

# **EXHIBIT 12**



# Training Key® #529

## Investigation of Public Complaints: Part I - General Disciplinary Concepts

This is the first 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.

### Introduction

A substantial degree of attention is devoted in these three *Training Keys*® to the topic of citizen complaints, the disciplinary process and the many facets of investigating allegations of police officer misconduct. There are several reasons for addressing this issue 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 of agencies — to supervise, detect and effectively intervene or prevent instances of officer misconduct. The notoriety of the most serious of these cases has been devastating to the police agencies involved and the communities they serve and has had negative impact for the overall police profession. In fact, as these *Training Keys*® go to print, the federal government is considering a comprehensive nationwide study of law enforcement issues to include that of police integrity.

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

The vast majority of police officers are honest, loyal, hard-working professionals. The broad brush strokes of officer bru-

tal and excessive force sometimes painted by the media is almost always the product of a very small minority. But these few individuals can often taint the integrity of many. 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, the ability of a police department to internally monitor both mistakes and misconduct of its officers is absolutely crucial to protecting its interests and reputation. In order to do so, police officers must be willing to be forthcoming about their conduct and the conduct of other officers. And, in order to do that, they must have a knowledge of and faith in the integrity of their agency's investigative and disciplinary process. These are complex issue areas that need sound procedures based on up-to-date information. But to be effective they must be understood by all members of the department.

Therefore, it is the intent of this *Training Key*® and the two that follow to take a close look at the internal investigation and disciplinary process. Hopefully this information will provide insights and possible alternatives to present procedures, inform officers and supervisors alike of their legal rights and responsibilities during internal investigations and disciplinary actions, and 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 community.

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 individual requirements or legally binding agreements. But what it attempts to do is to provide the essential ingredients of a well-administered, professional program governing internal investigations and disciplinary procedures.

## Discipline and “Fair Play”

Discipline is an indispensable component of law enforcement management. There are rules and regulations that pertain to nearly all fields of employment. But, unlike any other profession, law enforcement officers possess unique powers and discretion to take actions that require management oversight and control and the 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 dissension than the issue of employee discipline and the process by which agencies investigate specific allegations of employee misconduct. Where there are widespread perceptions that the investigation and/or administration of discipline is handled unfairly, capriciously, inconsistently or unprofessionally, ramifications can be widespread and extremely damaging to department morale and operations.

An underlying theme and message that runs throughout this and subsequent *Training Keys*® is that of following an investigative and disciplinary process based on the principle of “fair play.” Police agencies have a duty and a responsibility to investigate fully and completely accusations of officer misconduct in order to protect the department’s integrity and its credibility in the community, not to mention clear the name 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 fair, it goes a long way to enhance relations between management and staff and eliminate self protective, stonewalling behavior that is often seen among officers who view the disciplinary system as unfair.

## 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.

*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 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.

*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.<sup>1</sup>

Positive discipline also focuses on determining why misconduct occurred, rather than solely on taking punitive 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 standard expected as 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, humans respond to even small amounts of praise in a more positive manner 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 or even better job. They feel a part of the agency and want to support its reputation. The sole use of intimidation or threats of punishment in order to force officers to comply with established norms, 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 the same or similar misconduct, any lessons that the department hoped to impart through discipline will be lost. This is true no matter who the employee and irrespective of the fact that the employee may be of a higher rank. Discipline must be consistent.

Finally, it should be noted that training is perhaps one of the most effective approaches to positive discipline. Some disciplinary matters are partially or even largely a product of improper or inadequate training, a failure by officers to fully master what is being taught, or their inability to remember or refresh specific skills and abilities, practices, protocols, or procedures. For such individuals, refresher training may be more effective and appropriate than punishment as a means to correct problem behavior.

## Disciplinary “Schedules”

As noted earlier in this document, one essential ingredient of 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 involving uniform tables of penalties for one or more infractions or breaches of conduct. 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 certain types of infractions. Major departures from the disciplinary schedule are readily apparent - a factor that also serves as a check on fair decision making. This approach is more easily utilized with certain types of

misconduct where there are no unusual circumstances involved. However, many instances of misconduct arise that, while they may involve the same or similar charges, involve substantially different facts and circumstances. Administration of discipline strictly on a formula basis under these conditions would not take into account the total circumstances of the event or the performance history of the individual officer.

Disciplinary systems that rely solely on administration of discipline by formula can prove to be too inflexible and thus unfair in some circumstances. 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 generally 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 that scale and that the reasons for such departures will be fully explained to those involved.

