

**POLICING THE POLICE:
LEGAL OVERSIGHT OF INTERNAL
AFFAIRS INVESTIGATIONS**

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I. Scope of The Presentation

(1 of 2)

- This presentation will address the role, and the point of view, of a legal advisor in connection with an internal affairs investigation into allegations of misconduct against a law enforcement officer
- I will identify and discuss the role of legal counsel at the various key stages of this process for the IA Investigator, the Chief of Police, and the City. The review will involve an exercise in slowing the process down and analyzing its component parts

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I. Scope of The Presentation

(2 of 2)

- In reality, the process is handled quickly and intuitively, especially by experienced personnel
- This presentation is a bird's eye view of a much longer training program offered to internal affairs personnel on a more concentrated basis. The training periods typically take one full day

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I. Scope of The Presentation

[PARALLEL PROCEEDINGS]

- Criminal proceedings
- Civil Rights and Tort Claims Act proceedings

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II. Evaluating Misconduct Allegations

(1 of 2)

- How do allegations of misconduct come to the attention of management?
- Misconduct allegations that come from within the department
- Misconduct allegations that come from citizen complaints

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II. Evaluating Misconduct Allegations

(2 of 2)

- Clarifying factual allegations of misconduct
- Identifying the rules, regulations, and standards that make certain types of behaviors misconduct that could justify disciplinary action
- What is misconduct? How is it different from simply poor performance?

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III. Notice of the Complaint of Misconduct
(1 of 2)

- The concept of substantive and procedural due process in our legal system.
- Notice requirements imposed by law or statute, such as Chapter 614, Texas Gov't Code.
- Notice requirements imposed by a labor agreement

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III. Notice of the Complaint of Misconduct
(2 of 2)

- Notice requirements imposed by rule or policy (be aware of internal rules that impede investigation)
- Notice requirements imposed to satisfy expectations of fairness (perspective of reviewing tribunal)
- Grounds for delaying notice of misconduct

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Chapter 614, Texas Gov't Code
(1 of 3)

- Sec. 614.021. APPLICABILITY OF SUBCHAPTER. (a) Except as provided by Subsection (b), this subchapter applies only to a complaint against:
 - (2) a fire fighter who is employed by this state or a political subdivision of this state;
 - (3) a peace officer under Article 2.12, Code of Criminal Procedure, or other law who is appointed or employed by a political subdivision of this state; or
 - (4) a detention officer or county jailer who is appointed or employed by a political subdivision of this state.
- (b) This subchapter **does not apply** to a peace officer or fire fighter appointed or employed by a political subdivision that is **covered by a meet and confer or collective bargaining agreement** under Chapter 143 or 174, Local Government Code, if that agreement includes provisions relating to the investigation of, and disciplinary action resulting from, a complaint against a peace officer or fire fighter, as applicable.
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Chapter 614, Texas Gov't Code

(2 of 3)

Texas Gov't Code:

- Sec. 614.022. COMPLAINT TO BE IN WRITING AND SIGNED BY COMPLAINANT. To be considered by the head of a state agency or by the head of a fire department or local law enforcement agency, the complaint must be:
 - (1) **in writing**; and
 - (2) **signed by** the person making the complaint.

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Chapter 614, Texas Gov't Code

(3 of 3)

- Sec. 614.023. COPY OF COMPLAINT TO BE GIVEN TO OFFICER OR EMPLOYEE. (a) A copy of a signed complaint against a law enforcement officer of this state or a fire fighter, detention officer, county jailer, or peace officer appointed or employed by a political subdivision of this state **shall be** given to the officer or employee **within a reasonable time** after the complaint is filed.
- (b) Disciplinary action may not be taken against the officer or employee **unless** a copy of the signed complaint is given to the officer or employee.
- (c) In addition to the requirement of Subsection (b), the officer or employee may not be indefinitely suspended or terminated from employment based on the subject matter of the complaint **unless**:
 - (1) the complaint is investigated; and
 - (2) there is evidence **to prove** the allegation of misconduct.

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IV. Investigative Tools

(1 of 2)

- Orders to respond in writing
- Garrity statements
- Other affidavits and interviews of witnesses

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IV. Investigative Tools
(2 of 2)

- Relevant documentary proof, including photographs, video, and other recordings
- Polygraph orders
- Misconduct in the investigation process (how to address)

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V. Internal Affairs Report
(1 of 1)

- Keeping a chronological log of the investigation itself
- Marshalling the proofs
- Laying out the facts supported by evidence and
- Whether or to what extent IA should identify relevant rules, regulations, and policies at issue given the supporting facts
- Preliminary conclusions.

