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Disciplinary Hearing Officer

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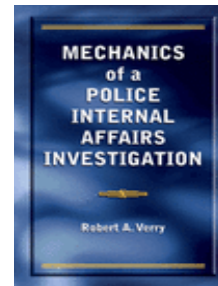
Internal Affairs | Harassment | Workplace Investigator

Robert is **not** a lawyer. If you need legal advice, please contact a lawyer. (^Retired SBB-NJ)

Internal Affairs Professional Standards/Guidelines

Employee Misconduct | Employee Discipline

OPRA | Common Law (Internal Affairs/Police Records)



Breaching an Officer's Confidentiality

For at least the past year, I have been weighing in on my thoughts that rank-and-file members of the police departments will be looking to file lawsuits for breaching their confidentiality. Depending upon the discussions and circumstances described, I offered my opinion that exposure of an officer's internal affairs records could eventually come back and haunt the police department and/or Chief of Police. Alas, in reading the pressofAtlanticCity.com, the below snapshot is one of the many counts in a lawsuit filed by two (2) police officers against their Chief (see <http://tinyurl.com/4e26zn9>).

- Repeatedly and blatantly violated confidentiality requirements during Internal Affairs investigations.

Considering this suit is not the first in New Jersey to raise a breach of confidentiality issue and regrettably will not be the last, as a reminder, I offer the following:

Internal affairs personnel shall maintain a filing system accessible only to unit personnel and the law enforcement executive. Other personnel may be given access based on a specific need, such as a deputy chief in the law enforcement executive's absence. Access to these records must be specifically addressed with department policy and procedures. The list of those authorized to access these files must be kept to a minimum. (Guidelines @ 11-44).

Simply put, Internal Affairs records should be maintained exclusively by the Internal Affairs Commander with access to the Chief Law Enforcement Executive (e.g.,

Chief of Police). Access to any other persons (e.g., Deputy Chief) , in my opinion, would only be granted if and when the Chief is incapacitated or as stipulated by written policy. Moreover, any discipline [regardless of degree] should also be entirely maintained by the Internal Affairs Commander with access to the Chief.

Regardless of the agency size, the Chief or Internal Affairs Commander should be the sole individual in the department to serve an officer formally and directly with any type and kind of discipline. That is, under no circumstances should an immediate supervisor directly serve an immediate subordinate under his/her command with discipline. Furthermore, unless the subordinate tells his/her supervisor about the discipline the Internal Affairs Commander served, the immediate supervisor (or anyone in the department) should not even know what discipline the offending officer received.

According to a rule that most, if not all, police departments have (see below), violations observed by officers should be reported in writing to the Chief of Police through official channels.

RULE: Reporting Violations of Law or Rules. Employees knowing of other employees violating laws, ordinances, or rules of the department, shall report same in writing to the Chief of Police through official channels. If the employee believes the information is of such gravity that it must be brought to the immediate, personal attention of the Chief of Police, official channels may be bypassed.

Thus, to avoid any confidentiality issues an officer may raise in a lawsuit, those official channels, as referenced in that rule, should be nothing more than an officer delivering directly to the Internal Affairs Commander their suspected allegations. Unlike what many departments practice today, this would unquestionably and appropriately bypass the target officer's immediate supervisor and everyone else in that target officer's

chain of command who realistically has no lawful reason to be given such allegations. Moreover, with the recommendation that internal affairs and supervisory investigations be twice removed from the target officer, Sergeants, for example, purposefully and knowingly being handed their immediate subordinates suspected violations could be counterproductive. (It is not uncommon for the target officer's immediate supervisor to also be a target of the same investigation.)

(II)

Another concern I raised was supervisor's keeping individual files on their subordinate officers, e.g., Sergeants who keep a file on officers in their squad. One reason this practice is troubling is because what is in the Sergeant's private file on Officer "A" may be distinctly different than what is maintained in the file held by the Internal Affairs Commander. Take for example Officer "A" receiving a Performance Notice by the Chief of Police for inappropriate demeanor on a traffic stop. A copy of the Performance Notice is placed in Officer "A"'s personnel file, internal affairs file, and in some cases the Sergeant's private [secret] file. After six (6) months the Performance Notice is supposed to be officially removed from the officer's personnel file.¹ (It stays in Officer "A"'s internal affairs file.) While the Performance Notice is removed from his personnel file, what happens if it is not removed from the private file the Sergeant is keeping on Officer "A?" When Officer "A,"² requests to examine his/her file – which file does this officer examine and what happens if this officer discovers the Performance Notice s/he understood was removed and destroyed is still in the Sergeant's file?

¹ Refer to the Officer's Collective Negotiating Agreement ("CNA")

² Through the CNA

More concerning with an immediate supervisor maintaining a file on his/her subordinates surrounds what happens to the file if the officer is transferred to another division. Does the outgoing supervisor take the confidential record file and hand it to the incoming supervisor, thus exposing everything in that file to the incoming supervisor? What's more, what happens if that Performance Notice that was known to be removed and destroyed is still in the outgoing supervisor's file and is now observed by the incoming supervisor?

