BREAKING BLUE

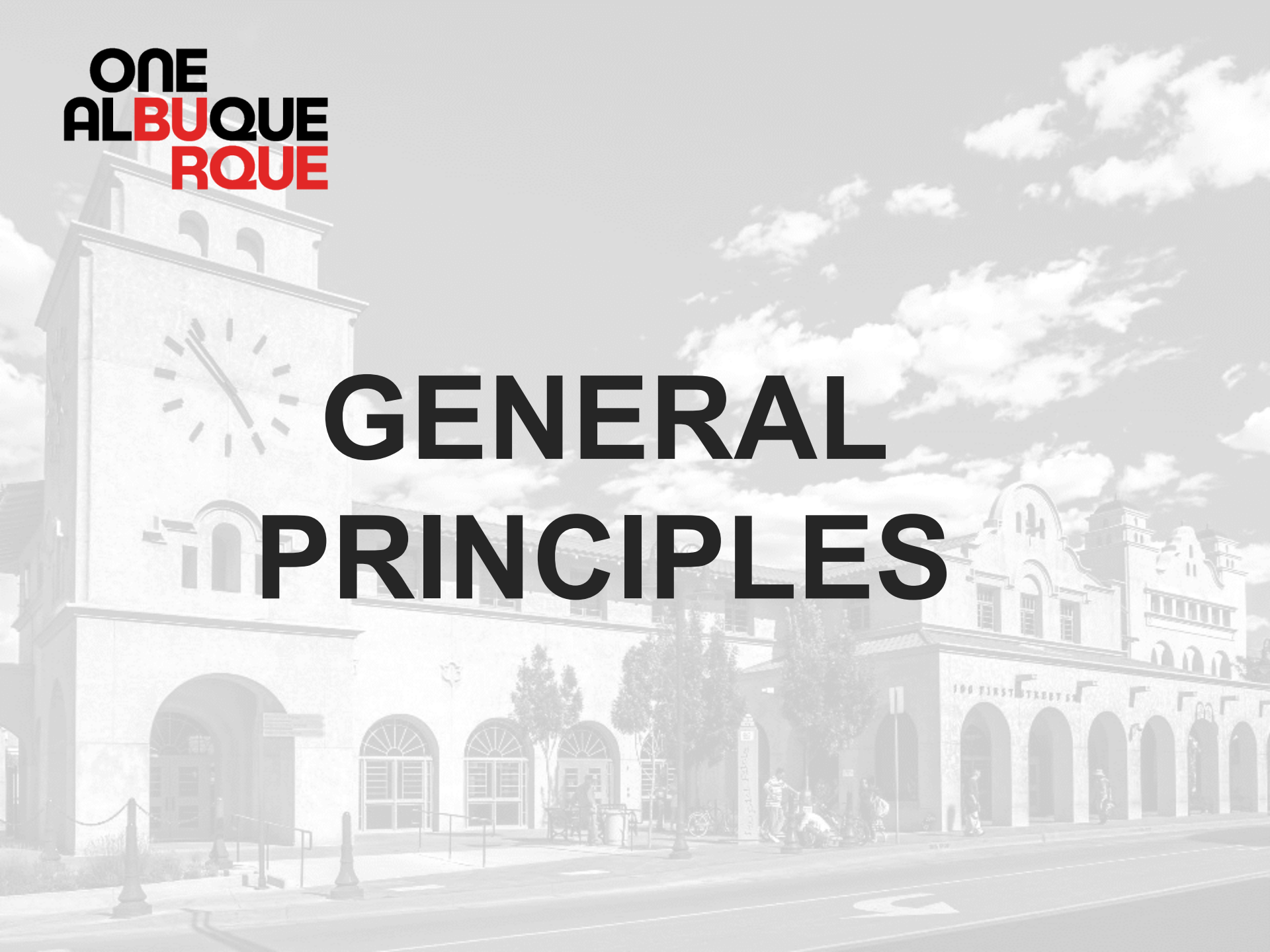
Considerations In Advising and Defending Police Disciplinary Actions

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OVERVIEW

- General Principles
- Selection of Discipline
- Importance of Public Trust
- Use of Force Cases
- Truthfulness Cases
- Labor Agreements and Disciplinary Consequences

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GENERAL PRINCIPLES

A person's interest in a benefit is a ‘property’ interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

Perry v. Sindermann, 408 U.S. 593, 601, 92 S. Ct. 2694, 2699, 33 L. Ed. 2d 570 (1972)

Consequently, many public employees (including police officers) have a constitutionally protected property interest in continued employment. Thus, before removal of the benefit of employment, they are entitled to a pre-decision hearing. The sufficiency of pre-determination process takes into account the contours of post-termination process.

