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Liability Report

Personnel Discipline / Misconduct; Civil Rights Liability; Corrections and Jail Update, The Law Enforcement Plaintiff (cont'd)

Special Bulletin

Proving the Untruthful Officer Is Unfit to Serve: Practical Guidelines for the Police Administrator by William L. Flink 3

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I. Notes from the Editor

This issue of *LDM* completes our annual review of corrections cases and police plaintiff cases, and begins our annual review of discipline problems for police administrators.

We begin this subject with a **Special Bulletin** by William L. Flink on **proving the untruthful officer unfit to serve**. Mr Flink, a recognized expert on law enforcement management and policy, is the Executive Director, Central Shenandoah Criminal Justice Academy, Waynesboro, VA 22980; phone: (540)943-0532; fax: (540)943-8827. A regular contributor to *LDM*, Mr. Flink has written for such publications as *The Police Chief* and *Law and Order*.

On the issue of investigation of employees and adjudication of complaints we present a condensed and abridged sample issue from the revised **Model Manual of Policies, Procedures and General Orders**, produced by Robert Hicks, Director, Law Enforcement Services Section, Department of Criminal Justice Services, Commonwealth of Virginia.

Our next issue will conclude the subject of discipline, with emphasis on substantive and

procedural matters and we will begin our annual survey of negligence and vicarious liability problems for employers. *LDM* subscribers are reminded that they have the benefit of consulting our **Board of Consultants** with specific problems and may contact our office at (630)858-6392 for further information. We also note that our **regular and special authors of articles in the publication are resources for our readers with particular problems**; contact them for assistance. As always, we are grateful for the many contributions in this issue by consultant, Bernard J. Farber, Esq.

Let *LDM* and your valuable subscriber benefits, *i.e.*, (1) the **National Resource Center**, (2) our **Board of Consultants** and (3) our **expanded web pages for obtaining copies of many full opinions of cases** cited in the publication and elsewhere, be your guide in 2000 to current issues affecting **civil liability, discipline, labor/management and discrimination law**, with cases, policies and procedures and other materials relating to key concerns you have. **Don't miss a single issue and don't hesitate to use your subscriber benefits.**

II. Special Discipline Bulletin: Proving the Untruthful Officer Is Unfit to Serve

Practical Guidelines for the Police Administrator

by William L Flink (see Section I, *supra*).

The officer had lied. He had lied while testifying in a court of law about his activities during a murder investigation. Even though the officer's lie was not determined to be material and relevant to the issue before the court, a lie occurred—an impertinent lie. Both attorneys believed the officer had not perjured himself in the eyes of the court, but the officer had lied—under oath, and the Police Chief knew the officer lied.

The officer was not without additional baggage. His work ethic was questionable, and his job performance, as determined by the administration, did not rise to a satisfactory level. The officer's courtroom

testimony shredded any belief of the Chief that the officer's tenure with the department was salvageable.

The Police Chief prepared to discharge the officer from employment. Whatever considerations were reviewed before initiating the termination action, they can be said to have been stressful. The decision about how to proceed would either bring credit or discredit to the Chief's authority among the department's subordinates.

Introduction

The above description is a true event; just one of a myriad of incidents that have occurred in law

enforcement. The volume of incidents uncovering untruthful officers has weakened our criminal justice system. **It appears, the officer who lies can no longer be considered an aberration within the law enforcement profession¹. And so, the police administrator who discovers an officer lying has little recourse but to formally discipline the officer.** An affirmative action must be taken, because acts of untruthfulness scar the professional image of all other officers. Therefore, the administrator's action must be

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effective, with resolve, mindful of the public implications, as well as the offending officer's personal well-being. Our system of justice depends on the reputation for truthfulness of those public officers who come before the courts to testify.

How serious the administrator considers the untruthful event is but one of the questions to be determined. Questions arise: are there **different kinds** of lies; do all lies prejudice the officer's ability to serve the public; is there a **difference** to the department between **official** and **unofficial** untruthfulness? The answer to these questions in most cases should be, untruthfulness is unacceptable. Only the scale of the lie, and its impact upon the integrity of the officer and the department, can be measured against the ability to serve. However, **integrity is the primary key to public service**, and a reputation for integrity is always measured for an officer of the law. Acts of untruthfulness, no matter how slight, should not be encouraged, condoned, or pardoned by the criminal justice profession. At the very least, there must be condemnation and the reassurance that such conduct will not recur. Although the impact of untruthful statements is at the discretion of the administrator, any allowance of untruthfulness within the administrator's command could become a dagger to the administrator's career.

