

The Bill Blackwood
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Revising the Brazos County Sheriff's Office Policy on Employee Discipline

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ABSTRACT

Employee discipline is one of the personnel issues that have been the basis of costly lawsuits against criminal justice practitioners. Subordinate personnel can sue supervisors and administrators if it is deemed that the supervisor or administrator has violated the subordinate's rights under *Title 42 United States Code, Section 1983*. This trend is expected to continue.

The purpose of this research project is to identify the legal aspects of employee discipline in government agencies, define the meaning of progressive discipline, and provide information to the Sheriff of Brazos County.

This research covers current statutes, training manuals for law enforcement, and current policy and procedures of five other law enforcement agencies in this state. Sections dealing with discipline were compared to the policy and procedures of the Brazos County Sheriff's Office.

This researcher found that police training manuals and literature recommends the use of positive, progressive discipline measures to correct employee behavior problems. One of the most common problems found in progressive discipline is officer misconception. The policy on discipline for the Brazos County Sheriff's Office contains the minimum requirements for legality. But, it could benefit from revision and clarification of some of the sections.

This researcher recommends that changes be made in the areas of directives and training. A consistent procedure for reviewing, updating, and purging of written directives is necessary. A method of ensuring that each employee receives a copy of policies, procedures, and instructional memos is required. Supervisors must receive training in order to provide training to employees in this area. A written guideline for supervisors, that includes examples of violations, would be beneficial. Specific recommendations are listed in the appendix.

TABLE OF CONTENTS

Section	Page
Abstract	
Introduction	1
Historical or Legal Context	2
Review of Literature or Practice	5
Discussion of Relevant Issues	8
Conclusion/Recommendations	11
Bibliography	
Appendix A	

Introduction

Employee discipline is one of the personnel issues that fall under *Section 1983* statutes. Subordinate personnel can sue supervisors and administrators if it is deemed that the supervisor or administrator has violated the subordinate's rights in disciplinary actions (Barrineau, p.71). All law enforcement agencies must develop, maintain, and follow written policies and procedures. "However, if an agency does have policies and procedures (and it must), it has to be absolutely sure to follow those policies and procedures to the letter. If it can be shown that an agency has no policy, the agency is in trouble; if it can be shown that an agency has a policy but did not follow it, the agency is in greater trouble" (Barrineau, p.84).

The purpose of this research project is to identify the legal aspects of employee discipline in government agencies, define the meaning of progressive discipline, and provide information to the Sheriff of Brazos County. The Brazos County Sheriff's Office has a written policy and procedures manual. However, the section on employee discipline has not been revised since 1993. The current written policy has not been followed to the letter in all cases.

Law enforcement administrators recognize that *Title 42 United States Code, Section 1983* has been the basis of tens of thousands of lawsuits against criminal justice practitioners (Barrineau, p.7). This trend is predicted to continue. In order to prevent a cause of action under *Section 1983*, or any other statute, the administrator must take the proactive approach. This approach includes some sound principles: know the law; develop and implement appropriate policies and procedures; train; supervise; and document. According to Barrineau, management changes are usually the most cost-effective method to prevent lawsuits, and positive changes foster trust for the criminal justice system and its personnel (p.95).

Although the intended audience of this research is primarily the Sheriff of Brazos County, other administrators of law enforcement agencies in Texas will benefit from this information. Indeed, any police agency can be sued under *Section 1983*.

This information is based on current statutes, training manuals for law enforcement, and current policy and procedures of other law enforcement agencies in this state. Sections dealing with discipline will be compared to the policy and procedures of the Brazos County Sheriff's Office to decide if they are comparable. A goal has been set to revise any section on discipline in the Brazos County Sheriff's Office Policy and Ethics Manual that does not meet the highest standards for being fair, equitable, and consistent.

Historical, or Legal Context

Nineteenth century employers hired and fired employees as they pleased until the early 1900's. The Institute of Industrial Relations cites a famous conspiracy case in 1827, *Commonwealth v. Moore and others*, which makes clear the extent of the power of employers. "The employers have an undisputed right to discharge any workman. . . when conceived that his continuance was no longer conducive to their interest. . . the discharge was a matter of perfect right, without the assignment or even the existence of reason" (p.1). This is no longer true.