The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

Cleveland Bd. Of Educ. V. Loudermill, 470 U.S. 532, 546, 105 S. CT. 1487, 1495, 84 L. ED. 2D 494 (1985)

Post determination process can vary. For example, in Albuquerque, a complaint that an employee was dismissed without just cause might be heard by the City's Personnel Board, it's Labor Board, or by an arbitrator. The available venues depend on the circumstances of the individual employee (e.g. whether he or she belongs to a bargaining unit) and which venue they select.

The venue will determine the extent to which the rules of evidence are followed and where the burden of proof lays. Make sure you know what the rules are.

Union membership amongst police officers is common, but not universal. In a union environment, the union is likely to be involved in the disciplinary process and subsequent appeals. The Union was also likely involved prior in determining conditions of employment.

Typically, officers may only be discharged for "just cause." The exact definition of just cause varies depending on the context, but many arbitrators utilize a seven element test created by Arbitrator Carroll R. Daugherty in the *Enterprise Wire Co.* arbitration award (46 LA 359, 1966)

JUST CAUSE

- Employee was forewarned of consequences;
- Company's rules are reasonably related to business efficiency;
- Effort was made to determine if the employee was guilty prior to termination;
- Any investigation was conducted fairly and objectively

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JUST CAUSE

- Substantial evidence of the employee's guilt was obtained;
- Rules were applied fairly and without discrimination; and
- The degree of discipline was reasonably related to the offense.

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Progressive discipline should be a key consideration in cases where conduct is not egregious.

In addition to the restrictions inherent in operating in a union and public employment environment, Albuquerque is also party to a Court Approved Settlement Agreement with the Department of Justice. Disciplinary policies and decisions are also considered in light of that settlement agreement and its relationship with its Independent Monitoring Team.

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34 USC § 12601*

(a) Unlawful conduct

It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Civil action by Attorney General

Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

* Formerly 42 USC § 14141

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CASE EXAMPLES

United States v. Ferguson:

DOJ determined that FPD's approach to law enforcement is unduly focused on revenue generation and that its practices both reflect and exacerbate existing race bias. As a result, Ferguson's law enforcement practices discriminate against African Americans and decrease trust between the Ferguson community and law enforcement, hampering FPD's ability to ensure public safety.

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CASE EXAMPLES

United States v. New Jersey:

Defendants have engaged in and continue to engage in a pattern or practice of performing vehicle stops and post-stop enforcement actions and procedures, including searches, of African American motorists traveling on New Jersey roadways, including the New Jersey Turnpike, that:

a. have the intent of discriminating on the basis of race;

b. use criteria or methods of administration that have the effect of discriminating on the basis of race.

ALLEGATIONS
U.S. V. CITY OF ALBUQUERQUE

Albuquerque police officers use deadly force in an unconstitutional manner in their use of firearms. From 2009 through 2012, Albuquerque police officers have been involved in approximately 20 officer-involved shootings resulting in fatalities. The United States concluded that the majority of these shootings were unconstitutional. The use of unreasonable deadly force by Albuquerque police officers continues.

ALLEGATIONS
U.S. V. CITY OF ALBUQUERQUE

Albuquerque police officers use less lethal force in an unconstitutional manner. Officers typically use physical force, such as punches, kicks, and violent takedowns, against individuals who pose little or no threat to officers or others, or who offer only minimal resistance. Officers also typically use less lethal weapons, such as electronic control weapons, to shock and inflict excruciating pain on individuals who pose little or no threat to officers or others, or who offer only minimal resistance.

STEPS OF CASES

- investigation
- complaint
- settlement agreement
- Monitoring
  - Develop policy
  - Develop training
  - Demonstrate institutional impact and lasting change
- release

DISCIPLINARY REQUIREMENTS U.S. V. CITY OF ALBUQUERQUE

- Creates Civilian Police Oversight Agency
- APD must investigate all complaints and document investigation, findings and conclusions in writing
- When and how to refer for criminal investigation and prosecution
- Timelines – 90 days to complete investigation with 30-day extension

DISCIPLINARY REQUIREMENTS U.S. V. CITY OF ALBUQUERQUE

- Outcomes
  - Unfounded
  - Sustained
  - Not sustained
  - Exonerated
  - Sustained allegations not based on original complaint
  - Administratively closed

DISCIPLINARY REQUIREMENTS U.S. V. CITY OF ALBUQUERQUE

In reviewing completed administrative investigations, APD shall also assess and document whether: (a) the incident suggests that APD should revise strategies and tactics; and (b) the incident indicates a need for additional training, counseling, or other non-disciplinary corrective measures. This information shall be shared with the relevant commander(s).

