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BEFORE THE UTAH DEPARTMENT OF PUBLIC SAFETY

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IN THE MATTER OF BRIGHAM YOUNG  
UNIVERSITY POLICE DECERTIFICATION  
PROCEEDINGS

RULE 56(F) NOTICE AND ORDER  
ON BYU UNIVERSITY'S  
POLICE MOTION FOR SUMMARY  
JUDGEMENT  
AND SUA SPONTE ORDER FOR  
CONTINUANCE

Administrative Law Judge Richard Catten

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On or about August 6, 2020, BYU University Police (“BYUPD”) filed a Motion for Summary Judgement in the above encaptioned matter. The Utah Department of Public Safety (“UDPS”) filed its Memorandum in Opposition to BYUPD’s Motion on or about October 5, 2020 (after a stipulated extension of time). BYUPD filed its Reply Memorandum on October 16, 2020.

A hearing was held on October 26, 2020, at the Peace Officer Standards and Training offices in Sandy Utah. BYUPD was represented by James Jardine and Samuel Straight of Ray Quinney and Nebeker, P.C. UDPS was represented by J. Michael Hansen and Lynda Viti, Assistant Attorney Generals.

Based on the pleadings, exhibits, statutes, rules and the arguments of the parties, it has been preliminarily determined that the undisputed facts set forth in BYUPD’s Motion for Summary Judgement may not support judgment as a matter of law in BYUPD’s favor. To the contrary, those undisputed facts may support the granting of summary judgment or partial summary judgement to the UDPS, Therefore, pursuant to Utah Rule of Civil Procedure Rule

56(f), this Order serves as notice that 1) summary judgement may be granted for the nonmoving party (Rule 56(f)(1); or 2) summary judgement may be considered by the ALJ after identifying for the parties material facts that may not be genuinely in dispute (Rule 56(f)(3). In accordance with the foregoing, the Parties are hereby on notice that the following legal conclusions are under consideration.

**1. Potential legal conclusion.**

It may be a violation of the certification criteria set forth in Utah Admin. Code R698-4-4, if BYUPD, or its parent organization Brigham Young University, takes action that restricts, obstructs or is uncooperative with the UDPS's ability to administer its duties under the Peace Officer Training and Certification Act (the "Officer Certification Act" or "Act") (i.e., UDPS's ability to investigate or discipline an individual officer); or failed to perform any duties it may have under that act (i.e., investigate and report true allegations of such conduct that appears to violate the Act to "POST" - the Peace Officer Standards and Training division of UDPS).

**Analysis.**

Pursuant to Utah Admin. Code Rule R698-4-5,<sup>1</sup> "Certification of a law enforcement agency of a private college or university may be denied or revoked for failure to meet the certification criteria set forth in this rule." UDPS has specifically alleged that BYUPD failed to meet the certification criteria set forth in R698-4-4(4) which states that "The law enforcement agency's officers shall be subject to all of the requirements of Title 53, Chapter 6, Part 2."<sup>2</sup>

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<sup>1</sup> This rule was established under the authority granted in §53-13-103(b)(xxi) Utah Code Ann.

<sup>2</sup> Title 53, Chapter 6, Part 2 is the Peace Officer Training and Certification Act.

It is undisputed that individual officers within BYUPD are subject to the certification requirements of the Officer Certification Act. BYU argues that its officers are, and always have been, subject to the Act and submitted affidavits from both its former and current chief in support of that claim. However, that argument misses the point by focusing on the individual officers, rather than BYUPD's certification. If the Rule is read to only apply to individual officers and places no burden whatsoever on BYUPD to ensure compliance with the Act as part of its own certification criteria, then the criteria is essentially rendered meaningless.

Statutes must be read to give meaning to all provisions. The Utah Supreme court has stated: "well-established principle of statutory construction requiring us to give meaning, where possible, to all provisions of a statute..." "[A]ny interpretation which renders parts or words in a statute inoperative or superfluous is to be avoided."... *Lund v. Brown*, 2000 UT 75, 11 P.3d 277 (Utah 2000). {citations omitted}.

