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Police Issues: Police Legal Advice 101

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WHAT DOES IT MEAN TO BE A POLICE LEGAL ADVISOR?

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Wanted: Attorney with litigation and transactional experience, preferably some experience in criminal prosecution. The successful applicant will have a demonstrated mastery of criminal law and criminal procedure, with expertise in Fourth Amendment issues. In addition, the applicant must have a strong working knowledge of the First Amendment, employment and labor law as well as Title VII and other discrimination claims and federal civil rights matters. Prior experience in the fields of public records, human resources, media and public relations, policy development, procurement, risk management, asset forfeiture, contract negotiations and employee education are helpful. Applicants should also have a working knowledge of the fields of psychology, counseling, clergy, political consultancy, domestic relations, child protective services, medical records and billing, communications and employee investigations and discipline.

These are only the primary issues encountered by the police legal advisor. An attorney in this position must also be well-versed in state criminal and employment law, court procedures, practical and cultural aspects of police management, state accreditation and police operations. If one is called upon to represent a sheriff's office, additional responsibilities arise under correctional services, warrant service and execution, evictions, replevins, property seizures and Eighth Amendment issues. It's a challenging job and calls for both proactive and reactive strategies to serve your client well.

Police legal advisors are often faced with the question of is who is the actual client? To be effective, a police legal advisor must have a close and trusted relationship with the chief of police. One must gain and retain the confidence of the chief, command staff members and the rank and file in order to enhance access to information and encourage members to follow listen to and follow legal advice. The attorney must understand the nature of and respect the paramilitary quality of a police agency, recognize his or her own role in that agency and navigate agency politics for self-preservation and to insure good service. And yet despite these important relationships, one must bear in mind that the actual client is, in most instances, the governing body such as the City, Town or commission. It is not a rare instance in which a police chief's interests or goals actually conflict with the governing body, and the police legal advisor must know how to recognize and deal with those situations.

At the same time, the police chief is dependent on the legal advisor to protect him or her from legal liability and political liability. The legal advisor must assist in policy development and decision-making concerning hot button issues such as immigration, managing suspects who are affected by mental illness and police corruption and use of force. Both the chief and the legal advisor must stay abreast of changing standards in the law enforcement industry to avoid negligence and constitutional liability.

Law enforcement is a culture unto its own. The successful police legal advisor must find a way to establish credibility in this culture, learn to speak the 'language," and be interested and knowledgeable about police procedures. At the same time, it is helpful to both the agency and the lawyer that the lawyer remain something of an outsider to offer a broader perspective when important decisions are being made. It is useful if the attorney refrains from being a "naysayer" but instead works to help the client achieve its goals, if at all possible.

Below is a brief examination of some of the critical issues facing police legal advisors in the current law enforcement world.

Internal Investigation and Employee Discipline

Communities expect and deserve their law enforcement officers to be trustworthy and honorable and to act in compliance with the law. When officers fail to do so, it is incumbent on law enforcement leadership to take prompt and appropriate action to correct behavior or to remove unfit personnel. That action may consist of counseling and mentoring, providing additional training, or imposing punishment.

One of the most challenging responsibilities of a chief of police is to impose fair and reasonable discipline in response to employee misconduct. The purposes of effective employee discipline are multifold and include changing the individual employee's behavior for the better, communicating agency expectations, ensuring officer safety, and restoring public confidence in the agency.

In most cases, public employees are entitled to due process before being deprived of a property right, as would come in the form of discipline or termination of employment. Some states even have a statutory Bill of Rights or special civil service rules that provide additional rights to law enforcement officers. The police legal advisor must be aware of these laws and assist the agency in conducting the necessary investigation and afford the specified procedures. A failure to effectively discipline can lead to claims of negligent retention, and of pattern and practice constitutional liability and political challenges.

The legal advisor should remind police chiefs and command staff members to consider the character of the involved employee and the type of conduct involved, the degree of harm

caused by the conduct, and the impact of the conduct on the public trust and then select discipline in a fair manner that is not based on any unlawful discriminatory criteria.

