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Discipline: What is right?

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ABSTRACT

Police administrators must take disciplinary action on police misconduct and their action will always be criticized. With the increase in police labor organizations, a police chief's disciplinary decision will be questioned as to whether the discipline was fair or the process appropriate. Legislation is being adopted throughout the country protecting police officers and their constitutional rights against arbitrary and capricious discipline. This legislation has impacted how and why police agencies award discipline. This research is designed to inform police administrators of the various legislation, commonly referred to as the "Peace Officer's Bill of Rights", and what impact it has on disciplinary issues. The intent is to provide guidelines on developing a fair and equitable disciplinary process, with consideration for the rights of the employee and the employer. The State of Texas has an implied "rights" protection which governs disciplinary practices in police agencies. Therefore, it is important to review legal aspects which have influenced this legislation and how departments across the state have been affected. In reviewing legislation insuring fair practices and the intent behind discipline, this research should provide guidelines for modifying or implementing a disciplinary process which supports the constitutional protections and fair and equitable standards expected in a disciplinary process.

INTRODUCTION

Discipline in a police agency has always been a source of controversy and one in which everybody has an opinion, but no one has the solution. Managers will insist that maintaining discipline is essential for ensuring professionalism. Yet, managers will defer the practice of discipline to those in executive positions. Police officers also agree discipline is important, however they view disciplinary practices as a controlling technique by those in power. Executives and professional law enforcement unions/associations will both agree that discipline is paramount to maintaining integrity. Still, both view it from differing perspectives. It is perhaps the process by which law enforcement executives establish and maintain discipline that creates these differing views. The end result is that discipline and its process are important in a law enforcement agency, yet it is obvious that discipline is often misapplied. The purpose of this research, is to demonstrate that discipline is crucial to the existence of any law enforcement agency and to find a process which will serve the interests of the employer and the employee and meet legal requirements. This researcher has selected several police agencies, varying in size and geography, to review in determining the existence of any guidelines, policies or regulations addressing discipline.

Darrel W. Stephens, Chief of Police, St. Petersburg, Fl., points out that discipline without a philosophical basis only leads to inconsistency and inequity, two areas which are perceived by employees as lacking in any formal disciplinary process (1995). Most police officers receiving disciplinary action will immediately attack the lack of equity in his/her plight. From this, police administrators can conclude that fairness and equity are paramount in any disciplinary process. The foundation of a disciplinary philosophy should build on values that a law enforcement agency must hold sacred. Without a system of values, it will be difficult defend disciplinary action. Police administrators can anticipate that legal constraints, such as employee rights, will play a major factor in how and why they discipline. With this in mind, it is critical to the well being of any agency, to ensure that a disciplinary process follows the legal restrictions governed by legislation and that a process, which is perceived as fair and equitable, is in place.

This research is intended to clarify the purpose of discipline and propose guidelines for developing a process which will withstand challenges. It will focus on the philosophical intent of discipline and support the need for establishing a disciplinary process which will be viewed as fair, equitable and

consistent.

Maintaining disciplinary standards within a law enforcement agency is critical, but the process followed is perhaps more important. As Chief Stephens points out, "discipline, without a fair process, only serves to enhance the potential for chaos and litigation" (1995). Many notable professionals in the field of law enforcement emphasize the need for discipline, so police administrators must recognize its importance and be willing to confront this problem while maintaining a perspective of the philosophical basis of discipline.

HISTORICAL AND LEGAL CONTEXT

Traditionally, discipline is thought of as simply meaning punishment, a negative connotation. To hold discipline in such a light is incorrect and self defeating. Viewed in its totality, discipline allows for correction and a change in behavior (Barker 121). With increasing civil litigation for alleged misconduct on the part of police officers, police managers and executives feel it is important to have a fair disciplinary process. Vicarious liability, such as negligent supervision and negligent training, many times plays a role in how and why police administrators discipline. Simply administering adverse action for misconduct and not attempting to correct or change behavior, will not always protect the agency or its managers from litigation. Therefore, it is important to know why we must discipline. Discipline should be viewed as training and preparation that develops self control and sound character (Swanson 364). Courts have held that police departments have a duty to discipline and correct behavior (Swanson 359). Communities expect that police departments will police themselves and correct inappropriate behavior. In short, police agencies are forced into maintaining discipline within the organization. Almost every law enforcement agency throughout the country has in place an internal process to address misconduct. It is how this process is followed that has given rise to a new area of litigation now haunting police departments.