A reading of the various provisions of Utah Admin. Code R698, as a whole, indicates that the criteria of "being subject to" the Officer Certification Act is an obligation of BYUPD, not individual officers. In other words, it is a certification criterion that BYUPD make its officers subject to the Act. If BYUPD fails to carry out its duties under the Officer Certification Act, takes action to prevent the application of the Act to one of its individual officers, or obstructs the UDPS from performing its duties under the Act, then BYUPD is not meeting the certification criteria set forth in the Rule.

## **2. Potential Legal Conclusion.**

The undisputed facts show that the allegations that a BYUPD officer was accessing and sharing records from other law enforcement agencies were true. The truthfulness of allegations of “conduct which is a state or federal criminal offense, triggers the investigation and reporting requirements of §53-6-211(6) Utah Code Ann. If the allegations are found to be true, then the matter is reported to POST for its administrative investigation and potential adjudication. The fact that prosecution of a crime was declined by state prosecutors, has no relevance to the administrative determination and referral required by §53-6-211(6).

### **Basis.**

The applicable statutes, rules, and undisputed facts set forth in the Motion and its exhibits and other materials in the record (see Rule 56 (c)(3), URCP), indicate the following:

a. The Utah Government Access Management Act (“GRAMA”) governs the collection, classification, protection and distribution of records held by state agencies and political subdivisions of the State of Utah. BYU is a private entity and, at the relevant time, was not subject to the provisions of GRAMA. However, through a shared computer program known as “Spillman” BYUPD had access to the records of other law enforcement agencies in Utah County. Those agencies are governmental entities and, therefore, subject to GRAMA. The police records collected and held by those governmental entities are clearly “Records” as defined in GRAMA §63G-2-101, et seq., Utah Code Ann.

b. The undisputed facts indicate that the BYUPD officer accessed and distributed Records, as defined in GRAMA, that were created and maintained, not by BYUPD, but by other local government law enforcement agencies. (See citations to the Undisputed Facts set forth under paragraph 3 below).

The allegations being true trigger a reporting requirement to POST if the conduct meets one of the violation criteria set forth in §53-6-211 Utah Code Ann. In this case, the undisputed facts clearly appear to meet the requirements of §53-6-211(1)(d), “engages in conduct which is a state or federal criminal offense.”

The offense is set forth in the “Remedies” section of GRAMA which states:

§63G-2-801(1)(a). Criminal penalties.

A public employee **or other person who has lawful access to any private, controlled, or protected record under this chapter**, and who intentionally discloses, provides a copy of, or improperly uses a private, controlled, or protected record knowing that the disclosure or use is prohibited under this chapter, is, except as provided in Subsection 53-5-708(1)(c), guilty of a class B misdemeanor. (emphasis added)

Based on the foregoing, the allegations made against the BYUPD officer were true and should have been referred to POST as set forth in §53-6-211(6)

Utah Code Ann., so that POST could perform its duties under the Act.

### **3. Potential Legal Conclusion.**

BYUPD did not comply with its investigation and referral obligation under §53-6-211(6) Utah Code Ann.

#### **Basis.**

The BYUPD Chief was informed of allegations that a BUYPD officer had violated GRAMA. BYUPD either did not investigate the allegations for

truthfulness as required by Officer Certification Act, or if it did, BYUPD failed to report the matter to POST for investigation pursuant to §53-6-211. The failure to conduct the investigation required by §211 and the failure to refer the true allegations to POST may constitute a violation by the BYUPD of the certification criteria of R698-4-4, by the law enforcement agency. By its actions, it prevented its officer from being subject to the provisions of Officer Certification Act.

It is undisputed that BYUPD is subject to the provisions of §53-6-211 Utah Code Ann., as part of its certification criteria under R689-4-4. §211 provides the process by which UDPS, through POST, its Peace Officer Standards and Training Division, suspends, revokes or otherwise disciplines individual officers for violations of their individual certifications. The process outlined in §211 is administrative (see §53-6-211(3) Utah Code Ann.) and provides, among other things, discipline for “conduct which is a state or federal criminal offense...” §53-6-211(1)(d) Utah Code Ann. The provisions of §211 are administrative and are specifically not criminal proceedings. §53-6-211(3)(c), Utah Code Ann.

