

EXHIBIT H



IACP NATIONAL LAW ENFORCEMENT POLICY CENTER

Investigation of Employee Misconduct

Concepts and Issues Paper

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I. INTRODUCTION

A. Purpose of the Document

This document was designed to accompany the *Model Policy on Investigation of Employee Misconduct* established by the IACP National Law Enforcement Policy Center. This paper provides essential background material and supporting documentation to provide greater understanding of the developmental philosophy and implementation requirements for the model policy. This material will be of value to law enforcement executives in their efforts to tailor the model to the requirements and circumstances of their communities and their law enforcement agencies.

This discussion is divided into five parts. Part I provides background information; part II discusses discipline as an integral and potentially constructive part of any internal investigative process; part III examines the process of receiving and processing complaints from the public; part IV addresses the legal and procedural issues surrounding the investigative process; and part V reviews means of preventing employee misconduct.

B. Background

A substantial degree of attention is devoted in this concepts and issues paper to the disciplinary process, citizen complaints, and the many facets of investigating allegations of police officer misconduct. There are several reasons for addressing these interrelated issues in such detail.

First, over the past several years there has been a series of high-profile incidents of police officer misconduct.

Many individuals believe that this demonstrates in part a weakness in many police agencies—even the largest and seemingly most sophisticated agencies—to detect, effectively intervene in, or prevent instances of officer misconduct as well as a failure to effectively supervise officers and take effective action in instances of officer misconduct. The notoriety generated by the most serious of these high-profile cases has had devastating effects on the police agencies involved, undermined their reputation and effectiveness in the communities they serve, and diminished the police profession. In fact, as this document is being prepared, the federal government is considering a comprehensive nationwide study of issues surrounding law enforcement misconduct and integrity.

Second, early in their careers some police officers become suspicious of or even hostile to the internal investigation process and wary of disciplinary procedures. These procedures are often viewed as unfair and biased against accused officers, and in some instances even regarded as an unnecessary interference into an officer's ability to perform his or her duties. Some officers come to view this regulatory function as an indication that the police agency does not trust them or that management has misgivings about the integrity and honesty of their officers. As such, some police officers may only grudgingly cooperate in internal affairs investigations—an act that often perpetuates the all-too-common distance between management and line officers.

The vast majority of police officers are honest, loyal, and hardworking professionals. The broad-brush strokes of officer brutality and excessive force sometimes painted by the media are almost always the product of misconduct by a small minority of officers. But the misconduct of

a few can often taint the reputation of many. Often this affects an entire department when, in the face of employee misconduct, management imposes a more demanding system of officer accountability and discipline. Of course, police officers, like all other professionals, can and do make mistakes. There are also some officers who take advantage of their office or who, on a recurring basis, make such serious errors of judgment or overstep their authority that they probably should not be employed in law enforcement. Therefore, a police department must monitor its officer's mistakes and misconduct to protect its interests and reputation.

To protect their own interests, reputations, and career goals, police officers must be forthcoming about their conduct and the conduct of other officers. This requires that they have knowledge of and faith in the integrity of their agency's investigative and disciplinary process. These are complex issue areas that require sound procedures based on up-to-date information. But, to be effective, internal investigation and disciplinary procedures must be understood by all members of the department.

Therefore, it is the intent of this document and the model policy upon which it is based to closely examine the internal investigation and disciplinary process. This information will (1) provide possible alternatives to present procedures; (2) expand the knowledge of officers, supervisors, and managers alike concerning their legal rights and responsibilities during internal investigations and disciplinary actions; and (3) instill the notion that a well-organized and professionally run internal investigation and disciplinary process serves the best interests of officers, law enforcement agencies, and the communities they serve.

It is recognized that individual agencies often have widely varying procedures and styles in this area and that some of these are the product of individual state law, employment contracts, state or local civil service requirements, and related matters. Obviously, this document cannot take into account all of the terms of these requirements and agreements. But it attempts to provide the essential ingredients of a well-administered, professional program governing internal investigations and disciplinary procedures.

II. GENERAL DISCIPLINARY CONCEPTS

A. "Fair Play" in Officer Investigations and Discipline

Discipline is an indispensable component of law enforcement management. There are rules and regulations that pertain to all fields of employment. But, unlike any other professionals, law enforcement officers possess unique powers and discretion to take actions that require

professional supervision, management, oversight, and control, and adherence of officers to a rigid code of conduct and professionalism.

There are few issues among law enforcement personnel that can raise more concern, debate, rancor, and sometimes outright dissention than the issue of employee discipline and the way agencies investigate specific allegations of employee misconduct. Where there are widespread perceptions that the investigation and administration of discipline is handled unfairly, capriciously, inconsistently, or unprofessionally, ramifications can be widespread and extremely damaging to department morale and operations.

A theme that runs throughout this document involves the need for police agencies to follow an investigative and disciplinary process based on the principle of "fair play." Police agencies have a duty to investigate fully and completely accusations of officer misconduct to protect the department's integrity and its credibility in the community, not to mention clearing the names of officers who have done no wrong. But in that process, it must be remembered that accused officers do not lose their due process rights or the right to be treated fairly, impartially, and respectfully. When all officers understand that the department's disciplinary process is managed in this way it goes a long way to enhance relations between management and staff and to eliminate self-protective, stonewalling behavior that is often seen among officers who view the disciplinary system as unfair.

B. Perceptions of Discipline

As noted, public complaints and the disciplinary process often have unpleasant connotations for law enforcement officers and their superiors. For some officers, disciplinary matters conjure up feelings of fear, shame, discredit, anger, and alienation from the department. The issue also raises concerns and stress for law enforcement managers. The thoughtful executive or administrator may question whether his or her current mechanism for detecting officer misconduct achieves its goal. These same persons may question whether the existing disciplinary system is too lax or too harsh, whether it is applied consistently and fairly, and whether the disciplined officer will become embittered by the process or learn to become a better officer.

By contrast, some law enforcement officers and executives view citizens' allegations of officer misconduct and the disciplinary process in a significantly different light. They may consider these functions to be a carefully created facade to satisfy political and community groups, with no real intention of effectively investigating allegations of misconduct and applying appropriate discipline when warranted. Some officers take the position that the policies, procedures, and rules of an agency

are primarily intended to assign blame when things go wrong rather than serve as a necessary means for directing, controlling, and managing employee conduct and operational practices. Such attitudes exist for a variety of reasons, not the least of which are issues of alienation between line and management personnel incorporating but not limited to a failure to engage officers in the establishment and justification of policies, procedures, and rules in the first place.

Neither of the foregoing views is healthy for the officer or law enforcement agency. Each undermines the basic goals of the internal investigative process and disciplinary system. In order to maximize the goals and purposes of these critical functions, police agencies must understand the entire process and formulate a philosophy of discipline for the department. The common adage, “Actions speak louder than words,” is appropriate here. To instill an unbiased philosophy of discipline there must be a history within the agency of dealing fairly, impartially, and consistently with officers in the disciplinary process. Unfair or unnecessarily harsh discipline, treating officers as criminals or as guilty until proven innocent during the investigative process, generally has unintended negative consequences. Rather than serve to gain cooperation and respect of officers, such treatment most often serves to estrange them. It lowers morale and can even foster a siege mentality between management and line officers that debilitates the entire organization. Aside from issues such as fairness, a large part of the problem is how police agencies and officers view discipline in general—particularly whether it is regarded as a fundamentally punitive measure (negative discipline) or whether it also serves a constructive purpose (positive discipline).

C. Positive vs. Negative Discipline

In order to develop a sound philosophy of discipline and apply it effectively, one must understand the distinction between negative discipline and positive discipline.

1. Negative discipline. The concept of negative discipline functions on one reactive and negative premise: A proven allegation of misconduct receives immediate punishment. This style is reactive because officer misconduct is addressed only after it has occurred. The disciplinary process is an end in itself and not a means of educating officers about appropriate types of behavior or a way to explain why certain standards are necessary. While negative discipline is long on punishment, it generally is short on reward.

Traditionally, the law enforcement profession has maintained a negative, reactive approach to internal investigations of allegations of officer misconduct and the disciplinary process. The paramilitary style upon which the law enforcement profession is modeled has helped to

reinforce this approach.

2. Positive discipline. The current trend among law enforcement is to formulate an internal investigation and discipline system using a more holistic and positive approach to discipline and investigating allegations of officer misconduct.¹

Positive discipline also focuses on determining why misconduct occurred, rather than focusing solely on taking measures to punish misconduct. For example, officer misconduct may be a result of poorly written policy or ineffective training. A positive disciplinary system analyzes each case to determine the cause of misconduct and develops appropriate remedial recommendations in addition to or in place of punitive actions.

Positive discipline includes reinforcement of excellent behavior by maintaining a reward system in addition to a punitive system. Actions by officers that exceed the norm deserve recognition. This may be done by special departmental commendations and medals or by recognition during performance reviews or similar means. In addition, each agency has officers who may not be outstanding but who are known for their reliability and consistent performance. These individuals also need to be recognized.

Generally, human beings respond to praise more positively than to criticism and punishment. Officers who perceive that their daily contributions are appreciated tend to feel better about themselves and want to continue doing a good job or even improve. They feel part of the agency and want to support its reputation. The use of threats of punishment alone to gain compliance with policy does not encourage excellence or promote the efficient delivery of police services.

Positive discipline implies a departmental goal of administering counseling, reprimands, suspension, or other discipline in a fair and consistent manner. Inconsistent discipline can undermine the entire disciplinary process and lead to charges of disparate treatment and civil litigation. Where officers perceive that they may receive stiffer punishment than another officer or supervisor for similar misconduct, any lessons that the department hoped to impart through discipline will be lost. This is true of every employee, irrespective of rank. Discipline must be consistent.

Finally, it should be noted that training is one of the most effective approaches to positive discipline. Some disciplinary matters are largely a product of inadequate training, a failure by officers to master what is being taught, or their inability to maintain specific skills and abilities or remember how to follow specific practices, protocols, or procedures. For them, refresher training may be more effective and appropriate than punishment.

¹ IACP, *Managing for Effective Police Discipline*, International Association of Chiefs of Police, Alexandria, Virginia (1977).

D. Developing a Departmental Philosophy of Discipline

1. Establishing Goals. Law enforcement agencies must provide a firm foundation for the disciplinary process by developing clear goals to be achieved by the department. It is not enough for the chief executive officer to inform officers that the goal of the department is to prevent and detect criminal activity. While it may be the mission, this goal is too broad and too simple. Modern agencies operate in a complicated environment that affects this mission and requires thoughtful assessment of how these many factors affect delivery of public services. For example, relevant departmental goals may be established to create an environment that encourages the community both to work with the agency and to actively use the citizen complaint process. Goals focusing on a more positive relationship with the community have helped departments achieve the larger mission of detecting criminal conduct.

Additionally, the internal investigative process must be mindful of the potential for internal police misconduct that is not registered through the citizen complaint process. Therefore, it is important that police ethics and rules of police conduct are clearly defined. The process for internal investigations should also provide for the reporting and investigation of potential misconduct that has been identified from within the agency.

2. Goals and Departmental Policy. Departmental policy is the written expression of the department's goals. Departmental policy also reflects the standards of behavior that are expected from officers in daily operations. In addition, policy is one means of communicating these goals and how they are to be implemented by the officer.

3. Communicating Goals, Policy, Procedures, and Rules.² In order to achieve a positive, focused disciplinary system, departmental goals as well as departmental policy, rules, and procedures must be effectively communicated to and understood by all employees. Effective communication is often a complex and difficult process, and it requires much more than periodic pronouncements posted on a bulletin board. One method of communicating goals and policies effectively is by incorporating officers and supervisors into the policy development process. Empowering officers and supervisors to participate in the articulation of goals and development of policies can help hone policies into more effective instruments for officer guidance and direction. Sharing the process of developing goals and policies will provide the officer with a better understanding of why a policy is necessary and why the officer must conform his or her behavior to that standard.

Officers who can internalize the basis for agency goals through assisting in developing and refining agency policy have a clearer understanding of the reasons for expected behavior. This is one way to minimize disciplinary problems. Individuals will generally conform more easily to a standard that they understand and accept as rational than to blind orders to adhere to such standards or procedures.

E. Disciplinary "Schedules"

One essential criteria for effective discipline is the degree to which departmental personnel perceive the disciplinary system as being fair. In order to achieve consistency, fairness, and objectivity in discipline, some departments use a system of graduated discipline. This typically involves the use of tables or schedules of penalties for one or more infractions or breaches of conduct, policy, procedures, or rules. There are arguments both for and against this type of uniformity.

On the one hand, it provides officers with a general idea of what they can expect for committing certain types of infractions. Major departures from the disciplinary schedule for these infractions are readily apparent—a factor that also serves as a check on decision making. This approach is more easily applied to certain types of misconduct where there are no unusual circumstances involved. However, many instances of misconduct occur that, while they may involve the same or similar charges, involve substantially different facts and circumstances. Administration of discipline strictly on a formula basis in these circumstances may not take into account the total circumstances of the event or the performance history of the individual officer(s). Therefore, disciplinary systems that rely solely on administration of discipline by formula can prove to be too inflexible and thus unfair.