(III)

Undisputedly, citizens are becoming very well educated on exercising their rights in obtaining public records under the Open Public Records Act, Freedom of Information Act, and/or Common Law access to governmental records. As a result, it is incumbent upon the Chief of Police to protect the rights of the officers under their command. This protection includes but is not limited to not giving the public access to records to which the public had no legal right. Since the list of undiscloseable records is limitless, knowing what records are open to the public is simpler to understand; for that reason, according to N.J.S.A. 47:1A-10 the following records are open to the public: “[A]n individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record.” Additionally, according to Kovlcik v. Somerset County Prosecutor's Office, Docket No. A-5432-08T2 an officer's “education and qualification records required for employment are to be considered as falling within the purview of “government record.” Furthermore, a decision out of Chatham Borough reinforced the release of resolutions to the public that are adopted by the public entity involving police officers but placed reservations on releasing information surrounding an officer's

suspension. (One would assume information on the suspension was not in the resolution.)³ Anyway, generally speaking, the records open to the public are maintained in an officer's personnel file. For example, pursuant to an article in the "New Jersey Division of Criminal Justice: Law Enforcement Reporter, Fall 1999" it is written, in part, that:

The contents of the individual officer's Personnel File should be limited to: employee's name, payroll information, and attendance records, training and special schools attended, assignments and promotion records, awards and accommodations and notations as to any disciplinary action to which the officer was subject. Disciplinary action information should only include identification of the rule or regulation violated and the penalty assessed.

Accepting the preceding, if for nothing else, should heighten the Chief's awareness that the only records and/or files kept in the police department should be those records and/or files the Chief of Police has full access and control over. Secret, private, and/or individual files maintained by supervisors, in my opinion, should cease immediately. Also, access to an officer's confidential records should never be released to the civilian clerk (who by statute is the records custodian) or any civilian elected and/or appointed official without the lawful redactions or the written advice of an attorney.

(IV)

Considering my thoughts, it is highly probable that a question will be raised concerning immediate supervisors needing access to a subordinate's disciplinary record when completing performance evaluations. If an immediate supervisor does not know a subordinate's disciplinary record, it will not be entered on the officer's performance evaluation. My concerns and position regarding memorializing discipline on an officer's

³ Considering the Chatham decision, before placing suspensions on an open to the public work schedule, it is recommended that you seek the advice of a competent labor attorney.

performance evaluations aside,⁴ the answer is “yes” and “no.” “Yes,” the immediate supervisor will not be able to document his/her subordinate’s discipline/penalty on a performance evaluation, but “no,” it could be on the performance evaluation when the Internal Affairs Commander puts it there. In other words, the immediate supervisor would complete their performance evaluation sections, leaving the discipline section blank. Then, once the immediate supervisor is finished, the Internal Affairs Commander would complete his/her section on discipline and turn over the completed performance evaluation to the Chief of Police.

Reality is, if the Internal Affairs Commander and Chief are the only two individuals in the department who have unfettered access to an officer’s entire file, then how exactly would the immediate supervisor even know what discipline and/or penalties an officer has in their squad?⁵

(V)

Ensuring an officer’s confidentiality is paramount. By accepting this fundamental fact and understanding that it is the respect for the officer’s privacy that recommends an investigator is twice removed and having the Internal Affairs Commander serve as the department’s repository of all disciplinary records unquestionably should assist in limiting a Chiefs and departments liability. In fact, something as straightforward as having the Internal Affairs Commander directly serve discipline to the offending officer

⁴ I believe memorializing on an evaluation form an officer’s discipline is problematic. For example, in six months when a counseling notice is removed and destroyed from an officer’s personnel file it would literally not be removed and destroyed if it is solidified in the officer’s evaluation. In other words, the evaluation haunts an officer long after the discipline is lawfully removed and destroyed. I believe evaluations are subjective, unnecessary, and a lawsuit waiting to happen.

⁵ I put on a seminar titled “Documenting Discipline” which addresses these issues.

will undoubtedly uphold the integrity of the process, diminish the circulation of confidential information, and limit unnecessary burdens.

THEREFORE, to limit liability, I believe that Chiefs and Internal Affairs Commanders should aggressively and actively restrict access to an officer's file and the records within that file to only the Internal Affairs Commander and him/herself. Additionally, barring unforeseen circumstances, the department's Internal Affairs Commander should be the sole individual to directly serve an officer (regardless of rank) with any type and kind of discipline including, but not limited to, performance notices. Lastly, except for the Internal Affairs Commander's file, there should be no other files held by anyone within an agency as it relates to internal affairs, discipline or any record that is considered confidential; excepting the medical file⁶ which would be preserved solely by the Chief of Police.

As every reader should unquestionably know by now, I am not an attorney and my thoughts, interpretations, et cetera should not be considered a legal opinion or advice, because I cannot give, will not give, and have not given any. As always, I'm in the background should you have any questions; therefore, please feel comfortable asking.

⁶ Original Doctor's Notes, in my opinion, should be kept in an officer's medical file.
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