Among the specific requirements of §211 is subsection (6)(a) which states:

A chief, sheriff, or administrative officer of a law enforcement agency who is made aware of an allegation against a peace officer employed by that agency that involves conduct in violation of Subsection (1) shall investigate the allegation and report to the division if the allegation is found to be true.  
§53-6-211(6)(a) Utah Code Ann.

A plain reading of both Rule R698 and §53-6-211(6), read in order to give meaning to each, leads to the conclusion that when the statute specifically

designates the head of an agency (the “chief, sheriff or administrative officer”) as the one who should investigate and refer allegations, it is, for Rule R968 purposes, the agency that is required to comply with the investigation and reporting process set forth in §53-6-211(6)(a) Utah Code Ann. To read it otherwise would lead to an absurd result or render it meaningless as a certification criteria.

BYUPD contends that there were 4 investigations in this matter, but each is potentially defective when compared to the simple requirements of §53-6-211(6). Subsection §211(6), simply requires two things 1) investigate the allegation, and 2) report the allegation if found to be true. All three investigations arguably performed by BYUPD or on their behalf focus almost exclusively on whether the officer had committed a prosecutable crime. That is simply not the standard or requirement of §53-6-211, Utah Code Ann. Each investigation is described separately as follows:

a. Investigation by the Chief. Based on the undisputed facts, the Chief’s investigation appears to be little more than speaking with the officer on a couple of occasions, removing his Spillman access, and eventually transferring him to another position.

BYUPD submitted and relies upon the Declaration of Larry Stott, its former police chief (BYU Exhibit #58) in which he declares that he found that the actions of his officer “did not rise to the level of criminal conduct.,” but reliance on that declaration misconstrues the requirements of the Officer Certification Act. Chief Stott was required to determine whether or not the allegations were

“found to be true.” §53-6-211(6) Utah Code Ann. If they are true, then he is to refer the matter to POST. It is POST’s responsibility, not BYUPD’s, to investigate the matter further and determine, in accordance with the administrative process set out in the statute, if the conduct is a violation of a §53-6-211 Utah Code Ann. The POST process set out by statute and rule differs significantly from the court process that determines criminal liability. For example, the administrative adjudication uses different discovery rules, evidence rules and a lesser burden of proof. Utah Admin. Rules R728-401-1, et.seq.

It undisputed that Stott, even with his limited investigation, found the allegations to be true when he “found out that The Honor Code and Title IX had received a report – a police report and it had not come from BYU Police.” (UDPS Memorandum in Opposition “Facts Regarding the Investigation of Aaron Rhoades #2; BYUPD Exhibit #60, Stott Dep. at Page 18, Lines 11-13). Also, BYUPD argued that the investigation resulted in a disciplinary transfer for the officer. That supports that fact that Stott found the allegations to be true.

It is undisputed that BYUPD did not report the matter to POST as a result of Stott’s investigation.

b. Investigation by State Bureau of Investigation (“SBI”). The BYUPD Chief met with the then Commissioner of Public Safety and asked UDPS to investigate the matter. It is undisputed that the State Bureau of Investigation (“SBI”) investigation was conducted. Chief Stott asked the UDPS to “investigate any violations within his department in relation to any improper or illegal dissemination of private or protected information.” (BYUPD Undisputed Fact



#29). Consistent with Stotts request as set forth above, the investigation was not focused specifically on the pending allegations against a specific officer but was more global in nature. (BYUPD Undisputed Fact #30). The investigation was done independently from the BYUPD and there is no indication that it was for the purpose of determining if the alleged conduct of the BYUPD officer in question may be in violation of the Officer Certification Act. To the contrary, it was solely focused on prosecution under the criminal code. (BYUPD Undisputed Facts #31, #32). Even though the investigation was broad based, it is apparent that the results of this investigation were that the allegations brought against the BYUPD officer were true, as the case was screened for prosecution. Prosecution was declined by the Utah Attorney General's Office. (BYUPD Undisputed Fact #35). At the conclusion of the SBI investigation, SBI referred to matter to POST for an administrative investigation.