However, the availability of a scale of disciplinary actions for various types of misconduct provides some general controls over inappropriate use of administrative discretion. If punishment for misconduct deviates from what is perceived to be the norm, a written explanation should be made explaining the decision-making process that supported the punitive action. Administrators and supervisors need not relinquish all discretion in this matter if they use a disciplinary scale. It can be used with the understanding that unusual circumstances may require departures from the schedule and that the reasons for such departures will be fully explained to those involved.

All things being equal, use of a scale of disciplinary penalties, or a "disciplinary matrix," can be a valuable tool for both employers and employees. The federal government uses a system that incorporates both a scale of potential penalties for various administrative infractions, as well as guidelines that supervisors must incorporate in making

² Whenever the term "policy" is used in this document it is meant to include policies, rules, and procedures. The violation of any of these can form the grounds for discipline.

final decisions that takes into account both mitigating and aggravating factors of the employee's employment record. (A discussion of this process is included in an addendum to this concept paper).

Ideally, a matrix of penalties should be developed in a collaborative undertaking between employees and management. Employees who have input into determining appropriate punitive action for misconduct automatically invest themselves in the system. Some police departments that have used this approach have found both that officers are often harsher in their perceptions of appropriate disciplinary action for specific acts of misconduct than is management, and are less likely to lodge complaints against management for being unfair in disciplinary decision making.

III. RECEIVING AND PROCESSING COMPLAINTS

A. Responsibility for Complaint Investigation and Review

A police department's mechanism for investigating allegations of officer misconduct is of great importance. Whether this responsibility falls on one individual or an entire unit, those involved should adhere to guidelines and principles of operation that in many respects go far beyond those undertaken by internal affairs units of days gone by. Significant issue areas in this regard include the following:

1. Necessity for Establishing an Internal Investigations Authority. The internal investigation function is critical to maintaining the integrity and professionalism of a police agency. Public trust and confidence in law enforcement are injured where the public perceives that officer misconduct is ignored or that punishment is not commensurate with the misconduct. In addition, the internal investigation function serves to maintain the internal discipline and control necessary to provide efficient law enforcement services. Therefore, each law enforcement agency should have a mechanism for investigating citizen complaints and other allegations of employee misconduct.

2. Nature of the Investigative Authority. The traditional approach to investigating employee misconduct has been the responsibility of what has been commonly referred to as "internal affairs." This document's use of the term "office of professional standards" (OPS) to define this function represents more than a change in terminology. It is meant to convey a different perspective on the duties and responsibilities of this function within police agencies. Where information is available, compiled and summarized, this office can identify potential problems with agency policy, training, supervision, and other functions.

The office is also well situated to combine information on individual officer misconduct with other risk factors to determine whether individual officers or even units have been engaged in behavior that is potentially problematic. Often referred to as an "early warning" or "early identification" system, these analyses can be used effectively to avoid future misconduct by identifying employees who are exhibiting various types of problematic behavior. Early warning systems are now required as an element of the accreditation process for agencies seeking or maintaining that status through the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA).³

As suggested above, an office of professional standards should be charged with more than investigating alleged wrongdoing by officers, which is a purely reactive response to problems of misconduct. OPS can become a cornerstone for risk management within law enforcement agencies by identifying ways the agency and officers can avoid problems and correct shortcomings before they become problems. This office can also monitor evolving police practices that the agency may wish to adopt. These functions are best performed in conjunction with the inspections unit, research and planning or similar offices where available.

Many agencies have a separate unit that is solely responsible for conducting investigations of employee misconduct. Smaller agencies are typically unable to staff a separate unit. These agencies may designate an officer or officers to conduct all internal investigations on an ad hoc basis or rotate this responsibility among selected investigators as the need arises.

A growing number of law enforcement agencies have one unit to review the outcome of complaints lodged by the public and another to investigate internal allegations of employee misconduct. Some of these agencies staff the public complaint unit solely with department employees or use a mixture of citizens and officers. The latter may create more public accountability, since the citizens in the unit are meant to guard against internal department bias.

Several large urban areas have attempted to develop distinct units outside their departments in order to facilitate the public complaint review process. These units are usually staffed exclusively by members of the public such as community leaders and politicians or by a combination of police officers and the public. In a study of citizen complaint procedures conducted by the Police Executive Research Forum (PERF), it was determined that these

³ See *Model Policy on Early Warning Systems*. IACP National Law Enforcement Policy Center, Alexandria, VA.

external units have not worked as well as expected.⁴

Proponents of external complaint review units cite the value of injecting an independent and more objective voice in assessing and remedying officer misconduct. They claim that citizen involvement in this function reinforces goodwill between the department and the public. The public gains confidence that misconduct is fairly and adequately addressed where the public participates in the complaint review system.

The PERF study notes that opponents of external complaint review units feel that these units can undermine the morale of a police agency. The authority and responsibility for command staff to manage the department is interrupted and influenced by persons who are inexperienced in law enforcement and its unique workings. The PERF study suggests that some early citizen review boards may have been inherently biased against law enforcement and thus failed to achieve their goals.

3. Organizational Placement of Investigative Authority. The placement of the internal investigations authority—whether designated OPS or known by another title—within the organizational structure of the agency is an issue of critical importance. The internal investigations authority, whether a unit or employee, should be under the direct oversight of the chief executive officer of the department. The authority should have direct access to, and report directly to, this chief executive officer or another senior executive officer if so directed by the chief.

The integrity of internal investigations into allegations of officer misconduct is protected to a large degree when the internal investigations authority is required to report directly to the chief executive officer. Such investigations may unearth sensitive and confidential information that may or may not prove to be true. If treated without rigid internal controls, such information could potentially ruin the reputation and career of employees under investigation. Therefore, access to investigative information must be closely guarded and limited to those personnel with a need and right to know. This will protect the subject from the unfounded rumors or false accusations that may arise where numerous employees have access to all or some of the investigative information.

The process of conducting internal investigations must also guard against personal influence or bias. The possibility that an investigation may be stifled or unduly influenced as a result of favoritism, discrimination, or personal dislike increases as more personnel are involved in the internal investigation function. Where the internal investigation authority does not report directly to the chief executive officer there is a greater opportunity for corrupt

officers to influence the outcome of internal investigations.

The attitudes of personnel involved in the investigative process may also threaten the integrity of the investigation. For example, a supervisor may privately consider investigation of use-of-force incidents to be less important than investigation of patrol car accidents, because the supervisor believes that all uses of force are merited. The supervisor may thereby practice internal selectivity in directing internal investigations. Whether due to personal selectivity or bias, the chief executive officer may ultimately receive a distorted picture of allegations of officer misconduct where all complaints are not forwarded to the internal investigation's authority and the authority does not report directly to the Office of the Chief.

The nature of the complaint review process and the duties of the chief executive officer is another reason for placing the internal investigative function under the direct control of the chief. The chief is responsible for control of the law enforcement agency and its employees. Immediate and firsthand knowledge of employee actions is necessary so that the CEO can effectively fulfill this responsibility. Additionally, corrective actions must be taken in a timely manner where a pattern of misconduct indicates weaknesses in policy, training, or supervision. This can be delayed or interrupted if the chief receives allegations of misconduct through indirect channels.

4. Staffing of the Investigations Authority. The choice of staff to perform internal investigations is a critical factor in ensuring the integrity of this function. Officers for these assignments must be selected and assigned with the utmost care. Some law enforcement managers are uncomfortable with the prospect of administering discipline to fellow officers for misconduct. Often, they retain the perception that everything is different on the street and that any subsequent review of the facts to determine potential misconduct cannot accurately reproduce the event or duplicate the officer's feelings while involved in the incident.⁵ Where civilians are involved in the review of investigations of misconduct (as in civilian review boards) the civilian may compensate for lack of street experience by recommending inordinately harsh or light discipline. Therefore, the chief executive officer must establish a unit comprised of personnel who understand the critical necessity for accurate, unbiased, and fair investigations.

Another means of ensuring unbiased and professional internal investigations is to use only trained personnel for this function. Personnel should receive formal training in this area both within the department and through professionally recognized external sources. The law relating to internal investigations is complex and requires investigators to know its requirements. In addition, internal

⁴ Inspector Paul West, "PERF Investigation of Complaints Against the Police Survey: Summary Report of Results", Police Executive Research Forum, Washington, DC

⁵ *Gardner v. Broderick*, 392 U.S. 273 (1968); *Garrity v. New Jersey*, 385 U.S. 493 (1967).

investigators should have a firm grasp of such matters as the Peace Officers' Bill of Rights, use of the polygraph, the range of other operations and practices that influence the investigative process as well as local collective bargaining agreements, civil service requirements, and related matters.

When considering candidates for internal investigation assignments, the department CEO should evaluate a candidate's image within the department, his or her communication skills, personal disciplinary history and reputation, and breadth of law enforcement experience. The successful candidate for this assignment should have considerable patrol and supervisory experience, a positive reputation within the department, and outstanding interpersonal and investigative skills. In order for an officer to perform his or her duties, the officer must be able to conduct focused, unbiased fact-finding investigations irrespective of the officer(s) under investigation. At the same time, these no-nonsense investigations must be conducted in a manner that promotes a sense of fairness in the internal investigative process and confidence both inside and outside the police agency that charges of officer misconduct are being dealt within a professional manner. These are significant demands and underscore the demanding qualifications that must be possessed by the successful candidate.

B. Additional Duties of OPS

Although a supervisor will often initiate complaint inquiries, the primary responsibility for review and investigation of complaints and allegations against employees lies with the office of professional standards. This is the case regardless of whether the complaint or allegation is initiated by a member of the public or someone in the department or another state or local governmental agency. OPS may, for example, assume responsibility for an investigation (a) upon notification from a supervisor of the complaint or allegation, or (b) upon its own initiative once the complaint is registered with the department. However, OPS can take the initiative to conduct internal investigations of its own that are not generated by one of the foregoing sources if given prior approval by the department's CEO or the CEO's designee. This approval process is required to ensure that OPS does not become too independent and engage in "fishing expeditions" without reasonable justification to suspect misconduct.

In addition to its conduct of, or participation in, investigations of alleged employee misconduct, OPS should also do the following:

- Maintain a complaint log.
- Maintain a central file of complaints received. This file should be stored in a secured area with limited access. These records should be maintained in

accordance with any records retention requirements imposed by state law.

- Conduct a regular audit of complaints to ascertain the need for changes in training or policy.
- Compile statistical and related information to identify trends in complaints involving use of excessive force or abuse of authority.
- Track complaints against individual employees to assist in employee risk analysis (e.g., early warning systems).
- Provide the department's CEO with an annual summary of complaints against employees and the disposition of those complaints. This summary may be made available to the public or used in other ways as directed by the CEO.

Analysis of documented public complaints and their disposition may provide the department with critical information pertaining to the need for increased training and policy development or refinement on a department wide basis. This analysis may also act as an early warning system by producing one element of such a system—evidence of a pattern of misconduct by an officer or officers. It can serve as one component of a more comprehensive system for identifying problematic patterns of officer behavior and conduct that warrant attention and possible intervention. Analysis may also illuminate malfunctions in the disciplinary process itself that may be corrected, such as inconsistent discipline.

Another role of OPS is to provide certain types of information that will assist the agency in educating the public about the public complaint process. This is an essential part of efforts to facilitate a climate in which the public feels it can be heard by the police department. For this reason annual summaries of complaints investigated and the collective results of investigations should be made available to the public. These reports should not name the officers involved but should provide a summary of the nature of the complaints and dispositions. Increased education about the public complaint process and the daily operations of its law enforcement agency will help the public better understand law enforcement procedures. Often, public complaints arise due to a lack of understanding of these procedures.

C. Accepting and Filing Public Complaints

Although allegations of misconduct may come from within the department as well as from external sources, the primary focus here is upon the handling of complaints from members of the public.

1. Receipt of Complaint. Police departments should allow public complaints to be received initially by any

member of the department.⁶ However, when someone expresses to a non-supervisory employee a desire to make a complaint, where possible the matter should be referred to a supervisor, as noted below. There should be little or no restriction on the means of receiving a complaint. Complaints should be accepted directly from the complainant in person, by telephone, in writing, or by any other means.⁷ Anonymous complaints should also be accepted and reviewed.

Any supervisor within the department should be authorized to accept and record a public complaint. This is the prevalent practice among law enforcement agencies. Many departments permit any sworn officer or department employee to accept such complaints. This has the benefit of broad employee involvement while maximizing citizen access to the complaint process. This approach eliminates the need for the public to go through lengthy procedures before being able to register a complaint. In this manner, the public may also perceive that all officers and departmental personnel are genuinely open to investigation of misconduct. However, allowing a line officer to record a complaint may promote a lack of organization in the complaint acceptance and review process and permit individual officers to bypass the process by not recording or forwarding troublesome complaints. Therefore, it is preferable in efforts to safeguard the integrity of the process for members of the public to lodge complaints with a supervisory officer and be provided with whatever assistance is reasonable and necessary for them to do so by subordinate officers.

Alternatively, the department's complaint procedures should be explained to the complainant, and the complainant should be advised where and with whom the complaint may be filed. It should also be explained to the complainant that the complaint may be made in person or by any other means.

Supervisors are generally considered to have primary initial responsibility for observing officers' behavior for potential misconduct (see below); thus, responsibility for primary intake of public complaints reinforces their knowledge and ability to carry out this function.

