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Peace Officers Bill of Rights Guarantees:
Responding to Union Demands with a Management Sanctioned Version

By Wayne W. Schmidt *

History

The genesis of a uniform internal investigative procedure law was the federal "Police Officers' Bill of Rights" bill (POBR), sponsored by the late Congressman Mario Biaggi (D-N.Y.) in the 1971-1972 session. Initially, the bill had over a hundred and twenty cosponsors. Biaggi, who was wounded ten times during his 23 years of police service, was the most decorated officer in the history of the NYPD. He was a champion of police officer safety and occupational rights during his tenure in the Congress. [Note 1]

The bill was reintroduced repeatedly, but was not sent to the floor until 1991. In that year it passed the U.S. Senate by a 55-to-43 margin but the House did not vote on the bill before the session ended. By 1995, a revised and more inclusive version were sponsored in the House and Senate. To mandate compliance by recipients of federal funding, the bill would amend Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S. Code §3781). Currently the POBR bills are named the "State and Local Law Enforcement Discipline, Accountability, and Due Process Act," (H.R. 2967 and S. 1277, 108th Cong.).

Although a federal version of the POBR has never passed both Houses of Congress, at least 17 states and one province have enacted Bill of Rights laws: (1)Arizona (2003) §38-1101, (2) California (1976) Govt. Code §3301, (3) Delaware (1986) Code Ann. 11 §9200, (4) Florida (1974) Stat. §112.531, (5) Illinois (1983, 2004) Compiled Stat. 50 ILCS 725, (5) Kentucky Rev. Stat. Ann. §15.520, (6) Louisiana Revised Stat. §2531, (7) Maryland (1972, 1994) Ann. Code Art. 27, §727-734, (8) Minnesota (1991) Stat. Ann. §626.89, (9) Nevada (1983, 1989) Rev. Stat. §289.020, (10) New Mexico (1978) Stat. Ann. §29-14-4, (11) Rhode Island (1976) Gen. Laws §42-28.6-2, (12) Tennessee (1989) Code §38-8-301, (13) Texas (1997) Local Government Code §143.123, (14) Virginia (1978, 1991) Code Ann. §9-1-502, (15) West Virginia (1990) Code §8-14A-1, (16)Wisconsin (1989, 1993)

Stat. §164.02, and the Canadian Province of Alberta (1990) Police Act/Police Service Regulation 356/90 (1990).

In the last decade police unions in at least 10 states have attempted to enact a POBR, including (1) Hawaii, S.B. 2986 (21st Leg. 2002); (2) Kansas, S.B. 214 (77th Leg. 1997); (3) Massachusetts, H.B. 368 (182nd Leg. 1998); (4) Michigan, S.B. 25 (2001); (5) Montana, S.B. 44 (1993); (6) North Dakota, S.B. 2368 (57th Leg. 2001); (7) Pennsylvania, H.B. 376 (S. Res. 1073, 185th Leg. 2001); (8) South Carolina, H.B. 4498 (112th Leg., 1997 Sess.); (9) Utah, H.J.R. 9 §143 (54th Sess. 1999); and (10) Washington, H.B. 1850 (54th Sess. 1995). [Note 2]

There is no harmony among state POBR versions. Some protect firefighters, deputy sheriffs, corrections officers and police chiefs; others exclude some or all of those. A few require members of a disciplinary hearing or appeal board to be sworn peace officers; others do not. The laws can either supersede or be subordinate to collective bargaining agreements. Specific rights and prohibitions that are codified in some states are not mentioned in others.

Voluntary Adoptions

Concerned that similar legislation would pass in their states, two state associations of chiefs of police drafted POBR provisions that management could live with. In 1990 the Colorado Association of Chiefs of Police amended its *Professional Standards* (1986) with revisions and additions that address the conduct of internal affairs investigations. In 1992 the Arizona Association of Chiefs of Police published *a Model Policy* regarding the rights and responsibilities of law enforcement officers in internal investigations. It was written in response to several legislative attempts to impose a union-sponsored version in that state.

On this premise the chair of the Legislative Committee of the International Association of Chiefs of Police appointed an Internal Affairs Legislation Subcommittee, to draft a version of POBR law that management would find more acceptable. Although there was no immediate intention to have the IACP's version introduced in the Congress, it would be available – as a reference document – in those states where POBR legislation might be pending.

It should be noted that the final document, though unanimously approved by the subcommittee, was never adopted by the IACP Legislative Committee itself. Divided by a single vote difference, a majority of the full committee was so opposed to any POBR legislation that it rejected the adoption of a management version, even if it was labeled a "specimen" document. [Note 3]

Nevertheless, the work of the subcommittee stands, and the document has been sent to a few state associations of chiefs of police that have been faced with union versions that were pending in their state legislatures. The document has been in a "stealth mode" for over eight years – it exists, but has not been widely seen until now. It should be

remembered that many IACP members remain opposed to any POBR legislation, no matter how balanced it might be.