DISCIPLINARY REQUIREMENTS U.S. V. CITY OF ALBUQUERQUE

APD shall ensure that discipline for sustained allegations of misconduct is consistently applied, fair, and based on the nature of the allegation, and that mitigating and aggravating factors are set out and applied consistently.

DISCIPLINARY REQUIREMENTS U.S. V. CITY OF ALBUQUERQUE

APD shall establish a disciplinary matrix that:

a) establishes a presumptive range of discipline for each type of rule violation;
b) increases the presumptive discipline based on an officer's prior violations of the same or other rules;
c) sets out defined mitigating or aggravating factors;
d) requires that any departure from the presumptive range of discipline must be justified in writing;

DISCIPLINARY REQUIREMENTS U.S. V. CITY OF ALBUQUERQUE

e) provides that APD shall not take only non-disciplinary corrective action in cases in which the disciplinary matrix calls for the imposition of discipline; and

f) provides that APD shall consider whether non-disciplinary corrective action also is appropriate in a case where discipline has been imposed.

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SELECTING DISCIPLINE



Consistency with prior cases helps establish multiple elements of just cause, and is important in terms of general fairness.

It is helpful to have a policy that delineates the disciplinary action for some offenses.

Selection of a disciplinary action can and should be informed by aggravating and mitigating factors for the relevant employee and current situation.

AGGRAVATING

- Lack of accountability;
- Lack of remorse;
- Recent disciplinary history;
- Dishonesty;
- Prior notice that this conduct was inappropriate;
- Insubordination;
- Initiation of of Physical Attack; and
- Serious harm to employer based on employee's actions.

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MITIGATING

- Many years of service;
- Generally acceptable past performance;
- Remorsefulness;
- Taking accountability;
- Unintentional conduct;
- Past commendations; and
- A lack of serious harm to the employer.

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AGGRAVATING & MITIGATING FACTORS - MONITORING

Recommendation a: The current practice of figuring the sanction level of any sustained policy violation and whether there are any prior offenses that by their level of sanction and date of imposition count as a prior offense, is complicated and subject to too much subjectivity…. IAB and CPOA should make findings regarding the level of sanction and whether there are any applicable prior offenses. The SOP should be revised to provide for these determinations to be made by IAB and CPOA.

AGGRAVATING & MITIGATING FACTORS - MONITORING

Recommendation b: Retention cards need to indicate the level of sanction associated with each sustained violation and the date of imposition of discipline.

Recommendation c: Where a sustained violation (policy) has a sanction level that contains a range (e.g. 2-5), or where it has no associated sanction level, IAB and CPOA should make the sanction level determination in a finding and explain how the sanction level finding was reached.

AGGRAVATING & MITIGATING FACTORS - MONITORING

Recommendation d: Where an investigation that reaches sustained findings contains prior offenses on the officer's retention card, IAB and CPOA should make a finding whether those prior offenses count as a prior offense enhancement.

