



CHIEF[^] ROBERT A. VERRY, C.P.M., M.L.P.A., M.B.A.

Licensed Private Detective, License No.9629

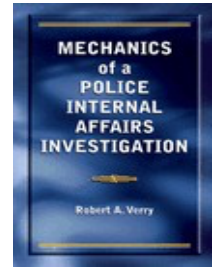
Certificated Freelance Paralegal

Post Office Box 47 | SBB | NJ | 08880-

0047 C – 732.302.9520 | F –

732.377.8710

BobVerry@BobVerry.com | ChiefVerry@gmail.com



CONCENTRATION

Disciplinary Hearing Officer

Grievances | Unfair Practice

Internal Affairs | Harassment | Workplace Investigator

Records) 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

Understanding the 45-Day Rule

Without a doubt, the most common question that is asked of me surrounds the application of the 45-day rule. The statute states:

Except as otherwise provided by law, no permanent member or officer of the police department or force shall be removed from his office, employment or position for political reasons or for any cause other than incapacity, misconduct, or disobedience of rules and regulations established for the government of the police department and force, nor shall such member or officer be suspended, removed, fined or reduced in rank from or in office, employment, or position therein, except for just cause as hereinbefore provided and then only upon a written complaint setting forth the charge or charges against such member or officer. The complaint shall be filed in the office of the body, officer or officers having charge of the department or force wherein the complaint is made and a copy shall be served upon the member or officer so charged, with notice of a designated hearing thereon by the proper authorities, which shall be not less than 10 nor more than 30 days from date of service of the complaint.

A complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. The 45-day time limit shall not apply if an investigation of a law enforcement officer for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State. The 45-day limit shall begin on the day after the disposition of the criminal investigation. The 45-day requirement of this paragraph for the filing of a complaint against an officer shall not apply to a filing of a complaint by a private individual.

A failure to comply with said provisions as to the service of the complaint and the time within which a complaint is to be filed shall require a dismissal of the complaint.

The law enforcement officer may waive the right to a hearing and may appeal the charges directly to any available authority specified by law or regulation, or follow any other procedure recognized by a contract, as permitted by law.

[N.J.S.A. 40A:14-147.]

It is easier to understand the statute when broken down into isolated sentences and examined in reverse. For example, the fourth paragraph, starting with “[t]he law enforcement officer may waive the right to a hearing,” *id.*, offers a charged officer the choice of sidestepping the local disciplinary hearing and going directly to, for example, the Civil Service Commission (N.J.A.C. 4A:2-2.8) or Court (N.J.S.A. 40A:14-150). However, rarely does an officer by-pass the local hearing, and with good reason:

1. Immediately, since the Final Notice of Disciplinary Action is filed, the penalty (e.g., termination, demotion, suspension) takes effect. That is, the charged officer would immediately be terminated, demoted, and/or suspended if the officer waives their right to the local hearing;
2. The local hearing creates a record, but more so, lock the agency’s witnesses’ testimony in;
3. The local hearing offers the opportunity to directly link the evidence to the charges;
4. The local hearing offers an opportunity to examine the flaws in the investigation that cannot be (or were not) cured; and
5. Employing a truly independent hearing officer¹ who gives the charged officer (and public agency²) an impartial analysis of the entire case.

Lastly, many times the officer’s defense attorney spends little time defending their client on the merits of the charges and, instead, focuses primarily on the internal affairs investigator’s procedural errors and policy missteps. *See, e.g., O’Rourke v. City of Lambertville*, 405 N.J. Super. 8, 19 (App. Div. 2008), *certif. denied*, 198 N.J. 311 (2009).

¹ *Ferrari v. Harold Melleby, Chief of Police, et al*, 134 N.J. Super. 583 (App. Div. 1975) (“We are convinced, by the record before us, that appellant will be unable to receive a fair and impartial trial if Melleby is the designated hearer.”); *Grasso v. Borough of Glassboro*, 205 N.J. Super. 18, 31 (App. Div. 1985) (“The Mayor and Council were without authority under the ordinance to conduct the disciplinary hearing under which plaintiff was dismissed.”)

