

Police Discipline: Legal Process & Issues



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Topics For Discussion

- Discipline Definition/Forms
- Disciplinary Process
- Government burden in discipline cases
- Employment status and discipline
- The exhaustion of administrative remedies
- Public policy considerations
- Due process
- Common defenses

Discipline Defined

- Discipline - any step taken by an employer aimed at eliciting a desired response or non-response from an employee
- Purpose of discipline
 - To punish past behavior
 - To improve current behavior
 - To guard against future behavior

Forms of Discipline

- Verbal warnings
- Formal reprimands
- Transfers
- Demotions
- Suspensions
- Discharge (the ultimate sanction)

Progressive Discipline

- Defined - principle of imposing successively more severe penalties on an employee each time an offense is repeated.
- Communicates a message – conformity!
- Progression - depends on gravity of conduct.
- Single serious offense permits termination.
- Supervisors are more accountable.

Progressive Discipline

EMPLOYEES MUST KNOW:

- 1) Expected standards of behavior
- 2) What sanctions will be imposed if the standards are violated

Progressive Discipline

REQUIRES COMMUNICATION BY:

- Policy/General Orders/Contract
- Training
- General Deterrence:
 - Observation of desired behavior
 - Seeing discipline applied to others

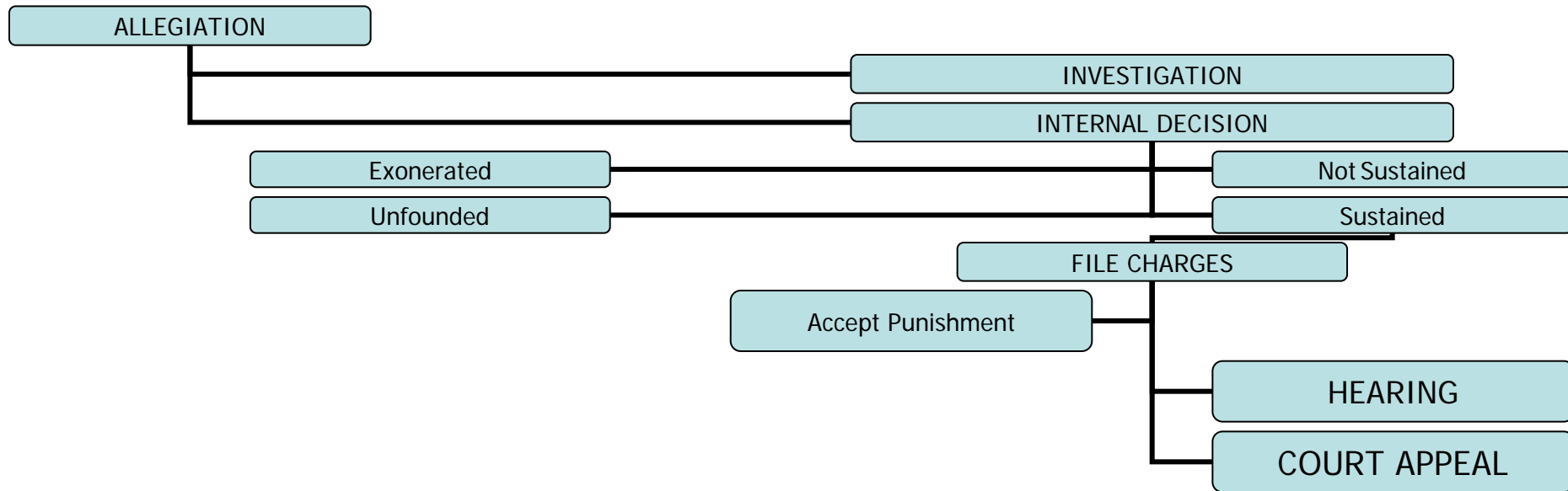
Constructive Discharge

- Defined - a claim or legal finding that an employee who purportedly voluntarily quit a position should be treated as though the employee was actually discharged or fired by the employer.
- Importance - triggers legal protections that are normally available only to the employee who is being discharged or fired from a position.

Constructive Discharge Issues

- Was the employer attempting to avoid the legal protections due the employee?
- Did the employer make the working situation intolerable for the employee?
- To prevail - must show that a reasonable person faced with similar unfair conditions would leave rather than to continue to suffer such conditions or treatment.