The most appropriate manner of addressing public complaints has become a matter of concern for law enforcement. One particular issue is whether all public complaints received by the department should be subject to a thorough internal investigation. Some police personnel maintain a skeptical attitude towards public complaints. They assert that the complaint process can

be manipulated by the public to exact revenge against officers. The increasingly high monetary judgments against law enforcement agencies in actions filed under Title 42 U.S.C. Sec. 1983 have contributed to the filing of frivolous or harassing public complaints. It is argued that some individuals file misconduct complaints and legal actions in the hopes of forcing the police department or governing jurisdiction into a quick out-of-court monetary settlement. Also, many officers dislike public complaints because they fear that the department may be more willing to believe the citizen than its own employee. The possibility of abuse in the public complaint filing process has prompted some agencies to investigate only the most serious allegations of officer misconduct.

Criticisms of the public complaint review process focusing on the potential for abuse of the system have some merit. Citizen abuse of this mechanism has occurred. However, when weighed against the benefits accrued to the department and public from a strong public review process, these criticisms prove negligible. In short, all citizen allegations of employee misconduct should be recorded and reviewed by the internal investigation authority. This doesn't mean that a full-scale investigation of every public complaint should be launched. But at a minimum each should be reviewed to determine whether it merits further investigation.

The complaint should be accepted and reviewed whether or not the complainant wishes to remain anonymous. There are numerous reasons why a citizen may wish to remain anonymous or distance him or herself from the complaint review process. Elderly citizens may have witnessed misconduct, but illness or infirmity may impede their ability to participate. Fear of reprisal should not, but can, influence a complainant's decision. The citizen may believe that a complaint against an officer will make the citizen a target both of the department and the officer against whom the complaint was lodged. Visions of daily parking tickets, citations for minor or nonexistent infractions, and officer failure to respond to a genuine emergency because the citizen was responsible for punishment of another police officer may scare the citizen into requiring anonymity or not registering a complaint at all.

2. Community Relations. Acceptance and review or investigation of all public complaints is vital in efforts to further the law enforcement goal of building and maintaining a good working relationship with all members of the community. One purpose of the complaint review process is to ensure that evidence of an officer's abuse of his or her official position is revealed and corrected. However, some citizens are unaware of the fact that a departmental mechanism exists to address public complaints of officer misconduct.

⁶ References are made to the receipt of complaints by supervisory personnel, but it is clear that initially a complaint may be received by any member of the department.

⁷ Today this might include the use of such means as facsimile or e-mail.

Until recently, law enforcement agencies have not typically taken active steps to inform the public about how to file complaints or how the police department handles those complaints. Nor have agencies, until relatively recently, provided the public with an annual summary of public complaints investigated and the results of those investigations. Many agencies have begun to provide such information to establish more credibility with, and accountability to, the public. However, there have been times when, as a result of the general lack of knowledge about the complaint review process, some individuals have simply accepted certain minor forms of officer misconduct without question. Thus isolated from a full picture of officer misconduct, departments often have remained relatively unaccountable for the disposition of public complaints. In doing so, they have also missed the opportunity to dispel rumors about officer conduct within their agency—often information that can demonstrate the overall excellence of their department and fine performance of their officers.

Failure to address public complaints or involve the public in this process may have two unfortunate results. First, incomplete knowledge of officer misconduct may permit officers with hostile or overly aggressive characters to remain in their positions of authority and to continue to abuse that authority. Officers with temporary physical or emotional problems that cause misconduct may not be identified by early warning signals that could have surfaced through public complaints. Second, the public and law enforcement can break into two isolated and opposing camps. Incidents of discriminatory behavior by law enforcement personnel may increasingly alienate large segments of the population. The law enforcement agency may gain a reputation for being unaccountable for its actions. Under such a situation, the phrase “to serve the public” becomes largely meaningless as the public is seldom consulted or considered.

Therefore, review of all public complaints received by the law enforcement agency is an important means of serving the public and remaining in touch with the public’s needs. Public trust and confidence are built when the public perceives that officer misconduct is addressed and corrected by the agency. This, in turn, promotes public willingness to help the agency carry out its law enforcement mission. In a climate that fosters trust between the public and law enforcement, citizens are more likely to come forward to testify, to provide evidence of criminal acts, and to provide other needed assistance in reducing crime.

3. Complaint Forms. Public complaint packages for use in the filing of complaints are also a good idea. Such packages should contain complaint forms, information on the department’s complaint procedures, and an explanation

of the action that the complainant can expect in response to a complaint. These packages can be made available to the public directly through police personnel and at designated public locations.

Use of a customized complaint form is a good idea no matter how large or small a police department. The components of a complaint form are attached to this document. Actions forming the basis for a public complaint may also form the basis for litigation against the public entity, employing department, or officer for a violation of individual rights. Full documentation of the complaint helps the department document that the facts as reported to them were received and then acted upon to the fullest extent of the department’s abilities.

Should the complainant revise his or her story, the department will have evidence to rebut these changes. Where the complainant has fraudulently filed a public complaint, the officer or department may decide to take legal action against the complainant. The documented complaint may be used to prove these charges.

Filing of false complaints is not a widespread problem in most localities. However, to guard against this possibility, some officers advise the complainant of the penalties for filing a false complaint. This is not a good general practice as it creates a chilling effect on the entire complaint reporting and filing process and could be perceived by others as an attempt to intimidate potential complainants. Failure to fully document all complaints can additionally create a perception that the department is covering up some officer misconduct. Thus, some written documentation of all public complaints should be instituted by law enforcement agencies.

D. Role of the Supervisor

Although the office of professional standards or similar entity should be given primary responsibility for the investigation of complaints and allegations, the initial responsibility for complaint review should lie with the supervisor receiving the complaint. Following is a suggested approach from the model policy for processing public complaints. This may be used as a prototype for creating a reporting/review system or as a basis for comparing an existing system. This approach consists of the following initial steps.

- *Supervisors Conduct a Preliminary Investigation.* Under this approach, supervisors conduct, or cause to be conducted, a preliminary inquiry to determine if grounds exist for initiating a full administrative investigation.
- *Complainant Receives a Copy of the Complaint.* The complainant receives a copy of the complaint as filed and is asked to verify by signature that the complaint set forth on the complaint form is a complete and accurate account of the events involved. If the complainant elects not to

sign, this is documented by the supervisor and the inquiry proceeds. Copies of the complaint and the supervisor's findings should be forwarded to the office of professional standards and to the agency's chief executive officer (CEO).

1. Document and Forward the Complaint. All public complaints should be documented upon receipt and forwarded to the office of professional standards and the agency CEO. Even where the supervisor has seemingly resolved the matter by way of explanation of departmental policy or other actions, the complaint should still be documented and forwarded to OPS. The documentation should note any actions that were taken by the supervisor to resolve the complaint and the citizen's reaction. A copy of the complaint should go to the sheriff or chief of police if for no other reason than to keep him or her apprised of the nature of complaints on a daily basis.

2. Provide Complainant with a Copy of the Complaint. The complainant should receive a copy of the complaint. In some cases, citizens who lodge complaints receive little feedback about the final disposition, or whether the complaint was ever investigated. This shortcoming helps promote a general perception that such complaints are discouraged by the police agency, or that the agency takes little meaningful action in response to public complaints. While agencies may actually investigate public complaints in good faith, lack of public knowledge concerning how these complaints were addressed or their outcomes reinforces this misperception.

3. Explain Complaint Process to Complainant. It is desirable that the complainant be given either a verbal briefing or written description of the complaint process and be informed that he or she will be contacted in writing about the final disposition.

If the supervisor taking the complaint recognizes that the actions taken by the officer(s) were appropriate and in accordance with existing agency policy and procedures, the supervisor should explain this to the complainant. The supervisor may explain to the complainant the policies and procedures in question in the event that a simple misunderstanding has precipitated the complaint.

For example, many citizens are unfamiliar with the field interview procedure or its purpose and may view this procedure as a form of harassment. A simple explanation of the purpose of this procedure may resolve these misunderstandings and may even leave the individual with positive feelings about law enforcement investigations and protection of the community. However, this in no measure implies that the explanation should be used as a means of talking the citizen out of filing a complaint should he or she desire to do so. In fact, the complaint should always be recorded for screening irrespective of other immediate steps by the supervisor to explain the events or actions of

the officer. This is a safeguard for the supervisor should he or she be accused of dissuading or failing to record a complaint.

4. Distinguish between Service vs. Personnel Complaints. Some police departments classify complaints as either "service" or "personnel" depending on the issue(s) involved. Service complaints or concerns are those associated with the way police services are provided. A common example is a citizen complaint over police response time. Many of these types of public complaints may be handled in the internal investigative process somewhat differently from those involving personnel action or inaction directly with a citizen. But each type of complaint should receive a unique tracking number and be screened for pertinent information and potential violations of departmental policy and procedures. Even complaints involving misunderstandings may contain information of value to a police agency. This includes, for example, a need for the department to clarify procedures to individual officers or groups of officers, or to provide additional training in communication or other interpersonal skills. Examination of all public complaints allows the police agency to determine if the complaints form a pattern that should be addressed by the department in another appropriate manner.

5. Conduct Further Investigation if Necessary. If the supervisor's preliminary investigation discovers issues that may support a charge of misconduct, the supervisor should cause further investigation to be made and should notify OPS of the information uncovered and the actions that are being undertaken. If the preliminary investigation reveals evidence of criminal conduct by a departmental employee, all available information should be forwarded to both OPS and the agency CEO immediately and investigation of the complaint will be turned over to OPS.

It should be clear, however, that OPS may assume concurrent or sole authority over the investigation of any charge of misconduct at any time or at any point in a supervisor's investigation. In doing so, OPS must notify the involved supervisor of this action. Such actions of OPS without notification or justification risk the development of ill will between OPS investigators and the supervisor involved. Therefore, these actions should only be taken by OPS where unusual circumstances or facts of the incident warrant intervention. The overall purpose for allowing OPS to intervene in this manner is to provide a check against any potential charges of supervisory inaction or failure to pursue an investigation in a diligent manner.

6. Give Supervisors a Major Role in Investigation of Complaints. The office of professional standards must have the primary responsibility for investigating all complaints of employee misconduct. However, in the vast majority of cases, officer misconduct does not rise to the level of an

offense for which suspension, dismissal or similarly serious disciplinary action is an appropriate remedy. Positive discipline may include additional training or counseling for an officer as an option to more punitive measures. For example, the officer may simply need a refresher on departmental policies in order to correct relatively minor problems. The supervisor is often in the best position to ascertain where these specific measures would be most effective and to administer them in an appropriate manner given the circumstances.

Thus, in many departments the officer's immediate supervisor is, or should be, given a major role in the investigative and disciplinary process. For example, first-line supervisors may be authorized to give the offending officer a verbal or written reprimand for minor infractions or for more serious infractions that still may not merit action through the department's formal disciplinary process. These reprimands should be used also in an educational manner for the officer, not solely as punishment. Even in more serious instances, the supervisor should also be asked to make recommendations for disposition of the case.

This system permits a more efficient and rational allocation of internal investigative manpower. For example, serious allegations of misconduct, such as brutality, are normally best assigned to OPS for internal investigation, while continued tardiness might better be investigated and handled by the officer's supervisor. In this manner, supervisors have a significant role in the investigatory and disciplinary process. But, where necessary and indicated the supervisor's investigation can be joined or even preempted by the OPS. Agencies that adopt this or a similar approach should provide both supervisors and OPS personnel with general guidelines concerning the types of complaints that should normally be handled by each.

IV. THE INVESTIGATIVE PROCESS

A. General Legal Considerations: Termination or Suspension

There are legal constraints that affect the investigation of officer misconduct and the administration of disciplinary action in all jurisdictions. Certain aspects of law enforcement officer discipline may vary in accordance with state or local law, civil service decisions, or the terms of collective bargaining agreements. In addition, several states provide statutory regulation of the public complaint process. However, in the absence of these specific constraints, certain general principles apply. A broad overview of these general features of officer discipline is important for all police personnel.

The most severe forms of discipline, such as suspension and termination, are those that are most extensively governed by federal, state, and local law. Regardless of the jurisdiction in which the department operates, suspension and termination proceedings must be conducted in accordance with applicable laws if they are to withstand legal scrutiny. The exact procedures for terminating or suspending a law enforcement officer will usually depend upon how the officer's employment is characterized under the applicable law.

Other forms of discipline that could impact an officer's property interests as determined under the 14th Amendment are also subject to legal guidelines as outlined in this section.

1. Property Interest in Continued Employment. The 14th Amendment's Due Process Clause guarantees that no person shall be deprived of life, liberty, or property without due process of law. "Property" has been expanded beyond its common meaning to include the abstract concept of a vested interest or right to continue holding one's job. Where such a property interest in continued employment exists, termination or suspension from such employment must conform to certain federally determined due process procedures.⁸ A property interest in employment may be created not only by court decision but also by federal, state, or local legislation, civil service decision, or personnel handbooks. These determine the extent of the property interest.⁹

In most jurisdictions, law enforcement officers are given property interest in their employment by state statute. The wording of such legislation may differ widely from state to state. Many state statutes provide that officers shall retain their position unless dismissed for just cause. Other statutes contain a listing of behavior that may subject an officer to dismissal or discipline. Statutory wording that limits when an officer may be dismissed or suspended generally implies intent to confer a property right.

Where the law confers a property right in employment, officers cannot be terminated or suspended without just cause and a hearing by the law enforcement agency or other appropriate tribunal must precede such management decisions.