### **Legal Considerations: Termination or Suspension**

In addition to the issues of discipline in general discussed above, there are legal constraints that affect the disciplinary process in nearly 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 a collective bargaining agreement. In addition, several states have begun to provide statutory regulation of the public complaint process. However, in the absence of these specific constraints, certain general principles will apply. A broad overview of these general features of officer discipline is important to 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/or 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.

*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.<sup>2</sup> 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.<sup>3</sup>

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. These include the following. There may be other grounds for discipline and other rights accorded to a department's officers in a given jurisdiction.

- *Incompetency.* Most states permit an officer to be disciplined up to termination for incompetency. The department is not required to retain an officer who is unable to perform his or her duties due to incompetence.<sup>4</sup>
- *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 suspension or termination.
- *Conduct Unbecoming an Officer.* A basis for discipline that has long been a subject of controversy is the catch-all 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." 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.

Suspension or dismissal based on CUBO has been criticized by some courts due to the sometimes seemingly vague nature of the charge. 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 would 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 a lawful order of a superior officer. What constitutes a lawful order can be disputed 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.<sup>6</sup> 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 in 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 either transfer him or her to an administrative assignment or administrative leave status. If the officer is maintained on any type of duty and retains law enforcement powers, the department risks civil litigation should the officer subsequently use those police powers, whether on or off duty and these actions have negative officer/departmental consequences.

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’s requirement 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.

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 that requires the granting of immunity from 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.

*Disciplinary Hearings.* Law enforcement officers holding a property interest in their position normally must be given an administrative hearing prior to suspension or dismissal.<sup>7</sup> 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.<sup>8</sup> 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 but with the provision that if the administrative hearing results in a favorable ruling for the officer, he or she will receive the appropriate back pay. Here again, officers and their agencies should understand that these are primarily defensive actions. 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.

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 suspension or dismissal is thus merited.

Due process requires that the officer be given notice of and an opportunity to be heard on the charges.<sup>9</sup> 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, and officers should expect as 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 orally or in writing within a reasonable period of time. This is referred to commonly as a “predisciplinary hearing” (PDH).

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 an adequate case or explanation to address the charges against him, and the hearing must be held at a time and location that is easily accessible to the officer.<sup>10</sup> State law generally establishes the provisions for formal and evidentiary hearings of this type.

Once the pre-disciplinary hearing is concluded, if the chief executive officer feels that discipline is justified, the officer must have the right to a full evidentiary hearing in order to satisfy the due process clause.<sup>11</sup> 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/or an award of civil damages to the officer.

*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 of-

ficers 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 the 14th Amendment would protect. Thus, generally the officer has no right to a pre-disciplinary hearing to determine the validity of the firing decision except in certain limited instances.<sup>12</sup>

The rights accorded a law enforcement officer in terminable-at-will states vary significantly from state to state.<sup>13</sup> Adoption of exceptions by statute or case law should be researched within individual state laws.

*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 officer’s “liberty interest,” as secured by the Due Process Clause of the 14th Amendment, is invoked.<sup>14</sup>

*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 affects the terminated employee’s reputation or ability to secure new employment.<sup>15</sup> Cases involving a right to a name clearing hearing have involved accusations of involvement in such criminal activity as rape, corruption, theft, as well as such charges as improper association with women, sexual misconduct, insubordination, dishonesty and others.

Even 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 only for just cause.<sup>16</sup> 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.<sup>17</sup>

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 a name-clearing hearing be afforded the employee.

*Defamation and Other Interests in Reputation.* Even where the termination itself is lawful, departments must be cautious of any statements released to the media or to other prospective

employers regarding the cause for the dismissal.<sup>18</sup> Regardless of whether there was or was not a property interest in the employment, and regardless of whether or not 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.

*“Whistle-Blowing” Statutes.* An important protection that is 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.

## Endnotes

<sup>1</sup> IACP, *Managing for Effective Police Discipline*, International Association of Chiefs of Police, Alexandria, VA (1977).

<sup>2</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>3</sup> *Arnett v. Kennedy*, 416 U.S. 134 (1974).

<sup>4</sup> 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.

<sup>5</sup> 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, etc., in the definition of moral turpitude.

<sup>6</sup> 16A McQuillan, *Municipal Corporations*, Sections 45.63 - 45.70 (3rd Ed.).

<sup>7</sup> *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

<sup>8</sup> *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 544-5 (1985).

<sup>9</sup> *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985).

<sup>10</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>11</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>12</sup> *Bishop v. Wood*, 426 U.S. 341 (1976).