Legal issues must be the first concern when writing policy dealing with discipline and termination of employees. Criminal justice practitioners recognize *Monroe v. Pape* as the *Section 1983* case that started the trend to filing suits in federal courts for alleged violations of constitutionally protected civil rights by law enforcement personnel (Barrineau, p. 11). Because all law enforcement officers, jail personnel, sheriffs, police chiefs, and state officials in criminal justice agencies act under "color of state law" when performing their duties, they can be sued under *Section 1983*. 1978 was the year that the portion of *Monroe* that granted government

agencies immunity from *Section* 1983 actions was overruled by the Supreme Court. The court held that counties, municipalities, and other units of local government could be sued and also, that suits against government officials in their official capacities was tantamount to suits against the unit of government (Barrineau, p. 27).

Kappeler relates the finding of the First Circuit Appeal Court case (*Bordanaro v. Mcleod* 1989) that found municipal liability for failure to train and for the promotion of an official policy based on custom. This *Section* 1983 civil rights action found liability against not only the municipality, but also the mayor, police chief, and individual officers. The findings were based on: operating under rules developed in the 1960s; the rules failed to address modern standards; failure to train officers and supervisors; failure to discipline officers involved in the incident; and failure to investigate the incident for an entire year after it occurred (Kappeler, p. 52-53).

The law holds now that a person can be held liable for acts that violate another person's rights, and also that a supervisor can be held liable for his own negligent conduct that was the cause of a subordinate's actionable conduct (*McClelland v. Facticeau*, 610 F.2d 693 10th Cir. [1979]). There are several types of negligence theories that are being presented under *Section* 1983 causes in the federal courts. Some of the ones relating to supervisors and administrators include negligent hiring, negligent retention, negligent assignment, negligent supervision, negligent training, and negligent direction. Case law exists for each of the negligence theories. A wise administrator will pay close heed to those theories that impact discipline and termination policies.

Section 1983 suits can also be filed if the administrator or supervisor is found to have violated subordinates' rights in disciplinary actions and the firing process. Civil suits can occur even when the employment relationship is governed by the employment-at-will-doctrine.

Property interest is an interest in a particular job and must be conveyed by state or local authority such as local ordinances, implied contracts, and possibly, employee handbooks. A liberty interest, however, is an interest in a person's suitability for work in a profession and is not applicable under "at-will" employment situations. Liberty interests are protected under the 14th Amendment of the U.S. Constitution (West, p. 11). The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty or property, without due process of law" (Data Research, Inc., p. 39). In *Elrod v. Burns*, a newly elected sheriff fired employees for not being affiliated with a certain political party. The Supreme Court stated that "the single substantive question involved in this case is whether a non-policymaking, non-confidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing." The answer was, he cannot. (*Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed2d 547 [1976]).

I

Barrineau makes this point clear by clarifying the fact that a sheriff or any other department head cannot fire an employee "at his pleasure", even though there is a common belief that they can. "A policymaker or confidential employee has no rights to employment and certainly can be terminated at the pleasure of the hiring authority. All other employees, however, have liberty interests and possibly property interests in their employment. Therefore, the requirements of due process must be met in order to terminate an employee, even when the termination is for cause" (p. 75). The Brazos County Employee Handbook refers to cause two times. Once in Section 12.01, "Disciplinary action may be taken against an employee for just cause" and again in 13.05 "An employee who has completed his or her initial probationary period may be dismissed only for just cause by the department head" (p. 30-33). According to Nathan F. Iannone, editor of *Supervision of Police Personnel*, Supreme Court cases dictate six

minimum requirements of procedural due process: written notice of the specific charges; disclosure of evidence to be used; opportunity to be heard and present evidence and witnesses; right to confront and cross-examine adverse witnesses; a hearing before a neutral and detached body; and a written statement by the body as to the evidence relied upon and reasons for their actions (p.224).

However, the Texas Association of Counties training material on *Mitigating Liability in County Jails* says that: "Even though a governmental entity acts in a manner which violates its own rules, or those of the State, there is no due process violation actionable under *Section 1983*, as long as appropriate individuals ultimately receive adequate process" (Texas Association... p.18). In order for procedural due process claims under *Section 1983*, a person must allege that both a deprivation of property by State action occurred, and that State procedures available for challenging the deprivation did not satisfy the requirements of due process (*Collins v. King*, 743F.2d 248 [5th Cir.1984]).

