



RISK MANAGEMENT INFORMATION
**PROPER PROCEDURES FOR
POLICE EMPLOYEE DISCIPLINE**

Discipline of officers requires certain documentation and procedural steps before a city can take final action. There are two primary categories in which disciplinary actions arise – employee misconduct or performance – and the procedures for dealing with both may vary. The following is a checklist of the most important legal procedural requirements for employment discipline and documentation.

Peace Officer Discipline Procedures Act (PODPA)

The PODPA, found at Minnesota Statute Section 626.89, requires cities follow certain procedures when, during the course of investigating allegations against a licensed peace officer, it is necessary to take a formal statement of that officer. A formal statement is defined as the questioning of an officer in the course of obtaining a recorded, stenographic or signed statement to be used as evidence in a disciplinary proceeding.

The manner and circumstances of the formal statement is mandated by the PODPA including:

- Location (at facility of city or investigating agency or other place mutually agreed upon).
- Written complaint signed by complainant.
- List of witnesses must be provided upon request.
- Copies of witness statements and investigative report must be provided upon request.
- Length of session (reasonable duration with rest periods).
- Time compensation.
- Electronic recording (and can't charge officer for copy of tape or transcript).
- Presence of attorney or union rep (and reasonable time given to obtain presence).
- Notice of use of admissions.

Definition

The Peace Officer Discipline Procedures Act (PODPA) mandates the manner and circumstances by which a city can obtain a formal statement from a police officer. A formal statement is the questioning of an officer in the course of obtaining a recorded, stenographic or signed statement to be used as evidence in a disciplinary proceeding.

The PODPA places restrictions on an employer's request for an officer's financial records (search warrant or subpoena required) and the release of photographs of the officer. A city also must provide prior notice to the officer of any disciplinary documentation before its inclusion in the officer's personnel file. The officer has a right to sue the city for any violations of the statute including for any retaliation against the officer for exercising his or her rights under the PODPA.

This material is provided as general information and is not a substitute for legal advice.
Consult your attorney for advice concerning specific situations.

Internal Misconduct/Complaint Policies

The POST Board requires every chief law enforcement officer (CLEO) establish written procedures for investigation and resolution of allegations of misconduct against licensed police officers employed by their city. At a minimum these procedures must include:

- The misconduct which may result in disciplinary action.
- The process by which complaints will be investigated.
- The sanctions which may be imposed if a complaint is sustained.
- The appeal process for the officer.
- The process which will be used to notify the complainant of the investigation and disposition.
- The effective date of the procedures or subsequent modifications of the procedures.

The mandatory misconduct policy must be distributed to all employed officers, and made available to the public upon request. All misconduct complaints must be processed according to the city's policy. Failure to do so is grounds for disciplinary action against the CLEO's license.

In addition, the CLEO is required to report annually to the POST board cases involving alleged misconduct of officers under his or her supervision. A report with summary data including the number of investigations conducted and disposition of complaints must be filed with POST.

More Information

Visit the POST website (www.post.state.mn.us) to obtain a July 2008 revision of the POST Board "Allegations of Misconduct Policy."

Minnesota Government Data Practice Act (MGDPA)

The MGDPA applies to personnel data created and maintained by a city. In the case of disciplinary documentation, a police officer – as with any city employee – has certain protections of privacy in information created and maintained due to the employment relationship.

The MGDPA governs when information on a personnel action becomes public and when it remains private. A city may be *required* to release data regarding discipline due to employee misconduct and performance issues if the conditions requiring the release of data are met.

Releasing personnel data that is classified as private, however, subjects the city – and even individual city officials – to legal liability and potential penalties, including criminal sanctions.

Definition

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- **Private Personnel Data:** The presumption under the MGDPA is that personnel data are "private" unless covered by a specific exception in the statute. Access to private data is limited

to the employee, or their designee, and to city officials whose duties require access. Private personnel data may also be released pursuant to a court order.

- **Public Personnel Data:** Notwithstanding the presumption that personnel data are private, the MGDPA does classify certain personnel data as public at all times. Final disciplinary actions are public. Specifically, the MGDPA classifies as public “the final disposition of any disciplinary action together with the specific reasons for the action and the data documenting the basis for the action, excluding data that would identify confidential sources who are employees of the public body.” In other words, the reasons for any discipline, if that discipline is final, are public.

The MGDPA also classifies as public data “the existence and status of complaints or charges against the employee, regardless of whether the complaint or charge resulted in disciplinary action.” If no disciplinary action has been imposed, however, the city should only release limited information that a complaint was made and its status. No further information about the specifics of the complaint or the investigation into the complaint should be released.

- **Tennessee Warning:** A Tennessee Warning is a standard tool used by city employers in discipline investigations and proceedings. Many police administrators do not realize this notice requirement comes from the MGDPA and that it has a specific application and purpose.

A Tennessee Warning comes into play when an officer is asked by his or her employer to supply private or confidential data concerning the officer. In that situation, the MGDPA requires the officer be informed of:

- The purpose and intended use of the requested data.
- Whether the officer may refuse or is legally required to supply the data.
- Any known consequences from supplying or refusing to supply private or confidential data.
- The identity of other persons or entities authorized to receive the data.

Minnesota Courts have held that a public employer is not required to give an employee a Tennessee Warning before obtaining information from the employee about incidents that occur within the course and scope of employment. Requesting information on facts of an incident under investigation is not the same as requesting private or confidential data on a police officer. A safe practice to protect the city, however, is to provide a Tennessee Warning when a formal statement is being taken, in the event private or confidential information is volunteered by the officer, or if the questioning leads to discussion of private or confidential matters about the officer.