The expectation for the future is that agencies will continue to expand and place responsibility upon themselves to address internal disciplinary issues with consideration for the rights and privileges of the employee and the employer (Wicker 21). In 1975, a California case, *Skelly v. State Personnel Board*, forever changed the manner by which the employee could challenge a disciplinary action being taken by the employer. The *Skelly* decision is important because it established certain elements which

must be in place to ensure due process. First, an employee must be made aware of the reasons for any adverse action. Second, the employee must be provided with all information used in support of the action. Third, the employee must be given an opportunity to respond to the charges prior to the imposition of any disciplinary action (Wicker 23).

The Fifth Amendment of the U. S. Constitution requires that no person will be deprived of life, liberty or property without due process of law. Therefore, it is important to understand how a liberty or property rights is created. Essentially, there are six ways in which a property right interest is created:

- * collective bargaining agreements which require "cause" for any adverse action**
- * provisions in the employer's ordinances or charter which grant some form of job protection or tenured status**
- * operation manuals of the employer/agency requiring some protection against unjust disciplinary actions**
- * civil service rules or ordinances granting employees some job protection**
- * state statutes which provide some expected form of due process**
- * any oral contracts or promises by the employer which may assure against inappropriate or unjust behavior (Aitchison 100).**

Liberty rights job are much less common than property rights. The concept of liberty rights focuses on the freedom to follow a trade, profession or other calling (Aitchison 103). Essentially, this means that the employer's action, if publicized, would make an officer unemployable as a police officer elsewhere. The issue of property and interest rights then becomes a topic of consideration when developing and administering any disciplinary process.

In many instances, local bargaining agreements have already established certain criteria which must be adhered to when dealing with a disciplinary process. These issues which entitle an employee to an expected amount of protection from adverse action establish the requirements which must be met under the Fifth Amendment of the U.S. Constitution. Today, with court rulings and civil service rules, discipline must be based on fair, consistent and equitable procedures (Swanson 363).

Another concern for police administrators is in the area of internal affairs investigations. As stated before, judicial and civil service hearings will only over-turn disciplinary action if it is determined that the employer over stepped the allowable boundaries of due process. Therefore, it is important to understand the due process requirements attached to internal investigations. Court rulings have set out specific guidelines protecting an employee's rights when subjected to internal

investigations. The purpose here is to eliminate the illusion of coerciveness or inappropriateness on the part of the employer during internal investigations (Wicker 27). Although courts recognize the need for an employer to conduct such internal investigations and has provided this opportunity with some leniency, the focus on an employee's rights will still prevail (Iannone 368).

In *Morrissey v. Brewer*, the court established certain criteria which an employee would be entitled to during an internal investigation. The purpose of was simply to prevent the employer from coercive behavior during internal investigations. The *Morrissey* court required employers to provide:

- * **written notice of all relevant charges**
 - * **disclosure of all evidence prior to hearing**
 - * **an opportunity to be heard and present witnesses**
 - * **the opportunity to confront and cross examine witnesses**
 - * **an opportunity to have a hearing before a "neutral and detached" party**
 - * **a written statement from the employer as to the reasons for such adverse action**
- (Morrissey).**

The focus of any internal investigation must not only be concerned with the facts surrounding the incident, but also must include these protections for the employee. Some chiefs may see this as a hindrance, but the reality is that these protections will cause police departments to implement a process which will accomplish the purpose of discipline and ensure that employee litigation is reduced against false claims of arbitrary or capricious discipline (Burpo 228).

The right against self-incrimination, representation and "pre" and "post" deprivation hearings are generally associated with an employee's due process protection. However, these are three critical areas which need review individually.