Where an officer is considered to have a property right in employment, suspension or termination must be based upon "just cause," that is, certain legally recognized grounds. There may be other grounds for discipline and other rights accorded to a department's officers in a given jurisdiction. These include the following.

- **Incompetence.** Most states permit an officer to be disciplined up to termination for incompetence. The depart-

⁸ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁹ *Arnett v. Kennedy*, 416 U.S. 134 (1974).

ment is not required to retain an officer who is unable to perform his or her duties due to incompetence.¹⁰

- *Neglect, Nonfeasance, or Failure to Perform Official Duties.* Even where the officer is competent, if the officer does not fulfill his or her responsibilities, the officer may be disciplined. Thus, many states include neglect of duty, nonfeasance, and/or failure to perform official duties as grounds for disciplinary action up to and including termination.

- *Conduct Unbecoming an Officer.* A basis for discipline that has long been a subject of controversy is the catchall provision “conduct unbecoming an officer,” often referred to as CUBO. Conduct unbecoming an officer may include a wide range of behavior. For example, acts of moral turpitude by the officer, such as certain sexual activity or lying, may constitute CUBO.¹¹ This charge may also refer to acts that are considered to damage the department’s reputation or the welfare of the department or the general public.

Some courts that are uneasy with the seemingly vague nature of the charge have criticized suspension or dismissal based on CUBO. It is sometimes contended that, because of this vagueness, the officer is not given adequate notice of the types of acts that are prohibited. By contrast, many courts have upheld this charge as a basis for discipline. Under the latter view, the officer is considered able to determine from state case law and department policy the scope of actions constituting conduct unbecoming an officer. In addition, officers are considered to be able to discern from their own moral value systems, which of their acts could potentially bring the department into disrepute. Law enforcement personnel need to receive advice on state employment law to determine whether a trend exists locally that would support CUBO as a basis for discipline.

- *Violation of Departmental Policy, Rules, or Procedures.* “Just cause” for discipline has also been found where the officer has violated departmental policies, rules, or procedures. Officers have a duty to obey all properly promulgated and legal policies and procedures of the department. Charges of misconduct by the officer or malfeasance in office are usually premised on such departmental policy violations.

- *Failure to Obey an Order.* Dismissal may in some cases be founded upon failure to obey the lawful order of a superior officer. What constitutes a lawful order can be dis-

puted in some cases. If the officer can show that there was in fact no direct order, or that the order given was unlawful, there are no grounds for discipline.

- *Violation of Criminal Law.* In most states, an officer may be disciplined administratively in degrees up to and including dismissal for violating criminal law. Where there is a concurrent departmental policy prohibiting criminal conduct, the officer may also be disciplined for violation of departmental policy.¹²

In such cases an administrative finding of misconduct and subsequent discipline will not be dependent on a judicial conviction unless otherwise provided by law. If the commission of a crime is a violation of department policy (as it should be) it may be immaterial that the employee was not criminally charged or convicted. The administrative proceeding conducted by the police department does not have to be guided by the legal standard of proof “beyond a reasonable doubt” as does a criminal court proceeding. A fair preponderance of the evidence indicating guilt is all that is necessary for a department to take disciplinary action up to and including dismissal from service.

Some departments choose not to file formal administrative charges until there has been an ultimate resolution of the criminal charges. However, this approach has some consequences that should be considered in advance. In particular, criminal court proceedings often take extensive time for resolution, particularly where appeals are granted. If the criminal charges against the officer are serious, the police department often does not and generally should not return the officer to street duties and may transfer him or her either to an administrative assignment or to administrative leave status. If the officer is maintained on any type of duty and/or retains law enforcement powers, the department risks civil litigation should the officer subsequently use those police powers inappropriately, whether on or off duty.

If the officer is placed on administrative leave, it should be with pay. This action ensures the employment status of the officer and, as an employee, the officer is required to answer questions regarding the investigation or face dismissal for failure to comply with a legal order. However, considering that an officer can remain, and many have remained, on administrative leave with pay for years pending the outcome of criminal charges, the financial efficacy of this approach often comes into question. Agencies should also consider whether this action has negative effects on other officers in the department who continue to work for their pay. As a result, the time officers may remain on administrative duty with pay should be as short as possible.

¹⁰ This generally does not include physical inability to perform. The Americans with Disabilities Act (ADA) and state or local law may affect the department’s right to take action against an employee where physical inability is involved.

¹¹ Some states limit “moral turpitude” to acts involving stealing or lying. Others view the concept more broadly and include such matters as sexual misconduct, drug use, and so on, in the definition of moral turpitude.

¹² 16A McQuillan, *Municipal Corporations*, Sections 45.63 - 45.70 (3rd Ed.)

Coordination and cooperation with the prosecutor's office where criminal conduct is under investigation is essential. In some cases, where the evidence is sufficiently strong to determine that an officer has committed a crime, it may be best to dismiss the officer even if in doing so the department has to grant use immunity to the officer barring his statement from being used for criminal prosecution. This action effectively rids the department of an officer who poses additional risks to civilians and other officers if allowed to remain employed. Such decisions depend on a number of factors to include the seriousness of the offense and the strength of the case against the officer, among other matters.

2. Disciplinary Hearings. Law enforcement officers holding a property interest in their position normally must be given an administrative hearing prior to suspension or dismissal.¹³ However, the department may be permitted to suspend the officer with pay pending the administrative hearing where the officer would pose a significant hazard to the public or the department if allowed to remain on active duty while awaiting a hearing.¹⁴ Even without these exigent circumstances, an officer may be relieved from active duty or placed on administrative leave with pay pending the administrative hearing. In some rare instances it may be feasible to relieve an officer from active duty without pay with the proviso that if the administrative hearing results in a favorable ruling for the officer, he or she will be reinstated with appropriate back pay and without a break in benefits. Here again, officers and their agencies should understand that these are primarily defensive actions designed to protect the police agency, governing jurisdiction and citizens. It is not worth risking the safety of civilians or other officers when the ability of an officer to hold office is in serious doubt.

3. Terminable-at-will Employment. A more difficult legal disciplinary problem is presented in those states that do not confer a property interest upon law enforcement officers. While few in number, these states essentially treat public and private-sector employees in a similar manner. Termination of officers is considered to be at the will of the employing agency. Probationary officers are often regarded as "terminable-at-will."

Employment at-will means just that. Discharge can be imposed without good cause. However, no at-will employee can be discharged based upon race, religion, sex, or national origin. Nor should any person be discharged because of his or her sexual orientation.

In general, the federal due process pre-disciplinary requirements discussed in the previous section do not

apply to terminable-at-will employees. As the officer has no legal property interest in his or her position, there is no deprivation of property upon termination that is protected by the 14th Amendment. As a result, a terminable-at-will officer has no right to a pre-disciplinary hearing to determine the validity of the firing decision except in certain limited instances.¹⁵

The rights accorded a law enforcement officer in terminable-at-will states vary significantly from state to state.¹⁶ Adoption of exceptions by statute or case law should be researched within individual state laws.

4. Probationary Officers. It is well settled that probationary employees of public agencies can be dismissed without a hearing and without judicially cognizable good cause. [*Perry v. Sindermann*, 408 U.S. 593 (1972)] However, a general exception to this rule is recognized whenever an officers's liberty interest, as secured by the Due Process Clause of the 14th Amendment is invoked.¹⁷

5. Right to Good Reputation and "Clean Name."

Any employee whose discharge impacts his or her liberty interests as provided by the 14th Amendment has a right to a name-clearing hearing. Impairment of a liberty interest occurs when a stigma or other disability results from termination of employment. In other words, the action

¹⁵ *Bishop v. Wood*, 426 U.S. 341 (1976).

¹⁶ For a fuller discussion of the exceptions to the doctrine of employment at will and the available causes of action, see Larson, and Barowsky, *Unjust Dismissal*, Mathew Bender Publication (1987).

¹⁷ [*Lubey v. City and County of San Francisco*, 98 Cal. App. 3d 340, 346 (1979)] *Lubey* defines an officer's liberty interest as "charges of misconduct which 'stigmatize' his reputation, or 'seriously impair' his opportunity to earn a living." Therefore, in matters involving the contemplated discipline of a probationary officer, only where the officer is able to allege an infringement of his or her liberty interest, will it become certain that "due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective." [*Skelly v. State Personnel Board*, 15 Cal. 3d 194, 215 (1975)] The procedural safeguards in place for public employees who allege valid deprivations of their liberty interest, require that a public employee receive, "prior to imposition of discipline," (1) notice of the action proposed, (2) the grounds for discipline, (3) the charges and materials upon which action is based, and (4) the opportunity to respond in opposition to the proposed action. [*Bollinger v. San Diego Civil Service Commission*, 84 Cal. Rptr. 2d 27, 32 (1999), quoting *Skelly* Id at 215: "To be meaningful, the right to respond must afford the employee an opportunity to present his side of the controversy before a reasonable impartial and an uninvolved reviewer who possesses the authority to recommend a final disposition of the matter."]

In determining whether or not an employee has alleged facts sufficient to constitute a violation of due process, courts look at three distinct factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or sub statute procedural safeguards; and finally (3) the state's interest. In applying these factors, courts are generally concerned to see whether the probationary officer is currently, or may be, subjected to any stigmatization or impairment of his right to make a living.

¹³ *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

¹⁴ *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 544-5 (1985).

affects the terminated employee's reputation or ability to secure new employment.¹⁸ Cases involving the right to a name-clearing hearing have involved accusations of involvement in such criminal activity as rape, corruption, and theft as well as such charges as improper association with women, sexual misconduct, insubordination, and dishonesty.

In terminable-at-will employment, the 14th Amendment property provision has been construed to include an abstract right of employees to a good reputation and "clean name." Even where there is no property interest in the employment itself, the officer may have an enforceable interest in his or her good reputation. Indeed, this interest in reputation triggers the 14th Amendment due process requirements regardless of whether the employee is terminable at will or is being terminated for just cause.¹⁹ Where an officer is to be discharged on the basis of a charge that may damage his or her standing in the community or attach a stigma to his or her good name, reputation, honor, and integrity, a name-clearing hearing prior to termination is necessary.²⁰

Essentially, employers are not allowed to ruin an employee's chances of getting another job by firing him or her on the basis of scandalous or grievous charges that may be false, without giving the employee an opportunity to prove that the charges are false. For example, discharge of an employee for a positive drug test would trigger the requirement that the officer be given the opportunity to have a name-clearing hearing.

6. Defamation and Other Interests in Reputation.

Even where termination itself is lawful, departments must be cautious of any statements released to the media or to prospective employers regarding the cause for the dismissal.²¹ Regardless of whether there is a property interest in the employment, and whether correct procedures were followed in the disciplinary process, incorrect or incautious statements about an ex-officer may provide that officer with a right to bring a civil action in state court for defamation or in federal court for violation of the employee's "liberty interest" in his or her reputation.²²

¹⁸ See for example, *Lubey v. City and County of San Francisco*, 98 C.A. 3rd, 340 (1979).

¹⁹ *Board of Regents v. Roth*, 408 U.S. 564 (1972).

²⁰ *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972).

²¹ Today, legislation may protect the department from liability for statements made to prospective employers about the ex-officer's performance or the cause of the ex-officer's dismissal. To ensure the lawfulness of releasing this information, departments should seek a written release signed by the former employee.

²² For a complete discussion of this complex issue, see, for example, *Policy Review*, vol. 8, no. 2, "Avoiding Liability for Employment References," IACP National Law Enforcement Policy Center, International Association of Chiefs of Police, Alexandria, Virginia.

7. "Whistle-Blowing" Statutes. An important protection afforded to all employees is found in the so-called whistle-blowing statutes. These statutes prohibit employers from discharging employees who report or threaten to report an employer's violations or intended violations of the law.

B. Investigative Procedures

Responsibility for conducting internal investigations of police conduct carries with it the important responsibility to conduct such investigations in accordance with the law and professionally accepted practices. An officer who is the subject of an internal investigation retains certain rights, and legally accepted procedures must be followed during the investigation of alleged officer misconduct. Officer rights may vary according to state and local law or the terms of a departmental collective bargaining agreement. In addition, the characterization of the investigation as administrative or criminal will determine the applicable rules.

Several state legislatures have enacted legislation addressing the various rights guaranteed to law enforcement officers during their employment. These legislative acts are generally known as Peace Officers' Bill of Rights and generally incorporate the rights of officers who are under investigation for misconduct. The states that have adopted a Peace Officers' Bill of Rights include Kentucky, West Virginia, Virginia, Rhode Island, Maryland, Illinois, California, and Florida, among others.

Where the allegation of officer misconduct may involve a violation of criminal law, different considerations apply, and more stringent officer rights are generally guaranteed. For example, an officer who is to be questioned in a criminal investigation must be read his or her *Miranda* rights before questioning is begun, and those dictates must be honored during the interview. If in a criminal investigation the officer invokes his or her *Miranda* rights, that officer may not be disciplined for invocation of those rights. By contrast, questioning an officer during a purely administrative investigation into noncriminal violations invokes what are known as "Reverse *Miranda*" rights. The officer is not entitled to remain silent and must truthfully answer questions narrowly, specifically, and directly related to the performance of his or her official duties. Failure to answer these narrowly focused questions provides the agency with grounds for invoking discipline up to and including discharge from service for failure of the officer to respond to a direct order. Prior to questioning, the officer must be advised of the Reverse *Miranda* provisions.

