal under the Local Agency Law.” RR-001269. The Court further held that the Trial Board Findings were defective because they lacked written findings of fact and reasons for the adjudication and, therefore, struck down the Trial Board findings, remanding the matter back to the Swartz Trial Board so

that it “may issue an adjudication that complies with [the Local Agency Law].” RR-001270-1271.

53. The Court additionally held that “[a]ll other issues raised by the parties are moot at this time and dismissed without prejudice.” RR-001271; *see also* RR-001267 (dismissing without prejudice).

I. As the City Sought to Appoint an Independent Solicitor for the Swartz Trial Board, It Issued the Revised Trial Board Findings

54. Due to the voluminous record and the legal nuances required to achieve compliance with applicable law, the City planned to appoint an independent Solicitor to the Swartz Trial Board after receiving the Court’s Memorandum Opinion and Order, as it does with many of its boards or agencies. The Solicitor would have been able to assist the Swartz Trial Board in navigating the meeting process and drafting the required findings of fact.

55. On March 1, 2021, City Mayor Michael Helfrich discussed with FOP President Matthew Irvin the City’s desire to appoint an independent Solicitor to the Swartz Trial Board and disclosed that the City was in the process of selecting qualified attorneys to propose to the FOP that could serve the Board in this capacity. The City does not know if the FOP relayed these discussions or the City’s plan to appoint a Solicitor to any member of the Swartz Trial Board.

56. However, on March 2, 2021, Assistant City Solicitor Jason Sabol sent an email to Swartz Trial Board Member Captain Matthew Leitzel, with a request to forward the message to the FOP’s appointed Board Member, which stated:

Gentlemen,

I wanted to touch base with you to let you know that we are going to be appointing an independent third party attorney to walk you through the process for drafting your findings of fact and opinion for the Schwartz case. We should have someone appointed fairly soon, so hang tight. We understand that this isn’t in your guys’ wheelhouse and we aren’t to leave you out to dry. We’ll be in touch.

RR-001272-1273.

57. Swartz Trial Board Member Leitzel confirmed receipt of the message on March 2, 2021 at 12:27 p.m. and also stated that he had forwarded the email to the two other Members of the Swartz Trial Board. *See id.*

58. Significantly, on March 9, 2021, Swartz Trial Board Member Derrick Millhouse was scheduled to officially retire from the York City Police Department after exhausting his accrued but unused leave time, which he began to utilize instead of working on September 26, 2020. Upon information and belief, the other members of the Swartz Trial Board and the FOP were aware of Lieutenant Millhouse's pending March 9, 2021 retirement.

59. Under the York City Police Department's General Order governing Trial Boards, the provisions regarding the mutually agreed upon third Trial Board Member, such as now retired Lieutenant Millhouse, states that, "The third member will be a police officer with the rank of Lieutenant or above who is agreed to by" the Members appointed by the City and FOP. RR-001157. Accordingly, Lieutenant Millhouse, who served as the "swing vote" in the original Trial Board Findings, would no longer be eligible to serve on the Swartz Trial Board when his retirement from the York City Police Department became effective on March 9, 2021.

60. But on March 4, 2019, just two days after being informed that the City was in the process of appointing a Solicitor, and just five days before Millhouse was no longer eligible to serve, the Swartz Trial Board issued the Revised Trial Board Findings. RR-001274-1278.

61. The Revised Trial Board Findings, like its predecessor, found Respondent "Not Guilty" on all three charges, by a majority vote on the "Unbecoming Conduct" and "Truthfulness" charges and by a unanimous vote on the "Use of Alcohol off Duty" charge. *See id.* Unlike its predecessor, the Revised Trial Board Findings contained written findings of fact to

supposedly support its “Not Guilty” findings. *See id.* However, as discussed further below, these findings are not supported by substantial evidence in the record.

62. The Swartz Trial Board did not take the vote referenced in the Revised Trial Board Findings at an advertised public meeting.

63. The Swartz Trial Board did not issue the Revised Trial Board Findings at an advertised public meeting or otherwise hold any public meeting of any kind.

64. The Swartz Trial Board provided no advance notice to the City or to the public that it would meet at any time, in public or in private, before issuing the Revised Trial Board Findings. The City has no knowledge as to whether the Swartz Trial Board provided any such notice to the FOP.

65. The City has no knowledge of when the Swartz Trial Board met to deliberate or discuss the Revised Trial Board Findings.

66. The City received no indication from the Swartz Trial Board that it was going to issue the Revised Trial Board Findings instead of waiting for the appointment of an independent Solicitor to advise the Board and assist with drafting the Revised Trial Board Findings.

67. In short, the Swartz Trial Board deliberated in secret, never held an advertised public meeting, and never announced an executive session.

68. On March 30, 2021, Police Commissioner Michael Muldrow “disapproved” of the Swartz Trial Board’s findings on all three charges. RR-001279.¹

¹ While the City’s First Petition was pending, former Police Commissioner Robinson resigned and the City hired Michael Muldrow to replace him. After a Trial Board’s findings are issued, the Police Commissioner “may approve, disapprove, or change the findings and recommendations of the Trial Board. However, he may not change a finding of Not Guilty to Guilty.” RR-001159.

VI. THE REVISED TRIAL BOARD FINDINGS MUST BE OVERTURNED BECAUSE THE SWARTZ TRIAL BOARD VIOLATED THE SUNSHINE ACT

69. The City incorporates by reference, as if fully set forth herein, the allegations of all preceding paragraphs and the allegations of the First Petition.

70. As is fully set forth below, the Court should void the Revised Trial Board Findings because the Swartz Trial Board violated the Sunshine Act by meeting, voting, and issuing the Revised Trial Board Findings outside of an advertised public meeting and by failing to abide by the Sunshine Act's procedure for holding an executive session.

A. The Swartz Trial Board is an "Agency" under the Sunshine Act

71. The purpose of the Sunshine Act is "to insure the right of its citizens to have notice of and the right to attend all meetings of agencies at which any agency business is discussed or acted upon...." 65 Pa.C.S. § 702(b).

72. As defined in the Sunshine Act, the term "agency" encompasses a municipal "body, and all committees thereof" that are authorized to take "official action or render advice on matters of agency business...." 65 Pa.C.S. § 703. The term "agency business" includes "the adjudication of rights, duties and responsibilities," excluding purely administrative actions. *Id.*

73. Here, the Trial Board is authorized by the City, through the Collective Bargaining Agreement between the City and the FOP (the "CBA") and written York City Police Department Policy, to hold hearings for disciplinary matters, including suspension and termination, and issue a final decision after such hearing. RR-000927-953. Accordingly, the Trial Board falls within the definition of "agency" under the Sunshine Act because it is authorized to take "official action or render advice on matters of agency business."

74. If there were any doubt on the status of the Trial Board as a public body subject to the open meetings requirements, this was eliminated by the Court's Memorandum Opinion in

this matter, which held that the findings of a City of York Trial Board are subject to the requirements of the Local Agency Law as a Local Agency. *See* RR-001268-1271.

B. The Swartz Trial Board Violated the Sunshine Act when it Issued the Revised Trial Board Findings without a Public Meeting and without Announcing an Executive Session

75. Under Section 704 of the Sunshine Act regarding open meetings, “[o]fficial action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public unless closed under section 707 (relating to exceptions to open meetings) [or] 708 (relating to executive sessions). . . .” 65 Pa.C.S. § 704.

76. None of the Section 707 exceptions to the open meetings requirement are relevant to this matter, except for executive sessions that are held pursuant to Section 708. *See* 65 Pa.C.S. § 707.

77. Regarding the “procedure” for holding an executive session, Section 708 states:

The executive session may be held during an open meeting or at the conclusion of an open meeting or may be announced for a future time. The reason for holding the executive session must be announced at the open meeting occurring immediately prior or subsequent to the executive session. . . .

65 Pa.C.S. § 708(b).

78. Any “[o]fficial action on discussions held [in an executive session] shall be taken at an open meeting. Nothing in this section . . . shall be construed to require that any meeting be closed to the public, nor shall any executive session be used as a subterfuge to defeat the purposes of” the open meetings provisions of the Sunshine Act. 65 Pa.C.S. § 708(c).

79. To this end, while the executive session provisions permit “an agency to discuss employment matters² in a private executive session, the final vote on those matters must be taken

² Notably, section 708 only permits executive sessions to discuss the “ . . . termination of employment, terms and conditions of employment . . . or disciplining of any specific prospective public officer or employee or current public

at a public meeting.” *Preston v. Saucon Valley Sch. Dist.*, 666 A.2d 1120, 1123 (Pa.Cmwlth. 1995).