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**VI. Discipline Decision:
Who Decides?**
(1 of 2)

- Who is the client?
- What is chain of command?
- Who signs off on the decision?
- Who will testify in support of the decision made?

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**VI. Discipline Decision:
Pleading the Case**

(2 of 2)

- The disciplinary order
- The recitation of relevant facts
- Linkage of facts to relevant rule, regulation, or policy
- Pleading through credibility issues arising out of conflicting statements or evidence
- Pleading suspension days; logistical problems with schedules and number of days

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Pleading Facts

SAMPLE #1

- The relevant incident is October 16, 2013 at or about 3:18 a.m., you were advised of a maroon 4-dr Jaguar passenger vehicle displaying Texas Tags DD9-N244 that had just left 806 W Coney in Pharr, Texas. The vehicle's occupants were possibly involved in a Theft at 824 W Ferguson. As you attempted to conduct a traffic stop on said vehicle, the vehicle's driver refused to stop as he disregarded the red light at Cage and Frontage. You advised dispatch of the driver's refusal to stop and relayed that the speeds were approximately 60 mph as the vehicle entered the Expressway. You were ordered to terminate the pursuit as you lost visual of the suspect vehicle, however, you continued with your lights and siren activated (Code 3). The allegations are that you failed to obey a direct order, you failed to adhere to departmental rules and regulations, and you failed to adhere to the emergency vehicle operations policy.

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Pleading Facts

SAMPLE #2

1. The relevant incident happened on October __, 201__ at or about 3:18 a.m. in the morning.
2. The information available to me shows that you were made aware by dispatch of a maroon 4-dr Jaguar passenger vehicle displaying Texas Tags DD9-N244 that had just left 806 W Coney in Pharr, Texas. The vehicle's occupants were possibly involved in a theft at 824 W Ferguson.
3. As you attempted to conduct a traffic stop on this vehicle, the vehicle's driver refused to stop, and he disregarded a red light at ____ and ____.
4. You apparently advised dispatch of the driver's refusal to stop. During the pursuit, you relayed to dispatch that the speeds were approximately 60 mph as the vehicle entered the Expressway.
5. The investigation shows that you were ordered to terminate the pursuit after you reported having lost visual of the suspect vehicle. Despite this, the investigation shows that you continued with your lights and siren activated (Code 3).
6. The allegation and the concern is that you failed to obey a direct order, you failed to adhere to departmental rules and regulations, and you failed to adhere to the emergency vehicle operations policy of the department.

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**VI. Discipline Decision:
Pleading the Case**

(3 of 3)

- Pleading administrative violations most relevant to the facts
- Avoid over-charging
- Avoid pleading civil rights violations
- Avoid pleading criminal violations
- Avoid pleading tort claims act violations

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**VII. Discipline Decision:
Assessing Discipline**

(1 of 1)

- The requirement of proportionality
- The requirement of consistency
- Discipline for punishment versus discipline for correction
- Prior misconduct, including reprimands, warnings, suspensions

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**VIII. Discipline Decision:
Negotiated Discipline**

(1 of 2)

- Tendering an offer of agreed discipline
- Securing acceptance of responsibility by the officer
- Negotiating admissions on factual findings and rule violations

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**VIII. Discipline Decision:
Negotiated Discipline**

(2 of 2)

- Consequences of Discipline; Enhancements
- Brady – Morton disclosure obligations
- Dealing with the TCOLE F-5 Issues.
- Alternative “discipline” strategies

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IX. The Appeal Forum

(1 of 1)

- Executive internal review, such as City Manager
- Adjudicative review by civil service board or city council or commission
- Arbitral or Independent Hearing Examiner review; including handling the strike selection process
- Judicial review of adverse personnel action

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X. Advocacy: Presentation of the Case

(1 of 1)

- Advocacy generally
- Opening statement; setting the stage
- Cutting to the chase; assume attention window is short
- Burden of proof vs. Burden of persuasion
- Order of Witnesses generally
 - ✓ Whether, and when, to call the Chief
 - ✓ Whether, and when, to call the grievant adversely.
- Documentary evidence; documents and things.

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XI. Closing Arguments and Briefing
(1 of 1)

- Tie together package of pleadings, proof, and conclusions
- Address conflicts in evidence, and Chief's reasonable resolution of those conflicts
- Proportionality of the discipline.

XII. Award and Challenges to the Award
(1 of 1)

- Finality of award generally, except for the following:
 - Jurisdictional Issues
 - Exceeding scope of authority
 - Fraud and collusion.

THE END

QUESTIONS?
