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2019 Texas Public Employer Labor Relations Association (TxPELRA) Annual Workshop & 33rd Annual Civil Service Workshop

Law Enforcement Disciplinary Practices

A Barrier to Officer Accountability and Gateway to Civil Liability Needing Reform

Presenter: George E. Hyde, Attorney & Counselor at Law

Law Enforcement Disciplinary Practices A Barrier to Officer Accountability and Gateway to Civil Liability Needing Reform

- *Presentation Format:*
 - *4 Parts:*
 - *Discuss analytical research presented in two law journal articles regarding Disciplinary Practices in Law Enforcement*
 - *Conduct our own case study as an example of alleged Police Misconduct*



Law Enforcement Disciplinary Practices A Barrier to Officer Accountability and Gateway to Civil Liability Needing Reform

- *Presentation Format, continued:*
 - *Conduct our own case study of the Federal Court's Treatment of the above case.*
 - *Consider the compounding application of the common law standards of Brady, the Morton Act amendments to Tx. CCP. 39 and Giglio/Kyles Information to the employment relationship*



Law Enforcement Disciplinary Practices

Part 1 - Analytical Research

- *Police Union Contracts, Duke Law Journal, Vol. 66, No. 6, March 2017 by Stephen Rushin, Associate Professor, Loyola University, Chicago, Ill.*

This Article empirically demonstrates that police departments' internal disciplinary procedures, often established through the collective bargaining process, can serve as barriers to officer accountability.



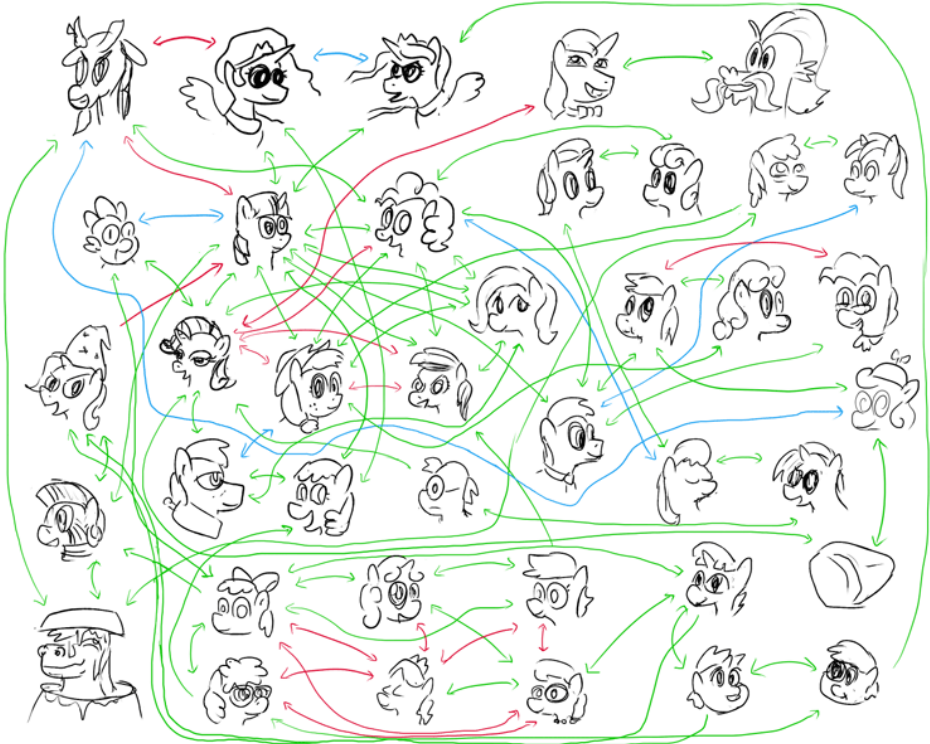
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Law Enforcement Disciplinary Practices

Part 1 - Analytical Research

- *One view of a police departments' internal disciplinary procedure:*



Law Enforcement Disciplinary Practices Part 1 - Analytical Research

- *Police Union Contracts, Duke Law Journal, Vol. 66, No. 6, March 2017*

The Article analyzes an original dataset of 178 collective bargaining agreements that govern the working conditions of around 40 percent of the municipal officers in states that permit or require collective bargaining in police departments.