First, an employee is entitled to protection against self-incrimination, but courts have consistently held that this protection only extends to criminal charges. In *Garrity v. New Jersey*, the Supreme Court held that an employee may be compelled to answer questions under threat of disciplinary action and as a condition of his/her employment. Although, an employee may invoke his/her Fifth Amendment right against self-incrimination, the *Garrity* Rule prohibits an employee from refusing to answer questions narrowly directed at his/her employment. Simply, this means that an employee may be compelled to answer incriminating questions strictly for the purposes of determining fitness for employment, however, those statements may not be used in any subsequent criminal proceedings. The *Garrity* Rule requires a law enforcement agency, prior to questioning an employee, to do the

following:

- * **Order the officer to answer the questions,**
- * **Ask questions which are specifically, directly and narrowly related to the officer's duties or the officer's fitness for duty, and**
- * **Advise the officer that the answers to the questions will not and cannot be used against the officer in criminal proceedings (Garrity).**

Should the officer still refuse to answer questions, he/she may be disciplined for insubordination.

Second, in *National Relations Board v. J. Wiengarten*, the Supreme Court ruled an employee is entitled to representation during the disciplinary process. The *Weingarten* Rule is still evolving and there is much discussion as to the limitations of representation. It is important, however, to understand that an employee is entitled to representation, either by counsel or a local union member. The Supreme Court established the following rules under *Weingarten* to determine representation:

- * **The employee must reasonably believe that discipline may result;**
- * **The employee must request such representation; and**
- * **The exercise of the right to representation cannot unduly interfere with legitimate needs of the employer (Weingarten).**

Third, is the protection of a "pre" or "post" deprivation hearing. In *Cleveland Board of Education v. Loudermill*, the Supreme Court established the so called *Loudermill* hearing. Essentially, this rule assures that an employee, once threatened against property and liberty rights, is entitled to a hearing. The extent of this hearing will be determined by "pre" disciplinary action or "post" disciplinary action. There is considerable disagreement as to the time such a hearing must occur. The intent of this hearing, however, is to afford an employee an opportunity to present his/her side. The pre-deprivation hearing may be informal and requires that the employee be notified of the intended action. This hearing may be in person or in writing. Some courts have stated that if a post-deprivation hearing is in place, an employee need not be given a "pre-deprivation" hearing.

The post-deprivation hearing is always after the fact. These post-deprivation hearings generally are of a formal nature and may be heard before civil service, a court or an arbitrator. It is during this process that disclosure of witnesses and/or evidence must be provided to the employee. This hearing can be equated to any criminal proceeding in that it is a full evidentiary hearing (*Loudermill*).

LITERATURE AND PRACTICE

A delicate balance exists between an agency's prerogative to discipline and the employee's rights. It is evident that any creation of a property or liberty right will entitle an employee to due process. Nationally, police departments are being scrutinized by professional law enforcement unions/associations on how they handle disciplinary issues. These unions/associations are becoming a factor in the political arenas and stressing the need for a "Peace Officer's Bill of Rights". California, Nevada, Rhode Island and Maryland already have comprehensive statutory bills of rights for peace officers. The general theme of this legislation is simply to ensure a fair and equitable working relationship between the employer and its employees.

In those states not having rights legislation, property and liberty rights may be inferred by the local civil service rules or through collective bargaining agreements. Many local municipalities, such as Houston, El Paso and Dallas, have enacted local civil service rules modeled after the state Civil Service Statute, Chapter 143 of the Local Government Code. However, many local unions/associations, such as the El Paso Police Officer's Association and the San Antonio Police Officer's Association, have entered into agreements with their cities, essentially creating property rights. Included in these agreements are procedures on how internal affairs investigations are conducted. These procedures will dictate when and where the interview will take place, what grievance procedures are applicable and that the employee will be made aware of the nature of the alleged misconduct.