<sup>13</sup> For a fuller discussion of the exceptions to the doctrine of employment at will and the available causes of action, see Larson, Barowsky, *Unjust Dismissal*, Mathew Bender Pub. (1987).

<sup>14</sup> [*Lubey v. 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 that 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.

<sup>15</sup> See for example, *Lubey v. City and County of San Francisco*, 98 C.A. 3rd, 340 (1979).

<sup>16</sup> *Board of Regents v. Roth*, 408 U.S. 564 (1972).

<sup>17</sup> *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972).

<sup>18</sup> 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.

## 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 false?

- (a) *Officers accused of misconduct do not lose their due process rights.*
- (b) *Negative discipline is reactive because officer misconduct is addressed only after the misconduct has occurred.*
- (c) *Positive discipline focuses on determining why misconduct occurred and preventing misconduct.*
- (d) *Positive discipline does not include rewarding officers for excellence.*

2. Which of the following statements is false?

- (a) *The use of disciplinary “schedules” is the best means of determining fair and appropriate disciplinary sanctions.*
- (b) *Not all police officers have a “property interest” in continued employment under the 14th Amendment.*
- (c) *Conduct unbecoming an officer (CUBO) has been attacked by some courts as being too vague in defining unacceptable officer conduct to be enforceable.*
- (d) *Most states permit an officer to be disciplined up to termination of employment for incompetency.*

3. Which of the following statements is false?

- (a) *Officers holding a property interest in their employment normally must be given an administrative hearing prior to suspension or dismissal.*
- (b) *Police departments may suspend an officer with pay pending an administrative hearing if the officer poses a significant threat to others if allowed to remain on duty pending the hearing.*
- (c) *A pre-disciplinary hearing (PDH) must be conducted in the same manner as a judicial trial in order to satisfy the due process requirements of the 14th Amendment.*
- (d) *Due process requires that an accused officer be given notice of the charges against him or her and an opportunity to be heard on those charges.*

## answers

- 1. (d) Positive discipline does include rewards for excellence and reliability in work performance.
- 2. (a) Disciplinary “schedules” is one means of determining discipline but if followed too rigidly can be unfair in cases that have unusual or extenuating circumstances.
- 3. (c) Pre-disciplinary hearings do not have to reach the level of a full blown judicial proceeding in order to satisfy due process requirements.

## 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.







# Training Key® #530

## **Investigation of Public Complaints: Part II - Receiving and Processing Complaints**

This is the second of a three-part series on the subject of receiving and investigating public complaints. 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.

## **Responsibility for Complaint Investigation and Review**

A police department's mechanism for investigating allegations of officer misconduct is a significant issue. 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.

*Necessity of Establishing an Internal Investigations Authority.* The internal investigation's 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 improper action. In addition, the internal investigation's 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 both internal public complaints and other allegations of employee misconduct.

*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" to define this function represents more than a change of terminology. It is meant to convey a different perspective on the duties and responsibilities of this function within the police agency. In essence, this office is in a position within many law enforcement agencies where information is available that, if compiled and summarized, can detect not only individual officer misconduct but potential prob-

lems with overall agency policy, training, supervision or other activities.

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 be responsible for identifying ways and means in which the agency and officers can avoid problems, much as do risk managers, and correct shortcomings before they become problems. It can also maintain an ongoing awareness of evolving police practices that the agency may wish to adopt. These latter functions are best performed in conjunction with the inspections unit or similar authority.

*Placement of Investigative Authority within the Department.* The placement of the internal investigations authority - whether designated OPS or 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 only to, this chief executive officer or others that he or she may designate.

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 the officer/employee under investigation. Thus, in major investigations, access to the 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 em-



employees have access to all or some of the investigative information.

*Staffing of the Investigations Authority.* The choice of staff to perform internal investigations is a critical factor in ensuring that this process is not undermined. Officers for these assignments must be selected and assigned with the utmost of 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 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.<sup>1</sup> Where a civilian is in charge of reviewing internal investigations of misconduct (e.g., as in civilian review boards) he or she may compensate for lack of street experience by recommending light discipline. Thus, the chief executive officer must establish a unit comprised of personnel who understand the critical necessity for accurate, unbiased, and fair investigations.

Personnel who have not had experience in this function should receive training and hands-on indoctrination to the law relating to investigations of misconduct, the Police Officer's Bill of Rights, use of the polygraph, and the range of other operations and practices that influence the investigative process. All officers who are assigned to the internal investigative function must have formal training in this area provided by a professionally recognized organization notwithstanding any other in-house training that the officer may receive.