² It is just as important for the public agency to employ an impartial hearing officer who writes a neutral decision because if the officer is found not-guilty, the charges are dismissed, or the charges are terminated prior to prosecution, the public agency could be held accountable for the officer’s legal defense. N.J.S.A. 40A:14-155.

Many times these procedural issues can be resolved, (before any live testimony is taken), by way of prehearing administrative motions³ that would be overlooked if the local hearing is waived.

(I)

The third paragraph, starting with “[a] failure to comply” (N.J.S.A. 40A:14-147), shows the importance of filing a complaint within the statutory time frames because failure to comply “**shall** require a dismissal of the complaint” (emphasis added). *Id.* While filing the disciplinary charges are determined by statute (and will be explored below), the service of the charges are not. Stated differently, while the charges have to be filed within 45-days once specific elements are met, there is no time frame for the public agency to serve the filed charges on an officer. One reason for this, as some departments experienced, is because while the active internal affairs investigation is going on, the subject⁴ officer is deployed to serve our Country; thus, making service difficult (if not impossible) and unacceptable. As a result, service remains pending until the officer returns.⁵ On the other hand, once the preliminary notice of charges are served upon the officer, the officer has a statutory right to have the hearing “not less than 10 nor more than 30 days **from the date of service** of the complaint” (emphasis added). *Id.* Failure to hold the hearing by the 30th day, with limited exceptions, “shall require a dismissal of the complaint.” *Id.* See, e.g., Ressel v. Costello, 79 N.J. Super. 149 (App. Div. 1963), In re Frey, 160 N.J. Super. 140 (App. Div. 1978), Herzog v. Twp. of Fairfield, 349 N.J. Super. 602 (App. Div. 2002). Considering the preceding, the public agency should engage the services of an independent hearing officer and labor attorney before the charges are served in expectation of the disciplinary hearing moving forward pursuant to the 10–30-day rule even though, in most cases, the charged officer receives a waiver of the preset hearing date.

³ A violation of the 45-day rule is a commonly filed prehearing motion.

⁴ The term “subject” is used throughout this paper for simplicity purposes only and refers to the officer the allegations are principally filed against (i.e., the “subject officer”).

⁵ It would be impossible to have a hearing within the 10-30 day rule while an officer is serving the country overseas.

(II)

Continuing to move backwards, the 45-day rule does not apply under two distinct, but common, circumstances:

1. When “an investigation of a law enforcement officer for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State.” N.J.S.A. 40A:14-147.
2. When the “complaint [is filed] by a private individual.” *Id.*

Both are self-explanatory, but still warrant further clarification for procedural purposes.

With respect to paragraph #1, it is not uncommon for an allegation to be presented “where a preliminary investigation indicates the possibility of a criminal act on the part of the subject officer.” New Jersey Attorney General Internal Affairs Policy and Procedure (“Guidelines”), Requirement #6, p. 20. Under these circumstances, even if alleged rules and regulations violations are suspected, the receiving internal affairs investigator is required to immediately notify the county prosecutor. *Id.* Accordingly, the impending internal affairs investigation is immediately stopped awaiting direction from the county prosecutor. Throughout the prosecutor’s office screening (and/or investigation) of the allegations, any department rules and regulations violations are halted, unless directed otherwise by the county prosecutor. At this point, several procedural steps could take place:

- A. County prosecutor requests reporting agency to investigate (as a branch to the prosecutor’s office) the allegations criminally;
- B. County prosecutor investigates allegations without the assistance of the reporting agency;
- C. County prosecutor investigates the allegations in concurrence with the reporting agency.

From there, several procedural steps could also take place:

- A. County prosecutor presents the case to the grand jury;
- B. County prosecutor files criminal charges;

C. County prosecutor declines to prosecute and issues a declination letter.

In continuance to the exact statute referenced (above), when an allegation is being investigated by the county prosecutor in concurrence⁶ with the reporting agency, the 45-days to file a complaint based upon the rules and regulations “begins to run the day after the disposition of the criminal investigation, not when the law enforcement agency receives actual notice.”

