

IN THE CIRCUIT COURT OF THE  
FOURTH JUDICIAL CIRCUIT IN AND  
FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2004-CA-0108356-MA

DIVISION: CV-E

FLORIDA STATE LODGE,  
FRATERNAL ORDER OF POLICE, and  
VICTOR RAYNOR

Petitioners,

vs.

ATLANTIC BEACH POLICE  
DEPARTMENT, CITY OF  
ATLANTIC BEACH, FLORIDA,

Respondent.

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**ORDER ON MOTION FOR TEMPORARY INJUNCTION**

This matter is before the Court on Petitioners' Motion for a Temporary Injunction to prevent Respondent from ordering the appearance or questioning of Petitioner regarding any matters set out in a "fitness-for-duty" evaluation report prepared by Dr. Christopher Kalkines, a psychologist, on November 26, 2004.<sup>1</sup> From the evidence, the Court finds:

1. Petitioner Raynor has been employed by the Atlantic Beach Police Department ("the Police Department") as a police officer for over sixteen years.
2. On October 25, 2004, Respondent's chief of police received a memorandum from Petitioner's supervising sergeant concerning an alleged excessive use of force by Petitioner and expressing concerns about Petitioner having a serious anger problem. Consequently, on October

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<sup>1</sup> The report is actually misdated October 26, 2004, but the correct date is November 26, 2004.

27, 2004, Respondent, by a memorandum from the chief of police , ordered Petitioner to undergo a “fitness-for-duty” evaluation with Dr. Kalkines on November 1, 2004. The memorandum stated, in part: “Based on concerns relative to the incident that occurred on 10/23/04, *which is currently the basis for an internal investigation for the excessive use of force*, you are being directed to undergo an evaluation for your fitness for duty.” (Emphasis added). The memorandum also placed Petitioner on administrative leave, rescinded his arrest powers and ordered him to turn in his “department issued firearm, ID and vehicle...” Notwithstanding the foregoing, it also provided, “This is not a disciplinary action. The investigation into the incident has not been completed, and no findings have been made at this time.”

3. As ordered, Petitioner underwent the evaluation with Dr. Kalkines on November 1, 2004. (Although Dr. Kalkines is a private practitioner and not an employee of Respondent, his services have been regularly used by Respondent to conduct psychological “fitness for duty” evaluations.) At the outset, Petitioner was presented with and signed an authorization form which provided, “I hereby authorize the release of the results of my evaluation by Byron, Harless, Reynolds, Kalkines & Buffone, Inc., to the management of Atlantic Beach Police Dept.” Petitioner executed that document believing that he was required to do so to comply with the order that he undergo the evaluation. The evaluation process consisted of psychological testing and an interview by Dr. Kalkines.

4. In the course of the interview Petitioner, who was then 44 years old, related an incident involving a bar fight he was in when he was 21.<sup>2</sup> In his November 26, 2004 evaluation

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<sup>2</sup> The incident was therefore 23 years before the interview and 7 years before Petitioner became employed by the Atlantic Beach Police Department.

report to Respondent, Dr. Kalkines discussed this incident and its aftermath, which disclosure Petitioner now seeks to prevent Respondent from using as a basis for any disciplinary action against him.

5. Dr. Kalkines' report concluded that: Petitioner was fully fit for duty; there was no evidence of a mental disorder; he was fully responsible for his actions; he was aware of the difference between right and wrong and the consequences for his choices in behavior. In addition Dr. Kalkines reported in detail the results of Petitioner's psychometric testing and his entire life history, family background, education, recreational interests, employment history, his divorce, friendships, and religious beliefs.

6. The evaluation occurred at the offices of Dr. Kalkines. During the interview, the conditions prescribed by the Police Officers' Bill of Rights, §112.532, Fla. Stat. (2004), were not observed in a number of respects, including the requirement that the interview be recorded, and that it take place at the office of the local precinct, or police unit. Respondent contends that those requirements were not applicable to Dr. Kalkines' interview for the purpose of conducting a fitness for duty evaluation.

### **Discussion**

Petitioner contends that he is entitled to injunctive relief on the grounds that permitting Respondent to disclose or use the details of his interview with Dr. Kalkines, other than the conclusions that he was fit for duty, as a basis for an investigation for disciplinary action would violate his right of privacy under Art. I, § 23 Fla.. Const. and would violate his rights under the Law Enforcement Officers' Bill of Rights, §§112.532-534, Fla. Stat. (2004) ("LEOBR").