Constitutional Liability Under Section 1983

Under 18 U.S.C. 1983, a plaintiff may sue employers and supervisors who negligently hire, supervise, and retain an employee or fail to train an employee. The negligent retention and negligent supervision cases generally involve poor supervisory performance, such as failing to investigate complaints or discipline problem employees. Although first-line supervisors generally do not have to worry about liability for negligent hiring, chiefs of police may face such challenges. Supervisors at all levels may face liability for negligent supervision or failure to train.

To establish supervisor liability the plaintiff must prove that (1) the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens, (2) the supervisor's response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices and (3) there was an affirmative causal link between the supervisor's inaction and the alleged constitutional injury.

Police personnel and municipalities can also be sued under § 1983 for practices that show a pattern of unconstitutional conduct, known as *Monnel* liability. These claims are often based on inadequate policies, training and supervision and can be very costly to the government, since attorneys fees are also provided for by §1983. The police legal advisor must be well acquainted with this body of law, and, in particular, the all-important qualified immunity defense.

Title VII

Title VII of the 1964 Civil Rights Act prohibits discrimination based on race, color, religion, sex, or national origin. Generally speaking, an employee may show Title VII discrimination of one of two kinds: disparate impact of disparate treatment. A disparate impact case arises where the employer uses a particular employment practice that is facially neutral but causes a disparate impact on applicants or employees in one of the protected classes. Such a challenges practice may still be shown to be legal (despite the disparate impact) if the employer can demonstrate that the challenges practice is job related and is consistent with business necessity. In a disparate treatment case, the applicant or employee presents evidence the employee was treated differently because of the employee's membership in a protected class. Disparate treatment cases may arise in the context of hiring, promotion, or termination.

Sexual harassment cases are rooted in Title VII and fall into two categories: quid pro quo (where the rewards or punishments occur to the employee because of the employee's response to a request for sexual favors), and hostile environment claims (where an employee shoes that the sexual harassment had created such an intolerable work environment as to be hostile or offensive; proof of loss of a job benefit is not required.) Employers are liable for quid pro quo actions committed by their supervisors. Also, an employer may be liable for a hostile work environment claim if the supervisor is aware of the situation and fails to resolve the matter effectively. Sexual harassment claims may be more common in workplaces that are traditionally dominated by males, as is policing.

Americans with Disabilities Act (ADA)

The Americans with Disabilities Act prohibits discrimination against an otherwise qualified individual with a disability. A qualified individual with a disability is an individual

who, with or without reasonable accommodation, can perform the essential functions of a particular position. The Act also prohibits employers from unfairly or improperly "regarding" a person as disabled to his or her disadvantage. These prohibitions apply both the incumbent employees and applicants.

The ADA also imposes certain access requirements so that individuals with disabilities may avail themselves of government services. This requirement may mean that a law enforcement agency must have a deaf interpreter available to assist arresting officers, or offer handicapped accessible so the disabled can attend a community meeting.

Under the regulations promulgated pursuant to this statue and under case law, a disability for purposes of the ADA is permanent in nature and affects the employee's ability to perform one or more major life activities. The reasonableness of an accommodation is judged in light of the impact on the employer, with consideration given to the employer's economic resources. Essential job functions (identified through instruments such as job task analyses) are duties the employee must perform. Requiring a police officer to shoot a firearm with specified accuracy is an example of an essential job function.

Not all functions of a particular job are essential, core functions; some may be peripheral functions. To determine what constitutes an essential job function and a reasonable accommodation required considerations of facts specific to that particular case. However, supervisors should be capable of detecting that a situation may involve an ADA issue and should know when to seek further legal advice. The police legal advisor must be prepared to address these issues which can sometimes be difficult since policing is a physically demanding job, and requires acute physical and mental abilities.

Pregnancy and Age Discrimination

The Pregnancy Discrimination Act prohibits discrimination against pregnant employees. Few police agencies have adequate pregnancy policies and discrimination against women is not uncommon in this respect. Police legal advisors should be aware of the model policy issued by the International Association of Chiefs of Police and new PD guidelines recently promulgated by the EEOC in advising law enforcement clients about accommodating pregnancy in the police workplace.

The Age Discrimination in Employment Act (ADEA) protects employees 40 years and older, and prohibits employers from making decisions affecting the employee's terms or conditions of employment because of the employee's age. As with Title VII cases, disparate treatment and separate impact theories may apply.

