

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

LIEUTENANT HENRY V. TOBIN III )

Plaintiff, )

v. )

Civil Action No. 04-1211-KAJ

THOMAS P. GORDON, individually and )  
in his official capacity; SHERRY )  
FREEBERY, individually and in her )  
official capacity; COLONEL JOHN L. )  
CUNNINGHAM, RETIRED, individually; )  
DAVID F. McALLISTER, individually and )  
in his official capacity; and NEW CASTLE )  
COUNTY, a municipal corporation, )

Defendants.

**MEMORANDUM ORDER**

I. INTRODUCTION

This matter is before me on the defendants' motion (Docket Item ["D.I."] 8; the "Motion") to stay these proceedings until after the resolution of Criminal Action No. 04-63-KAJ pending in this court against defendants Thomas P. Gordon and Sherry L. Freebery (the "Criminal Case"). For the reasons that follow, the Motion is granted.<sup>1</sup>

II. BACKGROUND<sup>2</sup>

The relevant background information is straightforward. This case is one of several that have developed from events transpiring during the administration of defendant Gordon as the County Executive of New Castle County (the "County"). See,

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<sup>1</sup>This is one of two nearly identical motions being decided today, the other motion being in Civil Action No. 04-1201.

<sup>2</sup>This background information is drawn primarily from the Plaintiff's complaint and does not reflect any finding of fact by the court.

e.g., Civil Action Nos. 02-1283-KAJ, 03-999-KAJ, and 04-1201-KAJ. Defendant Freebery has been the Chief Administrative Officer of the County during the Gordon administration and has also served as the Colonel of the County's police department. (See D.I. 1 at ¶ 5.) The plaintiff is a New Castle County police officer and has been so employed for more than 25 years. (D.I. 1 at ¶ 3.) He alleges that "he was denied three promotions to the rank of police Captain after he reported to federal authorities alleged wrongdoing by County officials[,]” including Gordon and Freebery. (D.I. 10 at ¶ 9; see also D.I. 1 at ¶ 1.) The wrongdoing he claims to have reported to federal law enforcement authorities includes matters that are also alleged in the indictment in the Criminal Case. Indeed, the Complaint in this case cross-references the indictment. (See, e.g., D.I. 1 at ¶¶ 15-16.)

### III. DISCUSSION

I have previously addressed a motion to stay under very similar circumstances, namely allegations that defendants Gordon and Freebery retaliated against County employees because of those employees' cooperation with federal law enforcement authorities engaged in the investigation leading to the Criminal Case. See *Maloney v. Gordon*, 328 F.Supp.2d 508, 510 (D. Del. 2004) (describing plaintiffs' allegations that they stated concern about defendants' use of County employees in election activities, that they gathered evidence of defendants' illegal and corrupt activities, and that defendants retaliated against them). In that earlier Memorandum Order, I described the six factors commonly considered by courts confronted with a request to stay civil proceedings in deference to related criminal proceedings:

- (1) the extent to which the issues in the civil and criminal cases overlap;

(2) the status of the criminal proceedings, including whether any defendants have been indicted; (3) the plaintiff's interests in expeditious civil proceedings weighed against the prejudice to the plaintiff caused by the delay; (4) the burden on the defendants; (5) the interests of the court; and (6) the public interest.

*Id.* at 511 (citing *In re Adelpia Communs. Secs. Litig.*, 2003 U.S. Dist. LEXIS 9736 at \*7 (E.D. Pa. May 14, 2003); *Javier H. v. Garcia Botello*, 218 F.R.D. 72, 74 (W.D.N.Y. 2003); *Walsh Securities, Inc. v. Cristo Prop. Mgmt, Ltd.*, 7 F. Supp. 2d 523, 527 (D.N.J. 1998)).

As in the *Maloney* case, those factors overwhelmingly weigh in favor of staying this case. The discussion of those factors in *Maloney* is, with one meaningful exception, applicable here and need not be repeated. That exception bears on the third factor, “the plaintiff’s interests in expeditious civil proceedings weighed against the prejudice to the plaintiff caused by the delay.” In *Maloney*, that factor actually weighed in favor of a stay because the plaintiffs themselves sought the stay. See 328 F.Supp.2d at 511, 512. That the plaintiff here takes the opposite position does shift the weight of that factor against granting a stay, but it is, standing alone, insufficient to overcome the several factors that weigh strongly in favor of a stay. The cases clearly overlap to a significant degree. The defendants are currently under indictment. The burden on defendants Gordon and Freebery in particular has the potential of being dramatically and unfairly negative if the stay is denied, for the same reasons expressed in *Maloney*, 328 F. Supp.2d at 521-13. The interests of the court and the public both favor resolution of the criminal charges before addressing the closely related civil complaint because, among other reasons, it will allow “the criminal prosecution of [Gordon and Freebery], who are public officials, to proceed unimpeded and unobstructed by any concerns that may arise

in discovery in the civil case.” *Id.* at 513. In sum, here, as in *Maloney*, “[t]he public’s interest in the integrity of the criminal case is entitled to precedence over the civil litigant.” *Id.* (citing *Javier H.*, 218 F.R.D. at 75).

#### IV. CONCLUSION

Accordingly, it is hereby ORDERED that the Motion (D.I. 8) is GRANTED, and all proceedings in this case are stayed until further order of this court.

Kent A. Jordan  
UNITED STATES DISTRICT JUDGE

Wilmington, Delaware  
December 15, 2004