Albert Alston v. City of East Orange, Docket No: ESX-L- 9535-05 (Law. Div. 2005).⁷ As such, waiting for a declination letter from the county prosecutor may ultimately result in the dismissal of the rules and regulations violations if, for example, the county prosecutor fails to notify the reporting agency for several weeks that the grand jury “no billed” the criminal charges alleged against the subject officer. A delayed notification could be misinterpreted as the 45-days begins the day after the notification is received, and not the day after the grand jury “no billed” the criminal charges. As an example, according to Alston, if the grand jury “no billed” the official charges on January 25th, the 45-day period would begin on January 26th regardless of when the county prosecutor notifies the police department.

With respect to paragraph #2 above, the 45-day rule does not apply to complaints (allegations) filed by private individuals. Here, timing of the alleged incident aside:

- A. The private individual could file municipal court charges⁸ against an officer; and/or
- B. The private individual could report allegations against an officer with the officer’s internal affairs unit.

Regardless of the timing of the incident, once the private individual files a complaint, reports an allegation, or both, internal affairs would, at minimum, open an active internal affairs investigation. Depending on the charges/allegations, the steps the internal affairs investigator

⁶ Interestingly, the term “concurrence” (and concurrent) is not defined as it relates to its application within the statute.

⁷ While Alston is a non-binding Law Division decision, it is frequently cited in defense of dismissal of the charges based upon the 45-day rule with allegations investigated by the county prosecutor in concurrence with the reporting agency.

⁸ For example, disorderly, petty disorderly, and traffic.

takes is beyond the scope of this paper, but “[a] complaint charging a violation of the internal rules and regulations...shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based.” N.J.S.A. 40A:14-147.

Undoubtedly, the preceding quote is misunderstood by not only law enforcement officials, but by the attorneys hired to defend their clients; therefore, an analysis with examples may help. To begin with, the 45-day rule only applies to violations of the internal rules and regulations. Therefore, to avoid the potential dismissal of the notice of disciplinary charges at a local hearing or on appeal for a violation of the 45-day rule, simply file the following:⁹

- A. N.J.S.A. 40A:14-147 – Misconduct.¹⁰
- B. Appeal of Tuch, 159 N.J. Super. 219 (App. Div. 1978).¹⁰
- C. Asbury Park v. Civil Service Department, 17 N.J. 419 (1955).¹¹
- D. N.J.A.C. 4A:2-2.3, *et seq.* General causes.¹¹

Let me repeat, the 45-day rule only applies to violations of the police department’s rules and regulations. Stated differently, the 45-day rule **does not apply** to the statutory law (N.J.S.A. 40A:14-147 – Misconduct) or civil service statutes (N.J.A.C. 4A:2-2.3 et seq. – General causes).

(III)

Numerous debates surround various sections within this statute, but the greatest number of questions seem to come from the phrase “shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based.” N.J.S.A. 40A:14-147. First, “the person,” *id.*, is singular

⁹ Before filing any charges, seek the advice of a competent labor attorney who specializes in police misconduct matters.

¹⁰ Civil Service & Non-Civil Service.

¹¹ Civil Service.

and not plural; therefore, “the person,” *id.*, should be, for example¹², the chief of police, who statutorily serves as the disciplinarian of the law enforcement agency. N.J.S.A. 40A:14-118. Second, what is “sufficient information,” *id.*, and when does “the person,” *id.*, know when s/he obtained it? The right answer is – *it depends*, but that offers little in providing guidance to the filer; therefore, the filer must look to the Guidelines for an answer. Internal affairs investigators are charged with investigating “[a]ll allegations of officer misconduct [] thoroughly and objectively [] to their logical conclusion.” Guidelines, Requirement #4, p. 18. Furthermore, by “thorough,” an internal affairs investigation must not only be conducted impartially, but it must be conducted by an impartial investigator. Nonetheless, for an investigation to be thorough, at minimum, the impartial internal affairs investigator:

- A. Gathers all relevant evidence including, but not limited to, firearms; policies; photographs, patrol logs; videos; clothes; samples (e.g., blood, hair, breathe, handwriting, etc.); cell phone records; recordings; hospital records; court transcripts; etc.
- B. Examines all relevant reports;
- C. Examines all relevant documents;
- D. Interviews all witnesses;¹³ and
- E. Interviews subject officer.^{14,15}

Procedurally, an impartial internal affairs investigator does not investigate the subject officer as many not assigned to internal affairs mistakenly believe. An internal affairs investigator is charged with investigating the allegation(s) by way of closely examining the policies, evidence, reports, documents, statements, etc., to determine only the truth, regardless

¹² Some agencies have the appointing authority, clerk, or appropriate authority sign (or co-sign) the charges. Regardless of who ultimately signs the charges, the signer should remain consistent in compliance with the singular phrase “the person.” *Id.*

¹³ All witnesses should sign a Witness Acknowledgment Form. Guidelines, Appendix G.

¹⁴ Under very limited circumstances should (1) the subject officer not be interviewed last, and (2) not be interviewed at all.

¹⁵ Subjects should sign an Administrative Investigation Form. Guidelines, Appendix H.

of where the truth ends up. For example, frequently the investigation points to poorly written policies that were the direct cause of the alleged misconduct, the action taken by the subject officer was lawful or due to neglectful training, supervision, or hiring.

Here are four different abbreviated scenarios to help explain the 45-day rule:

Scenario #1

On January 1, 2015, Internal Affairs receives an allegation that an officer is sleeping behind Quick Chek at or about 1 AM. In this case, the subject officer would not be notified (Guidelines, Requirement #3, p. 16), because the notification would interfere with the investigation. Internal affairs would, at minimum, conduct surveillance, gather evidence, conduct interviews, and finally conduct an investigatory interview on the subject officer. For the sake of argument, the preceding steps, without delay, took exactly two weeks (ending on January 15th). The internal affairs investigator writes her report, makes a recommendation, and submits the final report to the chief on January 16th.¹⁶ In this case, the Chief has sufficient information to file the internal rules and regulations charges; therefore, she must file on or before March 2nd.

Scenario #2

On January 1, 2015 Internal Affairs receives an allegation that an officer is sleeping behind Quick Chek at or about 1 AM. In this case, the subject officer would not be notified (Guidelines, Requirement #3, p. 16), because the notification would interfere with the investigation. Internal affairs would, at minimum, conduct surveillance, gather evidence, conduct interviews, and finally conduct an investigatory interview on the subject officer. For the sake of argument, the preceding steps, without delay, took exactly two weeks (ending on January 15th). The internal affairs investigator writes her report, makes a recommendation, and submits the final report to the chief on January 16th. On January 17th the chief returns the

¹⁶ There should be no delay in turning over the final report to the chief of police. Any delay may call for an explanation, with documentation, to defend against an argument that delay was bureaucratic, political, or otherwise.

report to the internal affairs investigator and requests the Mobile Data Terminal logs for the incident nights be reviewed and included in the report. Without delay, the internal affairs investigator retrieves, reviews, and documents her findings in the report. On January 20th the updated report is turned back over to the chief. In this case, because on the 17th the chief did not have sufficient information and returned the investigation back to the internal affairs investigator, the 45-day clock stopped and was restarted on January 20th. In this case, the Chief has sufficient information to file the internal rules and regulations charges on January 20th; therefore, she must file on or before March 5th.

Scenario #3

On January 1, 2015 Internal Affairs receives an allegation that an officer walked out of Dunkin Donuts without paying. On the same date, Internal Affairs immediately contacts the county prosecutor who takes the investigation without assistance from the department's internal affairs investigators. [This investigation is not a concurrent investigation.] The subject officer would not be notified, *id.*, because the allegation and investigation are criminal. [This investigation is not an internal affairs investigation and is purely a criminal investigation regardless of who (county prosecutor's investigators or subject officer's internal affairs investigator) conduct the investigation.] On June 1st the county prosecutor delivers to the chief a Declination Letter because they are not filing criminal charges. On or about June 1st, the subject officer would be notified in writing that an investigation will begin. *Id.* In this scenario, the 45-day clock does not start until the chief has sufficient information to file the charges because this was not a concurrent investigation (with the county prosecutor). Without delay, the internal affairs investigator would, at minimum, retrieve the county prosecutor's investigation file (with possible exclusions), gather evidence, conduct interviews, and finally conduct an investigatory interview on the subject officer.¹⁷ Again, for the sake of argument, the preceding steps, without delay, took exactly two weeks (ending on June 15th). The internal