This type of compulsory testimony raises a potential problem for police officers. The officer knows that by answering all questions truthfully he or she may be forced to admit criminal activity and thus face criminal

charges. On the other hand, the officer knows that failure to answer as ordered may result in being discharged from employment. In order to circumvent this problem and ensure that officers are encouraged to answer all questions, the officer may be given “use immunity” in return for a waiver of his or her right against self-incrimination during the administrative investigation. “Use immunity” as previously noted, means that the department will not use any admissions of criminal activity by the officer for criminal prosecution purposes. However, if the officer is prosecuted for a federal criminal civil rights violation, such statements may be used for impeachment purposes. Also, the admissions may be used as the basis for administrative charges for any departmental policies that may have been breached.

The distinction between criminal and administrative investigations is an important one for investigators as will be noted later. But for purposes of the following discussion it should be emphasized that this document is primarily intended to address the conduct of administrative investigations.

1. Notification to Employee. Prior to a hearing on charges, the officer must be informed of the charges against him or her in accordance with the provisions of state law. The officer under investigation should have the opportunity to contact the investigating authority, whether a supervisor, OPS, or similar entity, to ascertain the status of the investigation. Some police departments neglect to inform the involved officer of the outcome of the investigation until the disciplinary hearing is imminent. This is a serious oversight by an investigating authority. It is a practice that should not be followed as it minimizes the officer’s opportunity to prepare his or her response and defense to departmental charges. In addition, where the officer is able to ascertain the progress of the investigation, the pressure and alienation generated by being the subject of an internal investigation may be minimized. The officer is not left in the dark and may feel more in control of the situation. Again, providing this information to the officer is part of dealing fairly with police officers under investigation.

2. Interviewing Employees. Irrespective of any notification of the investigation with which the officer has been provided, the employee to be interviewed should be advised of the nature of the complaint prior to any questioning.

All interviews should be conducted while the employee is on duty, unless the seriousness of the investigation is such that an interview during off-duty time is required. The atmosphere of the interview should not be coercive or demeaning. The officer should be treated in a dignified and respectful manner, and offensive or threatening language should not be used.

While more than one internal investigator may be in the room during an interview, one person shall be designated as the primary investigator who will conduct the questioning. Some departments permit questioning by more than one investigator, but this practice can degenerate into a hostile and coercive situation for the interviewee.

An officer under investigation should be able to bring a personal representative into an internal interview. The personal representative may be an attorney, union representative, supervisor, or other person chosen by the officer. But such representative(s) should not be in any manner connected with the incident under investigation. The role of the interviewee’s representative is primarily that of observer. He or she should be advised not to intervene in the interview unless requested to do so by the interviewers or the employee, or unless the interview leads to issues of criminal activity.

Some law enforcement agencies only permit an officer under investigation to be accompanied by a supervisor or union representative. It is sometimes asserted that attorneys unnecessarily impede the progress of administrative investigations without fulfilling any critical role. However, in the complex world of civil liability, logic dictates that an officer be permitted legal representation during an administrative interview. A supervisor or union representative may be unable to foresee all the ramifications of any given case or be in a position to adequately prepare the officer. A personal legal representative, although relegated to an observer’s role during an administrative interview, can still help the officer prepare a better case, while ensuring that the interview proceeds in an appropriate and legal manner.

Finally, while an administrative interview does not carry the direct threat of punitive action at the conclusion, it does target the livelihood and chosen profession of the officer under investigation. A sense of fairness suggests that an officer is entitled to protect his or her livelihood and unblemished name by having a legal representative present as an observer during an administrative interview.

All interviews should be recorded in their entirety. If breaks are taken, a notation should be made on the recording concerning the time that the break was taken, who requested it, and the time at which the interview resumed.

At the commencement of the interview, the interviewee under investigation should be given the following warning:

- You are advised that this is an internal administrative investigation only.
- You will be asked questions specifically related to the performance of your duties and your fitness for office. You are required to answer all such questions.

- If you refuse to answer these questions, you may be subject to discipline for the refusal. This discipline may include measures up to and including termination of employment.
- You will also be subject to discipline if you knowingly make false statements during the interview.
- Any answers that you give are to be used solely for internal administrative purposes. They may not be used in any subsequent criminal proceedings, if any such proceedings should occur. However, should there be a federal criminal civil rights prosecution, your statement may be admissible for impeachment purposes.

3. Examinations, Tests, Lineups, and Searches.

Where deemed pertinent, the department may require an employee under investigation to undergo any of the following examinations:

- Intoximeter test
- Blood test
- Urine test
- Psychological examination
- Polygraph examination
- Medical examination
- Any other examination not prohibited by law

In addition to the foregoing general authorization for examinations of the officer under investigation, an on-duty supervisor should be permitted to direct an employee to submit immediately to a breath, blood, or urine test when there is reasonable suspicion in the line of duty that alcohol or drug usage is directly related to a public complaint or other misconduct.

Specialized tests such as medical or psychological examinations should only be required as part of an internal investigation where it is probable that the examination will produce relevant evidence. For example, an employee might be ordered to submit to a physical examination where the employee explains that the alleged misconduct occurred due to a temporary physical illness or condition.

State law varies on the permissibility of using the polygraph. The reliability of the polygraph examination has also been increasingly challenged as a means of discerning the truth. Some states have outlawed employer use of the polygraph on employees in both the public and private sector. Law enforcement agencies in those states may not be permitted to use the polygraph as a tool to help prove or disprove employee misconduct.

The trend among the states has been to provide stringent regulations on the use of the polygraph and to require certification of the polygraph examiner where these tests are permitted. Those states with statutes regulating use of the polygraph generally prohibit its use within the private sector but permit the law enforcement profession

to use the polygraph in investigations of employee misconduct and as a recruit-screening device. Some states permit this exception based upon the heightened need for internal security by the law enforcement profession. However, in other states this has led to the argument that a statute requiring only employees of a public law enforcement agency to take a polygraph is unconstitutional. For this reason, individual law enforcement agencies should carefully check their state law on this serious issue.

Where the polygraph examination is permitted as part of an internal investigation into officer misconduct, specific limits should be placed on the scope of the questioning. The employee may only be asked questions that are narrowly related to the performance of his or her official duties. The department may not ask broad questions unrelated to the investigation in hopes of gaining other information. This standard is the same as that applicable to questioning of the officer in a verbal investigative interview.

Whether the employee or employer requests the test, the employee must be advised prior to the polygraph test that failure to answer questions truthfully could result in discipline up to and including discharge. Use immunity for admissions of a criminal nature must be explained and a waiver obtained as in normal face-to-face questioning.

Where the law permits the test, if the citizen making the complaint submits to and passes a polygraph examination, the employee should also be required to submit to a polygraph examination.

An employee can also be required to participate in a lineup, if the lineup is to be used solely for administrative purposes.²³

With regard to searches, property belonging to the department is normally subject to inspection for investigative purposes. This may include vehicles, desks, files, storage lockers, computers, e-mail messages, MDT transmissions, or other items or locations that are the property of the department. However, this right to inspect applies only to items in which the employee does not have a reasonable expectation of privacy. This is sometimes difficult to determine in cases where it has not been defined by departmental policy.

However, authorization to search should be restricted to a search for evidence of work-related misconduct. Authorization should extend only to departmental property, (that is “those areas and items that are related to work and are generally within the employer’s control”).²⁴ The employer may not search for evidence in private areas

²³ This document deals with administrative investigations. The gathering of evidence against an employee for use in connection with criminal charges is governed by federal constitutional law.

²⁴ *O’Connor v. Ortega*, 107 S.Ct. 1492 (1987).

such as in a purse or locked luggage. Even when the item or location is departmental property, a search may not be legal without first obtaining a search warrant. This is the case if the employee has established a reasonable expectation of privacy by law, by departmental regulations or operating procedures, or by custom or practice of the department where formal policy to the contrary has not been established.

C. Disposition Following Investigation

1. Review and Recommendation. After the investigation is deemed complete, the primary investigative authority should review the complaint report and the investigative findings relative to the complaint. That investigative authority should then compile a report of findings and provide a disposition recommendation for each charge.

The model policy provides four possible dispositions for consideration in making these decisions.

- *Sustained:* There is sufficient evidence to prove the allegations.
- *Not sustained:* There is insufficient evidence to either prove or disprove the allegations.
- *Exonerated:* The incident occurred but was lawful and within policy.
- *Unfounded:* The allegation was false or not factual or the accused employee was not involved in the incident.

2. Review and Forwarding of Report. A copy of the investigator's findings and recommendations should be submitted for review to OPS. Thereafter, OPS may make any additional inquiries or conduct any investigation deemed necessary to verify, authenticate, or clarify the findings and recommendations of the investigative report. The report should then be forwarded to the department CEO through the chain of command for command officers' information, review, and comment.

3. Actions of CEO. Upon receipt of the report, the CEO should review the report and supporting documents. Generally, the CEO then chooses either to accept the findings and recommendations of the report or to remand the case for additional investigation. If the complaint is sustained, the CEO should determine whether final charges should be brought. If there is an affirmative finding on this matter, the CEO or his or her designee must direct that a charging document be prepared by the employee's supervisor or commander or by the OPS as appropriate. This document must be signed and thereafter served upon the employee.

The charging document must include the following:

- The nature of the charges.
- A copy of the investigative file.
- Notification that the employee may respond to the

charges and a statement of the time frame for such response. This time frame must be reasonable, that is, long enough to give the employee a reasonable opportunity to prepare his or her response.

4. Response of Employee. The point at which the officer's response to the charges is accepted or heard is commonly referred to as the pre-disciplinary hearing (PDH). An employee who desires an opportunity to be heard regarding the proposed charges may request such a hearing. This request should be made to the CEO or the CEO's designee within the time stated in the charging document. The employee may respond either verbally or in writing to the charges within the time stated in the charging document.

The pre-disciplinary hearing need not approach the formality of a full judicial trial to satisfy the due process requirements of the 14th Amendment. The purpose of the hearing is to determine whether there are reasonable grounds to believe that departmental charges against the employee are true and that suspension, dismissal, or other form of discipline is merited. This may include a reduction in penalty.

Due process requires that the officer be given notice of and an opportunity to be heard on the charges.²⁵ Due process does not require a police department to provide a permanent employee with a full evidentiary hearing prior to taking initial punitive action. But it does require at a minimum such pre-disciplinary safeguards as a notice of the proposed action, the reasons for such actions, a copy of the charges and materials on which the action is based, and the opportunity to respond either verbally or in writing within a reasonable period.

In order for the PDH to be meaningful, it must be held at a reasonable time and place. The officer must be permitted enough time before the hearing to prepare to address the charges against him or her, and the hearing must be held at a time and location that is easily accessible to the officer.²⁶ State law generally establishes the provisions for formal and evidentiary hearings of this type.

In many departments, the CEO will delegate this hearing to a member of his or her command staff or another designee. It is absolutely essential that the individuals so designated be fair and impartial and that the individual possess the authority to recommend a final disposition without fear of any reprisal from the CEO. The CEO may still make his or her own decision concerning appropriate punishment but should provide the reasons for overriding the recommendation decision to the involved officer.

Once the pre-disciplinary hearing is concluded, if the chief executive officer feels that discipline is justified, the

²⁵ *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985).

²⁶ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

officer must have the right to a full evidentiary hearing in order to satisfy the due process clause.²⁷ It is essential that departments observe the procedural requirements imposed upon the disciplinary process and that officers understand their right to these procedural safeguards. Even where just cause for discipline exists, failure to observe the proper procedures may result in judicial invalidation of the departmental action and an award of civil damages to the officer.

5. Disposition. Following the PDH or written response of the employee, the CEO is in a position to determine the appropriate disposition of the charge(s).²⁸ The disposition should normally be returned from the CEO to the commander of the employee's unit although this will depend upon the size and organization of the police department. The commander should then direct the employee's supervisor to take whatever disciplinary action is designated. A written copy of the disposition must be provided to the employee. The supervisor must subsequently verify to the commander, to OPS, and to the department's central personnel authority that the authorized disciplinary action has been taken.

6. Time Limit on Review Process. Whenever possible, the investigation of a complaint should be completed within a reasonable period of time. A period of 45 days from the time of the initial receipt of the complaint to its disposition would be considered reasonable under most circumstances although extenuating circumstances may have bearing on this time limit. For that reason, the time designated by the agency may be altered by a waiver granted by the CEO or the CEO's designee and must be modified in accordance with any requirements established by departmental policy, applicable law, or existing labor agreement. Whatever the time allowed, it may be desirable that regular status reports be submitted regarding the progress of the investigation.

This time limit may be impractical in investigations involving criminal activity where the administrative investigation is suspended to allow the criminal investigation to begin or to proceed. However, administrative investigations should comply with some reasonable established timetable in order to ensure the freshness and continuing availability of all witnesses and relevant evidence. In addition, adherence to a time limit demonstrates, both to employees and the community, the department's serious commitment to investigation of alleged misconduct. A set time limit on internal investigations helps to moderate the atmosphere of suspense and pressure that often exists where the accused

officer must wait an interminable period for the conclusion of the investigation. Finally, a timetable for all internal investigations tends to ensure fairness in the process.

