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Police Accountability: The Established Legal Landscape and Evolving Public Expectations

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Agenda

- The existing legal landscape
- Recently passed and proposed state and federal legislation
- Potential practical implications for local agencies

Constitutional Due Process Requirements for Police Discipline



Cleveland Bd. of Educ. v. Loudermill (1985) 470 U.S. 532

- Non-probationary, "for cause" public sector employees facing discipline are entitled to due process:
  - Pre-disciplinary notice and an opportunity to be heard
    - Oral or written notice of charges
    - Explanation of employer's evidence
    - Opportunity for employee to present his or her side
  - Post-deprivation appeal hearing

Gilbert v. Homar (1997) 520 U.S. 924

- Officer arrested and charged with a felony was not entitled to notice and hearing prior to suspension without pay
  - Employer had significant interest in immediately suspending employee in position of great public trust and high public visibility
  - Arrest and formal charge serve to assure that the employer's decision to suspend the employee is not "baseless or unwarranted"

Police Officer “Bill of Rights” Laws



Police Officer Bill of Rights Laws

- What are they?
  - Statutory due process rights and protections that employing agencies must provide to peace officers under investigation for alleged misconduct

Police Officer Bill of Rights Laws

- 22 States have enacted police officer "Bill of Rights" laws:

Arizona	Indiana	Rhode Island
Arkansas	Kentucky	Tennessee
California	Louisiana	Texas
Delaware	Maryland	Virginia
Florida	Minnesota	West Virginia
Georgia*	Nevada	Wisconsin
Illinois	New Mexico	
Iowa	Oregon	

Common Provisions

- Rights and protections regarding administrative interrogations
  - Notice of nature of investigation
  - Rules regarding timing and place of interrogations
  - Right to representation during interrogation
  - Limitation on number of investigators asking questions

Common Provisions (cont.)

- Rights and protections regarding administrative interrogations
  - Recorded interrogations
  - Entitlement to recording or transcript of interrogation
  - Prohibition on offensive language, threats of punitive action or harassment during interrogations

Common Provisions (cont.)

- Statute of limitations on bringing disciplinary action
- Right to disciplinary appeal hearing
- Right to review and respond to adverse materials placed in their personnel files
- Prohibition on retaliation for exercising rights

Possible Remedies for Bill of Rights Violations

- Depends upon statutory scheme
- Examples include:
  - Prohibition of disciplinary action (statute of limitations)
  - Suppression of interrogations
  - Monetary penalties
  - Removal of investigator

Practical Implications of Bill of Rights Laws

- Right to notice and representation
  - "Informal interrogations"
- Statute of limitations
  - Department management needs to respond promptly to allegations of misconduct to avoid blowing the S/L
  - Policy manual should clearly lay out who has authority to initiate an investigation

Access to Police Disciplinary Records



Confidentiality of Police Disciplinary Records

- Records confidential in 17 states + D.C.:

Alaska	Maryland	New Hampshire
Delaware	Mississippi	North Carolina
District of Columbia	Missouri	Rhode Island
Idaho	Montana	South Dakota
Iowa	Nebraska	Virginia
Kansas	Nevada	Wyoming

Based on 2015 survey by New York Public Radio, https://project.wnyc.org/disciplinary-records/

Confidentiality of Police Disciplinary Records

- Limited records available in 21 states:

Arkansas	Louisiana	Oregon
California	Massachusetts	Pennsylvania
Hawaii	Michigan	South Carolina
Colorado	New Jersey	Tennessee
Illinois	New Mexico	Texas
Indiana	New York	Vermont
Kentucky	Oklahoma	West Virginia

Based on 2015 survey by New York Public Radio, https://project.wnyc.org/disciplinary-records/

Confidentiality of Police Disciplinary Records

- Records are public in 12 states:

Alabama	Georgia	Ohio
Arizona	Maine	Utah
Connecticut	Minnesota	Washington
Florida	North Dakota	Wisconsin

Based on 2015 survey by New York Public Radio, https://project.wnyc.org/disciplinary-records/

Practical Implications of Police Record Confidentiality

- Confidentiality makes it harder for public to gauge how well an agency is policing itself
  - The greater the opacity, the greater the potential for public distrust of police
  - When records publicly available, may be easier for agencies to hold officers accountable
- The tide is changing—be prepared!