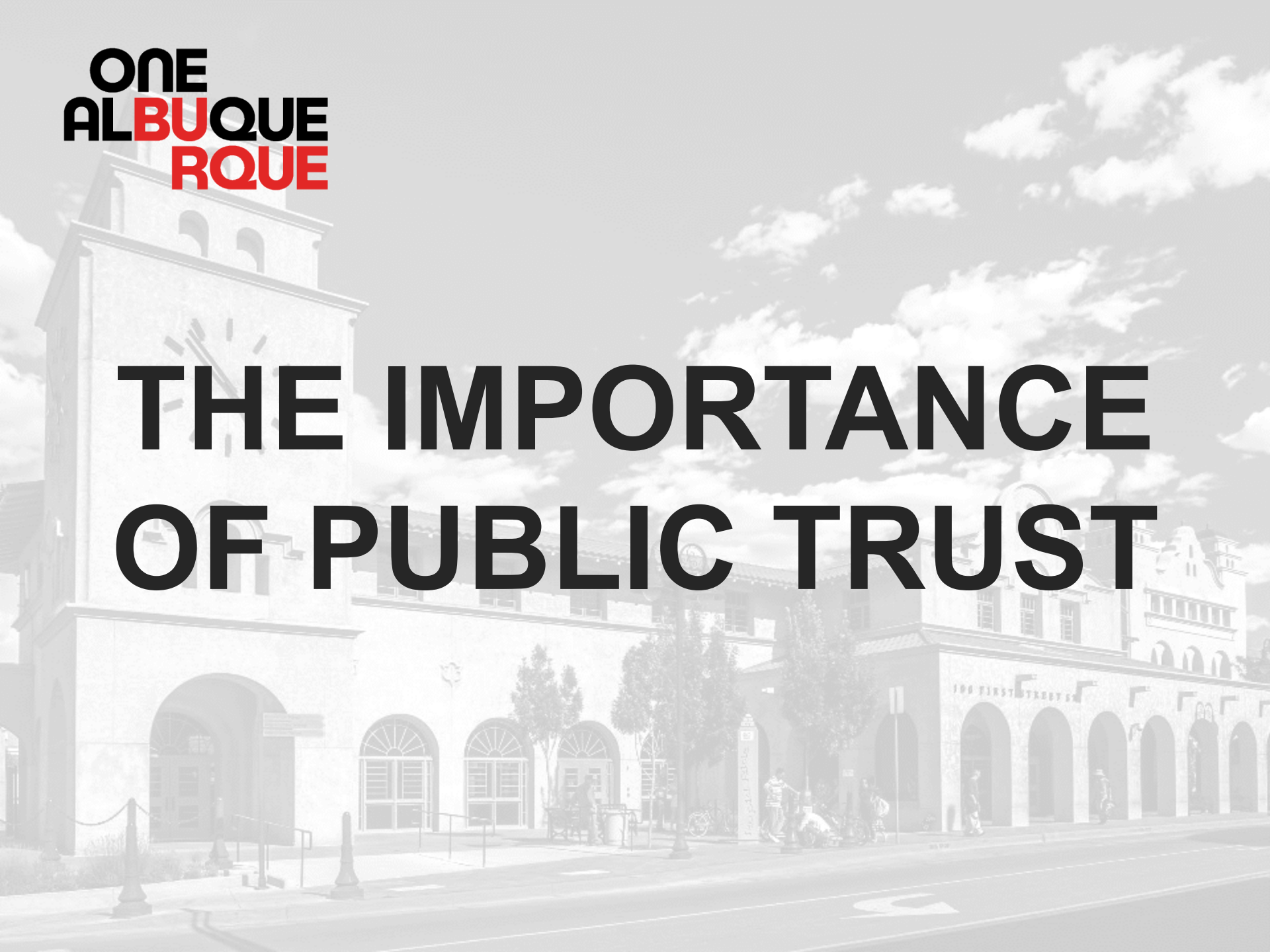
Recommendation e: Once the above findings are made, APD and CPOA – utilizing the sanction level rows and prior offense columns of the disciplinary matrix - should make a finding as which box applies on the disciplinary matrix and the range of discipline associated with the box.

AGGRAVATING & MITIGATING FACTORS - MONITORING

Recommendation f: The findings recommended in this paragraph, as all other findings, shall be subject to review, comment and recommendation by supervisors of the subject officer in the supervisory review of the investigation.

AGGRAVATING & MITIGATING FACTORS - MONITORING

Recommendation g: When discipline imposed after a PDH differs from the Chief's proposed findings and discipline, then the Final Decision on Discipline Letter, or a separate memo in the investigative file, should contain an explanation of the balancing of mitigating and aggravating circumstances occurring at the PDH, and an explanation for the final discipline as opposed to the proposed discipline.



THE IMPORTANCE OF PUBLIC TRUST

Police are held to a higher standard.

At the same time, fact finders can be reluctant to uphold discipline for behavior that occurred off duty.

Useful argument has been that because officers are individually vested with so much power (arrest, use force, or take lives) it is of paramount importance that the public trust them. This is not possible if the office engages in conduct unbecoming, even if it is “off the clock.”

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USE OF FORCE CASES

The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight...

As in other Fourth Amendment contexts, however, the “reasonableness” inquiry in an excessive force case is an objective one: the question is whether the officers' actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Graham v. Connor, 490 U.S. 386,396- 397, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989)

VIOLATION

If the violation is identified as a Constitutional violation, then the Graham v. Connor analysis is helpful.

If the violation is identified as arising out of your department's use of force policy, then the policy language is more important. It's possible to violate policy without violating constitutional rights.

It’s important that the Use of Force Policy is well circulated and well trained.