Review of Literature or Practice

In the review of police training manuals, definitions of discipline varied little from one author to another: "Discipline is the process by which the employer insures that each employee's conduct conforms to standards set by the employer" (*Supervisor's Handbook*, p.1). Progressive discipline is a system that begins with the least severe response and gradually moves to the more serious action. This is the system advocated in most police training manuals. The Institute of Industrial Relations' recommendations for a policy statement are superior: alleviate unreasonable fears; be reasonable and flexible; communicate realistic expectations; supply all the essential information; and remove obstacles to achievement (p. 7-8).

Ethical standards are stressed through out police training manuals. Good ethics require courage and the ability to ask hard questions. This process should begin at the top level in any organization. "Management must always do the right thing and must always "sweat the small stuff," says the Director of the Department of Correctional Services in Lincoln Nebraska in an article on ethics in The Corrections Connection Network (Caramanis). "The proactive approach to police corruption is not only the appropriate choice, but also the only ethical choice, since to ignore misconduct is to condone it" (Rothlein, April 1996). The authors of *Local Government Police Management* set this same standard in the chapter on integrity. "When appropriate, departmental managers need to have courage to accept the blame for having tolerated systemic defects that virtually compelled the officer in question to mi3behave" (Geller, p. 265). If a supervisor fails to take action, they may be seen as condoning deviance. This often becomes the "unstated" policy of the department (Kappeler, et al. p. 247).

There are many variations in law enforcement agencies' policy and procedure manuals in the area of discipline. Ten agencies were asked to provide policy copies of discipline and conduct matters. Five agencies complied. The agencies that responded are Bell County, Collin County, Montgomery County, Travis County, and Farmers Branch Police Department. The agencies' policies were examined as to how they addressed six areas relating to discipline. Three agencies use progressive discipline. Three agencies use a philosophical foundation to support the discipline process. Only two agencies have the employee right to a notice in the policy. Only two confirm in the policy that a pre or post hearing is conducted. Two out of five confirm an appeal process exists. All five agencies assign the responsibility for discipline to the line supervisor.

Montgomery County (1998) and Collin County (1998) both include The Law Enforcement Code of Ethics in the body of their policy and procedure. Montgomery County has extensive language addressing the use of alcohol and drugs by employees. However, their discipline section is rather short comparatively. Collin County has a notice procedure, but no other category is affirmative out of the six. They outline their dress code in detail, but not their conduct code. Bell County (1985) is very brief in their entire section on discipline, but they do advocate progressive discipline. The City of Farmer's Branch (1996) is the only agency that has an internal affairs division outlined in its policy. This agency has a very detailed accounting of how discipline should be carried out in their agency. Although they do not use a philosophical foundation, they do start with a counseling form or oral reprimand. Travis County (1998) goes to great lengths to explain how an employee can be removed from a duty post, be assigned a temporary non-public contact position, be placed on administrative leave, and even arrested by their own agency.

Although all five of the agencies that responded to the survey are larger than Brazos County, they did not all meet the same standards as the research material indicates is appropriate for policy and procedures in discipline matters. In the manual, *Executive Summary*, by the International Association of Chiefs of Police, there are ten elements that should be addressed in major discipline procedures. These elements are: "establishment of standards and rules of conduct; establishment of mechanisms for detecting violations; intake of misconduct complaints; assignment of responsibility for handling complaints; temporary and emergency suspensions; investigation, charging; resolution; imposing sanctions; and appeals" (p.11).

The City of Farmer's Branch is the only agency in the survey that addresses each of these issues in their policy. However, the same training manual indicates the need for the "human

element" in discipline. Farmer's Branch policy has sections that read like a law statute, and the employee may very well feel that negative discipline is the goal of this department. In contrast, the Travis County Sheriff's chapter on discipline is easily interpreted as respecting the employee and their rights. Positive recognition is addressed as well as corrective measures such as formal and informal training, coaching, and counseling. The role and exact authority of supervisory personnel is clearly linked to disciplinary measures. The areas lacking are in charging and in resolution. The policy does not clarify that the officer should be advised of the violation of a rule, the basis of the charge, and what steps to take in response. The right to a due process hearing is not addressed in this chapter.