Collective Bargaining



Officer Collective Bargaining Rights

- Police officers have the right to collectively bargain in the vast majority of states (41 States + D.C.)
- Officers are *barred* from collectively bargaining in only five states:
  - Georgia, North Carolina, South Carolina, Tennessee, Virginia
- No statutes or case law addressing police collective bargaining in four states:
  - Alabama, Colorado, Mississippi, Wyoming

Collectively Bargained Protections

- Some controversial provisions in collective bargaining agreements:
  - Automatic erasure of disciplinary records
  - Providing officers accused of misconduct access to entire investigative file ***before*** interrogation
  - Forfeiting sick leave or holiday/vacation pay in lieu of serving suspension
  - Strict limitations on investigation of complaints

Police Unions

- Frequently regarded as having outsized political strength
- Increasingly viewed as impediments to reform
  - Campaign Zero - “8 Can’t Wait” and “Nix the 6”
  - “Defund the Police”
- Any reforms at local level will require officer/union buy in to be most effective

Recently Passed State Legislation and Orders



California – SB 1421

- Requires disclosure of records and information relating to the following types of incidents in response to public records act request:
  - Discharge of a firearm at a person
  - Use of force resulting in death or great bodily injury
  - **Sustained** finding of sexual assault involving member of the public
  - **Sustained** finding of dishonesty

California – AB 748

- Requires disclosure of video and audio recordings of "critical incidents" involving police agencies
  - Critical incidents
    - Depicts an incident involving the discharge of a firearm at a person by a peace officer or custodial officer
    - Depicts an incident in which the use of force by a peace officer or custodial officer against a person resulted in death or great bodily injury

Colorado – HB 19-1119

- Requires disclosure of internal investigation files into certain peace officer misconduct in response to open records requests
  - Officer must have been in uniform or on duty
  - Misconduct must involve a member of the public
  - Must have resulted in at least a suspension or greater

Iowa – House File 2647

- Prevents a person from being hired as a police officer in Iowa if they have a previous felony conviction, had their certification to serve as a police officer in another state revoked, were fired for misconduct, or left a prior job while a disciplinary investigation which could have resulted in termination was pending

New Jersey – AG Law Enforcement Directive No. 2019-5

- "Internal Affairs Directive" revised Internal Affairs Policy & Procedures which govern all IA investigations in the state
  - Requires background investigations for new recruits that includes review of IA files for candidates with prior law enforcement experience
  - Requires disclosure of IA files to prospective law enforcement employers

New Jersey – AG Law Enforcement Directive No. 2020-5

- Revises statewide *Internal Affairs Policy & Procedures* to require all law enforcement agencies to publish annually the names of officers subjected to final disciplinary action of termination, demotion or suspension more than five days along with a summary of their misconduct

New York – S.8496 / A.10611

- Repealed Civil Rights Law § 50-a which prevented disclosure of police personnel records absent express, written consent of the officer or court order
- Law enforcement disciplinary records now subject to disclosure under Freedom of Information Law
  - Allows redaction of disciplinary records pertaining to "technical infractions"

New York – "STAT Act" (S.1830-C / A.10609)

- Requires courts to compile and publish racial and other demographic data of all low-level offenses, including misdemeanors and violations
- Requires police departments to report any arrest-related deaths to the Department of Criminal Justice Services and to submit annual reports on such deaths to the governor and the legislature

