

EXHIBIT J



Training Key® #531

Investigation of Public Complaints: Part III - The Investigation Process

This is the third of a three-part series on the subject of receiving and investigating public complaints and the administration of discipline. All police officers should have a solid understanding of the processes that should be followed in these areas and the appropriate roles, legal rights and responsibilities of officers and their employing police agencies.

Employee Rights During an Internal Investigation

Responsibility for conducting internal investigations of police conduct carries with it the important responsibility of conducting such investigations in accordance with the law and professionally accepted practices. This *Training Key*® addresses certain rights that are retained by an officer who is the subject of an internal investigation and procedures that should 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 may 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. Some of the states that have adopted Peace Officers' Bill of Rights include Kentucky, West Virginia, Virginia, Rhode Island, Maryland, Illinois, California, and Florida.

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 non-criminal 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 may provide the agency with grounds for discipline up to and including discharge from service on the basis of failure to respond to a direct order. Prior to questioning, the officer must be advised of the "Reverse Miranda" provisions as will be noted later.

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 a failure to answer as ordered may result in being discharged from the job. In order to circumvent this problem and ensure that officers are encouraged to testify, 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" provides that the department will not "use" any admissions of criminal activity 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.

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 fol-

lowed 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 feelings of pressure and alienation generated by being the subject of such investigations 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 with police officers under investigation with a sense of "fair play."

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.

Where possible, the interview should be held while the officer is on-duty, and within the employee's work area in order to accommodate both the needs of the officer and the department. These provisions allow the officer the fullest opportunity to comply with the internal investigative authority.

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 may 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 individuals that are involved in any manner 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 as it is sometimes asserted that attorneys unnecessarily impede the progress of administrative investigations without fulfilling any critical purpose. 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 not be able to foresee all the ramifications of any given case and be in a position to adequately help prepare the officer. A personal legal representative, although relegated to an observer's role only 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 hearing does not carry the threat of a jail sentence 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 and the recording should cover the entire interview. If breaks are taken, a notation should be made on the recording itself 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 admonished as follows:

- 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 making 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.

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 to a breath, blood, or urine test when there is reasonable suspicion that alcohol or drug usage is directly related to the allegations of 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 the use of 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 operator where it is permitted. Those states with statutes regulating use of the polygraph generally prohibit use within the private sector but permit the law enforcement profession to use the polygraph in investigations of employee misconduct or 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, indi-

vidual law enforcement agencies and officers 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-based 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 an oral investigative interview.

Whether the test is requested by the employee or employer, 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. The “use immunity” for admissions of a criminal nature must be explained and a waiver obtained, as in normal face-to-face questioning.

Where the test is permitted by law, 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.¹

With regard to searches, property belonging to the department is normally subject to inspection for investigative purposes. This may include departmental vehicles, desks, files, storage lockers, computers, 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.

Authorization to search should be restricted however, to a search for evidence of work-related misconduct. Also, the authorization should extend only to departmental property, i.e., “those areas and items that are related to work and are generally within the employer’s control.” The employer may not search for evidence in private areas, such as a purse or closed 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.

Disposition Following Investigation

Review and Recommendation. After the investigation is deemed to be complete, the primary investigative authority for the investigation 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.

Six possible dispositions of the matter are presented below for consideration. Many agencies limit such dispositions to a few, but there are other potential dispositions that when employed, add more clarity to case findings.

- “*Sustained*,” meaning that there is sufficient evidence to prove the allegations.
- “*Not sustained*,” meaning that there is insufficient evidence to either prove or disprove the allegations.

- “*Exonerated*,” meaning that the incident occurred but was lawful and/or within policy.
- “*Unfounded*,” meaning that the allegation was false or not factual, or that the accused employee was not involved in the incident.
- “*Policy and Procedure*,” meaning that the allegation was not against an individual officer, but rather dealt solely with a complainant’s objection to, or criticism of, a departmental policy or procedure.
- “*Incomplete Investigation*,” meaning that the investigation could not be thoroughly or properly completed. Incompleteness may result from a lack of cooperation by the complainant or witnesses, the absence of a critical interview which was necessary to the investigation, or a determination that the available physical evidence or witnesses statements were insufficient to permit adjudication of the complaint.

Review and Forwarding of Report. A copy of the investigator’s findings and recommendations should be submitted for review to and by 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.

Actions of CEO. Upon receipt of the report, the CEO should review the report and supporting documents. Generally, the CEO then chooses to accept the findings and recommendations of the report, or 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, commander, or by the OPS as appropriate. This document must be signed and thereafter served upon the employee after the pre-disciplinary hearing is concluded.

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. The point at which the response is accepted or heard is commonly referred to as the pre-disciplinary hearing (PDH).

Response of Employee. The employee may respond either in verbal or written form to the charges within the time frame stated in the charging document. An employee who desires an opportunity to be heard regarding the proposed charges may request a hearing. Such a request should be made to the CEO or the CEO’s designee within the time frame stated in the charging document.

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).³ 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 disci-

plinary 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.

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 frame. For that reason, the time frame 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.