Types of Statements

When we consider the investigation for act(s) of untruthfulness, we must first review the conduct that has brought about concern to the department. Is the officer's statement(s) an official action or mere conversation among employees that

tends to bring the belief that the officer fabricates or makes false statements in an attempt to benefit his/her position, or innocuous false statements of no benefit to the officer.

First, official statements, whether written or verbal, are a serious concern to the department. The only exception to this is when untruthfulness is used in a controlled manner, as an investigatory tool, e.g., while interviewing suspects of a crime.

Second, unofficial false statements that benefit the officer, directed towards other employees, should be of concern to the department. Though such statements do not affect the operations of the department, they could support the belief that an officer is untruthful in his/her official capacity.

Finally, false statements of no personal benefit to the officer, such as those emanating from jokes, etc., should be kept in context, but officially discouraged for apparent reasons. Such statements of no personal benefit to the officer or consequence to others, probably do not rise to the level requiring a department investigation and may be handled through counseling and/or minor discipline if they continue.

Oftentimes, the only reassurance that an officer's unsanctioned, official untruthfulness will not occur again, is termination from employment. The administrator's responsibility to engage the termination process can possess a measure of self-affliction. Self-affliction arises from the inability of the administrator to accomplish termination once such process has begun. The administrator should never initiate termination action for untruthfulness, unless the evidence is factually persuasive and the preparation to support the evidence is resourceful.

The investigation of untruthfulness should be a primary category in the department's internal reporting mechanism, along with the topics of use of force, sexual harassment and other departmental concerns. The public expects the department to have a "checks and balance" function within the department for such conduct. The Mollen Commission believed so, and subsequently criticized NYPD for not having a reporting category for "untruthfulness".²

Interviewing the Officer

When the administrator has determined cause exists to believe an officer has been untruthful, there is an immediate need to confront the officer and

resolve the issue. The method to handle untruthfulness can evolve through an interview or integrity testing (sting operation). Regardless of the investigative approach, it is important for the investigation to conclude rapidly.

The most direct approach, is to interview the officer regarding his untruthful conduct. The interview should be given the seriousness that such an allegation brings to the department, and all formal administrative procedures should be applied.

The question of who should interview the officer about untruthful statements, testimony or reports may not be a difficult issue. In small departments, the task will generally fall upon the agency administrator. If at all possible, use an intermediary for the agency administrator who is well versed in disciplinary issues and administrative law to manage the interview process. By using an intermediary, the agency administrator has the advantage of reviewing all the evidence and keeping his/her bias of the alleged untruthfulness separated from the final decision. Additionally, it may be easier for the agency administrator to analyze whether or not an additional interview should be conducted with the officer.

It is important to prepare for the interview. The department must collect any evidence of untruthful statements through testimony or reports made by the officer. Statements should be analyzed both from the perspective of the department and any perceived perception of the officer accused of untruthfulness. The key question about oral statements is whether there is any possibility of truth from the suspect officer's eyes? Reports are easier to deal with since the written word is more difficult to defend if it is untruthful.

After a complete review of the evidence has been conducted, the next decision is how the officer should be questioned regarding untruthful statements, testimony or reports? The importance of words and word usage, in general, should require a sophisticated department inquiry. That is, because words can be twisted or misunderstood by lay parties, capturing the factual context of statements and the characteristics of the manner in which they are made is important evidence to acquire during the investigation. Questioning of an officer, in cases of untruthfulness, should require the use of audiotape

and videotape recordings. Furthermore, recordings of the officer's interview should be carefully transcribed for the file. Without doubt, the manner in which statements are made will be decisive evidence in the department's case. The person who will interview the officer must be totally familiar with the transgressions of the officer, and must have a pre-determined plan in the event the officer contests the propriety of questioning by the department.