¹⁷ In this matter, the subject officer may request Garrity. If requested, Internal Affairs would contact the county prosecutor.

affairs investigator writes her report, makes a recommendation, and submits the final report to the chief on June 16th. In this case, the chief has sufficient information to file the internal rules and regulations charges; therefore, she must file on or before July 30th.

Scenario #4

Repeating **Scenario #3** above with the only difference that the county prosecutor and police department's internal affairs investigators work concurrently on the investigation. On June 1st when the county prosecutor delivers to the Chief the Declination Letter to the chief, the chief has 45-days from June 2nd (or July 16th) to file the internal rules and regulations charges.

(IV)

According to the statute, “no permanent member or officer...shall be removed from his office...for political reasons or for any cause other than incapacity, misconduct, or disobedience of rules and regulations.” N.J.S.A. 40A:14-147. Permanent member includes regularly sworn officers that are not on probation; however, discussing the charges against a probationary officer should be discussed with a competent labor attorney. Nevertheless, permanent does not include specials, crossing guards, fire police, or part-time officers, but, for example, school crossing guards may have a collective negotiation agreement that requires compliance.

All charges need to be in writing and supported by “just cause.” *Id.* *Just cause* is a “[l]egitimate cause; legal or lawful grounds for action; such reasons will suffice in law to justify the action taken” (Black’s Law Dictionary, 6th ed. 1998), through a set of seven (7) tests:

1. Reasonable Rule or Order;
2. Notice;
3. Sufficient Investigation;
4. Fair Investigation;
5. Proof;
6. Equal Treatment; and

7. Appropriate Penalty.¹⁸

[Enterprise Wire Co. & Enterprise Independent Union, 46 LA 359 (1966).]

Moreover, the filed complaint needs to set forth the charges and filed with the “officers having charge of the department,” *id.*, with a copy served upon the officer with a “designated hearing,” *id.*, date,¹⁹ which as discussed above, “shall be not less than 10 nor more than 30 days from date of service of the complaint.” *Id.*

(V)

Once service of the complaint is completed, the charged officer should be given five (5) calendar days to provide, in writing, whether s/he is:

1. Pleading guilty;
2. Pleading guilty with an explanation; or
3. Pleading not guilty and requesting a local hearing.

(VI)

In conclusion, in my almost 23 dedicated years conducting impartial criminal and departmental investigations where the subject was an individual who wore (wears) a blue uniform, it is vital the officer’s rights are protected including, but not limited to, the proper application of the 45-day rule. Unfortunately, applying the 45-day rule is at times misunderstood by not only internal affairs investigators, but also charged officer’s representatives. An attempt was made, in the above, to simplify the statute, describe its application, and offer several examples as it relates to the 45-day rule. Of course, every fact pattern is unique to the allegations filed and, therefore, adjusting (on a case-by-case basis) is reasonable, when necessary.

¹⁸ Although the seven steps to Just Cause will not be described further in this paper, more information can be found in *Just Cause: The Seven Steps*, 3rd ed., BNA BOOKS; 2006 edition (October 1, 2006): ISBN: 978-1570185496

¹⁹ It is suggested to not put TBA (To Be Announced) on the Preliminary Notice of Disciplinary Charges (civil service) or Notice and Charging Form (non-civil service). An exact date, in compliance with the 10–30 Rule, should be inserted.

What is important to remember is that the 45-days starts when the chief has sufficient information to file the charges unless the county prosecutor and department's internal affairs investigators are concurrently working on an investigation, at which point the 45-day clock starts the day after the Declination Letter is delivered to the chief or cautiously the day after the department is formally made aware no criminal charges will be filed.