The legal aspects of employee discipline in these government agencies vary widely from one extreme to another. It is clear that administrators of law enforcement agencies in Texas can benefit from a regular review of their policy and procedure to ensure compliance with law, as well as fairness and equitability.

Discussion of Relevant Issues

The issues involved when an agency reviews its policy and procedure guidelines include examining the following areas: U.S. Constitutional Law, Statutory Employment Laws, Contract Laws, and Civil Tort Laws (Van Meter & Associates, p. 4-6). This research focuses on the elements of Constitutional law. All law enforcement officers act under "color of state law" and can be sued under *Section 1983*. *Section 1983* lawsuits against law enforcement agencies are being filed in the thousands each year and are expected to continue.

Property interest in a job is conveyed by state or local authority such as: state constitution, statutory law, local ordinances, implied contracts, bargaining contracts, and possibly employee handbooks. Liberty interest is not covered under "at-will" employment.

These interests are protected by the equal protection clause of the 14th Amendment. The minimal elements in a due process proceeding must be afforded to each employee.

Not only can the individual officer be sued for violating another person's rights, but also the supervisor of that individual if the supervisor's conduct is found to be the cause of a subordinate's actionable conduct. Administrators held responsible for policies and customs resulting in police misconduct can be sued under negligent direction.

Police training manuals and literature recommends the use of positive discipline measures such as counseling, coaching, and training as the first steps in correcting employee behavior problems. Progressive discipline is the preferred method when corrective methods are not enough to bring the employee back into the line of accepted standards.

The review of the various department policies, constitutional law, and police training manuals advocates that certain principles be included in policy on discipline and termination. The following guidelines must be met in order to provide discipline that is fair, equitable, and consistent:

1. Make sure that the purpose of any rule is to achieve the goals of the organization and that all rules are reviewed on a regular basis;
2. Make sure that first-line supervisors clearly understand their responsibilities in detecting misconduct and their authority to enforce penalties is stated;
3. Make sure that there is an efficient procedure for intake of citizen complaints;
4. Make sure that departmental written procedures spell out the handling of the complaint, allowing for complaints of a minor nature to be investigated by the immediate supervisor and major concerns by internal affairs;

5. Make sure that a provision for temporary relief of officers from active duty (normally with pay) is in place;
6. Make sure that the suspension process is fully explained as a period that the officer is not on the payroll;
7. Make sure that the legal restrictions on investigations are correctly followed and a decision is made early on as to whether the act may be criminal;
8. Make sure that the filing of charges against an officer tells the officer that they are being charged with a violation of rules, states the reasons for the charge, and informs them of the steps to take to answer the charge;
9. Make sure that the six federal requirements of due process are met;
10. Make sure that corrective measures are considered when imposing sanctions and that any negative discipline fits the violation with a clear determination as to whether the violation was committed out of ignorance, carelessness, misunderstanding, or intention.; and
11. Make sure that the process of appeal is clearly defined in the policy.

These eleven guidelines cover the requirements of written policy and procedure. Any agency that abides by these guidelines would have a well-written discipline policy. However, having policy in place is only part of the ethical requirements to having self-disciplined employees and to preventing litigation. Captain Cerjio Martinez found in his research on discipline that " 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" (p.2).

In reviewing the policy for Brazos County and comparing it to the law enforcement agencies surveyed, the result is mixed. Although Brazos County policy contains the minimum basics for legality as it is written, the implementation is an issue that is at risk. Following policy and procedures is mandatory in avoiding lawsuits. Administrators cannot maintain credibility if compliance to their own policy is in question.

Making changes in the current policy of Brazos County is a very cost-effective way for management to prevent lawsuits and foster trust for its personnel. The cost is insignificant.

Recommendations

The goal of this research has been to compare the Brazos County Sheriff's Department Policy and Ethics Manual to current statutes, police training manuals, and other agencies of comparable size in the sections dealing with employee discipline and termination. Suits against law enforcement agencies continue to increase in numbers under *Section* 1983 cases. Effective administration calls for proactive procedures to prevent a cause of action: know the law; develop and implement appropriate policies and procedures; train; supervise; and document.