80. The Sunshine Act, at the very least, required the Swartz Trial Board to (i) take its “official action” – the vote and issuance of the Revised Trial Board Findings – at a properly noticed public meeting and (ii) announce any executive session for its deliberations and the reason for the executive session during its public meeting.

81. However, as is fully set forth above, the Swartz Trial Board held no advertised public meeting and, upon information and belief, convened in secret at which time it deliberated and voted upon the Revised Trial Board Findings. Accordingly, the Swartz Trial Board violated Sections 704, 707, and 708 of the Sunshine Act.

C. The Court Should Void the Revised Trial Board Findings as “Business Transacted at an Unauthorized Meeting”

82. The Sunshine Act provides:

A legal challenge under this chapter shall be filed within 30 days from the date of a meeting which is open, or within 30 days from the discovery of any action that occurred at a meeting which was not open at which this chapter was violated, provided that, in the case of a meeting which was not open, no legal challenge may be commenced more than one year from the date of said meeting. The court may enjoin any challenged action until a judicial determination of the legality of the meeting at which the action was adopted is reached. Should the court determine that the meeting did not meet the requirements of this chapter, it may in its discretion find that any or all official action taken at the meeting shall be invalid.

65 Pa.C.S. § 713.

83. As is fully set forth above, the Swartz Trial Board violated Sections 704, 707, and 708 of the Sunshine Act when it failed to take its official action at a public meeting and when it

officer or employee *employed or appointed by the agency*...” 65 Pa.C.S. § 708(a)(1) (emphasis added). Unlike the York City Council or Civil Service Commission, the Trial Board neither employed nor appointed Officer Swartz.

failed to properly announce any closed-door meetings that it viewed as, or might claim to be, an executive session. The Court may, therefore, “find that any or all official action taken at the meeting shall be invalid.”

84. In this case, context is everything. The City had already raised its concerns to the Court regarding the propriety of a remand to the Swartz Trial Board after it had reason to believe that the FOP, whose members compose the Swartz Trial Board, had taken or contemplated retaliatory actions against the City Inspector that investigated the Complaint about Officer Swartz. Then, in consultation with the FOP, the City was in the process of appointing a Solicitor to the Trial Board to navigate issuing findings of fact in a manner that complied the law. The City informed the Swartz Trial Board of this fact just two days before the Revised Trial Board Findings were issued. Finally, the Revised Trial Board findings were issued when Board Member Millhouse was just a few days away from his retirement, which would have made his continued membership on the Swartz Trial Board impossible.

85. With all of this as the backdrop – and in the span of approximately one week – the Swartz Trial Board convened in secret, drafted the Revised Trial Board Findings, voted upon the Revised Trial Board Findings, and issued the Revised Trial Board Findings without ever holding a public meeting or announcing an executive session.

86. Had the Swartz Trial Board noticed and held a public meeting for its official action, the City would have had the opportunity to take the following actions:

- a) Provide information regarding the retaliatory investigation and action, or contemplated action, taken against Inspector Davis following the August 19, 2020 hearing.

- b) Request *voir dire* of the members of Swartz Trial Board regarding contact or communications they have had regarding this matter with the parties or with FOP, including on the topic of investigations of, or actions against, Inspector Davis.
- c) Provide information regarding the pending retirement of Swartz Trial Board Member Millhouse on March 9, 2021.
- d) Object to Swartz Trial Board Member Millhouse's continued participation in light of his March 9, 2021 retirement, which would violate the mandate that that the third member of a Trial Board be York City Police Officer with the rank of Lieutenant or above. *See* RR-001157.

87. However, the Swartz Trial Board never advertised or held an open meeting. This made it impossible for the City to raise these matters and supplement the record during the public meeting at which the official action should have occurred (the Board Member vote and issuance of the Revised Trial Board Findings).

88. The Swartz Trial Board's rushed and clandestine behavior stands in stark contrast to matters which deal in minor issues of strict non-compliance which courts find do not exercise their discretion to void "business transacted" under Section 713. *See, e.g., Pennsylvania AFL-CIO by George v. Com.*, 683 A.2d 691, 699 (Pa.Cmwlth. 1996) (declining to exercise discretion where committee "convened a meeting five minutes prior to its scheduled time...[and] [t]here is no allegation that proper notice was not given of the meeting, nor that it was not 'open.'").

89. Accordingly, the Court should void the Revised Trial Board Findings as "business transacted at an unauthorized meeting" and remand the matter back to the Swartz Trial Board to conduct itself and issue findings in accordance with the Sunshine Act and the Local Agency

Law. This includes, but is not limited to, noticing and holding a public meeting before or after any executive session, holding executive session for those reasons only prescribed by the Sunshine Act and according to the procedure set forth therein, and taking its official actions during a public meeting.

**VII. THE REVISED TRIAL BOARD FINDINGS MUST BE OVERTURNED
BECAUSE THEY ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

90. The City incorporates by reference, as if fully set forth herein, the allegations of all preceding paragraphs and the allegations of the First Petition.

91. Although the Revised Trial Board Findings contain findings of fact and reasons for adjudication, neither are supported by “substantial evidence” in the record. Rather, as was fully set forth in the City’s Proposed Findings of Fact submitted to the Swartz Trial Board and in the First Petition submitted to this Court, there is not substantial evidence in the record to support a finding of “Not Guilty” on any of the three charges in the Notice of Charges. To the contrary, the “Not Guilty” determinations are a capricious disregard of the substantial evidence in the record that supports a finding of “Guilty” on all three charges. *See City of Pittsburgh v. Henderson*, 2020 WL 1911414, at *4 (Pa.Cmwlth. Apr. 20, 2020) (citation omitted) (“A capricious disregard of evidence occurs when there is a willful and deliberate disregard of competent testimony and relevant evidence which one of ordinary intelligence could not possibly have avoided in reaching a result” [and] “the ultimate question is whether the adjudicator failed to properly explain overwhelming critical evidence”).

92. As set forth in the First Petition, the Complainants provided a version of events that varied drastically from that provided by Respondent Clayton Swartz and witness Christopher Owens. In the Revised Trial Board Findings, the crux of the justification for the three “Not Guilty” verdicts is that the Swartz Trial Board found the testimony of Swartz and Owens “to be

credible and truthful as observed by the trial board” and, therefore, it disregarded the contradicting testimony of the three Complainants. RR-001278.

93. But, as detailed at length in the First Petition, there was not substantial evidence in the record to support Officer Swartz’s and Christopher Owens’ version of events. *See* First Petition, ¶¶ 74-143. Instead, the Complainants’ accounts were the only version of events supported by substantial evidence, corroborating witness accounts, common sense, and credibility. *See id.*, ¶¶ 144-149.

94. All of the City’s arguments regarding the substantial evidence, and the Reproduced Record in its entirety, are explicitly incorporated into this Second Petition for Review by reference. *See supra*. The fact that the Swartz Trial Board has since issued Revised Trial Board Findings does not change the evidentiary shortcomings of the “Not Guilty” findings, which are based upon the same hearing and the same record.

95. This evidentiary basis for overturning the Revised Trial Board Findings is secondary to the threshold issue of Sunshine Act compliance set forth above. Accordingly, if the Court either: (i) finds a Sunshine Act violation occurred, but desires issue its own findings of fact and reasoned adjudication in place of the Swartz Trial Board rather than remand the matter a second time, or (ii) finds that no Sunshine Act violation occurred, the City respectfully requests that the Court set a schedule for the parties to provide detailed briefing as to whether the “Not Guilty” findings of the Revised Trial Board Findings are supported by substantial evidence in the Reproduced Record.³

³ Notwithstanding the foregoing, the City’s arguments and the supporting evidence set forth in the First Petition are more than sufficient at this juncture for the Court to overturn the Revised Trial Board Findings as unsupported by substantial evidence in the Reproduced Record.

WHEREFORE, pursuant to the Sunshine Act, 65 Pa.C.S. § 701, *et seq.*, and the Local Agency Law, 2 Pa.C.S. § 751, *et seq.*, Petitioner City of York respectfully requests that this Court overturn the Revised Trial Board Findings issued by the Swartz Trial Board, issue a judgment in favor of the Petitioner for the various and compelling reasons set forth above, and, along with all such other just and further relief that this Court deems appropriate, enter an Order:

- a) Remanding the matter back to the Swartz Trial Board to conduct itself and issue findings in accordance with the Sunshine Act and the Local Agency Law, including, but not limited to, noticing and holding a public meeting before or after any executive session, taking its official actions only during a public meeting, and holding an executive session only for those reasons prescribed by the Sunshine Act and according to the procedure prescribed therein; or
- b) In lieu of a second remand to the Swartz Trial Board, overturning the Revised Trial Board Findings and issuing findings of fact and reasons for adjudication finding Officer Swartz Guilty on all three disciplinary charges based upon the substantial evidence in the record; or
- c) Setting a briefing schedule for the parties to detail whether the Revised Trial Board Findings are supported by substantial evidence.