First Amendment

A governmental employer may not illegally infringe on its employees' First Amendment rights of free speech and free exercise of religion. This can be a complicated matter in a workplace that is highly regulated, relies on loyalty and discretion and deals with confidential information, such as a police department. A government employee's right to free speech is not unfettered and can be reasonably regulated by the employer. The Supreme Court has recognized that where the employee is addressing matters of public concern, the employee generally has a right of free speech and the employer may not discipline or unduly restrict the speech. Whether a public employee's speech is a matter of public interest (and therefore entitled to free speech protection) involves a rather fact-specific balancing test. Where the employee is speaking on a topic of private interest that does not bear upon the broader issues of the government relations (to its citizens in general), the employer may regulate the speech and may pursue disciplinary action;

in other words, the speech is not protected. Police chiefs and supervisors facing a free speech issue should be encouraged to seek legal advice for the specific circumstances involved.

First amendment issues arise also in the enforcement context and officers often need guidance as to how much the police can regulate the time, place and manner of citizen speech. Many free speech suits (brought under §1983) in involve law enforcement's efforts to control crowds and maintain safety while still attempting to permit citizens to exercise their rights to protest and demonstrate. Sound policy direction and training are critical in this area.

Similarly, although the First Amendment guarantees that the government shall neither establish nor prohibit a religion nor prohibit the free exercise of religion, the public employee's freedom-of-religion rights are not unfettered in the workplace. Specifically, the employer should take steps to accommodate the employee's religious beliefs, but these steps need not infringe on the rights of other employees or impair the governmental employer's efficiency. Again, cases in this area are rather face specific, so any supervisor who identifies a freedom-of-religion issue should be encouraged to seek legal advice before taking action.

The Fair Labor Standards Act (FLSA)

The FLSA establishes federally mandated minimum wage and overtime standards, among other things. Pursuant to regulations promulgated by the Department of Labor, employees are classified as either "exempt" or "nonexempt." Generally, nonexempt (meaning covered by the Act) employees may work no more than 40 hours in a given week unless the employer pays them overtime or gives them compensatory time at the rate of one and one-half times hours worked. For sworn employees, even though they are nonexempt, the FLSA contains a special exemption under section 207(k). Most state and local governments have declared their intention to apply the section 207(k) exemption, which enables them to declare the work period as a

regularly recurring period of seven to 28 days. Many law enforcement agencies use the 28-day, 171 hour exemption.

Agencies must be careful when classifying an employee as exempt or nonexempt. Many supervisory employees may be considered "exempt" – that is, not covered by the protections of the Act. Under the DOL's regulations, the administrative and executive exemption tests have been revised. Many smaller agencies may benefit from engaging consultant services to develop a task analysis for positions the agency has classifies as, or wishes to classify as, exempt. This task analysis of the actual functions performed by individuals in those positions will enable the agency to seek a legal opinion regarding whether the positions are properly classified as exempt of nonexempt. All FLSA-related decisions should be reviewed by the legal advisor as the penalties for FLSA violations can be severe.

Teaching Law Enforcement Officers the Law

A police legal advisor may be called on to teach law and legal updates to uniformed personnel. In this context, the lawyer must understand his or her audience and be able to relate to their experience on the street, but must resist the temptation to act like a cop. To reach this balance, it is useful to have developed credibility with the officers in advance. Go on ride-alongs. Attend promotional and memorial ceremonies. Go to the scene of critical events to learn and listen to the officers' concerns. Ask to be called out to officer involved shootings. Attend squad briefings and roll calls. Allow officers to tell you why a certain legal approach won't work in real life and ask if they can think of a better approach. Develop a few confidants who will tell you how things are actually being done so that you can teach them a better way, if necessary. Network with other police legal advisors.

If your legal training is focused on giving officers tools to protect their safety and protect them from liability, they will be more receptive to your messages. Scenario based training is often an effective approach, as officers tend to appreciate examples of how to do things right. Most of all, don't be a know-it-all just because you are the lawyer.

Conclusion

Being a police legal advisor is one of the most rewarding jobs a lawyer can have. It is interesting, challenging, ever-changing and exciting to be part of the law enforcement world. Under the right circumstances, such lawyers are widely admired by their clients who are grateful for the knowledge and support that the legal advisor has to offer. Being a part of this team is a worthwhile endeavor.