Smaller agencies, such as Horizon City and Mission Police Departments have internal rules and procedures governing misconduct issues. These internal procedures also include the methods used by the agency to investigate misconduct issues. There is consistency in these agreements and internal procedures to the elements of *Morrissey v. Brewer*.

David Iannone suggests that discipline should always remain a managerial right, however, managers must look at discipline differently. The traditional use of discipline as a punishment is obsolete (Iannone 469). Managers must develop a philosophical basis which centers around fairness, consistency and correction. The "bill of rights" is not designed to prevent managers from imposing sanctions, but rather it is designed to ensure that discipline brings about a change in behavior. Law enforcement agencies must consider discipline as an opportunity to develop a higher level of professionalism.

Philosophically, discipline should be designed to correct and change behavior, through teaching, coaching and instructing. The purpose of discipline should focus on correcting an employee's behavior. The Houston Police Department has established a disciplinary philosophy based on the following:

- * The employee has a right to know the rules they are expected to work under.**
- * The employee has a right to equal treatment.**
- * The employee has a right to have their punishment fit the crime.**
- * The employee has a right to basic due process, which includes the right to:**
 - know the charge and see the evidence;**
 - examine and question witnesses;**
 - present evidence on their behalf;**
 - make the employer prove its case and produce its evidence or witnesses at some kind of hearing (Houston PD).**

Houston's objective is to provide a positive and constructive disciplinary process which ensures the employee's constitutional protections and allows for a fair and equitable solution. In reviewing various other policies, such as the San Antonio Police Department, the Dallas Police Department and the El Paso Police Department, there was no philosophical foundation supporting the disciplinary process (see references). Although the El Paso Police Department has not been challenged regarding its disciplinary process, it is important to understand the intent behind due process and develop a foundation on which constructive discipline can be built.

Police departments must provide a constructive and positive disciplinary program to insure the working relationship between the employee and the employer is fair. For years, discipline was designed simply to punish an officer's behavior. This intent has been condemned by courts as being arbitrary and capricious. There was no concern for the welfare of the employee or the well being of the organization (Barker 129). In many instances, discipline was believed to remove liability from police agencies. Today, vicarious liability issues demand that police agencies take some action on misconduct. To simply discipline without expectation for correction or change in behavior, will not insure agencies against civil litigation and may bring employee protests against this disciplinary action. Coupled with the inherent litigation which will occur due to police conduct, police agencies would do well in following a positive and constructive disciplinary process which will reduce the amount of litigation surrounding employment practices.

All law enforcement agencies have a duty to investigate any and all complaints of misconduct regardless of the severity. As such, police departments have internal affairs divisions which specialize in investigations of misconduct. The smaller departments, such as Katy, Horizon City and Roanoke do not have an internal affairs division, but delegate this responsibility to a supervisory staff member. Internal affairs divisions are designed to investigate misconduct and serve as a repository for records of disciplinary issues. How the internal affairs division investigates cases has been prescribed by internal rules and procedures, local civil service rules, or state laws. The Officer's Bill of Rights has had a significant impact on the procedures used by internal affairs divisions. Every department in Texas, having an IAD unit, reported having procedures in place which protect the interests of the employee. How and when an interview is conducted, informing the accused officer of all charges, identifying the investigator by name and rank and prohibiting coercive language and behavior are common throughout the policies this researcher reviewed. It is important to ensure that prohibitions against inappropriate behavior during an internal investigation are in place, to prevent any unnecessary litigation against warranted discipline.

DISCUSSION OF RELEVANT ISSUES

Police departments are one of many government agencies subject to review, and because of the services they provide, tend to be scrutinized by communities more closely (Swanson 360). For this reason, it is important that a mechanism exists to allow citizens an opportunity to complain of alleged misconduct or inappropriate behavior. All police departments have established an internal affairs division or provide some process for investigating issues of misconduct. Court rulings and civil judgements for police misconduct have emphasized the need for police departments to police themselves and impose sanctions for misconduct.