Coincidentally, serious consideration should be given to limiting the time that an officer may remain on administrative leave with pay pending the outcome of a criminal investigation. While the focus of this discussion is not on criminal investigations, it should be noted that if a criminal investigation has led to the filing of a criminal complaint, continuation of an officer on administrative leave without pay serves little or no purpose. At such point, it may be preferable to remove the officer from this status and to file administrative charges against him or her. This is particularly the case when administrative charges alone would normally form the basis for termination of employment.

7. Appeal. In addition to the foregoing opportunities for an officer to defend against charges of misconduct, most employees may appeal proposed charges and any action taken thereon as provided by statute, ordinance, collective bargaining agreement, civil service regulations, or departmental or jurisdictional appeal procedures.

8. Notification to Complainant. Following final disposition of the complaint, a letter should be sent to the complainant from the CEO or the CEO's designee explaining the final disposition.

9. Applicability of these Procedures. The procedures discussed here should be followed in any proceeding involving written admonishments, punitive transfers, punitive reduction in pay, punitive relinquishment of accumulated overtime or vacation, suspension, and discharge whether for cause or not.

In the last decade there has been a marked increase in complaints by unions and members about the way police officers are treated in personnel investigations. First is the complaint about disparity in the penalty imposed upon a police officer as opposed to a command staff officer. Second is the difference in which these classes of officers are treated while the personnel investigation is taking place. Complaints about disparity in treatment, among other matters, have become so common that morale in many departments has been negatively affected. When this occurs, there is routinely a reduction in overall efficiency of officers.

It is recognized that in many cases following the recommendations contained herein will give greater rights to employees under investigation than may exist at the state law level. However, these procedures are fundamentally fair and present no downside to either management or employees.

It is self-evident that no CEO wants to impose discipline upon a sworn officer without just cause. Following the prescribed route as outlined here is a

²⁷ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

²⁸ If necessary, the CEO may remand the case for further investigation before final disposition.

safeguard against real or imagined charges by critics that the CEO has acted in a capricious manner. Even though most internal investigations are for non-firing offenses, employees closely watch the manner in which these investigations are conducted. When it becomes clear that management conducts such investigations in a fair and impartial manner, one can expect to maintain or improve employee morale and productivity as well as decrease administrative hearings and civil suits.

D. Records and Confidentiality

The office of professional standards must be informed of all final disciplinary decisions and should in turn forward a copy of the final disciplinary decision to the department's central personnel authority.

It is essential that OPS case files and other information be physically separated from other personnel records and remain under the control of OPS. These files should be retained for the period determined by the CEO or as otherwise required by law. Information in these files is considered confidential and must be retained under secure conditions. OPS files may not be released to any person or entity without prior approval of the CEO unless law otherwise authorizes release.

Each law enforcement agency should recognize the importance of maintaining these investigative case records. Maintaining step-by-step written documentation of the investigative process, from receipt of the initial complaint to final disposition, protects the integrity of internal investigations. Officers who become the subject of an internal investigation are protected from an investigation tainted by personal influence or other corrupt actions from within the department through secured retention of such documentary evidence. In addition, an administrative finding of innocence from an untainted and fully documented investigation will weigh strongly in the officer's and the department's favor in any subsequent litigation that might be filed.

Due to the confidentiality of internal investigations, complaint records must be maintained in a secured area with access limited to only those personnel with the appropriate credentials who have a need to access this information and who have a right to do so as provided by law. To protect the confidentiality of the complainant, each complaint should be assigned a number, that should be used as a reference during the investigation.

V. PREVENTION OF EMPLOYEE MISCONDUCT

A. Proactive Measures

As with any other aspect of law enforcement, the best way to solve a problem is to prevent the problem

from arising. For this reason, the topic of employee misconduct discussed here has stressed the importance of embracing a broader view of discipline—one that also incorporates proactive, preventive measures for detecting and responding to indications of potential disciplinary problems before they become realities.²⁹

The following additional recommendations for misconduct prevention are provided for consideration by police agencies:

1. Individual Responsibility and Accountability.

Line officers are key stakeholders in efforts to preserve and enhance the reputation of their department and their personal pride as police officers. Police officers can no longer subscribe to the timeworn notion that silence and secrecy will serve their individual or collective interests. Experience has clearly demonstrated that these attitudes only serve to build barriers within police agencies and alienate officers, supervisors, and managers. Line officers are on the front line with the community they serve, and their conduct reflects on the department as a whole. They are no better or worse in the eyes of the public than the officers with whom they serve. Unfortunately, the mistakes and misdeeds of a few often have serious repercussions for all who wear the same uniform.

Therefore, if an agency is to maintain a professional image, officers must ensure that their behavior complies with professional standards of conduct. Every employee of the department has a responsibility to adhere to agency standards of conduct, policies, rules, and procedures. Employees should be made fully aware of the fact that they will be held strictly accountable for such adherence. Officers should also be required to report actions or patterns of behavior of fellow officers that breach agency standards of conduct. This does not mean that every misstep, mistake, or instance of poor judgment needs to be reported to a supervisor. Such zealotry could cause more harm than good. However, it does mean that officers need to draw the line when an act or pattern of behavior by fellow officers threatens the rights of citizens and/or the well-being and reputation of police officers and their police department. Officers need to be made aware of the fact that reporting misconduct is not an act of betrayal to fellow officers, it is an act of self-defense.

Agencies should facilitate this reporting practice by providing officers with anonymous or confidential reporting protocols. They should take those measures possible to protect the identity of any officer who reports serious misconduct or behavior that could jeopardize the lives, safety, and well-being of officers or citizens,

²⁹ For additional guidance on proactive measures to prevent employee misconduct, refer to the *Model Policy on Corruption Prevention* and its accompanying Concepts and Issues Paper published by the IACP National Law Enforcement Policy Center.

or damage the department's reputation. The department should also make it known and clearly demonstrate where necessary that any officer who attempts to interfere with or retaliate against an officer or other employee who makes such reports will be dealt with through administrative regulations or criminal proceedings where indicated.

2. Training, Supervision, and Policy Guidance.

The police department is responsible for providing each employee with sufficient and proper training, supervision, and policy guidance to ensure that all employees of the department are fully aware of standards of conduct, policies, rules, and procedures. Policies, procedures, and rules must be tied closely with training and supervision. These are not distinct functions that operate independently from one another but are part of a continuum of officer education, training, and management. An agency's mission establishes the basis for its policies, procedures, and rules. These in turn must serve to establish the essential groundwork upon which training curricula are developed and administered and field supervision conducted. These functions feed into each other, and upon evaluations of officer and agency effectiveness and efficiency, they complete the ongoing process of refinement and modification.

In this respect, policy and procedure development is not static but a dynamic function subject to continued refinement as the department's environment and circumstances change along with the law enforcement profession. As modifications are made, it should be noted that merely distributing or posting policies, procedures, and rules, is not sufficient. Steps must be taken to ensure that each employee has actual notice of such matters and fully understands what is required. To this end, individual copies of each policy, directive, or similar document should be distributed to every individual, a written receipt of delivery should be obtained, and, where necessary, testing should be instituted to determine whether each employee has read and fully understands these documents.

3. Appropriateness of Assignments. Employees must be assigned only to duties and responsibilities for which they have the necessary knowledge, capabilities, skills, abilities, and training.³⁰ To assign personnel in a haphazard fashion risks performance, morale, motivation, and productivity problems and increases the risk of officer mistakes, miscalculations, and misconduct.

4. Responsibility of Supervisors. The primary responsibility for maintaining and reinforcing employee conformance with the department's standards of conduct and operational procedures is lodged with first-line

supervisors. Supervisors are required to familiarize themselves with the personnel in their units. They must closely monitor and evaluate their general conduct and performance. This cannot be done through the review of performance statistics alone. The issue of how officers do their job is as important as the issue of what they accomplish.

Evaluations of officers must be the product of daily observation and close working relationships. Supervisors should remain alert to any indications of behavioral, physical, or other problems that may affect an employee's job performance as well as any behaviors that may suggest conduct that is inconsistent with agency policy, procedures, and rules. Where observed, any information of this type that is deemed relevant should be documented immediately.

When problems are detected, a supervisor may recommend additional training, counseling, or other measures for the employee. The supervisor should document all instances of additional training and counseling undertaken to modify an employee's behavior.

Supervisors play a critical role in observing officer behavior that may signal isolated or aggregate personal or work problems that may lead to misconduct. Supervisors are a police department's most important asset for continually reinforcing the department's evolving policies, procedures, goals, and objectives and ensuring that they are carried out properly.

Moreover, it cannot be assumed by the department that an officer's promotion to supervisory status necessarily imparts supervisory or leadership abilities to the subject officer. These are rarely innate talents, and all supervisory personnel require training in first-line supervision skills if they are to be effective in that role and serve the interests of the department and the community.

³⁰ Law such as the Americans with Disabilities Act or similar state laws may impose limitations upon the department as to what employees may or may not be deemed to have the necessary capability to perform a particular job.

Every effort has been made by the IACP National Law Enforcement Policy Center staff and advisory board to ensure that this document incorporates the most current information and contemporary professional judgment on this issue. However, law enforcement administrators should be cautioned that no “model” policy can meet all the needs of any given law enforcement agency. Each law enforcement agency operates in a unique environment of federal court rulings, state laws, local ordinances, regulations, judicial and administrative decisions and collective bargaining agreements that must be considered. In addition, the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives and demands; often divergent law enforcement strategies and philosophies; and the impact of varied agency resource capabilities among other factors.

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Attachment
Sample Citizen Complaint and Inquiry Form

This form should be completed in accordance with Departmental Directive

Nature of Complaint: _____

Complainant's Name: _____

Home Address: _____

Business Address: _____

If applicable, list other complainants and/or witnesses: _____

Citizen Complaint #: _____

Race and Sex: _____

Telephone: _____

Member Involved: (1) _____

Member Involved: (2) _____

Member Involved: (3) _____

Location of Incident: _____

Complaint Received By: _____

Forwarded for Investigation to: _____

Division: _____

Division: _____

Division: _____

Date: _____

Time: _____

Summary of Incident: _____

Disposition of Complaint or Inquiry: _____

Court Issue: _____

Resolved with Citizen and/or No Further Action Deemed Necessary: _____

Investigative Comments: _____

Routing: _____

Responsible Division Commanding Officer: _____

Responsible Assistant Chief of Police: _____

Internal Affairs Section: _____

Signature of Responsible Division Commanding Officer: _____

Signature of Responsible Assistant Chief of Police: _____

Appendix Flow Chart Investigation of Employee Misconduct

I. INTRODUCTION

The process and component steps or events involved in investigating officer misconduct can be difficult to understand and to visualize as a process. A flow chart is provided as an appendix to this concepts and issues paper to assist in this understanding. The chart presents the sequence of events and steps involved in the investigation as well as decision points in the investigative process.

It should be noted that while this chart includes nearly all the component parts of an internal investigation, not all police agencies will desire or need to adhere to them in the manner presented here or in the depth which they are discussed in the concepts and issues paper. The law, collective bargaining agreements, civil service regulations and other regulatory factors may preclude the need to include certain steps in this process or may require that additional steps or protocols be added. In addition, the size and complexity of individual agencies may dictate that certain investigative protocols or hearings be handled through less formal and more expeditious means than may otherwise be the case in larger agencies.

All police agencies need to protect the legal rights of officers during internal investigations. For example, officers charged with infractions that could affect their property interests in continued employment must be given the right to a pre-disciplinary hearing in most instances. However, in smaller agencies it may be permissible to hold this hearing in a closed door meeting with the chief of police and other authorized persons rather than in a more formal board hearing.

In effect, while the flow chart includes many component parts and at first glance may appear somewhat daunting, the majority of disciplinary actions within most police agencies can be resolved at the supervisory level as they do not rise to the level of possible suspension or termination of employment.

II. FLOW CHART COMPONENTS

As an overview, it can be seen from the flow chart that an investigation can commence at either of two junctures—through the initiation of a complaint to a police supervisor as depicted on the right side of the chart, or through public complaints lodged directly with the department's Office of Professional Standards (OPS). OPS may also investigate complaints that originate from employees within the agency, from other public agencies or from reasonable suspicion of wrongdoing established by other means or

through other sources.

The model policy provides a two-tiered investigative system that (1) draws supervisory personnel into the investigation of employee complaints, (2) allows minor infractions to be handled by supervisory personnel and their immediate commanding officer without the requirement to involve OPS officers in every complaint and (3) includes checks and balances during the process to ensure that all complaints are dealt with, fully, fairly, and impartially. Some agencies may wish to direct all complaints to OPS rather than adopt the two-pronged approach suggested here. While this would require shifts in the flow of complaints into the agency, most of the other decision points and measures cited in the flow chart would still need to be addressed in some manner.

The rationale for procedures identified in the flow chart are spelled out in the concepts and issues paper and are not reiterated here. The purpose of this discussion is to lead the reader through the sequence of steps and decision points identified in the flow chart and addressed in a more complete manner in the concepts and issues paper.

A. Complaints Lodged with Supervisors

The model policy for complaint acceptance and investigation suggested by the National Law Enforcement Policy Center allows for initiation of an investigation at one of two points—through a supervisory officer, or through the Office of Professional Standards. These two tracks are addressed here individually for sake of convenience. One can readily see the close coordination and direct linkages between supervisory and OPS initiated investigations.