DISCIPLINARY PROCESS



Government Burden In Discipline Cases

- Prove by a preponderance of the evidence - that degree of proof which is more probable than not.
- Same as a civil trial - 51%
- Government employer must show:
 - 1) Must show misconduct took place
 - 2) Link between the misconduct and the efficiency of the agency service
 - 3) Penalty imposed was reasonable

Legal Rules Governing Discipline

- Ideal world - all employees would be shielded against all arbitrary discipline or unjust dismissal by a single set of laws, rules, and guidelines.
- Reality - the laws and safeguards against arbitrary discipline or dismissal are NOT uniform for everyone.
- Depends on the nature of the work relationship with the employer - called the **employment status**.

Questions To Be Asked In Determining Employment Status

- How was the employee hired?
- What were the terms and conditions of employment at point of hire?
- Did the terms and conditions of employment evolve during the course of employment?
- Is the employee covered by a contract or union agreement?
- Specific Statutory Protections

Types Of Employment Status

- Civil Service / Merit Board Appointments
- Union (Bargaining Unit Employees)
- Tenured Positions
- Elected /Appointed Public Officials
- At Will Employees
- Probationary Employees

Civil Service / Merit Board

- A body established by statute or ordinance concerned with the employment of governmental employees within a public agency.
- Purpose: job security for lower wages
- Functions of Civil Service / Merit Board:
 - 1) Administrative Function
 - 2) Quasi Judicial Function

Civil Service/Merit Board Administrative Function

- A process established by statute or ordinance, to classify and grade positions, give examinations for employment, fill or certify lists of available candidates available for employment and serve as a process in order to avoid allegations of patronage or lack of fairness in the hiring process.

Civil Service/Merit Board Quasi-Judicial Function

- **Quasi Judicial Function - a term applied to the action and the discretion of a public administrative officer or body charged with the duty to investigate facts, hold hearings, and draw conclusions as a basis for their official action and to exercise discretion of a judicial nature.**
- **In discipline cases - by statute or ordinance has the subject matter and personal jurisdiction authority to hear cases and appeals for employees from a designated governmental agency.**
- **Rulings can be appealed to a 1st level civil court if there has been exhaustion of administrative remedies.**

Exhaustion of Administrative Remedies

- Legal doctrine to uphold the quasi judicial authority of administrative agencies / boards
- In order to appeal an administrative ruling or a quasi judicial ruling of a public body or agency to a court of law, person seeking a court review must have utilized all avenues of administrative appeal available from the public body or agency.

Appealing Civil Service/Merit Board Cases

- **Courts generally sustain the rulings as long as the ruling is REASONABLE and NOT ARBITRARY or CAPRICIOUS**
 - **Reasonable** - meaning fair, proper and just, moderate - suitable, under the circumstances
 - **Not Arbitrary** - meaning not done with bad faith or by disregarding the facts in evidence
 - **Not Capricious** - meaning not done by sudden whim - or without controlling principle

Questions For Reviewing Court

- Exhaustion of Administrative Remedies?
- Does competent and substantial evidence support the ruling?
- Was due process afforded the employee?
- Does the decision depart from basic notions of fundamental fairness?

Discipline Requires “For Cause”

- **“For Cause”** defined - a reason which law and public policy recognizes as sufficient to warrant discipline or removal and such cause is a legal cause and not merely a cause which the appointing power in the exercise of discretion may deem sufficient.
- Some cause affecting and concerning ability and fitness to perform duty imposed.

Why “For Cause”?

- “**For Cause**” - a key term in disciplinary actions, suspensions, or discharges in a civil service or merit board systems.
- To prevent arbitrary discipline against public employees.
- Creates a **PROPERTY INTEREST** for the employee - an aggregate of rights which are guaranteed and protected by government.

Property Interest

- When an employee is hired by a public agency and the rules require discipline or discharge only “for cause,” the employee is said to have a property interest.
- This entails an expectation of continued employment.
- The U. S. Constitution provides that in order for government to deprive an individual of a property right, the government employer must follow certain procedures and standards.
- These equate to **Due Process**.

Due Process

- Due Process - an orderly proceeding, rules fairly applied, notice, an opportunity to be heard, specific charges, a hearing, the right to appeal
- U.S. Constitution - 2 Due Process Clauses
 - 5th Amendment pertaining to federal actions
 - 14th Amendment pertaining to state actions

But Note The Following

- A full evidentiary hearing is NOT required BEFORE discipline is imposed - only an informal opportunity with an informal defense satisfies the Supreme Court
- Hearings before quasi judicial entities need NOT meet all the technical requirements of courts.
- Requires only a fair and impartial hearing - Example: hearsay rules liberal.

Higher Standard of Conduct for Police?

- Public employee conduct held to a higher standard than private employees.
- Officer conduct frequently held to a higher standard than other public employees.
- Merrifield v. Illinois State Police Merit Board 691 NE 2nd 191 (1998) - Trooper fired for romantic contact with convicted felon and lying about the relationship.