DATED: April 2, 2021

CLARK HILL PLC
Attorneys for Petitioner City of York

/s/ Joseph C. Rudolf
Joseph C. Rudolf, Esq.
PA Atty. I.D. 44189
Kevin Levine, Esq.
PA Atty. I.D. 326492

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Philadelphia, PA 19103
Phone: (215) 640-8410
Fax: (215) 640-8501
jrudolf@clarkhill.com
klevine@clarkhill.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Second Petition for Review and Reproduced Record has been served via delivery by email and the United States Postal Service upon the following on April 2, 2021:

Edward A. Paskey, Esq.
Attorney for Respondent
France Paskey
2675 Eastern Boulevard
York, PA 17402

Derrick Millhouse
Trial Board Member
York City Police Department
50 West King Street
York, PA 17401

Matthew Leitzel
Trial Board Member
York City Police Department
50 West King Street
York, PA 17401

Scott Nadzom
Trial Board Member
York City Police Department
50 West King Street
York, PA 17401

CLARK HILL PLC

/s/ Joseph C. Rudolf
Joseph C. Rudolf
Attorneys for Petitioner

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

IN THE MATTER OF CITY OF YORK, Petitioner,

v.

CLAYTON SWARTZ, Respondent.

2020-SU-001897

Second Petition for Review from the Revised Trial Board Findings of March 4, 2021

SUPPLEMENT TO REPRODUCED RECORD OF

AUGUST 19, 2020 TRIAL BOARD HEARING

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IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

IN THE MATTER OF)	
CITY OF YORK,)	
)	
Petitioner,	)	CIVIL DIVISION - LAW
)	
v.	)	Docket No. 2020-SU-1897
)	
CLAYTON SWARTZ,)	
)	
Respondent.)	

MOTION OF PETITIONER UNDER PA.R.C.P. NO. 4009.21(d)(1)
FOR A RULING ON RESPONDENT'S OBJECTIONS TO PETITIONER'S
SUBPOENA UPON A NON-PARTY FOR PRODUCTION OF DOCUMENTS

Petitioner City of York (the "City"), by its undersigned counsel, hereby moves pursuant to Pa.R.C.P. No. 4009.21(d)(1) for a ruling on Respondent Clayton Swartz's objections to the City's subpoena for documents upon non-party Fraternal Order of Police, White Rose Lodge #15 (the "FOP"), which denies Respondent's objections and permits Petitioner to file the subpoena with the Prothonotary for signature and subsequent service upon non-party FOP.

I. INTRODUCTION

1. Although this matter is a Local Agency Law Appeal with a complete record, the non-party document subpoena to the FOP is intended for the necessary discovery of facts or documents which relate to the relief that may be afforded by the Court. Specifically, the City has learned that the FOP, which is Respondent's labor union, has either take or discussed action to investigate, expel, or otherwise sanction City Inspector Michael Davis for his investigation of Respondent's alleged misconduct that was at issue in the Local Agency Law hearing that the City now appeals to this Court. As the duly appointed City Inspector, the investigation of alleged misconduct of a City Police Office constitutes an essential job function of Inspector Davis.

2. One of the possible remedies that the Court may order is a remand of the matter to the “Trial Board” in this matter for a written decision containing findings of facts and reasons for its adjudication. But the Trial Board is composed entirely of FOP members. Accordingly, discovery of the FOP’s actions and communications with regards to retaliating against Inspector Davis are relevant because they could show that the FOP and its membership would not issue an impartial written decision or may otherwise be constrained from issuing an impartial decision out of fear of similar retaliation from the FOP. Because the Court could weigh any such evidence in determining what remedy it should order, the subpoena seeks the discovery of relevant evidence and the Court should permit the City to serve it upon the FOP.

II. RELEVANT FACTS AND PROCEDURAL HISTORY¹

A. City Inspector Davis Investigates Complaints regarding Respondent

3. On June 1, 2020, three Complainants met with City Inspector Michael Davis and jointly lodged a Complaint that, at a May 30, 2020 graduation party, Respondent Officer Swartz approached an individual who was lying asleep on a couch, knelt on his neck, asked him if he could breathe, and then laughed. The Complainants, including two women of color, believed this to be an intentional mock reenactment of George Floyd’s widely publicized death just a few days earlier. RR-000622-624; RR-000625-628; RR-000866-886.

4. Thereafter, Inspector Davis conducted an investigation, which included individual transcribed interviews of each Complainant, two transcribed interviews with Officer Swartz, transcribed interviews with several other witnesses, and fact gathering conversations with potential witnesses and Party attendees. *See* RR-000866-886.

¹ The complete facts surrounding the investigation regarding Respondent, the evidence presented at the Local Agency Law hearing, and the Trial Board Findings are fully set forth in the City’s Petition for Review.

5. The investigation materials and report were provided to former Police Commissioner Osborne Robinson, who, on July 13, 2020, informed Officer Swartz of the conduct uncovered in the investigation that could form the basis of disciplinary action against him, up to and including termination, and provided him an opportunity to respond. *See* RR-000915-920.

6. On July 16, 2020, after Officer Swartz's response was received and reviewed, Inspector Davis issued Officer Swartz with the Notice of Charges. RR-000921-925. The Notice of Charges identified the three provisions of the York City Police Department Code of Conduct which Officer Swartz was found to have violated – Unbecoming Conduct, Use of Alcohol off Duty, and Truthfulness – and set forth the factual basis for each charge. *Id.* The “Unbecoming Conduct” and “Truthfulness” charges are considered further below.²

B. Respondent receives a Hearing Before the Swartz Trial Board

7. The Collective Bargaining Agreement and the York City Police Department General Orders provide that an employee facing serious discipline such as termination may request, among other things, a hearing by a “Board of Appeals” after receiving notification of a suspension and that such board shall consist of an appointee by the Police Commissioner, the FOP, and a “disinterested party.” RR-000927-953. At the conclusion of the Trial Board hearing, the Trial Board must issue findings of fact and then also find whether the accused officer is Guilty or Not Guilty of each charge against him or her. RR-001159.

8. After receiving the Notice of Charges, Officer Swartz elected a hearing before a Trial Board. RR-001150-1160.

² In its Local Agency Law appeal, the City does not seek to overturn the Swartz Trial Board's determination regarding the “Use of Alcohol off Duty” charge.

9. The parties then convened the Trial Board in this matter (the “Swartz Trial Board”). The Police Commissioner appointed Captain Matthew Leitzel and the FOP appointed Detective Scott Nadzom. Those appointees agreed upon Lieutenant Derrick Millhouse as the third member of the Swartz Trial Board.

10. All three members of the Swartz Trial Board are members of the FOP or recently retired (following the hearing) members of the FOP.

11. The Swartz Trial Board held a hearing on August 19, 2020 in the City Council Chambers. However, the record in did not close until 4:00 p.m. on Tuesday, September 8, 2020, when the parties submitted their post-hearing findings of fact to the Swartz Trial Board. At 11:06 a.m. on Thursday, September 10, 2020, less than 44 hours after the close of the record, which included hundreds of pages of exhibits, hundreds of pages of hearing testimony, and thorough briefing by the City and the FOP, the Swartz Trial Board issued its one-page “Trial Board Findings.” *See* RR-000001.

12. Despite the name, this document does not contain any findings of fact or any reasoned explanation as to why or how the Swartz Trial Board reached its conclusions. Instead, the Trial Board Findings state that a hearing occurred and issue findings which state “Not Guilty” for all three charges. *Id.*

C. The City Appeals the Trial Board Findings under the Local Agency Law

13. On September 15, 2020, the City filed its Petition for Review of the Trial Board Findings, with a complete Reproduced Record, pursuant to the Local Agency Law, 2 Pa.C.S. § 751, *et seq.*

14. In short, the City’s Petition argues that the Trial Board Findings were defective for two reasons. First, they fail to comply with the statutory requirement of the Local Agency

Law that the decision be supported by written findings of facts and reasons for the adjudication.

Second, the Trial Board Findings are not supported by “substantial evidence” in the record.

15. In its Petition for Review, the City notes that the Court could issue its own findings of fact and reasoned adjudication if it finds for the City on either or both of its arguments. *See* Petition for Review, ¶¶ 69, 166.

16. On October 14, 2020, after opposition and reply briefs were filed, the matter was assigned to Hon. Kathleen J. Prendergast for disposition.