Before beginning the officer's interview, make sure the rules of the interview are clearly presented to the officer. By setting forth the rules of the interview, the department can demonstrate its commitment to subordinate officers that a fair hearing is the primary objective of the department. Interview rules can demonstrate evidence of the department's intent to be fair to the officer, in the event the department finds itself defending its disciplinary procedures at a later time. **Interview**

The rules of the interview must be clearly presented to the officer before beginning the interview.

rules may include: the purpose of the interview, the potential use of any answer provided by the officer, individuals who may be present during the interview, and potential effects or results from the questioning. Also, it's important to remember that the officer is innocent until proven guilty. The officer's answers to questions should be believed until the facts of the case prove otherwise.

Unless provided by case law, state law, local provision, contract or union agreement, an officer does not have a right to have an attorney present during the administrative interview. If the department allows the officer to have an attorney present during the administrative interview, it should be made clear to the attorney that the officer does not have a right to have an attorney present during questioning. It should be further acknowledged that the department is allowing the presence of the attorney, because the department wants to demonstrate an atmosphere of fairness in such actions against departmental members. Furthermore, the attorney should be advised that he cannot interrupt the interviewer during questioning of the officer, or try to adversely interfere with the goals of the department during the interview. The attorney

should be on notice, that if he/she disregards the interview rules, he will be asked to leave the interview. The attorney may be given the opportunity to ask the officer questions during the interview, but not until the interviewer has finished questioning the officer. Usually, the attorney's questioning will be directed towards clarifying issues, but may provide significant evidence for the department to consider during the process.

The Garrity Warnings (see also p. 19, *infra*).

Remember, discipline is an administrative action. There is no cause to provide *Miranda* warnings to the officer for administrative purposes. Additionally, the administrative interview is a coercive interview. **The officer should know at the beginning of the interview process that the interview questions are required to be answered truthfully, and the Fifth Amendment to the Constitution has no bearing on the questioning.** To satisfy this position, the department should provide the officer with an Administrative (*Garrity*) Warning³ before questioning begins. The administrative warning simply advises the officer that his/her statements cannot be used against them in a criminal prosecution; that the questions must be answered; that statements made by the officer can be used in subsequent administrative or civil hearings; and that discipline under a claim of insubordination can be a cause for termination should the officer fail to comply truthfully with questioning during the interview. **The interviewer should provide the officer with a copy of the administrative warning to read silently, while the interviewer reads the warning out loud to the officer.** The administrative warning should also include a statement of understanding of the warning's provisions, with a **signature and date block for the officer to sign and acknowledge his/her understanding of the administrative warning.**

To emphasize the importance of the interview, it is recommended that the officer also be given the standard oath of truthful testimony, prior to questioning⁴. While an oath of truthful testimony is not required, it enhances the atmosphere of an official proceeding and provides another cause for discipline should the officer, ultimately, answer untruthfully during the administrative interview.

Tactics and Procedures

The interviewer's demeanor is especially important during questioning. Don't forget that you are audio/videotaping this process; a professional demeanor must be displayed. The words used by the interviewer must be clear, objective, and concise. Use of small, single-thought statements during questioning will afford the officer a fair opportunity to answer truthfully. Let the officer provide you with complete thoughts when answering the questions. The interviewer should not attempt to confuse the officer, or appear to use trickery during questioning. Also, it will not benefit the department if the interviewer uses a demanding attitude while questioning the officer. Time is on the side of the interviewer, and the officer will usually be uncomfortable in defending his/her conduct if it was wrong. If a subsequent interview becomes necessary to reach a conclusion in the matter, then you should re-interview the officer.

Repetitive questioning on points of contention are an appropriate method to determine truthfulness. Repeat questions only when you believe the officer is not telling the truth about an issue, and put some distance in between each repetitive question so the officer has to think about other facts, then come back to the previously-provided answer.

At the end of the questioning, the interviewer should explore the officer's own knowledge of honesty and dishonesty. This could be a significant factor in demonstrating the officer's propensity to lie. Also of importance, would be any information given about the officer's own experience in reviewing allegations of dishonesty or taking minor disciplinary action against subordinates in the department's name. **Finally, a successful tactic could be to place the officer in the department's position, by asking the officer what he/she would do if investigating the same allegations against a subordinate officer.**