That said, starting on the right side of the flow chart, a complaint that may come to the attention of a line officer must be referred to a supervisory officer for recording in accordance with procedures set forth in the model policy. From that point, the process of a supervisory investigation takes the following course:

- Once the complaint has been documented in a complaint report, a copy is provided to the complainant (unless the complainant is anonymous) and a second copy is forward to OPS.
- The OPS copy serves as a means of informing that office that a complaint has been lodged, allows OPS timely information to provide to the CEO, provides a means for ensuring that a follow-up supervisory investigation is completed in a timely manner, and allows OPS to intervene in an investigation should it be deemed necessary.

- A report of all complaints filed, whether in summary or detailed format, is provided to the CEO or his/her designee on a routine basis as defined by internal protocols.
- If the initial complaint appears to be relatively minor involving administrative or service matters, the supervisor conducts an investigation into the incident.
- If the investigation provides reasonable suspicion to uphold the complaint, the nature of the offense and potential discipline involved must be evaluated before proceeding.
- If the investigation reveals that the alleged violation is of a more serious nature than originally envisioned and/or would involve punishment that would potentially invoke the officer's "property interests" in employment, the complaint and all investigative findings must be referred to OPS for further action.
- If, on the other hand, the supervisory investigation does not unearth matters of a more serious nature and potential disciplinary action—such as verbal reprimand, counseling or retraining—would not invoke the officer's property interests, the supervisor must advise OPS of the findings of the inquiry with a recommendation for discipline.
- OPS then reviews the findings of the investigation, determines whether the investigation is complete and in order, whether recommended disciplinary action appears warranted and appropriate, and passes the recommendation and findings on to the CEO for approval or other action.
- The CEO may approve the findings and recommendations, dismiss the matter or take other action that he/she deems appropriate. If disciplinary action is approved, the approval is returned to the officer's unit commander and implemented by the subject officer's supervisor.
- A copy of the report and disposition is maintained at the local unit level for reference and use in subsequent periodic evaluations.

B. Investigations Conducted by the Office of Professional Standards

OPS can initiate investigations of alleged officer misconduct in several ways: (1) assumption of responsibility (with notice) of a supervisory investigation at any stage of the investigation, (2) supervisory referral of a public complaint due to the perceived significance/seriousness of the allegations, (3) on the basis of complaints received directly by OPS from individuals or groups of individuals in the public sector, or through public or private institutions or entities, or (4) basis on

information and/or evidence developed through internally initiated investigations that have received prior approval of the CEO.

Upon receiving an allegation of misconduct, OPS initiates a case file and reports the allegation to the CEO as previously noted. In instances of more serious complaints, particularly those that potentially involve corruption and other forms of criminal conduct, information on the allegations, evidence and subsequent investigation should normally be presented to the CEO in strict confidence outside normal reporting procedures. Steps and procedures beyond this point involve the following.

- OPS personnel conduct an investigation of the alleged misconduct.
- Should the investigation at any time uncover reasonable grounds to suspect criminal activity, OPS, with the knowledge of the CEO should refer and coordinate their investigation with the office of the prosecutor or district attorney.
- Once the administrative investigation has commenced, OPS should notify the subject officer(s) that OPS is conducting an investigation of the officer's conduct and the circumstances surrounding the specific complaint(s) in question.
- Within time limits designated by the police agency, investigation of the complaint should be concluded or an extension to that timeframe requested in order to conclude the investigation. Thereupon, OPS should complete its report of findings and submit it along with recommended dispositions for each charge to the agency CEO through the subject officer's chain of command.
- The CEO may take at least one of three measures (1) accept the findings and disposition recommendations, (2) reject some or all of the findings and disposition recommendations, or (3) remand some or all of the findings and disposition recommendations to OPS for additional inquiry or clarification.
- For charges that are finally approved by the agency CEO, a document must be prepared itemizing the charges against the officer.
- Upon receipt of the charging document, the officer has a period of time in which he or she can choose to respond to the charges, either verbally or in writing. This is the pre-disciplinary hearing.
- If a hearing is convened or a written statement submitted by the officer, this information will be provided to the CEO for consideration.
- If the officer is entitled to a full evidentiary hearing and chooses to invoke that right, the findings of that hearing will be forwarded to the CEO for consideration.

- Following any such hearings and with all findings in hand, the CEO then determines a disposition for each charge against the officer.
- The disposition is then forwarded to the subject officer's commander who in turn directs that the discipline be implemented.
- A copy of the disposition is provided to the subject officer at that time.
- In some jurisdictions, an officer may have a right to appeal a disciplinary action to a civil service or other board. He or she may also be entitled to a name clearing hearing. Should these options be authorized and available to the officer and he or she elects to be heard in these forums, the results of these hearings shall be returned to the CEO for information purposes or for purposes of making any modifications to the imposed discipline.
- Once disciplinary actions have been imposed and appeals or other hearings concluded, verification of final disciplinary action taken shall be forwarded to the commander of OPS and the agency's personnel authority.
- Finally, the complainant should be provided with a written statement of the outcome of the investigation and any disciplinary action that was taken as a result.

Addendum

Employee Disciplinary Matrix: A Search for Fairness in the Disciplinary Process

There are few issues among law enforcement personnel that can raise more concern, debate, rancor, and sometimes outright dissension than that of employee discipline—both the manner in which agencies investigate specific allegations of employee misconduct, and the way in which disciplinary penalties are determined. Where there are widespread perceptions that the investigation and administration of discipline is handled unfairly, capriciously, inconsistently, or otherwise unprofessionally, ramifications can be widespread and extremely damaging to department morale and operations.¹

Unfortunately, perceived unfairness is an all too common condition in law enforcement agencies. Employee discipline is never an easy matter to deal with in any employment environment, and law enforcement agencies are no exception. In the field of law enforcement there are additional forces that tend to complicate both the procedural and substantive aspects of employee discipline. In particular, because of the unique powers that police hold in a democratic society, there is greater demand for accountability among police departments and individual officers. Actions and behaviors of officers often have life altering consequences for the public and unauthorized behaviors or actions can have dire legal consequences for officers and their agencies. Consequently, ensuring that police officers act in accordance with law, departmental policy, rules, and training is an indispensable element of effective police management.

Traditionally, law enforcement has been long on discipline and short on remediation. In more recent times, police organizations have adopted disciplinary procedures that are designed not simply to impose negative sanctions but to provide employees with the opportunity to correct inappropriate behavior and learn from mistakes. Consistent with this more redemptive approach to personnel management has come the notion of progressive discipline—a key component, as shall be seen, in the construction and use of a disciplinary matrix. Progressive discipline holds that, when punishment is warranted, it is most effective to mete it out in increasing levels of severity based on reoccurrences. Less serious forms of misconduct and those that are first offenses do not always deserve or require severe punitive actions. They can often be dealt with effectively by verbal reprimands or counseling, among other possible alternatives. In other words, the discipline

must fit the misconduct, or be appropriate to the misdeed at hand. Progressive discipline, however, sometimes requires that employees receive different penalties for the same offense behavior because of different disciplinary histories.

In employment generally, and police work in particular, the notion of fairness in administration of discipline plays a key role. If employees believe that they are being dealt with fairly, they are more likely to be accepting of corrective actions and less likely to be alienated. In contrast, when discipline is viewed as unfair or unpredictable, employees often undermine the process and develop negative attitudes towards the organization. Unfair disciplinary processes (and those seen as unfair) support the development of a "code of silence" among employees and undermine the legitimacy of the disciplinary process.

The issue of fairness is comprised of at least two components of equal importance. The first of these is equality, which refers to consistency in the administration of discipline. Employees want to know that their punishment is no harsher than, and at least consistent with, the punishment of other employees who have committed the same type of misconduct. To be consistent, punishment for one person's act of misconduct must be the same or closely similar to the punishment given other persons who have committed the same or similar act. In other words, like penalties for like offenses in like circumstances. Equality also means that favoritism based on an employee's rank or position, race, gender, seniority or other characteristics does not play a part in determining appropriate discipline. Employee actions citing disparate treatment in disciplinary matters are often based on allegations that the police department's punishment was not in line with punishments given to other employees for the same or similar offense.

The second component of "fairness" is equity, meaning that underlying or contextual circumstances surrounding the misconduct or behavior need to be taken into account when deciding punishment. Mitigating circumstances may come into play. For example, in taking a prohibited action, the officer may have misunderstood the task or order that was given and acted inappropriately, the officer may have just learned of a death in the family and was not paying attention when engaged in the task at hand, or may have been confronted with highly unusual circumstances during the incident that warranted departure from established policy. On the other hand, determination of fair discipline must also take into account aggravating circumstances such as an officer's possible negative attitude toward the underlying incident, history of prior misconduct,

¹ *Investigation of Employee Misconduct: Concepts and Issues Paper*, IACP National Law Enforcement Policy Center, International Association of Chiefs of Police, 515 North Washington Street, Alexandria, Virginia.

prior attempts of the department to correct inappropriate behavior, or other factors.

Many if not most organizations generally, and police departments in particular, continue to find it difficult to successfully integrate the foregoing requirements into a cohesive disciplinary system. In larger departments in particular, it is difficult to achieve fairness of punishment when the authority for final disciplinary decisions is spread among a number of district, precinct, or division commanders who may not share the same views concerning appropriate punishment for the same offense. The perceived fairness of disciplinary actions may be further eroded when supervisory or command level personnel are not held to the same standards as their line counterparts. Aggravating or mitigating information important to the fair determination of discipline may not be shared between departmental assignments or units, informal discipline and remedial actions of supervisors may not be fully documented, and problem employees often may be transferred rather than effectively dealt with by their superiors.

Disciplinary Matrix

The problem of developing a fair system of disciplinary sanctions in policing is similar to the problem of ensuring a fair system of criminal sentencing in the courts. At bottom the issue revolves around the existence of discretion in the disciplinary decision. While discretion is necessary for fairness since latitude allows penalties to be fine-tuned to match behaviors and circumstances, it also allows unfairness. The same system that allows a supervisor to grant leniency in cases involving well intentioned but inexperienced officers can also allow supervisors to grant or withhold leniency based on officer sex, race, age, or other characteristics.

There are three basic ways to control discretion. One way to control discretion is to eliminate it. Mandatory sentencing laws or mandatory penalty policies that require persons found in violation to receive a pre-set punishment act to eliminate discretion. The problem here is that while mandatory penalties can work to improve equality, they almost always undercut equity in the disciplinary process. A second way to control discretion is by developing a series of "checks" so that decisions are reviewed. Appellate review of criminal sentences provides a check on judicial decisions; an appeals process in the disciplinary procedures can do the same. Checks on discretion have a number of problems including the fact that they extend the length of the disciplinary process and thus add to officer and supervisory anxiety, undermine any deterrent effects, and add layers of decision making (and cost) to the process. Disciplinary decisions in most agencies are reviewable today (in addition to any departmental appeals there are

often civil service reviews and, in the end, officers can seek court review of disciplinary decisions). Checking discretion may ultimately achieve more fairness, but given the current controversies, existing mechanisms do not seem to prevent disputes. A final way to limit discretion is through developing guidelines for decision makers. Guidelines inform the decision maker about the purpose of the decision, what factors should be considered (and how), and often, what has been the outcome in other similar cases.

In an effort to respond to charges of arbitrary and capricious disciplinary actions, police departments have sought several types of solutions, one of which is the development of a table of disciplinary actions often referred to as a disciplinary matrix. Such matrices attempt to answer the problem of fairness between individual disciplinary actions by the use of predetermined ranges of disciplinary alternatives. These disciplinary alternatives may be correlated to specific acts or various acts may be aggregated into a class of misconduct based on their perceived severity.

A disciplinary matrix provides the decision maker with a guideline for the disciplinary decision.

Disciplinary matrices are similar to matrix sentencing guidelines used in criminal courts around the country. The term "matrix" refers to a table that allows the decision maker to consider at least two things at the same time. Most criminal sentences are based on both the seriousness of the crime and the extent of the offender's prior record. Both more serious crimes and longer or more serious criminal histories lead to more severe penalties. The table plots offense seriousness against prior record and provides a suggested sentence or range of sentence for each combination of seriousness and prior record.

The matrix is like the mileage charts sometimes found on road maps that tell the reader how far it is between destinations. In these charts the same listing of destinations (usually cities) is printed across the top and down the side of the page. To find the distance between cities, the reader locates the first city on the vertical list (down the side) and then reads across the chart until reaching the second city on the horizontal list (across the top). At this point, where the two destinations intersect, the distance between the two places is printed. For discipline, the decision maker finds the seriousness of the behavior on one dimension and then reads across the chart to find a second dimension (such as prior disciplinary record). At the point where these two factors intersect, the matrix provides a range of appropriate sanctions or even a specific suggested sanction.

Progressive discipline is integral to disciplinary matrices or tables. Such tables are generally divided into several columns representing disciplinary history (a first, second, third, or even fourth repeat offense) and several rows representing seriousness of the misbehavior. Penalties

increase as either seriousness or disciplinary history increase. For disciplinary history each repeated offense category carries a harsher form of punishment.

Generally, repeated misconduct does not have to be of the same type or class in order to constitute repeated misconduct. The department establishes a period of time (typically between one and two years) wherein misconduct qualifies as a repeated offense. Generally, disciplinary matrices are used for the imposition of punitive action for acts of misconduct rather than behavioral problems. Behavioral problems are often dealt with through counseling, remedial training, mentoring, increased supervision or related approaches. However, depending on the nature of the misbehavior and the frequency of its recurrence, it may be subject to sanctions within the disciplinary matrix.