Many areas of this research indicate that there are common problems found in progressive discipline policy procedures. One problem is officer misconception. Most writers agree that the officer's understanding of the disciplinary system is linked to the management style of the agency. This researcher agrees that positive changes are needed in order to limit the misunderstanding of regulations by supervisors and line officers. The Brazos County Sheriff's Office can benefit from some of the solutions recommended in the research material by working with the following directives and training:

- Develop a consistent procedure for distributing policies, procedures, instructional material, and memorandums that ensures each employee receives a copy.

- . Develop a procedure for reviewing, updating, and purging of written directives.
- . Develop a precise format for issuing specific notice to individuals.
- . Include in the notice: exactly what the employee did in violation; how the violation affected the agency's needs; what has to occur to avoid future disciplinary action; the time frame for the demonstration of corrected performance; and exactly what will happen if correction does not occur.
- Develop training for supervisors and make handling of discipline an evaluation item for them.
- Have supervisors train officers at shift meetings on policy interpretations.
- Develop a supervisory guideline that includes an explanation of the regulation of conduct.
- Include in the guideline: what is required or prohibited; an explanation of why the regulation is important; examples of actions that would illustrate violations and non-violations of the regulation; and an enforcement guideline (Van Meter & Associates, Inc.).

Specifically, several revisions are recommended for the Brazos County Sheriff's Office Policy and Ethics Manual. These recommended additions or changes are attached to this research for the Sheriff's consideration. The Sheriff's values and personal ethics are an important factor behind the need to maintain policy of the highest integrity. As a leader in this community, the Sheriff must set the highest goals for county law enforcement.

This researcher believes that these changes will bring the policy of the Brazos County Sheriff's Office up to the quality standard that was set by the largest law enforcement agency covered in this material. Brazos County must continue to keep pace with the latest changes and

recommendations made by leaders in police management. Revising policy and procedures, dedicating the Department's goal to one of consistent implementation, and training supervisors, will enable the Brazos County Sheriff s Office to attain the goals as set forth in this research.

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APPENDIX A

The following revisions are a combination of all sources used in this research and are recommended revisions to the Brazos County Sheriff's Office Policy and Ethics Manual:

1. Include a philosophical statement in Section 14.0 Administration of Discipline that reassures employees that no greater level of discipline than necessary will be used. All discipline will be administrated fairly, impartially, and in a manner that will promote employee and community respect for the office.
2. Add a section that a copy of the policy and ethics will be provided, as part of the new employee processing and that training in the manual will be accomplished through formal and in-formal methods.
3. Consider adding Jail Administrator/Chief Deputy in every place that the words, Chief Deputy, exist in the policy to clarify the Jail Administrator's dual authority to act in regards to the correction staff
4. Change Section 14.4 (1) to Positive and Corrective Measures. Along with the positive recognition section that currently exists, add sections stating that supervisors provide In-Formal and Formal Training and Counseling to enhance existing skills, forestall problems, or correct specific deficiencies.
5. Begin the section on Minor Incidents Resulting from Censurable Conduct with a statement that first-line supervisors have the authority to take designated discipline measures.

6. Clarify that training and counseling forms are kept in the supervisor's file (unless conduct is not improved) and not placed in the permanent file.
7. List the exact measures that a first-line supervisor has the authority to take without consulting a higher command (including temporary relief from duty).
8. Consider setting a time limit (30 days) on the acceptance of personnel complaints, with exceptions for criminal or justifiable reasons for delay.
9. Review the form named in the current policy, Record of Complaint Against Employee, to determine if it should be used or purged.

Consider adding the following sections to explicitly outline the employee's rights during internal investigation:

- . Requirement to Answer Questions;
- Counsel's Presence During Interview;
- . Miranda Warning;
- Garrity Warning;
- Search of Equipment; and
- Special Examinations.

A full explanation of internal investigation proceedings under these headings will alleviate some of an employee's fears and concerns during major investigations.

The Sheriff's title should be removed from all areas that designate him as the person invoking disciplinary measures. The Jail Administrator or Chief Deputy invokes disciplinary action. The Sheriff is the one who makes all the decisions on appeals resulting from their action.

These revisions will bring the policy of the Brazos County Sheriff's Office in full compliance with each statute researched in this study. The information gained from studying other agencies' policies is incorporated into these recommendations. This information should supply the Sheriff of Brazos County, as well as other agencies, enough data to ensure a policy that is fair, equitable, and consistent.