Nationally, police labor organizations are lobbying state legislatures to pass legislation granting some form of an officer's bill of rights (Sheehan 466). In many states, such a measure already exists. The State of Texas and its municipalities allow for similar rights through civil service rules, state law or collective bargaining agreements (Texas Local Gov't). The Fifth Amendment to the U.S. Constitution provides that "no person shall be deprived of life, liberty or property without due process of law". Most departments, such as the Houston Police Department, the El Paso Police Department

and the San Antonio Police Department, have created the right to liberty and property by rules or procedures which guide the process of disciplinary issues.

Court rulings dictate why and how police departments can discipline. These rulings extend into the procedures used by departments in investigating complaints of misconduct. Few small departments reviewed by this researcher have revamped their disciplinary process. However, every large department reviewed had written regulations on how an internal investigation is conducted. In many departments, such as San Antonio, the local collectively bargained agreement proscribes how internal affairs investigations are conducted. Many of these policies or agreements are specific, such as, officers will not be treated with any harsh, profane vulgar or abusive language during the interview. While others are general, such as, officers will not be subjected to inappropriate behavior while being interviewed. Civil service rules and internal policies include more general comments such as, all employees being the subject of an internal affairs investigation shall be treated with professionalism and decency.

In reviewing various departments, this researcher found consistency in procedures, regulations and agreements to be followed prior to making a disciplinary decision. The Houston Police Department has a four block philosophy in evaluating the need for any disciplinary action. This philosophy removes any taint of arbitrary or capricious action by ensuring that the employee's rights are considered and all factors surrounding the action are evaluated prior to making any disciplinary decision. It signifies that the purpose of discipline is to correct behavior in the least intrusive manner and to ensure the constitutional protections of the employee.

A review of the various department policies, civil service rules and collective bargaining agreements obtained by this researcher found the following common statements:

- * interviews shall be conducted at a reasonable hour; interviews off duty will be compensated;**
- * notice of the charges shall be provided; name and rank of investigator shall be provided;**
- * officers will not be subjected to offensive language; will not be threatened with punitive actions (unless refusal to answer questions is apparent, see *Garrity v. New Jersey*);**
- * recordings of the interview may be done at the request of either party;**
- * right to representation during the process.**
- * right to appeal the disciplinary action; right to cross examine and present witnesses;**
- * right to be free of retaliation during grievance process**

Many of the larger departments, such as Houston and Dallas, tend to stress training needs verses

disciplinary action. Chief Nuchia, of the Houston Police Department, indicated the disciplinarians of his department attempt to identify training needs in lieu of punitive action. He stated that in many instances, he found the misconduct was related to a training issue or lack of training. By informing an employee of all facets of the investigation and the intent and need to administer discipline, an employee will be in a better position to understand the decision making process. Chief Nuchia believes that this philosophy, which is built on training and correcting, will help in reducing the repetitive mistakes and inevitably improve the quality of police service. This approach will also insure that civil litigation against misconduct will be reduced (Nuchia).

Two major concerns of employees are that they be allowed to present their side and that their needs be considered. Legislation exists insuring that a disciplined employee has an opportunity to be heard. Almost every police department has some type of a formal appeal process for aggrieved employees. However, few have an intermediate process. The Houston Police Department allows for an informal hearing between the employee and an investigator (Houston PD). The purpose of this hearing is to afford the employee an opportunity to know exactly what is occurring. Basically, the employee is told of the specific charges and the anticipated results. The employee is allowed to rebut the facts and have some input into the final outcome. After this, a final decision is reached. Chief Nuchia states that this step has significantly reduced the amount of contested disciplinary action, a cost savings to the department and city (Nuchia). The importance in any disciplinary action is that consideration has been given to the employee, the act, the employer's needs and to insuring a correction of that behavior (Stephens).

Implementing a disciplinary process which follows the findings of this research will not create a financial burden on a police department. Most of what has been discussed is already in place in most departments.

CONCLUSION AND RECOMMENDATIONS

Traditionally, discipline in police agencies was designed to punish an employee's conduct. There was little or no consideration for changing behavior through constructive means, much less consideration for the employee's constitutional rights. Historically, discipline was arbitrarily and capriciously administered. Courts and the National Labor Relations Board have now provided some

relief against unjust employment practices.