D. The City Serves its Notice of Subpoena under Pa.R.C.P. No. 4009.21

17. After the Trial Board Findings were issued, the City, upon information and belief, became aware of possible retaliatory action being considered or taken against Inspector Davis, who remains in the FOP despite his title and duties, based upon his investigation of Respondent and his testimony before the Trial Board. Specifically, upon information and belief, the FOP conducted its own “investigation” into Inspector Davis’ investigation of the multiple complaints about Respondent and further considered expelling Inspector Davis from the union or taking some other form of punitive action against him.

18. Inspector Davis is a past president of the FOP.

19. Because the City is unaware of the extent of the action taken or contemplated against Inspector Davis, and because such action has a direct bearing on the possible relief that may be afforded by this Court on the City’s appeal, the City served a document subpoena upon the non-party FOP in the manner provided under the Pennsylvania Rules of Civil Procedure.

20. Specifically, on October 28, 2020, in conformity with the Pennsylvania Rules of Civil Procedure and the York County Local Rules, the City served on Respondent and filed with the Prothonotary its:

- a. Notice of Intent to Serve a Subpoena to Produce Documents and Things for Discovery Pursuant to Rule No. 4009.21;
- b. Certificate Prerequisite to Service of a Subpoena Pursuant to Rule 4009.22; and
- c. Subpoena to Produce Documents and Things for Discovery Pursuant to Rule 4009.21, directed to the FOP, with an attached Schedule of Documents for Production.

21. On November 17, 2020, pursuant to Rule 4009.21, Respondent served his Objections to the City's Notice of Intent to Issue a Subpoena Pursuant to Rule 4009.21. The content of Respondent's objections are addressed in detail below. The objections, which contain the City's Subpoena, Notice of Intent to Serve, and Certificate, **are annexed to this motion, and fully incorporated herein, as Exhibit 1.**

22. Under Pa.R.C.P. 4009.21(d)(1), "If objections are received by the party intending to serve the subpoena prior to its service, the subpoena shall not be served. The court upon motion shall rule upon the objections and enter an appropriate order."

23. Accordingly, Petitioner now files this Motion for a Ruling upon the Respondent's Objections to Petitioner's Subpoena upon a Non-Party for Production of Documents.

III. ARGUMENT

A. The Pennsylvania Rules of Civil Procedure Apply to Local Agency Law Appeals

24. Without citing to any authority, Respondent objects to the subpoena because he contends that "the Pennsylvania Rules of Civil Procedure do not apply to the instant matter and, therefore, no right to discovery exists." Respondent's Objections, ¶ 2. However, the Rules of Civil Procedure are only inapplicable to the underlying Local Agency Law hearing. *See Ret. Bd.*

of Allegheny Cty. v. Colville, 852 A.2d 445 (Pa. Commw. Ct. 2004); *Rhodes v. Laurel Highlands Sch. Dist.*, 544 A.2d 562, 564 (Pa. Commw. Ct. 1988). This does not mean the Rules of Civil Procedure do not apply to Local Agency Law appeals filed with a Court of Common Pleas.

25. To the contrary, the Pennsylvania Rules of Civil Procedure “apply to **any civil action or proceeding brought in or appealed to** any court which is subject to these rules....” Pa.R.C.P. No. 4001(a) (emphasis added).

26. Accordingly, Pa.R.C.P. No. 4009.21, which provides a mechanism to serve document subpoenas on non-parties, is available to the City in this Local Agency Law appeal.

B. The Document Subpoena Seeks Discovery of Relevant Material

27. Respondent’s subsequent objections to the subpoena are based upon the fact that record on appeal is closed and that the documents requested from the FOP are not relevant to the issues before the Court that could warrant overturning the Trial Board Findings. *See* Respondent’s Objections, ¶¶ 3-4. Although the hearing record is closed and the subpoenaed documents are not probative as to whether the Trial Board Findings are procedurally defective or supported by substantial evidence in the record, the documents requested in the subpoena, as fully set forth below, are relevant to the relief that could be ordered by the Court.

28. Under Pa.R.C.P. No. 4003.1(a):

[A] party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

“It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Pa.R.C.P. No. 4003.1(b)

29. “Generally, discovery is liberally allowed with respect to any matter, not privileged, which is relevant to the cause being tried.” *PECO Energy Co. v. Ins. Co. of N. Am.*, 852 A.2d 1230, 1233 (Pa. Super. Ct. 2004). It is within the “court’s discretion to determine the appropriate measure necessary to insure adequate and prompt discovering of matters allowed by the Rules of Civil Procedure.” *Id.*

30. As described above and in the City’s Petition for Review, if the Court finds that the Trial Board Findings are procedurally defective, it could remand to the Trial Board for compliance or issue its own findings of fact and reasons for adjudication. *See supra*. But, as is also described above, the City has learned that the FOP took steps to “investigate” Inspector Davis’ investigation of the complaints that he received about Respondent. And the FOP may have also taken, or at least considered, sanctions or other retaliatory action against Inspector Davis for his investigation, who is a member and past president of the FOP, including his possible expulsion from the union.

31. The three members of the Swartz Trial Board are either active members, or recently became retired members, of the FOP.

32. Documents related to the extent of the FOP’s apparent campaign of retribution against Inspector Davis are, therefore, relevant because they could shed light on whether the Swartz Trial Board, composed of FOP members and retirees, might be incapable of issuing an unbiased decision based upon the record before it and based upon Inspector Davis’ investigation. Additionally, the documents might also show whether the Swartz Trial Board members would

have reason to fear similar retaliation from the FOP if they were ordered by the Court to draft findings of fact.

33. Accordingly, the subpoena is reasonably calculated to yield documents or correspondence regarding a coordinated effort to punish Inspector Davis for investigating claims of misconduct against one of their members. Those documents or correspondence are therefore relevant and discoverable because, if the Court rules in the City's favor in the appeal, they may persuade the Court that an adjudicatory body made up of FOP members should not be relied upon to issue unbiased findings of fact and conclusions upon remand.

WHEREFORE, Petitioner City of York respectfully requests that the Court issue an Order in the form of, or substantially similar to, the Proposed Order submitted herewith which denies Respondent's objections to the subpoena, permits Petitioner to submit the subpoena to the Prothonotary for signature, and permits Petitioner to serve the subpoena upon the non-party identified therein.

CLARK HILL PLC
Attorneys for Petitioner City of York

/s/ Joseph C. Rudolf
Joseph C. Rudolf, Esq.
PA Atty. I.D. 44189
Kevin Levine, Esq.
PA Atty. I.D. 326492

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Philadelphia, PA 19103
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jrudolf@clarkhill.com
klevine@clarkhill.com

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

IN THE MATTER OF)	
CITY OF YORK,)	
)	
Petitioner,	)	CIVIL DIVISION - LAW
)	
v.	)	Docket No. 2020-SU-1897
)	
CLAYTON SWARTZ,)	
)	
Respondent.)	

PROPOSED ORDER

AND NOW, this _____ day of _____, 2021, upon consideration of the within Motion of Petitioner under Pa.R.C.P. No. 4009.21(d)(1) for a Ruling on Respondent's Objections to Petitioner's Subpoena upon a Non-Party for Production of Documents and good cause appearing therefore, it is hereby ORDERED that the Motion is GRANTED, Respondent's objections to the subpoena are hereby denied, and Petitioner is permitted to submit the subpoena to the Prothonotary for signature and to serve the signed subpoena upon the non-party identified therein.

BY THE COURT:

J.

GOOD FAITH CERTIFICATION:**IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA**

IN THE MATTER OF)	
CITY OF YORK,)	
)	
Petitioner,	)	CIVIL DIVISION - LAW
)	
v.	)	Docket No. 2020-SU-1897
)	
CLAYTON SWARTZ,)	
)	
Respondent.)	

Moving Party Certification of Good Faith
Pursuant to YCCiv.208.2(e)(2).

The undersigned counsel for movant hereby certifies that:

He has had the contacts described below with opposing counsel regarding the discovery matter contained in the foregoing discovery motion in an effort to resolve the specific discovery dispute at issue and, further, that despite all counsel's good faith attempts to resolve the dispute, counsel have been unable to do so.

Specifically, my colleague and co-counsel for movant City of York communicated with counsel for Respondent Clayton Swartz, Edward A. Paskey, Esq., via telephone on November 23, 2020 to request that Respondent withdraw his objections to the non-party document subpoena at issue in this motion. Mr. Paskey stated that Respondent would not withdraw his objections. Additionally, the undersigned counsel for movant City of York again communicated with Mr. Paskey on January 8, via email, providing a draft copy of the motion and requesting that Respondent withdraw his objections. Mr. Paskey stated that Respondent's objections are not withdrawn. Therefore, this motion for a ruling upon the objections is necessary.