As the chair of the Internal Affairs Legislation Subcommittee, I believed then and now, that the document has value as an alternative to union-sponsored legislation. As the IACP has learned, sometimes painfully, that uncompromising opposition can lead to defeat. [Note 4] The Subcommittee's document follows, as it was originally written. First, a few comments on how it was written. [Note 5]

Content Philosophy

Americans are captivated by sports events, where one team or athlete wins and the other team or athletes lose. A few managers view interaction with their subordinates in the same competitive way. They concede no ground, contest all intrusions, and concentrate on achieving total victory, even if it diminishes employee morale.

Although competitiveness is an innate trait that is difficult to restrain, the subcommittee approached the content in a less confrontational way. It decided that it would recognize employee rights and prohibit management practices based on the following principles:

1. It would be a responsive statement. Personnel handbooks often address dozens of topics. The document focused on the principal issues that have been raised in POBR legislation.

2. Decisional law would be taken into account. If most courts or arbitrators had generally recognized an enforceable employee right or invalidated a management practice, the document embodied those holdings. Where courts have split on a right or practice, the subcommittee offered optional provisions or guiding commentary. An example is §10, the mandatory polygraph testing of employees, which has been struck down by courts in a few states, and upheld in many others.

3. It would focus on fundamentals. The objective of a disciplinary investigation is to gather facts in a nonbiased way. If the recognition of a right or the adoption of a practice is unlikely to impair or to unreasonably delay the investigative process, the union's position usually was accepted. An example was §5-C, allowing an employee to audio-record an interview or to promptly provide him or her with an audio copy or transcript of the interview.

4. It would be reasonable and balanced. Good personnel practices foster professional behavior from management and employees. Harsh methods and arbitrary practices can undermine morale. The fact that no court had yet imposed a restriction on a management practice was not viewed as determinative. An example was §5-F, setting a reasonable time limit on the duration of an uninterrupted interview session.

5. It would recognize alternative ways of implementation. The subcommittee was

cognizant that rights can be established by statute, charter amendment, ordinance, personnel or civil service rules and through the collective bargaining process. [Note 6]

6. Civilians would be included within its purview. Many tasks that were traditionally performed by commissioned peace officers are now fulfilled by civilian employees. Community service officers may have the authority to issue traffic and ordinance citations. The director of training and heads of other support divisions could be unsworn. A retired or injured officer might continue to work as a reclassified civilian. The lines are blurred, and if protections are afforded to some and not others, morale is undermined and confusion in the disciplinary process can result, especially when the incident giving rise to an investigation involves both classes of employees. This approach differed from the usual POBR law.

7. It would cover both rights and responsibilities. Some rights are conferred on individuals by the state; others are agreed to by employees and management. Both parties have responsibilities to each other and to the communities they serve. Section 2, for example, imposed an affirmative duty to report misconduct and to cooperate in intra-agency investigations.

Rights and Responsibilities
of Law Enforcement Personnel
in Disciplinary Investigations

IACP Subcommittee on Internal Affairs Legislation
(1996)

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Prefatory Note

This is a specimen document, and not a "Model." It is assumed that there are alternative policies and procedures that may be better suited for a particular agency or state.

Method of Adoption

The procedures which follow can be enabled in a variety of ways, including (a) a state statute, (b) a "home rule" ordinance, (c) a civil service rule, (d) a labor-management "Memorandum of Understanding," (e) provisions in a collectively bargained agreement, (f) inclusion in an agency handbook or employee manual, or (g) an Executive Order. The appropriate method of adoption depends on state law, historical labor practices and political considerations that may be unique to each jurisdiction.

Method of Compilation

This Statement is in two parts. The first covers those basic rights and responsibilities that (a) are generally accepted professional practices and/or (b) have been imposed by "mainstream" court decisions that have arisen in the course of due process appeals and litigation. The second part contains optional practices or procedures that are operative currently in some jurisdictions, but not others. They are treated separately because of their eristic nature.

Part One - Basic Rights, Responsibilities and Procedures

1. Definitions

A. "Agency" means the department or unit of government for which an officer or employee, as defined herein, provides occupational or professional services.

B. "Critical Incident Report" means a written report required to be completed and submitted by an officer to his or her superiors (or written at the request of his or her superiors) involving:

a. the death or serious injury of an officer, prisoner or suspect; or
b. the use of a firearm or impact weapon on a suspect, prisoner or other person by the reporting officer or by a fellow officer, or

c. the death or injury of a third person during the course of an arrest or while in pursuit of a fleeing suspect or prisoner, and
d. such other events or incidents designated as critical by the agency that employs the reporting officer.

It includes standardized format reports (such as an agency's "use of force" report) and nonstandardized narrative reports (such as an "incident report").

C. "Formal Interview" means the questioning or interrogation of an officer or employee as part of a Formal Investigation.

D. "Formal Investigation" means the process of investigating a complaint or allegation of serious misconduct, when the inquiry is ordered by a superior or a management representative, and where the results might furnish the basis for disciplinary action against an officer or employee.

E. "Informal Interview" means a meeting between an officer or employee and a superior for the purpose of learning facts or circumstances relating to an incident or event. It includes the mediation of a citizen's or supervisor's minor complaint.