Conduct Unbecoming & Official Misconduct

- Commonly cited basis for officer discipline.
- Attacked for being vague.
- More specific charging is preferred.
- Must show actions tend to impair operations or morale or the public to lose confidence in the agency.
- Creates a NEXUS between the alleged conduct and the agency.

Union Protected Positions

- Discipline issues almost always covered in the collective bargaining agreement.
- Unionization of public employees
 - Goal In Union Negotiation: a contract which recognizes the discipline authority and procedure of the agency.
 - Rule: do not create agreements which are inconsistent with the governing statute or ordinance.

Unions And Discipline

Recognize discipline in return for “Just Cause”

- “Just Cause” embraces union recognition that:
 - 1) Employee must give a fair days work for a fair days pay.
 - 2) Discipline can/must serves legitimate employer interest.
- Similar to “For Cause” in Civil Service

Elected/Appointed Officials

- Public agencies have employment positions held as public offices-governed by constitution, statute, ordinance, which are EXEMPT from civil service.
- Elected officials for set terms.
- Appointed officials- serve at the “pleasure of” a higher official.

Discipline - Elected/Appointed

- For elected - removal can be proscribed in:
 1. Constitution or statute (Recall Procedure)
 2. Power of the next vote/election
 3. Indictment
 4. Public opinion
- For appointed - official or public opinion becomes the driving force to terminate.

“At Will” Employee

- At will employee defined - a person employed under an agreement or contract that states that the position is subject to termination by either party at any time on **any grounds.**
- Duration of employment - indefinite or termination upon notice.

Limitation on “Any Grounds”

- Modern Court Trend- while recognizing the “at will” status, courts limiting employer discretion by making civil rights legislation, age discrimination statutes, and ADA applicable.
- General Rule: if grounds are not illegal, employee can be removed with or without “cause” and without due process.

Due Process For “At Will”

- In order to be protected by due process, need a property interest.
- At Will hires have no property interest- no expectation of continued employment.
- General Rule: At will employees in discipline matters are not guaranteed due process as a matter of a **constitutional** requirement.

Escaping “At Will” Status

- If an “at will employee” elects to fight a dismissal- must establish an exception:
 - 1) Express or implied contract to discharge only “For Cause.”
 - 2) Implied covenant of good faith and fair dealing.
 - 3) Public policy demands it.
 - 4) Employment status evolved.

Probationary Status

- Probationary Employee defined - a person who is in an initial period of employment during which the new, transferred, or promoted employee must prove or show the capability to perform the required duties of the position before being considered permanently employed in that position.
- Issue: competence and suitability.

Probationary Positions

- Normally proceeds full civil service protection.
- Dismissal similar to “at will” employees.
- General Rule: No due process hearing required if failure to successfully complete the time period.
- Exception: Under certain circumstances, due process may be required---very limited.

Agency Caution - Probation

- Agency must adhere to the specified time limits on probationary periods.
- Documentation, manuals, handbooks and other policies detailing terms and conditions must not create an express or implied promise of employment or dismissal only for cause.
- Do nothing to create a Property Interest.

Public Policy Considerations

- Not written or specifically stated policies but public opinion factors to protect persons from discipline perceived to be wrong:
 - 1) Order to commit a crime /unlawful act
 - 2) Refusing to testify falsely
 - 3) Exercising statutory rights
 - 4) Whistle Blowing Activities
 - 5) Anti-Retaliation Statutes

Public Policy Considerations

- **Whistle Blowing** - calling government and public attention to wrongs being committed by an agency or individuals within an agency for the purpose of bringing change.
- **Anti-Retaliation Statutes** - legislation to prevent punishing employee from pursuing claim rights provided by law (workers compensation/ medical benefits).

Hiding Behind Public Policy

- A public employee claim of protection under a whistleblowing or an anti-retaliatory statute will FAIL if the decision to discipline would have been reasonable even without the claim of a protected activity.
- Public policy does not shield the employee from discipline stemming from unprotected conduct.

Constitutional Considerations

- There is no constitutional right to public employment BUT ...
- Once hired a public employee CANNOT be disciplined or dismissed in violations of constitutional rights.
- Constitutional protection provided by Section 1 of the 14th Amendment.

14th Amendment

“All persons born or naturalized in the U.S., and subject to the jurisdiction thereof, are citizens of the U.S. and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U.S.; **nor shall any state deprive any person of life, liberty, or property without due process of law;** or deny any person within its jurisdiction the equal protection of laws.”