CERTIFIED TO THE COURT BY:

Dated: January 12, 2021

/s/ Kevin Levine
Kevin Levine, Esq.
Attorney for Movant City of York

Exhibit 1

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

CITY OF YORK, PENNSYLVANIA,	:	
APPELLANT	:	No. 2020-SU-1897
	:	
	:	
Vs.	:	CIVIL ACTION - LAW
	:	
CLAYTON SWARTZ,	:	
RESPONDENT	:	

**OBJECTIONS TO NOTICE OF INTENT TO ISSUE SUBPOENA PURSUANT TO
RULE 4009.21**

Clayton Swartz, by and through his attorneys, FrancePaskey, and more specifically Edward A. Paskey, Esquire and Douglas P. France, Esquire, file this Objection to a Notice of Intent to Issue Subpoena pursuant to Rule 4009.21, of which the following is a more specific Answer:

1. On or about October 28, 2020, the City of York, Pennsylvania provided to the undersigned the attached Notice of Intent to Issue Subpoena, a copy of which is attached hereto as Exhibit A and incorporated herein by reference.
2. Swartz specifically objects to the proposed subpoena as the Pennsylvania Rules of Civil Procedure do not apply to the instant matter and, therefore, no right to discovery exists.
3. Swartz specifically objects to the proposed subpoena as the City has previously alleged that the record before the trial board and, as a result,

before this Honorable Court is closed. Therefore, any documents produced pursuant to the subpoena cannot be made part of the record before the Court.

4. Finally, Swartz specifically objects to the subpoena because the documents requested pursuant to this subpoena are not relevant to the issues raised before the Court in that:

- a. Any documents produced pursuant to the subpoena will not tend to prove or disprove anything relating to the appealability of the trial board's decision finding Swartz not guilty of any general orders lodged against him;
- b. Any documents produced pursuant to the subpoena will not tend to prove or disprove whether the decision of the trial board is appealable;
- c. Any documents produced pursuant to the subpoena will not tend to prove or disprove whether the decision of the trial board is final and binding on the parties; and
- d. Any documents produced pursuant to the subpoena will not tend to prove or disprove anything related to the allegations previously made against Swartz by the City of York and the Complainants.

WHEREFORE, Clayton Swartz respectfully Objects to the proposed subpoena attached hereto as Exhibit A.

/s/Edward A. Paskey

Edward A. Paskey, Esquire
Attorney ID Number 80304

/s/Douglas P. France

Douglas P. France, Esquire
Attorney ID Number 48744
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E: epaskey@yorklaw.com
Counsel for York City Police
Officer Clayton Swartz

EXHIBIT A

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

IN THE MATTER OF)	
CITY OF YORK,)	
)	
Petitioner,	)	CIVIL DIVISION - LAW
)	
v.	)	Docket No. 2020-SU-1897
)	
CLAYTON SWARTZ,)	
)	
Respondent.)	

**NOTICE OF INTENT TO SERVE A SUBPOENA TO PRODUCE
 DOCUMENTS AND THINGS FOR DISCOVERY PURSUANT TO RULE 4009.21**

Petitioner City of York intends to serve a subpoena identical to the one that is attached to this notice. You have twenty (20) days from the date listed below in which to file of record and serve upon the undersigned an objection to the subpoena. If no objection is made the subpoena may be served.

Date: October 28, 2020

CLARK HILL PLC
Attorneys for Petitioner City of York

/s/ Kevin Levine
 Joseph C. Rudolf, Esq.
 PA Atty. I.D. 44189
 Kevin Levine, Esq.
 PA Atty. I.D. 326492

2001 Market Street, Suite 2620
 Philadelphia, PA 19103
 Phone: (215) 640-8410
 Fax: (215) 640-8501
 jrudolf@clarkhill.com
 klevine@clarkhill.com

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

IN THE MATTER OF)	
CITY OF YORK,)	
)	
	)	Petitioner,
	)	CIVIL DIVISION - LAW
)	
v.	)	Docket No. 2020-SU-1897
)	
CLAYTON SWARTZ,)	
)	
)	
	)	Respondent.

**CERTIFICATE PREREQUISITE TO SERVICE
OF A SUBPOENA PURSUANT TO RULE 4009.22**

As a prerequisite to service of a subpoena for documents and things pursuant to Rule 4009.22, Petitioner City of York certifies that:

- (1) a notice of intent to serve the subpoena with a copy of the subpoena attached thereto was mailed or delivered to each party at least twenty days prior to the date on which the subpoena is sought to be served,
- (2) a copy of the notice of intent, including the proposed subpoena, is attached to this certificate,
- (3) no objection to the subpoena has been received, and
- (4) the subpoena which will be served is identical to the subpoena which is attached to the notice of intent to serve the subpoena.

Date: October 28, 2020

CLARK HILL PLC
Attorneys for Petitioner City of York

/s/ Kevin Levine
Joseph C. Rudolf, Esq.
PA Atty. I.D. 44189
Kevin Levine, Esq.
PA Atty. I.D. 326492

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klevine@clarkhill.com

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF YORK

IN THE MATTER OF
CITY OF YORK,

Petitioner,

v.

CLAYTON SWARTZ,

Respondent.

File No. 2020-SU-001897

SUBPOENA TO PRODUCE DOCUMENTS OR THINGS
FOR DISCOVERY PURSUANT TO RULE 4009.22

TO: Fraternal Order of Police, White Rose Lodge No. 15

(Name of Person or Entity)

Within twenty (20) days after service of this subpoena, you are ordered by the court to produce the following documents or things:
See the attached Schedule of documents for production.

at Kevin Levine, Clark Hill PLC, 2001 Market Street, Suite 2620, Philadelphia, PA 19103

(Address)

You may deliver or mail legible copies of the documents or produce things requested by this subpoena, together with the certificate of compliance, to the party making this request at the address listed above. You have the right to seek, in advance, the reasonable cost of preparing the copies or producing the things sought.

If you fail to produce the documents or things required by this subpoena, within twenty (20) days after its service, the party serving this subpoena may seek a court order compelling you to comply with it.

THIS SUBPOENA WAS ISSUED AT THE REQUEST OF THE FOLLOWING PERSON:

NAME: Kevin Levine

ADDRESS: Clark Hill PLC

2001 Market St., Suite 2620, Philadelphia PA 19103

TELEPHONE: (215) 640-8524

SUPREME COURT ID #: 326492

ATTORNEY FOR: Petitioner City of York

DATE: _____

Seal of the Court

BY THE COURT:

Prothonotary/Clerk, Civil Division

RETURN OF SERVICE

On the _____ day of _____, 20____, I _____

Served _____
(Name of Person Served)

with the foregoing subpoena by: (Describe method of service)

I verify that the statements in this return of service are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Sec. 4904 relating to unsworn falsification to authorities.

Date: _____

(Signature)

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

IN THE MATTER OF
CITY OF YORK,

Petitioner,

v.

CLAYTON SWARTZ,

Respondent.

)
)
)
) CIVIL DIVISION - LAW
)
) Docket No. 2020-SU-1897
)
)
)
)

SCHEDULE OF DOCUMENTS FOR PRODUCTION


The following documents (including hard-copy documents, electronic documents, and email messages) must be produced by Fraternal Order of Police, White Rose Lodge No. 15 under this Subpoena to Produce Documents or Things for Discovery Pursuant to Rule 4009.22:

1. Documents or communications that refer or relate in any way to the Trial Board hearing held convened on August 19, 2020;
2. Documents or communications that refer or relate in any way to the selection of the Fraternal Order of Police, White Rose Lodge No. 15 ("FOP") appointed member to the Trial Board convened on August 19, 2020;
3. Documents or communications that refer or relate in any way to any FOP meeting, formal or informal, at which the August 19, 2020 Trial Board hearing or FOP member selection was on the agenda or otherwise discussed in any manner;
4. Documents or communications that refer or relate in any way to any penalty, sanction, censure, or other action or retribution by the FOP against City Inspector Michael Davis, including but not limited to the expulsion of Davis from the FOP, whether imposed or not;
5. Documents or communications that refer or relate in any way to any planned or possible investigation by the FOP of City Inspector Michael Davis for his investigation in this matter, whether taken or not;
6. Documents or communications that refer or relate in any way to any planned or possible petition to remove City Inspector Michael Davis from his office or from "internal affairs" within the York City Police Department; and
7. Documents or communications that refer or relate in any way to any FOP meeting, formal or informal, at which any of the above actions regarding City Inspector Michael Davis was on the agenda or otherwise discussed in any manner.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Edward A. Paskey, Esq.