The matrix is intended to provide officers with a general idea of the upper and lower limits of punishment for acts of misconduct. The matrix also provides guidance to supervisors and managers. In so doing, proponents hold, it takes some of the guesswork out discipline, relieving officer apprehensions about potential penalties and reducing stress during the investigatory and deliberative stages of the disciplinary process. It is also purported to reduce individual concerns and potential grievances and appeals concerning disparate treatment. Strict adherence to a disciplinary matrix can limit the discretion of deciding officials and thereby level the playing field among supervisors who may have widely divergent ideas about discipline. Some also argue that a disciplinary matrix can enhance public information and police accountability in cases where a department's disciplinary table of penalties is made public.

While a disciplinary matrix may assist in bringing consistency to disciplinary decisions, some argue that it does not go far enough in many instances in ensuring the inclusion of mitigating or aggravating factors that could enhance or diminish the decision on severity of discipline. Still others argue that it removes important management discretion to impose punishment that is consistent with both mitigating and aggravating factors.

These are both legitimate concerns. A table of penalties, once accepted by management and line officers alike, could conceivably limit disciplinary discretion of supervisors and commanders. The question then becomes, by using a disciplinary matrix, would departments sacrifice a degree of equity for the sake of meeting demands for equality? The answer to this is both yes and no. Theoretically, to be fully consistent in all cases of punishment would exclude, in some cases, equity in discipline because it would have to overlook individual differences and circumstances in reliance on the formula of penalties. Theoretically, the specific act of misconduct

would be the only issue at hand in making a disciplinary decision.

In reality, this is normally not the case for two reasons. First, equity and consistency do not have to be mutually exclusive, nor do they have to unacceptably compromise one another. Mitigating and aggravating factors can, and should, be incorporated into the disciplinary decision-making process when using a matrix. This has been done at the federal level, as we shall see, and to some degree in state and local disciplinary procedures. In fact, it would be problematic if provisions for considering extenuating circumstances were not included in a system that uses a disciplinary matrix given the fact that due process considerations allow employees to reply both orally and in writing to specific charges. Secondly, most tables of discipline do not identify discreet disciplinary penalties but rather a range of possible penalties, thus providing the deciding authority with necessary latitude in entertaining and incorporating extenuating circumstances into the disciplinary decision. An example of one page of a disciplinary matrix is included in the appendix.

The Federal Model

Many elements of the federal government, as well as the Metropolitan Washington Police Department, rely on a disciplinary matrix to guide decision making on appropriate discipline.

The Office of the Secretary of Defense (OSD) for example, provides guidance on the use of the matrix and the incorporation of mitigating and aggravating factors in disciplinary decisions.² An overview of their system may provide a useful example for those departments considering the use of a disciplinary matrix.

In this case, supervisors are provided with the primary responsibility for initiating and recommending employee discipline, albeit with significant oversight by a senior commander and a personnel specialist from the Office of Labor Relations. In referencing the table of penalties, guidance provides that a particular penalty is not mandatory simply because it is listed in the table. In addition, the system provides that appropriate penalties for unlisted offenses may be derived by comparing the nature and seriousness of an offense to those listed in the table. Then, selection of an appropriate penalty should involve the balancing of the relevant factors in the individual case, consideration of the employee's previous disciplinary record, if any, and the recent offense giving rise to the disciplinary action.

² Department of Defense, Washington Headquarters Service, Memorandum for Supervisors and Managers: Disciplinary and Adverse Actions, March 1989.

The instructions further state

In selecting the appropriate penalty from the table, a prior offense of any type for which formal disciplinary action was taken forms the basis for proposing the next higher sanction. For example, a first offense of insubordination for which an official reprimand is in the employee's official personnel folder, followed by a charge of absence without leave (AWOL), triggers the second offense identified in the table, i.e., a proposed five-day suspension if the AWOL charge was for eight hours or less or a proposed five-day suspension if the AWOL charge exceeded eight hours. Aggravating factors on which the supervisor intends to rely for imposition of a more stringent penalty, such as a history of discipline or the seriousness of the offense, should be addressed in the notice of proposed discipline, thereby giving the employee the opportunity to respond.

The federal system emphasizes that a matrix of penalties should not be employed in a mechanical fashion, but with practical realism. This approach was emphasized in the landmark case *Douglas v. Veterans Administration*,³ in which the Federal Merit System Protection Board, a federal adjudicatory agency, outlined 12 factors that must be considered by supervisors when recommending or deciding employee disciplinary action. While not all are pertinent to every case, they provide a broad-brush approach of the types of mitigating (or aggravating) factors that can and should be considered when employing an agency table of penalties. Many, if not most, of these have application in the disciplinary decision-making environment of state and local law enforcement:

- The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated
- The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position
- The employee's disciplinary record
- The employee's work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability
- The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's work ability to perform assigned duties

- Consistency of the penalty with those imposed upon other employees for the same or similar offenses
- Consistency of the penalty with any applicable agency table of penalties
- The notoriety of the offense or its impact upon the reputation of the agency
- The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question
- The potential for the employee's rehabilitation
- Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter
- The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others

Importance of Documentation

It is essential for supervisors to document misconduct and both formal and informal discipline by using either a disciplinary matrix or other means to determine discipline. Without such documentation, it is not possible to ensure consistency between disciplinary decisions for the same employee or other employees who have been engaged in similar misconduct, nor is it possible to respond effectively to potential disciplinary appeals. Informal discipline such as verbal reprimands and counseling is no exception. These should be recorded in a supervisor's memorandum as a matter of record for performance review purposes and for future reference in cases of repeat misconduct. While informal discipline should not be placed in an employee's permanent personnel file and may not have an immediate impact on an officer's employment status or condition, repeated behavioral problems or an accumulation of minor infractions of policy or procedure should be taken into account when assessing an employee's performance or determining future penalties for misconduct. As such, this information must be available to other supervisors if necessary. Such information is normally retained at the unit level for a limited period of time and is expunged after a set period of time if the officer does not engage in additional misconduct.

When conducting any type of informal discipline or corrective action, supervisors should fully document the details of the circumstances of the incident(s) on which the counseling or reprimand is based. The specifics of the counseling or reprimand should also be documented together with such information as the date it took place,

³ *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981).

persons present such as another supervisor as witness, name of the person conducting the counseling and any statements made by the subject officer that have bearing on the officer's performance or behavior. The officer should be notified that the counseling session or reprimand will be documented but will be used only for purposes of recording the incident unless misconduct or inappropriate behavior is repeated. In some cases, the supervisor and officer may decide to enter into an agreement involving informal remedial training, review of departmental policy and procedures, or related actions to help ensure that similar problems of conduct or misbehavior can be avoided. In such cases, the terms of such an agreement should be clearly defined in the memorandum.

The employee should be given the opportunity to read and discuss the contents of the memorandum once completed, asked to sign and date it to verify that the employee has read it, and given a copy if he or she requests one. Where differences of opinion concerning the contents of the memorandum exist, they should be discussed and documented in an attachment. If the employee refuses to acknowledge the memorandum by signature, this fact should be recorded on the document and witnessed by another supervisor.

The need for documentation is equally if not more important in instances of formal disciplinary actions that have direct impact on the terms and conditions of employment. These procedures and due process safeguards involving such matters as *Garrity* and *Laudermill* are generally well documented in departmental policy and need not be reexamined here.⁴

Comprehensive documentation in the realm of employee discipline may also serve the police department in other ways. When reports of misconduct are lodged in a central repository, they can provide the core data elements for an early warning system, both for individual employees and the organization as a whole. In all organizations, compilation of employee disciplinary offenses and subsequent penalties will prove invaluable for comparative purposes in determining the consistency of disciplinary actions between individuals and, in larger departments, between divisions, assignments, and varied departmental components. In addition, summary and comparative data on the overall nature of employee misconduct in the department can point to potential problems in departmental policy, training, or supervision as well as possible solutions. For example, public complaints that center on unacceptable delivery of services rather than officer conduct (such as response time) may also prove essential

in making alterations in personnel allocation or other organizational change.

When systematically organized in this manner, whether manually or by computer programming, individual officer conduct that may point to more serious problems can be flagged and addressed on a preemptive basis. Repeated complaints regarding firearms discharges, excessive force, damage to motor vehicles, loss of departmental property, and related information can suggest underlying problems with an officer that deserve proactive attention. Finally, this information is vital to monitoring and assessing the operation of the disciplinary matrix. A consistent pattern of disciplinary decisions that fall outside the range suggested in the matrix may be evidence that the matrix should be revised, or that supervisors require additional training in the use of the matrix.

What Is "Reasonable" Discipline?

Possibly most problematic in development of a disciplinary matrix is the selection of appropriate or reasonable penalties for individual acts or classes of misconduct. As noted earlier, a basic criterion for discipline is that the punishment must be in reasonable proportion to the rule or policy violation or other prohibited conduct. Obviously, a penalty that may be reasonable to one person may not be to another. There is no nationally recognized table of disciplines that can be used commonly among disciplinary schedules across states and localities. Many would argue that such a model would be impractical in light of differences in community and individual agency value systems, goals, and priorities. This is not to say that examples from similarly situated police departments cannot be effectively and usefully employed. In fact, if disciplinary actions are challenged as unreasonable, the availability of comparative information from other law enforcement agencies could be useful. But the final decision for an individual department must be made by that police department.

In order for a disciplinary system of this type to function with reasonable effectiveness, there must be some degree of buy in by employees. Where labor unions represent the employment interests of workers, this will unavoidably require union involvement. Even where collective bargaining entities are not at issue, management and line employees will need to reach a degree of agreement on acceptable disciplinary penalties and sanctions. This does not mean that management must seek concurrence on all decisions of disciplinary action but that there needs to be some reasonable accommodation of interests in arriving at a final table of disciplinary penalties.

Such a process of give-and-take can take considerable time and will undoubtedly test the patience of all involved. But if it can be accomplished, the exercise alone can be

⁴ See *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981), Model Policy and Concepts and Issues Paper, IACP National Law Enforcement Policy Center, International Association of Chiefs of Police, Alexandria, Virginia.

valuable. For example, in some cases where departments have engaged in this undertaking, it has been reported that employees take a stricter view toward adherence to certain principles of conduct and advocate harsher penalties than management for certain employee transgressions; thus, such negotiation can assist the department in defining or refining its core values and goals. For example, on close examination, employees may determine that police work requires, among all else, reliance on the integrity and truthfulness of officers. As such, employee conduct that undermines these basic tenets must be dealt with decisively and harshly. By the same token, departmental management may endorse more stringent penalties for failure of officers to adhere to policy in critical enforcement areas. For example, failure of officers to abide strictly to vehicular pursuit policy and procedures may be regarded as deserving strict enforcement and harsh penalties due to the department's involvement in a large number of crashes and injuries in such incidents. In this and related instances, a department can utilize the table of penalties to enforce and underline its commitment to specific priorities or goals.

Development of a table of penalties can be time consuming and laborious; however, the effort can be truncated somewhat by organizing acts of misconduct into conceptually similar classes with assigned sanctions on a collective basis. This approach has merit in that it is difficult to attempt to identify every discreet act of misconduct. And, failure to identify a specific act as impermissible could render any discipline in such a case as unreasonable based on the fact that employees were not informed in advance that it was prohibited. Identification of classes of prohibited actions combined with a defined list of mitigating and extenuating factors similar to those identified in *Douglas* under the federal model may be adequate to provide sufficient particularity to discipline based on the act of misconduct.

There is quite a bit of knowledge and experience with matrix sentencing guidelines that can ease the development of disciplinary matrices. It is not necessary to reinvent the wheel. Based on the experience with sentencing guidelines, there are two basic models for matrix development: descriptive or prescriptive. A descriptive matrix suggests sanctions based on what has typically been done in similar cases in the past. If disciplinary data are available, an analysis is done to identify the factors associated with different sanctions. Almost always this analysis will reveal that the severity of punishments is linked to the seriousness of the misbehavior and the prior history of the employee. Based on this analysis, a matrix can be derived that reflects these factors. In this way, the matrix actually describes current practice. In this case, the application of the matrix does little to change how discipline is decided but does increase consistency. Alternatively, a

prescriptive matrix can be developed by first determining what factors should be important and how they should relate. Then this determination of how discipline should work forms the basis of a matrix that prescribes penalties for future violations. In this case, the matrix discipline system may bear no relation to existing practice. The choice of developmental method depends on several factors including the availability of data, the capacity to conduct the analyses, the levels of satisfaction with current discipline practices, and the like. If the primary complaint about the current disciplinary process is procedural (concerns equality) and not substantive (concerns equity), a descriptive model seems to be indicated.

If a disciplinary matrix is adopted, regardless of the developmental model it is important to institute a system of recording disciplinary actions that includes collecting information about the relevant factors (such as offense seriousness, prior history, and sanction) so that the workings of the matrix system can be documented and evaluated. Periodic reviews should be conducted to look for areas where the system might be improved.

No matter how sanctions are determined in an employee disciplinary system, it is important to realize that the penalties are only part of the process. A matrix system can improve fairness in disciplinary decisions but the integrity of the total disciplinary processes depends on fairness in detecting, reporting, investigating, and documenting infractions. A disciplinary matrix is part of a total employee discipline process.