Should the officer lie during questioning, the presence of the officer's attorney may become an important factor in persuading the officer to tell the truth. (*This will only work if the department has substantial evidence of the officer's improper conduct.*) By excusing the officer for a few moments, the interviewer can disclose to the attorney the known evidence against the officer that would

prove the officer is untruthful. The interviewer can then allow the attorney an opportunity to provide advice to the officer regarding responses made during the interview questions. The end result could elicit a request by the officer for an opportunity to change untruthful responses to truthful answers for interview purposes (*the interviewer may choose to consider untruthful responses void from disciplinary consideration if truthful answers are obtained before the interview concludes*). While this may appear to a lay investigator to be an unnecessary tactic, it would be unethical for an attorney to advise his client to lie, and could subject the attorney to discipline from his state bar association if undertaken. Furthermore, attorneys do not want to have untruthful officers serving the public anymore than the department. **It's a tactic to get truthful answers from the officer, and may expedite the conclusion of the disciplinary process without the need for a hearing.**

The Decision to Discipline: Next Steps

After completing the interview, the decision must be made about whether discipline is appropriate. **If you proceed to discipline the officer, the next step is to develop supporting evidence demonstrating the unacceptability of untruthful conduct.** First look to those provisions within **department policy** that identify the responsibility of the officer to be honest and truthful. Then look at the officer's training history for attendance at classes supporting professionalism and leadership (*such courses should discuss honesty and truthfulness issues in their*

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lesson plan). Instructors who taught the officer ethics and leadership classes may be consulted for additional information relevant to the circumstances of the case. If the officer had, personally, engaged in supervisory actions against subordinates involving an honesty issue, it would be important to acquire any written statement or position that the officer wrote in evaluating dishonesty (*this could be performance evaluations, minor discipline, or a recommendation to a superior regarding an incident*). Also, the department's legal counsel should conduct

a search for all relevant case law regarding untruthful statements,⁵ as well as a review of case law regarding the law enforcement code of ethics⁶ and oath of office.⁷

A lack of evidence, even on the smallest detail you wish to prove, may defeat your claim that the officer should be disciplined. Your goal, is to overwhelm the opposition so you don't have to spend the time and money to go to a formal hearing to make your case. How do you "overwhelm" the opposition? You do it with facts, with credible and voluminous information supporting the facts, and by allowing the officer to save his/her dignity, to some extent, in the process. By preparing a strong case, you can often conclude the disciplinary process before a hearing becomes necessary.

If a hearing cannot be avoided, the agency administrator must win the case in order to maintain the confidence of his/her position. All necessary evidence must be entered into the hearing record. "If you fail to enter all your evidence into the hearing record, you have done the department an incredible injustice."⁸ You probably will not know the judge/hearing panel that will hear your case. You won't know if the judge/hearing panel has any formal knowledge of administrative or disciplinary law, or the case law surrounding the issue of untruthful officers. Make it your plan to educate the decision-maker(s) by ensuring that the requisite information is provided to them to prove your case. Evidence is persuasive, and the persuasion of the evidence is measured in its meaning to others, as well as the court. **Develop your evidentiary case as if you were presenting it before the U.S. Supreme Court, because, one day, you just might be presenting the case before a federal court.**

Under no circumstances, should any of the evidence be discarded because the administration believes the case is over. Many states have record retention requirements that control the destruction of personnel and internal affairs records. However, **when disciplinary action is reviewed or taken, such records should be retained throughout the officer's career and for a minimum of three years beyond resignation or termination.** A record retention policy of this nature ensures that the department has the means to defend itself from future civil litigation involving the officer.

Conclusion

In the event described at the beginning of this article, the officer lied about events specific to his duties within the department. The superior videotaped the officer committing an additional lie when answering questions during the interview. The superior took action to terminate the employment of the officer. The videotape was the major evidence the superior relied upon during the appeal of departmental action. The Judge who heard the officer's appeal, being unfamiliar with administrative procedures and law, criticized the superior for (1) videotaping the officer's interview, (2) demanding that the officer tell the truth when the officer refused to do so during the interview, and (3) trying to terminate the officer's employment for, what the Judge believed, was just a "little lie." The superior had failed to educate the Judge with supporting testimonial evidence or case law.

The superior had no formal training in conducting an administrative investigation. He knew the *Loudermill* provisions⁹, but he did not know about the available administrative investigative tools to acquire evidence in the administrative case. The superior put himself at a disadvantage through his lack of knowledge. Furthermore, the superior failed to have legal counsel research available case law to persuade the Judge that the officer had received a proper hearing, and that the pattern of untruthfulness displayed by the officer was more than enough to determine that the officer was unworthy to hold the public's trust.