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Law Enforcement Disciplinary Practices Part 1 - Analytical Research

*The analysis reveals that a substantial number of these contracts **unreasonably interfere with or otherwise limit the effectiveness of mechanisms designed to hold police officers accountable for their actions.***



Law Enforcement Disciplinary Practices

Part 1 - Analytical Research

- *External mechanisms fail to incentivize reform in American police departments.*
- *The external legal mechanisms which theoretically force development and application of rigorous disciplinary procedures do not in reality.*
- *Costs borne by police departments in cases of officer misconduct do not bring about organizational change in local police departments.*



Law Enforcement Disciplinary Practices Part 1 - Analytical Research

- *State labor laws and bargained for collective bargaining provisions, many of which were initially designed to shield law enforcement personnel from abuse, are now used as swords preventing employers from having effective control over the decisions to indefinitely suspend its police department workforce based on misconduct.*



Law Enforcement Disciplinary Practices

Part 1 - Analytical Research

- *Such procedural protections relate to:*
 - *interrogation after alleged misconduct,*
 - *the legal mandates of confidentiality or destruction of disciplinary records,*
 - *diminished or eliminated civilian oversight,*
 - *discreditation of anonymous complaints,*



Law Enforcement Disciplinary Practices

Part 1 - Analytical Research

- *procedural protections continued:*
 - *protections related to civil suits,*
 - *arbitration mandates in cases of disciplinary action, and*
 - *limitations as to time and scope of internal investigations,*

which all contribute to a police workforce that in part, may not live up to policies and standards set by the department command staff, city administration or the elected governing body.



Law Enforcement Disciplinary Practices

Part 1 - Analytical Research

- *Minimal safeguards:*
 - *Collective Bargaining takes place largely outside of the public view and with limited community stakeholder involvement.*
- *External pressures have elevated, i.e.:*
 - *DOJ Investigations*
 - *Ferguson and beyond*
 - *Statewide Legislation*
 - *Shifting Common Law*



Law Enforcement Disciplinary Practices Part 1 - Analytical Research

- *Where should your organization fall on the list of organizations working to reform their law enforcement organizations?*
- *With shifting standards impacting both the officer's livelihood and the municipality's civil liability and financial health, where do you want to be?*



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Law Enforcement Disciplinary Practices Part 1a - Analytical Research, continued

- ***Police Disciplinary Appeals***, *Univ. of Penn. Law Review*, Vol. 167, No. 2 (circulated rough draft) by Stephen Rushin, Associate Professor, Loyola University, Chicago, Ill.

Scholars and experts generally agree that rigorous enforcement of internal regulations within a police department promotes constitutional policing by deterring future misconduct and removing unfit officers from the streets.



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Law Enforcement Disciplinary Practices Part 1a - Analytical Research, continued

In recent years, though, a troubling pattern has emerged. Because of internal appeals procedures, police departments must often rehire or significantly reduce disciplinary sanctions against officers that have engaged in serious misconduct.



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Law Enforcement Disciplinary Practices Part 1a - Analytical Research, continued

*This Article empirically analyzes the disciplinary appeals process utilized in 656 police union contracts, many of which include the largest American police departments. It shows that the vast majority of these departments give police officers the ability to appeal disciplinary sanctions through **multiple levels of appellate review**.*

*At the end of this process, the majority of departments allow officers to **appeal disciplinary sanctions to an arbitrator selected, in part, by the local police union or the aggrieved officer**.*



Law Enforcement Disciplinary Practices Part 1a - Analytical Research, continued

*Most jurisdictions give these arbitrators **expansive authority to reconsider all factual and legal decisions** related to the disciplinary matter.*

*And **police departments frequently ban members of the public from watching or participating in these appellate hearings.***

*While each of these appellate procedures may be individually defensible, **they combine in many police departments to create a formidable barrier to officer accountability.***



Law Enforcement Disciplinary Practices
Part 1a - Analytical Research, continued

The Story of Officer Belver....

The Story of Officer Hector Jimenez....



Law Enforcement Disciplinary Practices Part 1a - Analytical Research, continued

The analytics show a majority of departments permit officers to appeal disciplinary sanctions to an arbitrator selected in part by the local police union.

Arbitrators are given expansive authority to re-litigate the factual and legal grounds for the disciplinary action.

In totality, this process creates a formidable barrier to police accountability.



Law Enforcement Disciplinary Practices Part 1a - Analytical Research, continued

In many documented cases, supervisors have been forced to rehire officers that have engaged in criminal offenses, violence, and other behaviors that raise serious questions about their fitness to serve in any law enforcement capacity



Law Enforcement Disciplinary Practices Part 1a - Analytical Research, continued

This Article concludes by arguing that states and localities should increase democratic accountability in police disciplinary appeals.

Police officers deserve procedural protections to avoid arbitrary punishment. But in many police departments across the country, disciplinary procedures seem as if they are designed to insulate officers from basic, democratic accountability.