Signature: 

Name: Edward A. Paskey, Esq.

Attorney No. (if applicable): 80304

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

CITY OF YORK, PENNSYLVANIA,	:	
APPELLANT	:	No. 2020-SU-1897
	:	
Vs.	:	CIVIL ACTION - LAW
	:	
CLAYTON SWARTZ,	:	
RESPONDENT	:	

CERTIFICATE OF SERVICE

AND NOW, to wit, this 17th day of November 2020, I Edward A. Paskey, Esquire, do hereby certify that I have this date served a copy of the foregoing Objection by E-mail and United States, First Class, Postage Prepaid, addressed as follows:

Mr. Joseph Rudolf, Esq.
Clark Hill
Two Commerce Square
2001 Market Street
Suite 2620
Philadelphia, PA 19103

Respectfully Submitted:

FRANCEPASKEY

/s/Edward A. Paskey

Edward A. Paskey, Esquire
Attorney ID No. PA 80304
2675 Eastern Blvd.
York, PA 17402-2905
Phone: (717) 757-4565

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Petition for Review and Reproduced Record has been served via delivery by the United States Postal Service and electronic mail upon the following on January 12, 2021:

Edward A. Paskey, Esq.
Attorney for the Respondent
France Paskey
2675 Eastern Boulevard
York, PA 17402
(by email)

CLARK HILL PLC

/s/ Kevin Levine
Kevin Levine
Attorneys for Petitioner

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

City of York

PLAINTIFF

VS.

Clayton Swartz

DEFENDANT

2020-SU-001897

CASE NUMBER

PREVIOUS JUDGE

Hon. Kathleen J. Prendergast

ASSIGNED JUDGE

NUMBERS OF RELATED CASES

Local Agency Law Appeal

TYPE OF ACTION

NOTICE OF PRESENTMENT OF MATTER AT CIVIL MOTIONS COURT

TO THE PROTHONOTARY:

The following matter is for presentment at Civil Motions Court:

Date to be presented: January 21, 2021

Petitioner's motion under Pa.R.C.P. 4009.21(d)(1) for a ruling on Respondent's
Pleading/matter to be presented: objections to Petitioner's subpoena upon a non-party for production of documents.

Date(s) conferred, or attempt to confer with all other interested parties: _____

November 23, 2020 and January 8, 2021

Date(s) moving party sought concurrence of each other party: _____

November 23, 2020 and January 8, 2021

Date other parties and Court Administration notified of intended presentment: January 12, 2021

Date: January 12, 2021

Petitioner City of York

Submitted by (Name of Party)

Joseph C. Rudolf, Esq., Clark Hill PLC
Kevin Levine, Esq., Clark Hill PLC

Name of Attorney

OFFICE OF PROTHONOTARY
2021 JAN 22 AM 9:44
JOS. J. L. CENTER
YORK, PA


IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA
CITY OF YORK
Plaintiff
Vs.
CLAYTON SWARTZ
Defendants
No. 2020-SU-1897

**ORDER DENYING PETITIONER'S MOTION UNDER P.A.R.C.P. NO. 4009.21(d)(1)
FOR A RULING ON RESPONDENT'S OBJECTIONS TO PETITIONER'S
SUBPOENA UPON A NON-PARTY FOR PRODUCTION OF DOCUMENTS**

AND NOW, this 21st day of January, 2021, upon consideration of the within Motion of Petitioner under Pa.R.C.P. No. 4009.21(d)(1) for a Ruling on Respondent's Objections to Petitioner's Subpoena upon a Non-Party for Production of Documents, and oral arguments of counsel, it is hereby ORDERED that:

- a) Petitioner's Motion is DENIED,
- b) Respondent's objections to the subpoena are hereby SUSTAINED, and
- c) Petitioner is not permitted to submit the subpoena to the Office of the Prothonotary of York County, Pennsylvania for signature or to serve the signed subpoena upon the non-party identified therein.

BY THE COURT:


The Honorable Matthew D. Menges,
Judge

883 701 51 1111-11

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

CITY OF YORK,
Plaintiff

v.

CLAYTON SWARTZ,
Defendant

No. 2020-SU-001897

CIVIL ACTION - LAW

**ORDER GRANTING IN PART and DISMISSING IN PART PLAINTIFF'S PETITION FOR
REVIEW UNDER LOCAL AGENCY LAW**

AND NOW, this 25th day of February, 2021, for the reasons set forth in the
Memorandum Opinion of this date, Plaintiff's Petition for Review under Local Agency Law is
GRANTED IN PART and DISSMISSED IN PART.

This matter is remanded so the Trial Board may issue an adjudication that complies
with 2 Pa.C.S. §555. All other issues raised by the parties are moot at this time and dismissed
without prejudice.

BY THE COURT:



KATHLEEN J. PRENDERGAST, JUDGE

The Prothonotary is directed to serve notice of the entry of this Order as required by law and
rule of court.

RECEIVED
YORK COUNTY PROTHONOTARY
2021 FEB 26 AM 10:04
JUDICIAL CENTER YORK PA

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

CITY OF YORK,
Plaintiff

No. 2020-SU-001897

v.

CIVIL ACTION - LAW

CLAYTON SWARTZ,
Defendant

RECEIVED
YORK COUNTY PROTHONOTARY
2021 FEB 26 AM 10:04
JUDICIAL CENTER YORK PA

**MEMORANDUM OPINION DISMISSING PLAINTIFF'S PETITION FOR REVIEW UNDER
LOCAL AGENCY LAW**

AND NOW, this 25th day of February, 2021, Plaintiff's Petition for Review under Local Agency Law is **GRANTED IN PART and DISMISSED IN PART.**

FACTS AND PROCEDURAL HISTORY

This matter is before the Court on a Petition for Review under Local Agency Law filed by the City of York (hereafter "the City"). On or about September 10, 2020, after a Trial Board had convened, issued findings and a recommendation for the Police Commissioner regarding disciplinary charges brought against Officer Clayton Swartz (hereafter "Swartz"). The disciplinary charges included Conduct Unbecoming, Truthfulness, and Use of Alcohol. The Trial Board found Swartz Not Guilty on all three charges. The Trial Board then sent its findings and recommendations to the Police Commissioner for review and approval. The Police Commissioner issued a letter September 15, 2020, which indicated he was accepting the Trial Board's finding of "Not Guilty" on the charge of Use of Alcohol, but disapproving the Board's findings on Conduct Unbecoming and Truthfulness. (Def.'s Ex.C).

The City filed a Petition for Review on September 16, 2020. Swartz filed a Brief in Opposition on October 6, 2020. The City then filed a Reply Brief on October 13, 2020.

A request for one-judge disposition was timely filed, and this matter was assigned to the undersigned judge.

DISCUSSION

The Commonwealth Court has held that decisions of police disciplinary trial boards are appealable to the Court of Common Pleas under the Local Agency Law. If the appropriate supervisory agent has taken proper procedural steps to finalize the trial board's decision, then that decision is an adjudication that is "appealable under Section 752 of the Local Agency Law. Lamb v. City of Pittsburgh, 99 Pa.Cmmw.Ct. 424, 512 A.2d 1361 (1986). Under Title 42 of the Pennsylvania Code, the jurisdiction of the courts of common pleas include, "appeals from government agencies" and specifically states that "each court of common pleas shall have jurisdiction of appeals from final orders of government agencies" with certain exceptions that are not applicable to this matter. 42 Pa.C.S. §933(a). Therefore, this Court is vested with jurisdiction to hear appeals of local agency by any person with a direct interest in such adjudication.

Here, both parties have filed briefs which raised a number of issues for consideration. Swartz specifically raised the issue of whether this Court has subject matter jurisdiction over the appeal due to both the Trial Board not being a "local agency" under the Local Agency Law and waiver. As noted above, the Commonwealth Court has held that decisions made by a police disciplinary trial board are subject to appeal under the Local Agency Law. Lamb at 1363. With regard to the issue of waiver, Swartz specifically argues that the city waived its ability to appeal the procedural defects of the trial board's decision because (1) the former Police Commissioner "accepted" the Not Guilty finding for the Use of Alcohol charge, and (2) the City failed to raise a procedural error to the Trial Board. However, there was no case law or statute presented that would require the City to raise any procedural errors to the Trial Board.

Nevertheless, there has been a final adjudication and no waiver of the right to appeal the Use of Alcohol decision. The Court finds it has subject matter jurisdiction over this issue. Additionally, the structure of the decision does not create severability of the other issues, as they appear to have been decided as a group with no separate finding.