The superior could have secured his position to terminate the officer if he had taken the time to discuss case strategy with his training staff, other administrative staff knowledgeable about internal investigations, and researched the key points that he wanted to have upheld on appeal. However, the superior didn't take these precautions. He now faces a formal grievance panel that will decide whether the administration or officer succeeds on the issue, and is preparing for what he will do if the officer is returned to duty.

Agency administrators employ individuals to be officers of the law with the expectation that they are hiring honest and truthful public servants. After all, being known for "truthfulness" is what all officers strive to achieve in their careers. Prepare yourself for instances where officers act untruthfully. The IACP

Police Chief magazine recently reported, in a survey conducted on Florida State University students, that 18.3% of the survey sample of third year criminal justice students preparing for employment as law enforcement officers indicated that they believed it would be acceptable to lie in order to convict those accused of heinous crimes¹⁰. **Such information should be cause for criminal justice officials to be concerned for the future of law enforcement.**

Endnotes

- 1 "Testilying," from the Mollen Commission Report; BNA Criminal Procedure Manual, July 1992; compounded by Alan Dershowitz's dissertation regarding Mark Furhman's testimony and Philip Vannatter's belief that O.J Simpson was "'no more of a suspect' than Robert Shapiro"; Dershowitz, Alan M., *Reasonable Doubts*, pg. 49, Simon & Schuster, Rockefeller Center, New York, New York (1996); the attempted cover-up in the Louima Case, "A Request to Postpone," Tom Hayes, Associated Press, ABC News.com, April 2, 1999; claims of a code of silence underlying sexual harassment within Houston P.D., *Sharp v. City of Houston*, No. 97-20602 (5th Cir. 1999); the chief of police from Montgomery County, Maryland, who revealed there are officers on his force who had lied and are still going to court and testifying; Walte Bader (FOP President) stated none of the officers lied under oath, "Lawyers Seek Names of Officers Who Lied," Katherine Shaver and Steven Gray, Washington POST, October 1999, pp. B1 and B4; subsequent article "Police Lies Called 'Fairly Minor,'" Katherine Shaver, Washington POST, November 6, 1999; and of course NYPD's "Dirty Thirty" and, presently, the incident with LAPD's Rampart Division, "4 More Cops Relieved of Duty," Associated Press, January 14, 2000.
- 2 *Id.* Mollen Commission Report.
- 3 *Garrity v. New Jersey*, 385 U.S. 493 (1967). See also, Sample Policy, "Complaints Against Police Personnel," IV., Procedures, Section B.3(a), in Section V. of this issue of *LDM*, at p. 19, *infra*.
- 4 "Do you promise to tell the truth, the whole truth, and nothing but the truth, so help you (God)."
- 5 See, e.g., *Spiratos v. Safir*, 672 N.Y.S.2d 311 (A.D. 1998); *Holmes v. Dist Atty.*, 81 Cal. Rptr.2d 174 (1998); *Paulding Co. Sheriff's Dept. and F.O.P.*, 105 LA. (BNA) 1100 (Bittel, 1995); *Gitty v. Village of Oak Park*, 919 F.2d 1247 (7th Cir. 1990); *Freyre v. Ward*, 555 N.Y.S.2d 102 (A.D. 1990); *Steinberg v. Dooley*, 562 N.Y.S.2d 742 (A.D. 1990).
- 6 Flink, William L., *Judicial Applications of the Law Enforcement Code of Ethics*, *The Police Chief*, International Association of Chiefs of Police, Alexandria, Virginia, February 1995, pp. 27-30.
- 7 Flink, William L., *The Oath of Office, Law and Order*, Herndon, Inc., Wilmette, Illinois, July 1996, pp.59-63.

UPDATE ON CORRECTIONS, JAIL, AND RELATED PROBLEMS

- 8 Flink, William L., *Discipline of Law Enforcement Employees, Prosecuting the Administrative Case, Law Enforcement Legal Defense Manual*, Law Enforcement Legal Publications, Spring 1999, pp.22-29, at 27.
- 9 *Cleveland v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487 (1985) (administrative hearing procedures for discipline of employees).
- 10 Brand, David E., Lt., *The Future of Law Enforcement Recruiting: The Impact of Generation X, The Police Chief*, International Association of Chiefs of Police, August 1999.