

**CIVIL SERVICE DISCIPLINARY
INVESTIGATIONS WITH CRIMINAL
INVESTIGATIONS AND POSSIBLE
PROSECUTION PENDING**

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I. Scope of The Presentation
(1 of 2)

- This presentation builds on a presentation I did last year which provided a bird's eye view of the disciplinary investigation process
- The presentation zooms in on specific considerations peculiar to a misconduct investigation when there is a concurrent criminal investigation or prosecution pending as well.

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I. Scope of The Presentation
[PARALLEL PROCEEDINGS]

- Criminal proceedings
 - Off-Duty Conduct
 - On-Duty Conduct
- Civil Proceedings
 - Civil Rights
 - Tort Claims Act proceedings

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II. Notice of the Complaint of Misconduct

- 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

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.

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.

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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III. Factors Affecting the Administrative Investigation; 143.056, TLGC
(1 of 5)

- Leave Status; Paid or Unpaid;
- Tolling the 180 Day Administrative Deadline
- Abatement of the Administrative Investigation
- Abatement of the Appeal Hearing

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III. Factors Affecting the Administrative Investigation; 143.056, TLGC

Leave Status; 143.056(a)

- (a) If a fire fighter or police officer is indicted for a felony or officially charged with the commission of a Class A or B misdemeanor, the department head **may** temporarily suspend the person with or without pay for a period not to exceed 30 days after the date of **final disposition** of the specified felony indictment or misdemeanor complaint.

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III. Factors Affecting the Administrative Investigation; 143.056, TLGC

Leave Status; 143.056(a); Caselaw

- *Rough v Ojeda*, 954 S.W.2d 127 (Tex. Civ. App – San Antonio, 1997)
- (entry of deferred adjudication is not “final disposition” of criminal case)
- Query: Here, all steps occurred within 180 days of arrest. What if discipline had occurred after 180 days?

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III. Factors Affecting the Administrative Investigation; 143.056, TLGC

Leave Status; 143.056(b)

- (b) The department head **shall notify** the suspended fire fighter or police officer in writing that the person is being temporarily suspended for a specific period with or without pay and that the temporary suspension is not intended to reflect an opinion on the merits of the indictment or complaint.

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III. Factors Affecting the Administrative Investigation; 143.056, TLGC

Leave Status; 143.056(b): Questions

- Does the writing have to be filed with the CSC? What are pros and cons of doing so.
- What is impact under 143.089 if criminal case is dismissed?
- Does an appeal from a temporary suspension have to be filed separately from an appeal from a disciplinary action?

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III. Factors Affecting the Administrative Investigation; 143.056, TLGC

Leave Status; 143.056(c)

- c) If the action **directly related** to the felony indictment or misdemeanor complaint occurred **or was discovered** on or after the 180th day before the date of the indictment or complaint, the department head **may, within 30 days after the date of final disposition** of the indictment or complaint, bring a charge against the fire fighter or police officer for a violation of civil service rules

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III. Factors Affecting the Administrative Investigation; 143.052(h), TLGC

Limitations Period; 143.052(h); Question

- "The department head **must allege** that the act complained of is related to criminal activity"
- Does this mean that it only has to be alleged?
- Does it also have to be proved as criminal activity?
- What is the standard of proof here?

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III. Factors Affecting the Administrative Investigation; 143.052(h), TLGC

Limitations Period; Criminal Activity

- h) [180 day rule] ... If the act is allegedly related to criminal activity including the violation of a federal, state, or local law for which the fire fighter or police officer is subject to a criminal penalty, the department head may not complain of an act that is **discovered** earlier than the 180th day preceding the date the department head suspends the fire fighter or police officer. The department head **must allege** that the act complained of is related to criminal activity

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III. Factors Affecting the Administrative Investigation; 143.056, TLGC

Leave Status; 143.056(d)

- d) A fire fighter or police officer indicted for a felony or officially charged with the commission of a Class A or B misdemeanor who has also been charged by the department head with civil service violations **directly related** to the indictment or complaint **may delay** the civil service hearing for not more than 30 days after the date of the final disposition of the indictment or complaint

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III. Factors Affecting the Administrative Investigation; 143.056, TLGC

Leave Status; 143.056(d); Caselaw

- *Amarillo v Fenwick*, 19 S.W.3d 499 (Tex. Civ. App. – Amarillo 2000, no writ)
- (term “directly related” to be given normal customary meaning; emphasis is on whether underlying facts for criminal and administrative violations are materially linked)
- (employee entitled to delay civil service appeal pending resolution of motion to revoke deferred adjudication of criminal charges; denial of delay resulted in reinstatement)

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III. Factors Affecting the Administrative Investigation; 143.056, TLGC

Leave Status; 143.056(e)

- e) If the department head temporarily suspends a fire fighter or police officer under this section and the fire fighter or police officer **is not found guilty** of the indictment or complaint in a court of competent jurisdiction, the fire fighter or police officer may appeal to the commission or to a hearing examiner for recovery of back pay. The commission or hearing examiner may award all or part of the back pay or reject the appeal.

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III. Factors Affecting the Administrative Investigation; 143.056, TLGC

Leave Status; 143.056(f)

- (f) Acquittal or dismissal of an indictment or a complaint does not mean that a fire fighter or police officer has not violated civil service rules and does not negate the charges that may have been or may be brought against the fire fighter or police officer by the department head.

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III. Factors Affecting the Administrative Investigation; 143.056, TLGC

Leave Status; 143.056(g)

- (g) Conviction of a felony is cause for dismissal, and conviction of a Class A or B misdemeanor may be cause for disciplinary action or indefinite suspension.

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III. Factors Affecting the Administrative Investigation; 143.056, TLGC

Leave Status; 143.056(h)

- h) The department head may order an indefinite suspension based on an act classified as a felony or a Class A or B misdemeanor after the 180-day period following the date of the discovery of the act by the department if the department head considers delay to be necessary to protect a criminal investigation of the person's conduct.

...

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III. Factors Affecting the Administrative Investigation; 143.056, TLGC

Leave Status; 143.056(h)

- h) ... If the department head intends to order an indefinite suspension after the 180-day period, the department head must file with the attorney general a statement describing the criminal investigation and its objectives within 180 days after the date the act complained of occurred.

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IV. Use of Criminal Case File Materials
(1 of 2)

- To extent available, criminal case file material can and should be incorporated into IA case file materials
- Statements of witnesses or complainants taken for criminal case file investigation are not necessarily useful for ad administrative investigation
- CID Investigators and IA Investigators do not have the same training, purpose, or investigative technique

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IV. Investigative Tools
(2 of 2)

- Orders to respond in writing
- Garrity statements
- Other affidavits and interviews of witnesses
- Relevant documentary proof, including photographs, video, and other recordings
- Polygraph orders
- Misconduct in the investigation process (how to address)

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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;
- Whether to avoid pleading violation of penal statutes or civil rights statutes

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**VI. Discipline Decision:
Pleading the Case**
(3 of 3)

- Pleading civil service and administrative violations
- 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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THE END

QUESTIONS?

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