Tennessee Warning

A safe practice for cities when gathering information from an officer is to provide a Tennessee Warning when a formal statement is being taken, in the event that private or confidential information is volunteered by the officer or if the questioning leads to discussion of private or confidential matters about the officer.

Constitutional Issues

- **Due Process:** The Fourteenth Amendment to the United States Constitution prohibits public employers such as cities from taking any action that deprives an individual of a protected property or liberty interest without first providing due process of law.

Certain disciplinary actions such as terminations and demotions require a city to provide “due process” before a decision becomes final.

Due process in the case of employment discipline consists of providing the employee notice of the allegations against him/her and an opportunity to respond prior to final action on the discipline.

Not every city employee is entitled to due process. Only those employees with a property interest in continued employment have constitutional protection. At-will employees or those considered probationary do not have a property interest. Employees who cannot be removed except for cause, however, would be entitled to due process. Oftentimes these “for cause” provisions are found in written personnel policies, union contracts and statutes such as the veterans preference act.

In some limited situations, some employees will have entitlement to constitutional due process *after* a discipline decision has been reached. In these cases, an employee’s liberty interest in his or her good name is implicated by the public statements made about the employee in connection with a discipline decision.

An employee must show that untrue statements were made public and these statements were so stigmatizing as to seriously damage his or her standing in the community, or foreclose the freedom to take advantage of other employment opportunities. The requisite stigma usually comes from accusations such as dishonesty, immorality, criminality, racism, and the like. Unsatisfactory performance or general misconduct is insufficient.

Where an employee has been sufficiently stigmatized, the employee’s due process rights are vindicated by a “name-clearing hearing at a meaningful time” during which the employee can respond to the employer’s accusations. Failure to provide a name-clearing hearing upon request is a constitutional violation by the employer.

- **Garrity Warning:** The Garrity Warning comes from the United States Supreme Court case of *Garrity v. New Jersey*.

This case involved police officers who were under investigation for allegedly fixing traffic tickets. The officers were given a choice of either providing a statement to their employers (which may subject them to criminal prosecution) or to forfeit their jobs.

The Supreme Court held that any employee statements made to the public employer under these circumstances were coerced and the Constitution prohibited their use in a subsequent criminal proceeding.

The Garrity Warning was thus established: *An employee statement obtained under threat of removal from office cannot be used in subsequent criminal proceedings.*

Therefore, before compelling a statement, a public employer should provide the employee notice and take steps ensuring the exclusion of the statement in subsequent criminal proceedings.

The overuse of Garrity Warnings in police employment investigations is common and can result in unanticipated negative consequences for the city and the public at large. Before giving a Garrity Warning, and assuming the risks of tainting future criminal proceedings should any self-incriminating statements or the fruits of any self-incriminating statements be leaked in anyway outside of the employment investigation, stop and ask the following question: Does the investigation require a compelled (or coerced) statement? The answer is rarely yes.

A safer course of action is to request that the employee provide a voluntary statement. If the employee gives a voluntary statement, no Garrity Warning is required, and the statement itself may be used in a future criminal matter against the employee.

A city can simply ask if the employee is willing to provide a response to allegations. Most employees will want to provide an explanation to the alleged misconduct. If the employee refuses, a city is free to make a determination on the investigation based on the other information gathered.

In addition, giving an employee the choice of making no statement and having potential discipline based on other evidence or making a voluntary statement which could be used against the employee in a subsequent criminal prosecution does not violate the employee's constitutional rights.

Garrity Warning

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Veterans Preference

An honorable-discharged veteran of the military services employed by a city cannot be terminated except for incompetence or misconduct.

Any veteran who has been notified of a city's intent to terminate must be given *written* notice of his or her right to request a hearing within 60-days of the notice of proposed termination. The

failure of a veteran to request a hearing within the 60-day period constitutes a waiver of his or her right to a hearing as well as other legal remedies for reinstatement.

If the veteran is discharged without the proper notice, the veteran is entitled to reinstatement and back pay. Although the 60-day period will not run until receipt of the appropriate notice, the statute of limitations bars petitions brought more than six years after discharge.

A veteran cannot be suspended without pay while the city determines whether or not to terminate employment. However, the city may suspend a veteran with pay in this situation. For purposes of the veteran's preference, a suspension of more than 30 days is the same as a discharge.

Probationary employees are entitled to the protections of the veteran's preference statutes which provide that a veteran may only be removed from public employment after a hearing and a showing of misconduct or incompetence.

Police Civil Service Commissions

The individual or governing body with the authority to make final disciplinary decisions depends on whether the city is formed under a statutory plan or charter. While most termination decisions are made by the city manager (statutory plan B) or city council (statutory plan A), the discretion given to police chiefs to impose lesser forms of discipline vary depending on a city's own procedures and contracts (pay particular attention to policies and procedures agreed to in an applicable collective bargaining agreement).

In addition, some cities have created a police civil service commission under Minnesota Statute, Chapter 419, and that has the "absolute control and supervision over the employment, promotion, discharge, and suspension of all officers and employees of the police department." The police civil service statute, however, provides that "any officer may suspend a subordinate for a reasonable period not exceeding 60-days for the purpose of discipline, or pending investigation of charges when the officer deems such suspension advisable."

A police civil service commission consists of three appointed members who are residents of the city. Members serve staggered three-year terms. Cities with a police civil service commission must provide a public hearing before a police employee can be removed or discharged from employment. In particular, any police officer who has been employed for at least 12 months can be removed or discharged only for cause upon written charges and "after an opportunity to be heard in defense of the charges." The discharge proceedings should comply with both state law and due-process requirements. A city must be careful to follow all procedural requirements and the decision of the commission can be appealed to the district court.

Patricia Beety, March 2009