When considering candidates for internal investigation assignments, the department CEO should evaluate the candidate's image within the department, communications skills, personal disciplinary history and reputation, and the officer's breadth of experience. The successful candidate for this assignment should have considerable patrol, 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 types of investigation 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 with in a professional manner. These are significant demands and qualifications for a successful candidate and reflect both the importance of the assignment and the emphasis that must be placed on selection and training of internal investigators.

*Guarding against Bias in the Investigative Process.* The process of conducting internal investigations must be guarded from personal influence or bias. The possibility that an investigation may be stifled or unduly influenced as a result of favoritism, discrimination, or personal dislike are increased as more departmental personnel are involved in the internal investigation function. Where the internal investigations authority does not report directly to the chief executive officer, there is a greater opportunity that corrupt officers may be tipped off to an investigation or may successfully 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 investiga-

tion 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 an internal selectivity in directing the internal investigations. Thus, whether due to personal selectivity or bias, the chief executive officer may ultimately receive a distorted picture of allegations of officer misconduct where the internal investigations authority does not report directly to him or her.

## Accepting and Filing Public Complaints

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

*Receipt of Complaint.* Police departments should allow public complaints to be received initially by any member of the department.<sup>2</sup> 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.<sup>3</sup> 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 certainly has the benefit of actively involving all employees in helping the public to identify official misconduct. Citizen access is maximized by not requiring the citizen to go through lengthy procedures before being able to register a complaint, and the citizen perceives that all officers and departmental personnel are genuinely open to investigation of misconduct. However, allowing a line officer to take and record a complaint may promote a lack of organization in the complaint review process and permit individual officers to bypass the process by not reporting a troublesome complaint. Thus, officers and department personnel should instruct citizens to contact a supervisor and should assist them in doing so.

Alternatively, the department's complaint procedures should be explained to the complainant, and the complainant should be advised as to the individuals with whom the complaint may be filed and the location where these persons are to be found. It should also be explained to the complainant that the complaint may be made in person or by any of the other means referred to above.

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.

Public Complaint Packages for use in the filing of complaints are also a good idea. This package should contain complaint forms, information on the departmental complaint procedures, and an explanation of the action that the complainant can expect in response to the complaint. These packages can be made available to the public directly through police personnel and at designated public locations.

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 with whom the citizen has had official contact. 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 citizens 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 thus 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 accruing 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 investigations 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 if there are merits for 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 himself 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.

*Community Relations.* Acceptance and review and/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.

Until recently, law enforcement agencies have not typically taken active steps to inform the public about how to file complaints or how those complaints are handled by the police department. 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 and innuendo 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 develop 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 held accountable to no one. "To serve the public" could become a largely meaningless phrase, as the public is seldom consulted or considered.

Therefore, review of full investigation 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 a 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.

*Complaint Forms.* Some departments use a specific public complaint form to record public complaints. This is a good idea no matter how large or small the agency. 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 may advise the complainant of the penalties for filing a false complaint. This approach is not recommended as a 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.

## 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. The following is a suggested approach for the processing of public complaints that may be used as a prototype for creating such a system or as a basis for comparison by agencies with established systems in place. This approach consists of the following.

- *Supervisors Conduct Preliminary Investigations.* Under this approach, supervisors are directed to 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 CEO.

*Documentation and Forwarding of Complaint.* As noted above, 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 resolved or attempted immediate resolution by an explanation of departmental policy or other actions, this process should still be adhered to. The documentation should note the actions if any that were taken by the supervisor to resolve the complaint and the citizen's reaction. A copy of the complaint should go to the office of 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.

*Provide Complainant with a Copy of the Complaint.* The complainant should receive a copy of the complaint. In some cases, citizens file complaints but receive little feedback as to the final disposition, or indeed 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 reinforces this misperception.

*Explanation to Complainant of Complaint Process.* A copy of the complaint should be provided to the complainant. Additionally, 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.

*Unfounded Complaints.* If the preliminary inquiry shows that the complaint is unfounded because the actions complained of were in accordance with existing agency policy and

procedures, the supervisor should explain to the complainant the steps that were taken to investigate the complaint and the results of that investigation. The supervisor may explain to the complainant the policies and procedures in question in the event that a simple misunderstanding has precipitated the complaint.

Often, the complaint may be immediately resolved by an explanation of department policies or procedures. For example, some citizens are unfamiliar with the field interview procedure and its purpose. Citizens may view this procedure as a means 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.