Law Enforcement Disciplinary Practices Part 1a - Analytical Research, continued

The research demonstrates a basis to support the fact that:

- internal disciplinary procedures, often established through the collective bargaining process, can serve as barriers to officer accountability.*
- internal appeals procedures force police departments to often rehire or significantly reduce disciplinary sanctions against officers that have engaged in serious misconduct.*



Law Enforcement Disciplinary Practices Part 1a - Analytical Research, continued

So again I ask:

- *Where should your organization fall on the list of organizations working to reform their law enforcement organizations?*
- *With shifting standards impacting both the officer's livelihood and the municipality's civil liability and financial health, where do you want to be?*



Law Enforcement Disciplinary Practices Part 2 – Case Study – Alleged Misconduct

- *You will be tested on your perspective of the next 11 minutes you experience as you conduct your own case study in an example of alleged Police Misconduct:*
- <https://www.youtube.com/watch?v=Z3sMpfm59hc>



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Law Enforcement Disciplinary Practices Part 3 – Federal Court's Treatment

Section 1983 Claim based on Excessive Force:

To establish a claim of excessive force under the Fourth Amendment, a plaintiff must show "(1) an injury (2) which resulted directly and only from the use of force that was clearly excessive to the need and (3) the force used was objectively unreasonable."



Law Enforcement Disciplinary Practices Part 3 – Federal Court’s Treatment

The 1989 Decision in *Graham v. Connor*:

Established the objective reasonableness test for officer use of force.

The right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.



Law Enforcement Disciplinary Practices Part 3 – Federal Court’s Treatment

The 1989 Decision in *Graham v. Connor*:

Determining whether force is excessive or unreasonable "requires careful attention to the facts and circumstances of each particular case, including:

- the severity of the crime at issue,
- whether the suspect poses an immediate threat to the safety of the officers or others, and
- whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight."



Law Enforcement Disciplinary Practices Part 3 – Federal Court's Treatment

The 1989 Decision in *Graham v. Connor*:

Additional considerations that "may bear on the reasonableness or unreasonableness of the force used [include]:

- the relationship between the need for the use of force and the amount of force used;
- the extent of the plaintiff's injury;
- any effort made by the officer to temper or to limit the amount of force;
- the severity of the security problem at issue;
- the threat reasonably perceived by the officer; and
- whether the plaintiff was actively resisting."



Law Enforcement Disciplinary Practices Part 3 – Federal Court’s Treatment

Additional common law:

An officer may consider a suspect's refusal to comply with instructions in assessing whether physical force is needed to effectuate the suspect's compliance. *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (per curiam).



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Law Enforcement Disciplinary Practices Part 3 – Federal Court's Treatment

The 1989 Decision in *Graham v. Connor*:

Moreover, the "reasonableness" of a particular use of force is judged from ***the perspective of the officer at the scene, rather than the 20/20 vision of hindsight.***

"Not every push or shove even if it may later seem unnecessary in the peace of a judge's chamber violate[s] the Fourth Amendment."



Law Enforcement Disciplinary Practices Part 3 – Federal Court’s Treatment

The Videotape Rule:

Where there is a video recording of the events in question, "the Court should analyze the video evidence and reject the plaintiff's account only where the video evidence so clearly discredits the plaintiff's story that no reasonable jury could believe the plaintiff's version of the events."

Chacon v. City of Austin, Tex., 2013 WL 2245139, at 14 (W.D. Tex. May 21, 2013), aff'd sub nom. *Chacon v. Copeland*, 577 F. App'x 355 (5th Cir. 2014) (citing *Scott v. Harris*, 550 U.S. 372, 378 (2007)).



Law Enforcement Disciplinary Practices Part 3 – Federal Court’s Treatment

So now I ask, what is your answer in your case study?

For officer making arrest?

And, for the transporting officer’s conduct?

What happened in the King v. City of Austin lawsuit?



Law Enforcement Disciplinary Practices Part 3 – Federal Court’s Treatment

So again I ask:

- Where should your organization fall on the list of organizations working to reform their law enforcement organizations?*
- With shifting standards impacting both the officer’s livelihood and the municipality’s civil liability and financial health, where do you want to be?*



Law Enforcement Disciplinary Practices

Part 4 – Compounding Application of “New” Legal Standards

Returning to the issue of retention and employment - what is the impact of:

- *Brady list enforcement*
- *The Morton Act amendments to Tx. CCP. 39;*
- Giglio/Kyles Information
- Shift in common law

to the officer-municipality employment relationship?



Law Enforcement Disciplinary Practices

Part 4 – Compounding Application of “New” Legal Standards

So again I ask:

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