

July 18, 2008
OPINION 08-0052

Mr. Jason Boudreaux
Chairman
Lafayette Municipal Fire and
Police Civil Service Board
300 Vermilion Street
Lafayette, LA 70501

47-A-1 FIRE PROTECTION DISTRICTS
59- LAW OFFICERS- AUTHORITY & JURISDICTION

R.S. 40:2531, R.S. 33:2181, R.S. 33:2186

Any discipline, demotion, or dismissal taken against a law enforcement officer or fire employee in violation of the sixty-day time frame imposed on investigations is an absolute nullity.

Dear Mr. Boudreaux:

You have asked this office to advise when an investigation of an officer begins and when the investigation is concluded under the police officer's bill of rights, R.S. 40:2531, and under the statutes governing fire employees' rights, R.S. 33:2181, in light of recent legislative amendments to both statutes.

I. POLICE OFFICER'S BILL OF RIGHTS

R.S. 40:2531 specifies minimum standards to be applied during investigations of law enforcement officers. The former language of R.S. 40:2531(B)(7) provided that "each investigation of a law enforcement officer which is conducted under the provisions of this Chapter shall be completed within sixty days". Although the statute provided that investigations "shall be concluded within sixty days", the statute did not contain a penalty provision for failure of the investigating authority to complete the investigation within the allotted sixty-day time frame.

In Marks v. New Orleans Police Department, 943 So.2d 1028 (La. 2006), the Louisiana Supreme Court discussed the nature of a statutory mandate that does not provide a penalty for non-compliance with the mandate. At issue in Marks was the effect of the failure of the police department to comply with the statutory sixty-day time period of R.S. 40:2531(B)(7) for conducting an investigation of a law enforcement officer. The Supreme Court held that "the fact that the legislature did not include a penalty in the statute for non-compliance with the sixty-day period to be more significant" than whether the statute required a mandatory or directory interpretation. 943 So.2d at 1035. The Supreme Court concluded that "certainly, the statute does not provide, nor suggest, that the remedy for non-compliance with the sixty-day time period is dismissal of the

disciplinary action.” Id. The Court in Marks additionally stated: “Generally, statutes using mandatory language prescribe the result to follow (a penalty) if the required action is not taken. If the terms of the statute are limited to what is required to be done, *i.e.*, procedural rules, then the statute is considered directory even though mandatory language is employed.” Id. Finally, the Court quoted Carter v. Duhe, 921 So.2d 963, 970 (La. 2006), in affirming that “it is not the function of the judicial branch in a civilian legal system to legislate by inserting penalty provisions into statutes where the legislature has chosen not to do so.” 943 So.2d at 1035.

The Court in Marks held that, because R.S. 40:2531 contained no penalty provisions, the failure of the police department to comply with the statutory sixty day time period for conducting an investigation of a law enforcement officer did not require a summary dismissal of the disciplinary action.

In response to Marks, the legislature has changed the law. Acts 91 and 258 of the 2007 Regular Legislative Session, effective August 15, 2007, amended 40:2531(B)(7) to require that, when a written complaint is made against an officer, “the chief of police or his authorized representative shall initiate an investigation within fourteen days of the date the complaint is made”. The statute retains the requirement that “each investigation of a law enforcement officer....shall be completed within sixty days” [except in cases in which the municipality is subject to Municipal Fire and Police Civil Service Law, in which case those departments may ask for an extension from the Police Civil Service Board—see R.S. 40:2531(B)(7)].

Significant is the new penalty provision in R.S. 40:2531(C) created in Act 258:

C. There shall be no discipline, demotion, dismissal or adverse action of any sort taken against a law enforcement officer unless the investigation is conducted in accordance with the minimum standards provided for in this Section. *Any discipline, demotion, dismissal or adverse action of any sort whatsoever taken against a law enforcement officer without complete compliance with the foregoing minimum standards is an absolute nullity.* (Emphasis added).

R.S. 40:2531 now mandates that an investigation be initiated within fourteen days of a written complaint filed against a police officer; further, the investigation must be completed within sixty days. Because the statute now contains the penalty provision of “absolute nullity” regarding a disciplinary action which is not compliant with the terms of the statute, a disciplinary action against a police officer must be dismissed if the investigation is not completed within the sixty-day time frame.

The reasoning expressed in Marks would require such a conclusion. The Court interpreted the language of R.S. 40:2531 to be directory only because the statute lacked a penalty provision, even though the statute then required that an investigation “shall be completed within sixty days”. Now that the statute has a penalty provision of “absolute nullity” regarding a non-compliant disciplinary action, under the holding of Marks, the language of the statute is mandatory.

FIRE EMPLOYEES’ RIGHTS

Act 258 of the 2007 Regular Legislative Session amended R.S. 33:2181, the statute relative to the rights of fire employees while under investigation, to include the following penalty provisions at Subsection (C):

C. No fire employee shall be disciplined, demoted, dismissed or be subject to any adverse action unless the investigation is conducted in accordance with this Subpart. *Any discipline, demotion, dismissal or adverse action of any sort taken against a fire employee without complete compliance with the provisions of this Subpart is an absolute nullity.* (Emphasis added).

R.S. 33:2186(A) requires that an “investigation of a fire employee which is conducted pursuant to this Subpart shall be completed within sixty days”. Failure to comply with the sixty-day time limitation now renders disciplinary action against a fire employee an “absolute nullity”.

While the legislature provided a specific time frame for the initiation of an investigation against a police officer (within fourteen days of the written complaint), such language is absent from the statutes pertaining to fire employees. In the instance of the fire employees, the question of “at what point does an investigation begin?” remains. We rely on previous opinions of this office which address the issue. In Opinion 93-52, this office stated:

Black's Law Dictionary defines the term as the process of inquiring into or tracking down through inquiry. Black's further defines the term “investigate” as follows: “To follow up step by step by patient inquiry or observation. To trace or track; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry.”

According to the reasoning expressed in Opinion 93-52, if circumstances concerning the conduct of a fire employee “require a close study or systematic inquiry into a situation”, the protections afforded a fire employee under R.S. 33:2181 apply. It is the opinion of this office that an investigation of a fire employee begins when an authorized person starts to make inquiries or collect

evidence concerning a fire employee where the end result is “with a view to possible disciplinary action, demotion, or dismissal.”

In further accord is Opinion 04-0180, in which this office concluded that “any action taken by formal investigating authorities...which could possibly affect the job status (of a fire employee)” requires that the minimum standards of R.S. 33:2181 apply. See Opinions 93-52 and 04-0180, copies attached.

You have previously submitted an inquiry to this office, raising the same questions regarding investigations of police officers and fire employees. This office responded to you in Attorney General Opinion 07-0073, and while Opinion 07-0073 is an accurate interpretation of the law as written then, the law has been amended, as discussed. Those changes in the law dictate that Opinion 07-0073 no longer represents the opinion of this office regarding the questions addressed herein.

We hope the foregoing is helpful to you. Should you have other questions in which we may provide assistance, please contact this office.

Very truly yours,

JAMES D. “BUDDY” CALDWELL
ATTORNEY GENERAL

BY:

KERRY L. KILPATRICK
ASSISTANT ATTORNEY GENERAL

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Chairman
Lafayette Municipal Fire and Police Civil Service
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Lafayette, LA 70501

Date Received:

Date Released: July 18, 2008

KERRY L. KILPATRICK
ASSISTANT ATTORNEY GENERAL