Some police departments classify complaints as either "service" or "personnel" depending on the issue(s) that are involved. Service complaints or concerns are those associated with public concerns over the way in which police services are provided. A common example is that of delayed response time. These types of public complaints may be handled in the internal investigative process somewhat differently from those involving personnel actions or inaction. 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, such issues as the need to clarify procedures or processes to individual officers or groups of officers, the need for additional training in communication or other interpersonal skills, or simply to determine whether citizen concerns/complaints form a pattern that should be addressed by the department in another appropriate manner.

*Further Investigation.* 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 this action. 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.

It should be clear, however, that OPS may assume concurrent or sole authority over the investigation of any charge of misconduct at any time but must notify the involved supervisor of this action. Such actions risk the development of ill will between officers in OPS and the supervisor involved and these actions should only be taken by OPS where unusual circumstances or facts of the incident warrant intervention. However, allowing OPS to intervene in this manner serves as a check against any potential charges of supervisory inaction or failure to pursue an investigation in a diligent manner.

*Role of the Supervisor.* 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 a desirable remedy. “Positive” discipline, as discussed in Part I of this series, 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 a problem with minor infractions. 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 an verbal or written reprimand for minor infractions or for more serious infractions that still may not merit submission to the department’s formal disciplinary process. These reprimands should be used also in an educational manner for the officer, not 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 investigations, 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 Office of Professional Standards. 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.

### Additional Duties of OPS

Although complaint inquiries will often be initiated by a supervisor, 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 originates from within the department or another state or local governmental agency. The 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. However, OPS can take the initiative to investigate complaints that are not generated by one of the foregoing sources only with the prior knowledge and approval of the department’s CEO or the CEO’s designee. This requirement is necessary to ensure that OPS does not become too independent, engage in “fishing expeditions,” or engage in unauthorized surreptitious activities intended to develop the basis for further internal investigations.

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.
- 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 investigative 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. The goal of the departmental disciplinary process should be to find out why misconduct occurred and to remedy it, not solely to punish. Analysis may also illuminate malfunctions in the disciplinary process itself that may be corrected, such as inconsistent discipline.

Another role of an OPS is to assist in educating the public about the public complaint process in order to facilitate a climate in which the public feels it can be heard by the police department. For this reason it is suggested that annual summaries of complaints investigated and resolved should be made available to the public. These reports should not name the officers involved, but should be 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.

### Endnotes

<sup>1</sup> *Gardner v. Broderick* 392 U.S. 273 (1968); *Garrity v. New Jersey*, 385 U.S. 493 (1967).

<sup>2</sup> 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.

<sup>3</sup> Today this might include the use of such means as facsimile or e-mail.



## 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 false?

- (a) *An Office of Professional Standards (OPS) is normally responsible for problem identification contributing to officer misconduct, prevention of misconduct, and investigations of alleged officer misconduct.*
- (b) *OPS or other internal investigation authority should report directly to the chief of police or chief executive officer of the police agency.*
- (c) *Internal investigative records should be available only to persons with a need and a right to know.*
- (d) *Members of the public should be required to file complaints against a police officer in person.*

2. Which of the following statements is false?

- (a) *Any line officer of a police agency should be authorized to accept, record and file a public complaint for internal review.*
- (b) *Anonymous public complaints should be accepted for review or investigation.*
- (c) *The public should be provided with summary data on a periodic basis concerning the number, nature and disposition of public complaints against police officers.*
- (d) *Abuse of the complaint process by members of the public can and has happened but it is generally not a widespread problem.*

3. Which of the following statements is false?

- (a) *Initial responsibility for review of public complaints should lie with the supervisor receiving the complaint.*
- (b) *Supervisors should normally be given the authority to conduct preliminary inquiries to determine if grounds exist for initiation of a full administrative investigation.*
- (c) *A copy of all public complaints should be forwarded to the OPS and/or the agency chief executive.*
- (d) *If a supervisor can satisfy a complainant by explanation of police procedures or other means, no complaint record need be completed or forwarded to OPS.*

## answers

- 1. (d) Members of the public should not be required to file complaints in person.
- 2. (a) Line officers should not be permitted to accept and record public complaints. They should contact a supervisor or direct/assist the complainant to a supervisor or other superior officer who can take the report.
- 3. (d) Even if a supervisor by explanation or other means can satisfy the concerns of a complainant, a report of the complaint should be made and filed.

## 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.





# 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.<sup>1</sup>

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).<sup>3</sup> 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.<sup>4</sup> 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

<sup>1</sup> 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.

<sup>2</sup> O'Connor v. Ortega, 107 S.Ct. 1492 (1987).

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

<sup>4</sup> 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.