BYUPD did not use the results of this investigation to refer the matter to POST, nor are there any facts presented that would indicate that this was referred by SBI at the direction of BYUPD.

c. Investigation by BYU legal counsel. An investigation was conducted by a law firm hired by BYU to represent it in this matter. It is clear from the undisputed facts that this investigation was done in the course of its legal representation of BYU and was not an independent investigation to determine if the allegations against the BYUPD officer were true. (Undisputed Fact #37, BYUPD Motion for Summary Judgment). Even so, the limited information available regarding this investigation reveals that the BYUPD officer accessed

and shared reports from other agencies, including information beyond initial reports. (BYUPD Exhibit #13, page 3, first and second bullet points). The investigation clearly found the allegations to be true.

After receiving the investigation of its law firm, BYUPD did not refer the matter to POST pursuant as required by §53-6-211(6) Utah Code Ann.

d. POST Investigation. The matter was referred to POST by SBI at the conclusion of their criminal investigation. As the administrative investigation by POST began, the BYUPD officer relinquished his individual certification and retired from BYUPD – effectively ending this investigation. As per POST’s policy, the administrative investigation ceases upon relinquishment of certification, therefore, POST did not complete an investigation of the BYUPD officer’s conduct. Also, the administrative investigation by POST is the investigation that takes place after the allegations are referred to POST, it is certainly not the investigation undertaken pursuant to §53-6-211(6), to determine the truth of the allegations and report if appropriate.

#### **4. Potential Legal Conclusion.**

BYUPD failure to respond to an investigative subpoena issued by POST as part of its administrative investigation obstructed that investigation. The failure to respond or to provide any requested information prevented the BYUPD officer from being subject to Officer Certification Act as required by the certification criteria.

**Basis.**

The POST investigation was conducted under the Utah Administrative Code rules promulgated pursuant to the provisions of Officer Certification Act. It was not a court proceeding, but rather is part of a process being administered under the Utah Administrative Procedures Act (“UAPA”) and applicable Administrative Rules. Utah Administrative Code R728-409-1, et. seq. It not subject to court rules or the Utah Rules of Civil Procedure unless specifically subject to such rules under the terms of the UAPA, as part of an action brought in a court or, once an administrative adjudication has commenced, by agreement of the Parties and approval of the presiding officer.

Consistent with POST Rules, POST issued a Subpoena Dues Tecum to BYUPD for “all materials related to the investigation of Lt. Rhoades.” BYUPD responded with an objection pursuant to Rule 45, Utah Rules of Civil Procedure and declined to provide any materials. (BYUPD Undisputed Fact #47, BYUPD Exhibit #36).

Given that there is not authority specifying that Rule 45 applied to administrative actions and that the Subpoena was an investigative subpoena and was not sent in connection a pending court proceeding, the logical conclusion is that Rule 45 is inapplicable and that, therefore, BYUPD was nonresponsive to the POST’s investigative subpoena.

BYUPD’s failure to respond to the subpoena interfered with POST’s ability to perform an investigation, one of its functions under the Officer Certification Act and thereby, prevented POST from subjecting BYUPD officers

to the Act. By taking action which interfered with or impaired the UDPS from administering a statute which is a specific criterion for BYUPD's certification, BYUPD has prevented its officer from being subject to the disciplinary provisions of the Officer Certification Act, a BYUPD certification criteria.

**5. Continuance.** An in-person hearing in this matter is scheduled for approximately one month from the issuance of this Order. A continuance of the hearing date will:

- a. provide time to respond to this Rule 56(c) Notice; and
- b. allow time for a final ruling on BYUPD's pending Motion for Summary Judgment; and
- c. allow the parties to reexamine the time needed for the hearing in light of the Motion for Summary Judgment ruling which may reduce or eliminate the need for a hearing or may limit the issues to be examined; and
- d. avoid the necessity for the parties to gather during the current worsening of the Covid-19 pandemic in the State of Utah.


## **ORDER**

### **IT IS HEREBY ORDERED AS FOLLOWS:**

1. If they so choose, each party shall have until 5:00pm on November 25, 2020 to provide a Memorandum responding to this Rule 56(f) notice.
2. Paragraph 11 of the Amended Discovery and Scheduling Order dated September 9, 2020, which includes the scheduled date of the hearing, December 2, 3, and 4, 2020, is hereby vacated and the hearing is continued to a

date to be agreed upon by the parties following the ruling on the Motion for Summary Judgement.

Dated this 4<sup>th</sup> day of November 2020.

  
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J. Richard Catten  
Administrative Law Judge

**FOX 13**