This time limit may be impractical in case of 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. Whatever the time allowed, it may be desirable that regular status reports be submitted regarding the progress of the investigation.

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.

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.

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, unless 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 the law otherwise authorizes release.

Each law enforcement agency should recognize the importance of maintaining these investigative case records. The integrity of the internal investigations process is protected by maintaining step-by-step written documentation of this

process, from the initial complaint to any disciplinary action taken by the department. 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 favor in any later litigation.

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 a right to do so as provided by law. To protect the confidentiality of the complainant, each complaint should be assigned a number, which should be used as a reference during the investigation.

Prevention of Employee Misconduct

As with any other aspect of law enforcement, the best way to solve a problem is to prevent the problem from arising. Thus this and associated *Training Keys®* on this subject have 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.

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

Individual Responsibility and Accountability. Every employee of the department has a personal 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. In addition, they should be held to their responsibility to report any employee misconduct as a violation of the ethical standards that guide all police officers. The "code of silence" among officers with regard to unethical or criminal behavior cannot be tolerated. Those who hold to this time-worn tradition do nearly as much to damage a police agency's reputation and standing in the community as do the perpetrators of misconduct.

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 the department's 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 evaluation of officer and agency effectiveness and efficiency complete the ongoing process of refinement and modification.

In this respect, policy and procedure development is not a 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, etc., 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 in fact understands each policy, regulation, or other document.

Appropriateness of Assignments. Employees must be assigned only to duties and responsibilities for which they have the necessary knowledge, capabilities, skills, abilities and training.⁴ To assign personnel in a haphazard fashion risks performance, morale, motivational and productivity problems and increases the risk of officer mistakes, miscalculations and misconduct.

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 employees and 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 or counseling for the employee. The supervisor should document all instances of additional training or counseling undertaken to modify an employee's behavior.

Supervisors play a critical role in observing officer behavior that may signal isolated or aggregate personal and/or work problems that may lead to the officer's becoming a disciplinary problem. Supervisors are 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.

Officer Responsibility to Report Misconduct and Problem Behavior. Line officers are key stakeholders in efforts to preserve and enhance the reputation of their department and their pride in themselves as police officers. Police officers can no longer subscribe to the time-worn 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 management. Line officers are on the front line with the community they serve, and their conduct is a di-

rect reflection on the department as a whole. They as individuals 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 can have serious repercussions on all who wear the same uniform.

Therefore, if an agency is to maintain a professional image, individual officers must ensure that their behavior and that of their fellow officers complies with professional standards of conduct. Officers need 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 actions could cause more harm than good. It does mean is 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 and/or citizens, 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.

Endnotes

¹ 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.

² O'Connor v. Ortega, 107 S.Ct. 1492 (1987).

³ If necessary, the CEO may remand the case for further investigation before final disposition.

⁴ 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.

questions

The following questions are based on information in this *Training Key*. Select the one best answer for each question.

1. Which of the following statements is true?

- (a) *An officer who is being questioned in a purely administrative interview must be read his or her Miranda rights.*
- (b) *In an internal criminal investigation, if an officer invokes his or her Miranda rights, that officer can be disciplined for doing so.*
- (c) *Questioning an officer during a purely administrative investigation into non-criminal violations invokes what are known as “Reverse Miranda” rights.*
- (d) *In a purely administrative investigation into non-criminal violations, if an officer fails to respond to narrowly focused questions concerning the matter under investigation, he or she may not be disciplined.*

2. Which of the following statements is false?

- (a) *Prior to a hearing on charges, an officer must be informed of the charges against him or her.*
- (b) *Officers under investigation should be permitted to ascertain the progress of the investigation.*
- (c) *All investigative interviews with officers should be recorded.*
- (d) *Officers under investigation for purely administrative violations may not have a personal representative present at the interview or interrogation.*

3. Which of the following statements is false?

- (a) *During an investigation of alleged officer misconduct, searches may be conducted of areas and items in which the officer has no reasonable expectation of privacy.*
- (b) *An employee under investigation for administrative charges may be required to participate in a lineup.*
- (c) *If following investigation a complaint is sustained, disciplinary action may be taken immediately thereafter.*
- (d) *Investigation of a complaint should be completed within a reasonable period of time as established by departmental policy.*

answers

- 1. (c) Questioning an officer during a purely administrative investigation into non-criminal violations invokes what are known as “Reverse Miranda” rights.
- 2. (d) Officers under investigation for purely administrative violations may have a personal representative present at the interview or interrogation.
- 3. (c) If following investigation a complaint is sustained, disciplinary action may not be taken immediately thereafter. A charging document must be prepared and served upon the officer and the officer must be given the opportunity to respond to those charges either verbally or in writing.

have you read ... ?

Managing for Effective Police Discipline: A Manual of Rules, Procedures, Supportive Law and Effective Management, International Association of Chiefs of Police, Alexandria, VA. (1976).

While some of the legal issues discussed in this volume need updating, the book provides a wide variety of information on the management of police disciplinary systems that is still current and useful.