Contrary to Petitioner's assertion, Dr. Kalkines' interview did not constitute a violation of

his rights under LEOBR. Section 112.532(1), Fla. Stat. (2004), requires certain conditions for the interrogation of a law enforcement officer under investigation for any reason which could lead to disciplinary action, only when the interrogation is by members of the law enforcement officer's agency. Dr. Kalkines was not a member of Petitioner's agency; therefore, the proscriptions of LEOBR did not apply to his interview of Petitioner.

For the following reasons, however, the Court finds and concludes that for Respondent to order the appearance or questioning of Petitioner regarding any matters disclosed in Dr. Kalkines' report, other than his recommendation as to his fitness, or to utilize it in any disciplinary proceeding, would constitute a violation of Petitioner's privacy rights.

In *State v. Johnson*, 814 So.2d 390, 393 (Fla. 2002), the Florida Supreme Court held that an individual's "medical records enjoy a confidential status by virtue of the right to privacy contained in the Florida Constitution, and any attempt on the part of the government to obtain such records must first meet constitutional muster." Raynor contends that the details of Dr. Kalkines' interview with him constitute such a medical record and, except for its conclusion, it is subject to the same right of privacy. The Police Department responds that in order for the right of privacy to attach, "a reasonable expectation of privacy must exist;" *Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544, 547 (Fla. 1985); and that because Raynor executed an authorization to release "the results" of his evaluation, he did not have such a reasonable expectation of privacy. This argument fails for two reasons.

First, Raynor's execution of the authorization was the subject of coercion, in that he reasonably believed that if he failed to execute it, that alone would have been a basis for terminating his employment. See *Garrity v. State of New York*, 385 U.S. 493 (1967) (Statements obtained from a police officer under threat of removal from office, are deemed to be coerced and may not be used against him in a subsequent criminal prosecution.) If a waiver of a federal

constitutional right against self incrimination is invalid as coerced under such circumstances, a waiver of a state constitutional right of privacy under the threat of being terminated is likewise invalid.

Second, Dr. Kalkines' evaluation report to the Police Department disclosed far more than was authorized by Raynor. The October 27, 2004 memorandum directed Raynor to undergo an evaluation for his fitness for duty. The authorization form signed by Raynor on November 1, 2004 authorized the release to the Police Department of "the results of my evaluation." The results of the evaluation was the conclusion arrived at by Dr. Kalkines that Raynor was fully fit for duty. While the report of the conclusion was certainly proper and within the purview of the authorization, the disclosure of all the details of Raynor's personal history, touching on indisputably private matters,<sup>3</sup> was unnecessary for the specific purpose of the report and constituted an invasion of his privacy, which could not be reasonably anticipated. *Cf. Sangirardi v. The Village of Stickney*, 342 Ill.App.3d 1,16, 793 N.E.2d 787, 800 (2003) (Chief of police's requirement of disclosure of police officer's mental fitness report not a violation of statutory privacy rights as to mental health records, when the Chief "did not compel the release of plaintiff's mental health records, but only the ultimate fitness for duty recommendation.") *See also Cochran v. City of Tampa, Florida*, 11 Fla. L. Weekly Supp. 556a, Case No. 04-3027, Fla. 13<sup>th</sup> Cir. Ct. (April 5, 2004) (Police officer who signed medical information release under threat of disciplinary action entitled to enjoin use of records released in any adverse employment action against him).

Accordingly the Court finds that to permit Respondent to use any part of Dr. Kalkines' report, other than the recommendation as to fitness, would cause irreparable harm to Petitioner,

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<sup>3</sup> The Court recognizes that those details were probably proper factors to be considered in the conclusion reached as to Raynor's fitness for duty, but their disclosure was not required to deliver to the Police Department the message which it sought, i.e, whether or not Raynor was fit for duty.

for which he has no adequate remedy at law, that he has a substantial likelihood of success on the merits of this case if it proceeds to trial, and that the public interest would be served by enforcing and maintaining in this case Florida's constitutional right of privacy.

It is therefore, **ORDERED AND ADJUDGED**, that until further order of this Court, Respondent is enjoined and restrained from:

1. Ordering the appearance or questioning of Petitioner regarding any matters disclosed in Dr. Kalkines' November 26, 2004 report to Respondent (actually misdated October 26, 2004) on his November 1, 2004 evaluation of Petitioner.

2. Directly or indirectly using the information derived from the foregoing report in any manner adverse to Petitioner.

**DONE AND ORDERED** at Jacksonville, Duval County, Florida on February 18, 2005.

**ORDER ENTERED**

**FEB 18 2005**

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Bernard Nachman, Circuit Judge

/s/ Bernard Nachman

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