Constitutional Requirement Due Process

Discipline cases can require either ONE or BOTH of the following D/P procedures:

- 1) Pre-Deprivation Hearing - a procedure which must be followed BEFORE a property or liberty interest is affected.
- 2) Post - Deprivation Hearing - procedure which must be observed AFTER a property or liberty right is affected.

Public Employees with Property Interest

- Most public employees have a property interest.
- Arises by statute, ordinance, or policy.
- Discipline- “For Cause.”
- As a general rule - due process requires BOTH a Pre-Deprivation Hearing AND a Post-Deprivation Hearing.

Pre-Deprivation Hearings

- Pre-deprivation hearing need not be formal or adversarial, nor does the officer have a **CONSTITUTIONAL** right to an attorney being present - no right to call witnesses or cross examine.
- Requirement:
 1. Notice/recitation of charges or allegations
 2. Reasonable opportunity to make a defense
 3. Information on how to respond to the charges

Purpose of Pre-Deprivation Hearing

- To protect against arbitrary decision making by public employer.
- State law or ordinances, or labor agreements can provide **greater protections** than the due process requirements of the Constitution.

Post-Deprivation Hearing

- Post- Deprivation Hearing is required after discipline is imposed.
- Formal procedure - requires a full evidentiary hearing, witnesses, presentation of evidence, cross examination, a finding, and an appeal procedure.

2 Hearings Required?

- **Required:** discharges - temporary suspensions without pay, demotions, involuntary retirement for a disability, involuntary unpaid leaves of absence.
- **Not Required:** denied off duty employment, compulsory psychological evaluations, poor ratings, denied a position, denied a promotion.

Public Employees: No Property Interest

- There is no property interest in a position which by statute, ordinance, or policy the employee can be dismissed without “for cause” and without a hearing - triggers no due process for property interest.
- BUT employee is not totally unprotected if a **LIBERTY INTEREST** is at issue - due process may require a hearing.

Liberty Interest

- Liberty Interest - interest in good name and reputation within the community - the freedom to pursue a trade or profession.
- If impacted by disciplinary action, even an employee with no property interest may be protected through a **Name Clearing Hearing.**

Name Clearing Hearing

- Name Clearing Hearing - Post-Deprivation hearing which provides the employee the opportunity to present a defense and correct any factual errors - not a full evidentiary hearing.
- Must be requested by the employee.
- Required in only limited circumstances.

Limits on Liberty Interest Claim

- Due Process Hearing triggered if:
 - (1) Dismissal is stigmatizing- loss of reputation from the job dismissal that is so serious as to stand in the way of re-employment.
- Charges of poor performance or insubordination do not rise to a stigma.
- BUT charges of illegal conduct/dishonesty/immorality can stigmatize

Requires Public Disclosure

- Due Process Hearing triggered if:

(2) If there has been public disclosure of the grounds behind the discharge - beyond reasons privately conveyed to the employee.

Even if stigma found, damages will generally not require re-hire of the employee.

Two Types of Due Process

- **Procedural Due Process** - the mode of the proceeding by which a legal right is enforced - the technical requirements of notice of charges, the opportunity to be heard - the mechanics.
- **Substantive Due Process** - deals with the concept of the fundamental fairness of the actual proceeding - not arbitrary - appropriate conduct by government.

Supreme Court Required Factors for Consideration:

- 1) The nature of the private interest affected by the action.
- 2) The risk of erroneous deprivation through the procedures used.
- 3) The Government interest to be protected.

Substantive Due Process Issues

To protect against grossly inappropriate conduct by government in constitutionally protected liberty issues

- Free Speech
- Freedom of Association
- Political Activities
- Union Activity
- Self Incrimination

Free Speech Issues

- General Rule: Speech protected whether public or private
- General Rule for Public Employee:
- Protection depends on whether speech is **a matter of public concern**
- Agency has the ability to regulate speech more than is permitted in private sector in both the work place and off duty.

Matter of Public Concern

- Balancing Test: right of free speech versus government need to regulate speech for sake of efficiency and meeting the responsibility owed to the public.
- BUT when speech comes to matters of public concern, courts will recognize that speech as legitimate and permitted.

Pickering v. Bd. of Ed.

- Pickering v. Board of Education 391 US 568 (1968) - Illinois teacher fired for letter to newspaper on funding issues – fired.

Court Says Public employment does not deprive speech rights - regulations to be balanced - entitled to protection on matters of public concern - here, not detrimental to school system, but only difference of ideas.