Therefore, we will turn to the next issues raised by the City that the Trial Board findings do not comply with statutory requirements. Under the Local Agency Law, “[a]ll adjudications of a local agency shall be in writing, shall contain findings and the reason for the adjudication, and shall be served upon all parties or their counsel personally, or by mail.” 2 Pa.C.S. §555. Upon review of prior case law, there is no doubt that that Trial Board’s findings are wholly insufficient and do not comply with the statutory requirements of the Local Agency Law. In City of Pittsburgh v. Henderson, the Court found that other than a bare statement that the Defendant “provided sufficient testimony and evidence,” the Commission’s opinion was bereft of reasons supporting its conclusions that the Defendant must be reinstated. 2020 Pa.Commw.Unpub. LEXIS 185 (Pa. Cmmw. Ct. Apr. 20, 2020). In the matter before this Court, the Trial Board’s findings did not even include a statement other than a finding of guilty or not guilty. With no findings and reasons for the adjudication, the Trial Board has failed to comply with the requirements found in the Local Agency Law. Therefore, this matter must be remanded so the Trial Board may issue an adjudication that complies with 2 Pa.C.S. §555. All other issues raised by the parties are moot at this time and dismissed without prejudice.

CONCLUSION

The City filed a Petition for Review of the Trial Board findings. At this time, the City has met its burden and persuaded this Court that the Trial Board’s findings do not comply with the Local Agency Law. As such, the Court **GRANTS in PART and DISMISSES in PART**

the Petition for Review and Defendants subsequent issues. This matter is remanded so the Trial Board may issue an adjudication that complies with Section 555 of the Local Agency Law. All other issues raised by the parties are moot at this time and dismissed without prejudice.

BY THE COURT:



KATHLEEN J. PRENDERGAST, Judge

Date: February 28, 2021

The Prothonotary is directed to serve notice of the entry of this Opinion as required by law and rule of court.

From: Matthew Leitzel <[REDACTED]>
Sent: Tuesday, March 2, 2021 12:27 PM
To: Jason Sabol
Subject: Re: Trial Board

Copy. Thanks

I forwarded to Nadzom and Millhouse.

[REDACTED]

[REDACTED]

Captain M. Leitzel
Commander - Admin Services Div
York City Police Department
[REDACTED]

Sent from my iPhone

> On Mar 2, 2021, at 12:13 PM, Jason Sabol <[REDACTED]> wrote:

>

> Please forward this to Nadzam as I do not have his email address.

>

> Gentlemen,

>

> I wanted to touch base with you to let you know that we are going to be appointing an independent third party attorney to walk you through the process for drafting your findings of fact and opinion for the Schwartz case. We should have someone appointed fairly soon, so hang tight. We understand that this isn't in your guys' wheelhouse and we aren't to leave you out to dry. We'll be in touch.

>

> Jason Sabol

>

>

> Sent from my iPhone

Trial Board Findings**RE: City of York vs. Clayton Swartz CC-12-20****Date: 9/10/20 (Revised with Findings of Fact on 3/04/21)**

On August 19th, 2020 a trial board was convened to hear the case, City of York vs. Officer Clayton Swartz. The charges included Unbecoming Conduct, Use of Alcohol off Duty, and Truthfulness. Both the City and Officer Swartz were represented by counsel. Trial Board members were selected in accordance with general orders and consisted of Captain Leitzel, Lt. Millhouse, and D1C Nadzom.

At the conclusion of the hearing, the Trial Board was tasked with reviewing and finding fact based on the evidence presented. Following this review, the trial board was further tasked with the following:

1. By majority vote, find the member Guilty or Not Guilty of each of the charges; and
2. If guilty, recommend a specific penalty to the Police Chief/Police Commissioner within the guidelines set forth in Section 1.8.1, II.
3. A copy of the Trial Board's findings and recommendations shall be delivered or mailed promptly to the charged member and to his or her counsel of record.

After careful consideration in reviewing the evidence presented during the hearing as well as the briefs provided by counsel, the trial board finds the following:

On May 30, 2020 there was a graduation party at 661 Madison Avenue York, PA. The party was at the home of Jeanette Day and her fiancé, Fred Dean. The party was being held to celebrate the college graduation of Jeanette Day's daughter, Logan Day. Jeanette Day is the mother of Swartz's fiancée, Zowie Day. Officer Swartz was off duty when he attended the party. Marley Dahlheimer, India Maldonado, and Lexus Brown (collectively, the "Complainants") attended the party. Jeannette Day's brother, Christopher Owens, attended the party.

The Complainants (Dahlheimer, Maldonado, and Brown) through their written and oral statements to Inspector Davis, alleged an incident took place on the living room couch involving Swartz and Owens. They described this incident as a re-enactment of the recent death of George Floyd. Their allegation further described Swartz approaching Owens as he was asleep on the couch. Swartz placed his knee on Owens neck and then utters the words "Can you breathe? Are you alive?". Owens responded by saying "I can't breathe." All the while both Swartz and Owens were laughing. The "Complainants" stated that the whole incident lasted between 1-2 minutes. All three Complainants immediately viewed this as an intentional re-enactment by Swartz and Owens of the recent George Floyd death. According to Dahlheimer, she confronted Swartz and Owens to stop and told them what they were doing was not funny and was not a joke. At this time, Swartz left the room. Owens soon also got up off the couch and stated to the three complainants "What are you bitches talking about?" He then left the room. All three Complainants were deeply offended and hurt by what they viewed and left the party. On their way out, the Complainants informed Ethan Dean (Fred Dean's son) and Anna Davis (Ethan Dean's girlfriend) that they were leaving because they just observed Owens and Swartz reenact the death of George Floyd on a couch in the living room. They also informed Jeanette Day as to what they observed and why they were leaving. In later interviews, the Complainants alleged that Swartz was making it crystal clear throughout the night that he was a Police Officer, throwing his title around and following

the group throughout the evening. These actions contributed to their belief that Swartz's re-enactment of the George Floyd death was intended to directly intimidate the Complainants because of their race.

Swartz and Owens testified under oath at the trial board proceedings that Owens was laying on the couch sleeping. Swartz approached him and attempted to shake him awake. When Owens awoke, he spontaneously exclaimed "I can't breathe!" Owens laughed, as he was attempting to make an insensitive joke about the death of George Floyd. Swartz stated he had no prior knowledge that Owens would make that statement and did not re-enact any part of the George Floyd incident. Swartz did not place his knee on Owens neck or any part of his body. Following this brief exchange (described as seconds) Swartz and Owens left the room and went to the kitchen. Swartz and Owens deny any confrontation with the Complainants.

Unbecoming Conduct, General Order 1.8.1.IV.A.2 85.

General Order 1.8.1.IV.A.2 states: Members shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably on the city. Conduct unbecoming a member shall include any conduct which adversely affects the morals or efficiency of the department, or any conduct which has a tendency to destroy public respect for police officers or other members and confidence in the operation of police services.

In determining guilt or innocence regarding the charge of Unbecoming Conduct, the trial board would need to determine which set of events, as described above, is more credible and/or believable.

The internal affairs investigation yielded written and audio statements from the Complainants, witnesses, and the defendant (Swartz). At the hearing, Inspector Michael Davis testified regarding his investigation. The City additionally called Swartz to the stand to testify under direct examination. The defense called several witnesses including (Erin Kinard, Jeannette Day, Fred Dean, William Unwin, Thomas Gross, Christopher Owens, Jason Parker, David Baez, Peter Fouad, Adam Nothstein). All that were called to the stand were sworn to give accurate and truthful testimony and were subject to both direct and cross examination. The three primary Complainants (Dahlheimer, Maldonado, and Brown) were not called to testify regarding their observations at the party.

Based on the information gathered, the following people were present during the couch incident: Swartz, Owens, Jeanette Day, Dahlheimer, Maldonado, and Brown.

This trial board based its decision after review of investigative statements (written/audio), direct testimony during the hearing, transcripts, and follow up proposed findings of fact from the prosecution and defense.

In making such a decision, the trial board needed to fully assess the credibility and believability of all involved. Cross examination is the primary method for testing the believability of a witness and the truthfulness of his/her testimony.

Following the hearing, the trial board was very disappointed it did not have the opportunity to hear direct or cross examination testimony of the Complainants. Additionally, the defense pointed out several inconsistencies in the Complainants' written and audio statements obtained during the internal affairs investigation.

Hours prior to the Complainants making contact with Inspector Davis, they appeared in a Facebook Live video where the three of them were standing in front of the York County Courthouse recalling their version of the incident. During this video, they can be heard chanting Swartz' name and one Complainant can be seen displaying her middle finger and uttering "Fuck the Police", while laughing.