New York – S.8493 / A.8674

- Requires NY State Police patrol officers to use body worn cameras to record:
  - Immediately before an officer exits a patrol vehicle to interact with a person or situation;
  - All uses of force;
  - All arrests and summonses;
  - All interactions with individuals suspected of criminal activity;
  - All searches of persons and property;
  - Any call to a crime in progress;
  - And more…

Oregon – HB 4207

- Establishes a statewide public database of officers whose certification has been revoked or suspended
- Database includes officers' names, employing agency, discipline, and a link to Department of Public Safety Standards and Training Staff reports and any final orders revoking or denying a public safety certification

Pennsylvania – Act 57

- Creates statewide database of separation records for officers (e.g., criminal records, civil suits, disciplinary records, other ethical complaints against officer)
- Requires agencies to search database when hiring a new officer

Pennsylvania – Act 57 (cont.)

- If agency hires officer who was disciplined or criminally convicted for any of 10 categories of behavior, then agency must file a report indicating the rationale for hiring the person
- "Hiring reports" which are submitted to a state agency are subject to disclosure under the state's "right-to-know" law

Proposed Legislation



State Legislation

- **Hawaii HB 285** - Requires county police departments to disclose to the Legislature the identity of an officer upon the officer's suspension or discharge. Amends the Uniform Information Practices Act to allow for the disclosure of employment misconduct information that results in the suspension of a county police officer.

State Legislation

- **Maryland HB 1221** – Renders all complaints about officer-involved shootings or serious injury available through public information requests, irrespective of merit. Complaints about sexual assault, dishonesty and discrimination only available if sustained.
- **Maryland SB 1029** – Amended version of HB 1221 makes all complaints available to public, whether or not sustained.

State Legislation

- **New Jersey SB 2656 / AB 4283** – Classifies complaints, charges, transcripts of disciplinary hearings, internal affairs records, body camera footage and more as "government records" subject to disclosure under Open Public Records Act

State Legislation

- **California SB 776** – Expands scope of SB 1421 disclosures to include:
  - All uses of force (not just those resulting in death/great bodily injury)
  - All complaints relating to sexual assault and dishonesty (not just sustained complaints)
  - Sustained findings of wrongful search or wrongful arrest
  - Incidents involving prejudice or discrimination on basis of protected classes
  - Records for incidents where officer resigned before investigation completed

State Legislation

- **California SB 731** – "Police Decertification Act," Creates procedure to decertify officers convicted of certain crimes
- **California AB 1196** – Bans use of the carotid restraints or chokeholds by officers

Federal Legislation – HR 7120

- "George Floyd Justice in Policing Act of 2020"
  - Limits legal protections for police
  - Bans chokeholds
  - Creates a "National Police Misconduct Registry"

Federal Legislation – HR 7120 (cont.)

- Registry would create a database containing:
  - (1) Complaints against law enforcement officers;
  - (2) Discipline records;
  - (3) Termination records;
  - (4) Records of certification of hiring requirements;
  - (5) Records of lawsuits against law enforcement officers and settlements of such lawsuits; and
  - (6) Instances where an officer resigns or retires while under active investigation related to the use of force.

Federal Legislation – S 3985

- "Justice Act"
  - Requires state and local governments to maintain discipline records and make them accessible to other federal, state and law enforcement agencies for hiring decisions
  - But prohibits unauthorized individuals from accessing the records, eliminating the possibility of public disclosure of records

Potential Practical Implications for Local Agencies



Impact of Sunshine/Public Disclosure Laws

- Can be a good opportunity for departments to show the public how well they have been self regulating
- BUT where department must disclose serious discipline involving current officers, need to explain why they're still employed

Impact of Sunshine/Public Disclosure Laws

- Responding to public records requests and ensuring any and all required redactions are made can be extremely time consuming
  - Staffing?
  - Costs?

Recruitment and Retention

- Negative public sentiment toward law enforcement coupled with heightened scrutiny of officers may decrease interest in the profession

Questions?

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