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Common Red Herrings:

- Victim Blaming; and
- The Officer Is Entitled to Some Sort of Special Consideration Due to Trauma.

Focus on the victim's behavior at the time of the use of force. Use of force analysis is dependent on what is happening contemporaneously with the force, not what was happening prior.

"[E]xcusing workplace misconduct to provide a fresh start/second chance to an employee whose disability could be offered as an after-the-fact excuse is not a required accommodation under the ADA." *Davila v. Qwest Corp., Inc.*, 113 Fed.Appx. 849, 854 (10th Cir. 2004)

USE OF FORCE - CASA

- officers shall use advisements, warnings, and verbal persuasion, when possible, before resorting to force;
- force shall be de-escalated immediately as resistance decreases;
- officers shall allow individuals time to submit to arrest before force is used whenever possible;
- APD shall explicitly prohibit neck holds, except where lethal force is authorized;

USE OF FORCE - CASA

- APD shall explicitly prohibit using leg sweeps, arm-bar takedowns, or prone restraints, except as objectively reasonable to prevent imminent bodily harm to the officer or another person or persons; to overcome active resistance; or as objectively reasonable where physical removal is necessary to overcome passive resistance and handcuff the subject;

USE OF FORCE - CASA

- APD shall explicitly prohibit using force against persons in handcuffs, except as objectively reasonable to prevent imminent bodily harm to the officer or another person or persons; to overcome active resistance; or as objectively reasonable where physical removal is necessary to overcome passive resistance;

USE OF FORCE - CASA

- officers shall not use force to attempt to effect compliance with a command that is unlawful;

- ECWs will not be used where such deployment poses a substantial risk of serious physical injury or death from situational hazards, except where lethal force would be permitted. Situational hazards include falling from an elevated position, drowning, losing control of a moving motor vehicle or bicycle, or the known presence of an explosive or flammable material or substance.

USE OF FORCE - CASA

- APD shall adopt a policy that prohibits officers from discharging a firearm from a moving vehicle or at a moving vehicle, including shooting to disable a moving vehicle, unless an occupant of the vehicle is using lethal force, other than the vehicle itself, against the officer or another person, and such action is necessary for self-defense, defense of other officers, or to protect another person. Officers shall not intentionally place themselves in the path of, or reach inside, a moving vehicle.

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HIGHER STANDARD

"The Constitution establishes certain minimum thresholds for official conduct. It is to be expected—and hoped—that states, school boards, police departments, and other agencies will go beyond constitutional minima in determining the standards and policies to which their employees must conform."

Couture v. Bd. of Educ. of Albuquerque Pub. Sch., 535 F.3d 1243, 1255 (10th Cir. 2008).

HIGHER STANDARD

"If federal courts were to regard such standards as setting the boundaries for reasonableness under the Fourth Amendment and thus for purposes of imposing monetary liability on local officials and agencies, it would create a disincentive for the promulgation of rigorous standards, and would place interpretation and enforcement of those standards into the hands of federal judges."

Couture v. Bd. of Educ. of Albuquerque Pub. Sch., 535 F.3d 1243, 1255 (10th Cir. 2008).

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TRUTHFULNESS

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An officer found to be untruthful faces grave issues in his career, especially related to testifying.

Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1197, 10 L. Ed. 2d 215 (1963)