Inspector Davis' initial contact with the Complainants was conducted as a group interview. The group interview included a 4th person (Mother of one Complainant). All Complainants were initially interviewed together and were able to hear one another's account of the incident. This group interview was not recorded, and Davis' notes failed to specify which details came from which Complainant.

Davis allowed the Complainants to leave the initial interview without providing written statements and instructed them to provide written statements via email. This further allowed the Complainants to engage in collaboration in the preparation of their statements. In reviewing their written statements and social media posts, it was obvious this collaboration occurred.

Multiple inconsistencies are observed in the Complainants' statements.

Some of the more significant inconsistencies follow:

- Maldonado's Instagram post on June 1st, stated that she and Brown were present in the room when the couch incident occurred. In her subsequent oral interview that occurred on June 10th, she places all three Complainants in the room. Jeanette Day testified that she observed Maldonado and Brown in the room but does not recall seeing Dahlheimer present at the time of the incident.
- Dahlheimer's written statement indicated that Swartz made it crystal clear that he was a police officer and threw around his title when she and her African American friends were present. During Dahlheimer's oral interview she was only able to identify one instance when Swartz identified himself as a police officer and that was in response to someone prompting him with a question. Additionally, during the oral interview, Dahlheimer made no statements regarding Swartz following their group around the party.
- In Brown's oral interview she states that she was the first to hear the incident begin to unfold. Brown looked over and observed Swartz placing his knee on Owen's neck. Brown directed the other two Complainants to watch what was happening. Dahlheimer stated that Brown notified her and when she first looked over, Swartz was not in contact with Owens. Swartz was behind the couch and mocking the George Floyd incident by laughing.
- Dahlheimer states in both her written statement and oral statement that Owens was face down on the couch. Maldonado states in her written statement that Owens was face up on the couch but then later changes her story to face down during her oral interview. Both Owens and Swartz testify that Owens was face up on the couch. This testimony was consistent with statements obtained from both during the investigation.
- Dahlheimer states in Instagram, written, and oral statements that she alone confronted Swartz and Owens. She further states that Maldonado and Brown were too intimidated by Swartz to

speak up. In Maldonado's oral interview she states that she and Dahlheimer both confront Swartz and Owens. Brown changes her story regarding the confrontation three different times throughout the investigation. First, she states she was afraid to confront Swartz. In a later interview, she observed Maldonado and Dahlheimer confront Swartz and Owens as she was running out of the house. In a third statement, she says that all three of them confronted Swartz and Owens.

Due to the above inconsistencies and lack of direct testimony/cross examination, the trial board found the Complainants' version of the incident may have been greatly exaggerated and simply not credible. If the trial board would have had the opportunity to hear direct testimony and cross examination by the Complainants, these inconsistencies could have possibly been cleared up and a clear picture of the events brought to light.

Swartz and Owens both testified during the hearing. Their testimony through direct and cross examination remained consistent with prior statements and appeared to be credible and truthful as observed by the trial board.

Based on the above facts the trial board found Swartz, in a 2-1 majority vote, to be NOT GUILTY of Unbecoming Conduct.

Use of Alcohol off Duty, General Order 1.8.1.IV.B.14 88.

General Order 1.8.1.IV.B.14 states: - 18 - Members, while off duty, shall refrain from consuming intoxicating beverages to the extent that it results in obnoxious or offensive behavior which discredits them or the city, or renders the member unfit to report for his or her next regular tour of duty.

Swartz was charged with Use of Alcohol. He admits to consuming 4-6 beers and 2-3 lemon drop shots throughout the evening (7+ hours). There was no evidence presented through witness statements or testimony that indicated Swartz was visibly intoxicated to the point of being obnoxious and/or offensive. No one saw him stumbling, falling asleep, being incoherent, or belligerent. At the end of the night, he recognized he was not sober enough to operate a motor vehicle. He called a friend to pick him up and take him home.

A text message revealed through the internal affairs investigation showed a statement made by Swartz indicating he was "blacked out drunk." Testimony from Swartz, and three other witnesses (Baez, Nothstein, Fouad) all stated the term "Blacked out drunk" is commonly used to describe regular intoxication. Baez described it as synonymous to being "buzzed." Inspector Davis did not clarify the statement with Swartz and did not follow up with any witnesses to ascertain their opinions and observations, regarding Swartz' level of intoxication.

Based on these facts, the trial board found no evidence to support the charge of Use of Alcohol off Duty and provided a unanimous vote of NOT GUILTY.

Truthfulness, General Order 1.8.1.IV.B.56 93.

General Order 1.8.1.IV.B.56 states: Members are required to truthfully answer questions by or render any relevant statements to any officer or agency conducting an official investigation.

Swartz was also charged under the general order of Truthfulness. The City establishes the charge through its belief that Swartz intentionally withheld information regarding a text conversation he had with Ethan Dean the day following the party.

The City specifically contends: Officer Swartz's June 15 interview statement that he was not aware of any drama at the party, specifically the drama surrounding the couch incident, is contradicted by Officer Swartz's May 31 text messages to Ethan Dean which acknowledged that he was aware that individuals at the party were upset with him. He also apologized to Ethan for his behavior at the party.

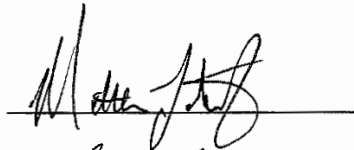
In reviewing the transcripts from Swartz' first and second interview, Swartz makes statements that he was aware of both the drama involving Logan Day and her boyfriend as well as the drama created by what Chris Owens said on the couch. He further stated that he was told the couch drama was about Chris and there were no issues with him (Swartz).

Inspector Davis received the text messages on June 18th from Ethan Dean. Davis' second and final interview with Swartz occurred on June 15th. Davis neither followed up with a 3rd interview of Swartz regarding this information nor did he conduct a formal interview with Dean. In the phone interview between Davis and Dean, Dean states he did not witness anything and only learned of the couch incident from the Complainants as they were leaving.

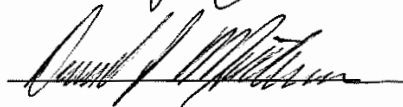
Additionally, Swartz identified Ethan Dean as being present at the party in an interview with Inspector Davis. Furthermore, Swartz identifies in his June 1st interview with Davis that Zoey Day told him that Ethan Dean was upset with him. Swartz would not have offered this information if his intent was to deceive or withhold information that was pertinent to the investigation.

Based on the above facts, there is not enough evidence to sustain the charge of truthfulness. The Trial Board, in a Majority 2-1 Vote, found Swartz to be NOT GUILTY for the Charge of Truthfulness.

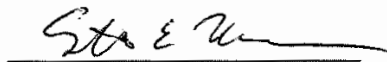
Capt. M. Leitzel


Date: 3.04.21

Lt. D. Millhouse


Date: 3-4-21

D1C S. Nadzom

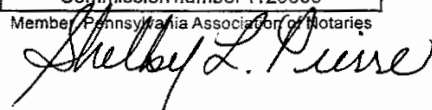

Date: 3-4-21

Commonwealth of Pennsylvania
County of York

Sworn to and subscribed before me
this 4 day of March, 2021.

5

Commonwealth of Pennsylvania - Notary Seal
Shelby L. Pierre, Notary Public
York County
My commission expires May 29, 2024
Commission number 1129566
Member, Pennsylvania Association of Notaries



**The City of York
Pennsylvania**

The Honorable Michael Helfrich, Mayor



York City Police Department
Police Commissioner
Michael Muldrow
50 W. King St.
York, PA 17401
www.yorkcity.org

March 30, 2021

VIA EMAIL AND USPS

Officer Clayton Swartz

[REDACTED]
[REDACTED]
[REDACTED]

Re: Review of Trial Board Findings and Recommendations

Dear Officer Swartz:

I received a copy of the March 4, 2021 "Trial Board Findings, Revised with Findings of Fact" that were issued by the Trial Board following the remand of this matter back to the Trial Board by the Court of Common Pleas. These Findings considered the August 19, 2020 hearing on the July 16, 2020 Notice of Charges. Based on my initial review of the investigation report, the Trial Board Hearing transcripts and exhibits, consultation with and recommendations from legal counsel for City Government, and as is required under General Order 2.3.2.A.4.b, this letter shall serve as my formal disapproval of the Trial Board's finding of "Not Guilty" on all three charges set forth in the Notice.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Muldrow", written over a horizontal line.

Commissioner Michael Muldrow
City of York Police Department

cc: Matthew Irvin, FOP President
Trial Board Members