Political Activity

- Political affiliation cannot be grounds for dismissal of public employee.
- Branti v. Finkel 445 US 507 (1980) - public defenders in New York dismissed for being Republicans.
- O'Hare Truck Service v. Northlake 116 S.Ct. 2353 (1996) - contractor cannot be punished for refusing to contribute to a party.

Union Activity

- Public employees are entitled to join labor unions.
- Discharge or discipline for union activities violates 1st Amendment.

Self Incrimination- Drug Testing

- National Treasury Employee Union v. Von Raab 489 US 656 (1989) - Promotion and assignment testing (not random)--- OK
- Skinner v. Railway Labor Executive Association 489 US 602 (1989) federal regulation mandating blood and urine testing of rail employees following a major accident--- OK

Drug Testing Principles

- Individual suspicion is not necessary under Constitution.
- Drug problem need not be documented at a particular workplace.
- Testing needs to serve a special interests beyond the scope of normal law enforcement.

Compelling Government Interests

- Maintaining workplace integrity
- Enhancing public safety
- Protecting sensitive information
- BUT has Limits:

Chandler v. Miller 520 US 259 (1997) Georgia legislature requires drug testing of candidates for office **Court Says:** No special need to test.

Random Testing

- Lower courts have approved random testing on principle of high government interest in law enforcement carrying weapons.
- Random must be random.
- Articulated procedures through a written policy.
- Can be at high frequency.

Reasonable Suspicion Testing

- Permitted for drugs and alcohol based on actions of officer, accusations by fellow officers, observations of supervisors.
- FOR ALL TESTING:
 - (1.) Rules must minimize intrusion of privacy
 - (2.) No direct observation of act (unless compelling)
 - (3.) Careful collection- split samples/accredited labs/
possible lab testing
 - (4.) Record of testifying in hearing

Searches

- Probable Cause and Warrant - No issue
- Administrative Searches - searches based on less than Probable Cause and no warrant:
 1. Reasonable Suspicion- officer has engaged in misconduct- confined to workplace/squad
 2. Less Than Reasonable Suspicion- OK if officer has no REP in area of search.

O'Connor v. Ortega

- O'Connor v. Ortega 480 US 709 (1987) search of doctor's office in state hospital - same office for 17 years but balance REP public agency supervision, control, and efficient operation.
- A search is OK when reasonable grounds for suspecting evidence of work related misconduct at inception AND reasonably related in scope.

Common Defenses in Disciplinary Cases

- Charges not factually proven
- Punishment disproportionate to offense
- Not through investigation
- Different punishments for different officers
- Inadequate training or supervision
- State of mind should be considered
- No progressive discipline

Defenses (Continued)

- No procedural due process
- No recognition of prior good conduct
- Anti-union bias
- Conduct not likely to occur again
- Policy and rules are not clear and understandable

Four Most Litigated Areas

- Conduct Unbecoming and Officer
- Off Duty Conduct
- Insubordination Cases
- Refusal to Submit to Polygraph Examination- Trend to discourage use and not permit termination based on refusal to take test

Garrity Rule

- Garrity v. New Jersey 385 US 493 (1967)
- Issue: Does the 5th Amendment protection against self-incrimination permit police not to respond to questions under the threat of firing if those responses can be introduced in a criminal case against the officer?
- Answer: YES

Gardner Case

- Gardner v. Broderick 392 US 273 (1968)
- Issue: Can police officers be discharged for refusing to sign a waiver of immunity for a grand jury which would have allowed officer statements to be used in a criminal case against the officer?
- Answer: NO

Two Gardner Rules

- 1) If 5th Amendment is invoked by officer, the officer may not be disciplined **UNLESS** there is a grant of immunity prohibiting the use of those statements in criminal court.
- 2) Agency questions to an officer must be “specifically, narrowly, and directly” tailored to the officer’s job activities.

Two Types Of Immunity

- **Use Immunity**- narrow in protection
 - specific statements and fruits of those statements not admissible in criminal court against that individual.
- **Transactional Immunity**- broad protection
 - prohibits any criminal prosecution involving any part of the subject matter of the investigation.

Right To Representation In Disciplinary Interview

- No **Constitutional** right under 6th Amendment
- May be granted by statute or contract
- National Labor Relations Board v. J. Weingarten 420 US 251 (1975) employee entitled to a representation by a collective bargaining representative

Law Enforcement Officers' Bill of Rights

- Statutes which govern the interrogation and discipline of police officer.
- Illinois (50 ILCS 725) also in Arkansas, California, Delaware, Florida, Kentucky, Louisiana, Maryland, Nevada, New Mexico, Rhode Island, Tennessee, Texas, Virginia, West Virginia, Wisconsin (Chapter 164.01).

QUESTIONS



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