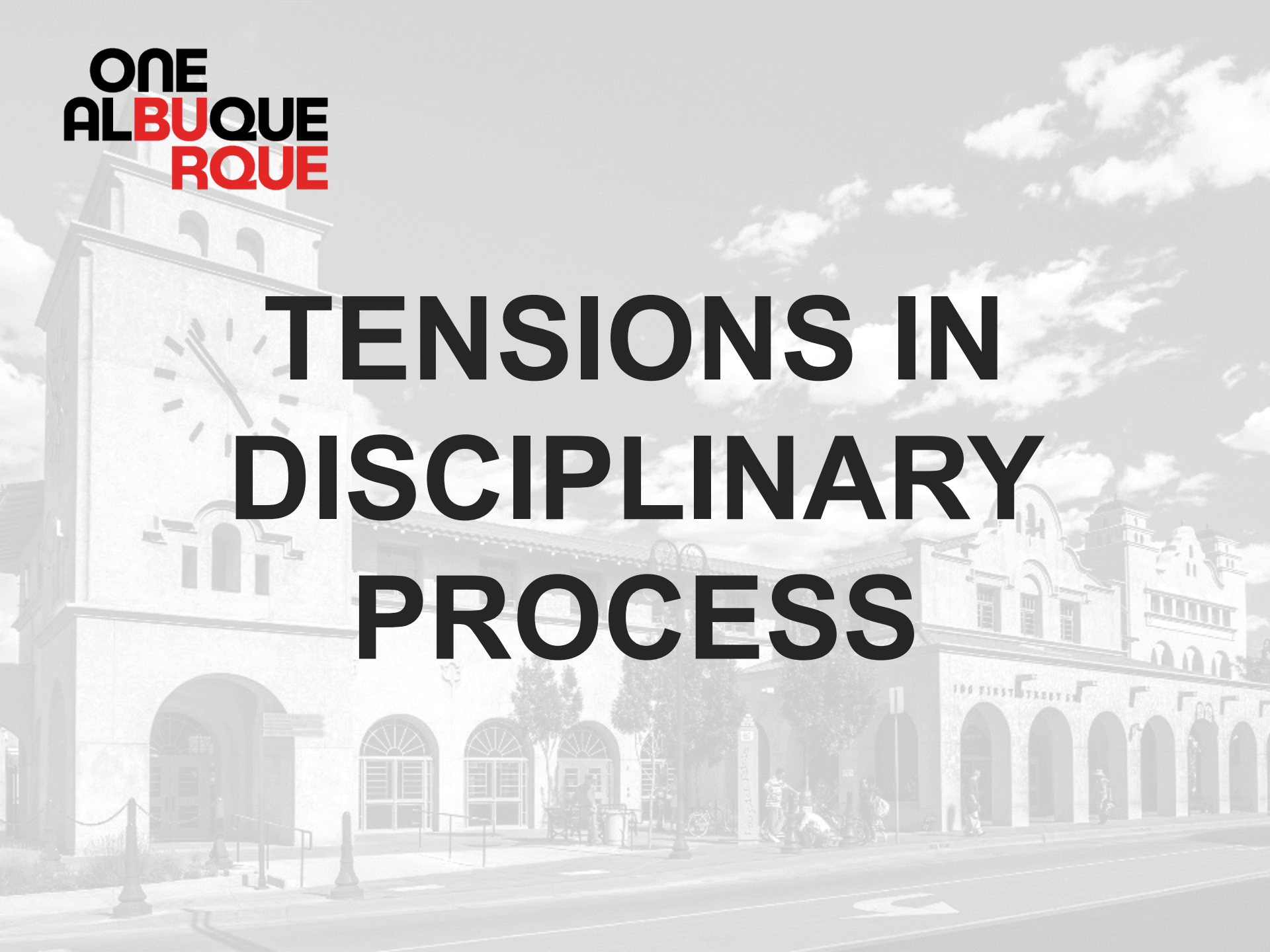
Giglio v. United States, 405 U.S. 150, 153, 92 S. Ct. 763, 765, 31 L. Ed. 2d 104 (1972)

United States v. Bagley, 473 U.S. 667, 667, 105 S. Ct. 3375, 3375, 87 L. Ed. 2d 481 (1985)

Kyles v. Whitley, 514 U.S. 419, 420, 115 S. Ct. 1555, 1559, 131 L. Ed. 2d 490 (1995)

Parity in truthfulness cases is difficult to obtain.

What is untruthful? What is the moral culpability of the officer in the particular situation?



TENSIONS IN DISCIPLINARY PROCESS

Labor Agreements can complicate disciplinary processes:

- Timeline issues;
- Proscribed disciplinary processes; or
- Structured interview formats.

What are the consequences for breach of the Collective Bargaining Agreement?

WHEN MONITOR DISAGREES WITH DISCIPLINARY DECISIONS

- Found not in compliance
- Little opportunity to respond
  - Risk
  - Effective
  - Public perception
- Cost of continued monitoring

DOJ INTERVENTION

CON

- Cost
  - Manpower
  - New software, etc.
  - Monitoring cost
- Disgruntled officers
- Public frustration
- Little control over narrative
- Success is person-dependent

PRO

- Improvements/best practices
- Upgraded systems
- Additional resources
- Reduced constitutional violations
- Reduced settlement/verdict costs

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HOW TO AVOID DOJ INTERVENTION

- Review policies for best practices
- Review training for best practices
- Review events (uses of force, litigation events) for lessons learned; ensure growth
- Ensure discipline is fair, timely, consistent
  - review it
- Invest in it
- Value sanctity of human life and constitutional rights

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QUESTIONS?