This research has shown that there is a need to evaluate disciplinary programs and implement procedures which insure that constitutional rights of police officers are protected. Because society expects high standards and professional service, police agencies must continue to correct misconduct. No one will question that police chiefs are responsible for addressing misconduct, however, the practices selected by chiefs will be questioned.

There is a rapidly growing push towards officer's rights in disciplinary issues. This research has identified those rights and procedures which police labor unions and associations are stressing. Police departments must recognize that they have a dual responsibility on disciplinary issues; first, to correct inappropriate behavior, and second, to ensure protection of officers' rights. In most jurisdictions, there already exists some form of protection, and in those which do not, it is vitally important to the interests of the employer to establish procedures which serve these two roles. This mandated change in disciplinary procedures will force police administrators to adopt a more positive and constructive attitude toward the disciplinary process. Emphasis should be placed on training, correcting and changing behavior of an officer (Burpo 124).

There is probably no ideal disciplinary process, but there are foundations from which to build on. Any disciplinary process which includes the following guidelines should withstand the concerns brought on by employees and police labor unions and associations. A parallel benefit of implementing these guidelines is the reduced costs associated with litigation against unfair discipline and a more efficient police service which should reduce litigation associated with misconduct (Swanson 368). The purpose of the following guidelines is to provide a structured disciplinary decision making process with consideration for employer and employee relations.

Example of a Disciplinary Procedures

- 1. Purpose of discipline is to correct behavior and the least intrusive measure should be used.**
- 2. Disciplinary procedures should strive for consistency in the application of discipline.**
- 3. Minor infractions should be handle through training, correcting or counseling.**

- 4. Discipline on repeat infractions should be consistent with progress discipline.**
- 5. All discipline decisions should include mitigating circumstances;**
 - A. The employee's motive,**
 - B. The employee's past and present work performance,**
 - C. The employee's commendations,**
 - D. The degree of culpability,**
 - E. The truthfulness of the employee,**
 - F. The employee's disciplinary history,**
 - G. The severity of the infraction,**
 - H. The acknowledgment of the employee's error or mistake,**
 - I. Any other mitigating factors relevant to the incident.**

In considering disciplinary measures, police managers must carefully weigh disciplinary objectives and employee rights as well as legal issues before taking any disciplinary action. In all but the most blatantly serious situations, police managers should take every effort to emphasize a change in behavior, not to punish (Sheehan 468).

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Dallas Police Department Operations Manual, 1994

San Antonio Police Officers' Association Collective Bargaining Agreement, 1992

El Paso Police Department Operations Manual, 1994

El Paso Police Officers' Association Collective Bargaining Agreement, 1992

Midland Police Department Operations Manual, 1990

Horizon City Police Department Operations Manual, 1992

Katy Police Department Internal Operations Manual, 1990

Mission Police Department Internal Affairs Operations Manual, 1990

Roanoke Police Department Operations Manual, 1994

Village Police Department Operations Manual, 1994

Appendix A

Six standard defenses offered by police officers against disciplinary action (Aitchison 57):

- * That the charges have not been factually proven;
- * That the punishment imposed by the employer is disproportionately severe under all the circumstances;
- * That the employer did not conduct a thorough, or fair, investigation into the incident;
- * That other employees who engaged in conduct similar or identical to that of the officer were not treated as harshly by the employer;
- * That the officer's misconduct was the product of action or inaction by the employer, i.e. failing to train properly, supervisor contributed to the atmosphere which lead to the misconduct;
- * That the employer did not take into consideration the officer's good or exemplary work history;
- * That the employer did not take into consideration a variety of mitigating circumstances, including the officer's state of mind at the time of the alleged misconduct;
- * That the officer was not subjected to progressive or corrective discipline;
- * That the employer was motivated by anti-union bias;
- * That the officer is not likely to engage in similar misconduct in the future;
- * That the officer was not accorded procedural due process in the disciplinary investigation.