F. "Officer" or "employee" means any person, (a) who has been commissioned or certified as a peace officer, whether compensated or not, or (b) any compensated civilian employee of the agency that retains such peace officers, or (c) a civilian employee of the parent entity who is permanently assigned to an agency that retains police officers.

"Officer" does not include privately employed special officers. "Employee" does not include persons who are employed by private sector contractors that provide support services to an agency or its parent governmental entity.

G. "Serious Misconduct" means an act, omission or other behavior which if proved, could result in (a) a disciplinary suspension of one or more days, or (b) a punitive interruption, loss, reduction, or restriction of an officer's privileges, rights or promotional opportunities, or (c) an involuntary transfer, or (d) a demotion in rank, pay or status, or (e) other diminution of compensation, or (f) termination.

Commentary

1. Application: California's statute includes police chiefs, probationary police officers and correctional officers but excludes temporary officers and recruits. Florida's statute includes full-time state and municipal law enforcement and correctional officers but not parttime officers or police chiefs. Deputy sheriffs are included within the procedural protections but lack tenure and can be terminated without cause. The Maryland statute is limited to officers with arrest powers and includes police chiefs and parttime officers. The Minnesota and Nevada statutes cover all licensed full or parttime peace officers. Virginia excludes chiefs of police and the Wisconsin act excludes state officers.

The Arizona *Model Policy* states that "every full-time permanent non-supervisory police employee has a property interest in continued employment which cannot be taken without due process of law." However, the procedures set forth in the policy are not restricted and apply to any "employee."

The Colorado *Standards* apply to all "peace officers."

These provisions apply to all peace officers, whether full or parttime, whether tenured or nontenured, whether paid officers or volunteers, and includes the chief of the agency. It includes court bailiffs and jailers who are peace officers. It excludes private sector persons who possess a special-police commission -- such as store and hotel detectives, railroad special agents, bail bond enforcement agents, private process servers, etc. It also applies to "civilian" employees, except those who are paid by private contractors.

2. Triggering Events: Informal interviews are outside the scope of these provisions, until such time as serious misconduct is suspected. Union leaders and their lawyers have long maintained that a compelled written report can be as intrusive as a formal interrogation. An officer's responses in a written report can jeopardize his or her career and expose him or her to civil liability in the same way as the answers to questions posed in a formal interview. Written reports are addressed in Section 9 of the document, as an optional right.

3. Included Penalties: These provisions follow court decisions that have recognized that there may be a significant penalty associated with non traditional disciplinary action, such as a transfer to an unpopular post or unit, the denial of a secondary employment permit, a prohibition against desirable overtime assignments or an involuntary shift change that disrupts an officer's family life. Just as the exposure to disciplinary action is a part of the professional life of law enforcement and correctional personnel, they ought to be subjected to adverse action only when basic due process has been fully accorded to them.

4. The definition of a "critical incident" may be omitted if Optional Section 9 is not included.

2. Duty to Report Misconduct and to Cooperate with Intra-agency Investigations.

A. Every officer and employee has a duty to report promptly any and all information concerning any acts or events which constitute serious misconduct, or a violation of state or federal criminal laws, or a substantial conflict of interest, or a corrupt or fraudulent transaction or practice, or any other serious abuse of office, when committed (a) by any other officer or employee of his or her agency or its parent governmental entity, or (b) any person having business dealings with that agency or the parent entity, or (c) by any other person possessing peace officer powers [in this state].

The knowing failure of any officer or employee to report such acts or events shall be

cause for termination or such lesser sanctions that might be appropriately imposed.

Unless otherwise directed, the information shall be given in written format to the chief executive of the agency, except that criminal matters may be referred directly to the appropriate prosecutor.

An officer or employee who complies fully and promptly with the above reporting requirements shall not be subject to any disciplinary or other adverse personnel action, provided the allegations are reasonably believed to be true.

B. Every officer and employee has a duty to cooperate fully with an internal investigation of misconduct, whether serious or minor, unless and until he or she becomes a suspect in a criminal investigation. Absent such a focus, every officer and employee must answer questions asked by a superior or investigator in a truthful and forthright manner, without equivocating or otherwise attempting to avoid disclosure of relevant information.

Commentary

"Serious misconduct" is defined in Section 1. The other activities contained in 2-A are taken from N.Y. Executive Order No. 39 [Part IV-1] (1996) which is applicable to all Executive Branch officers and employees. They parallel a similar provision in the Arizona *Model Policy* [Part II-B] (1992).

3. Time and Place of a Formal Interview.

Whenever an officer or employee is under investigation for serious misconduct, and is subjected to a formal interview at the request of management or a designated member of his agency, the interview will be conducted under the following conditions:

A. It will be scheduled at a reasonable time, preferably when the officer or employee is on duty or immediately preceding or following his tour of duty, unless the seriousness of the inquiry is such that an immediate interview is desired. If the officer or employee is not on duty (or is on suspension), he or she shall be entitled to his usual compensation for call-back duty.

B. The interview shall take place at (a) the usual duty station of the officer or employee, or (b) at the regular premises of the person in charge of the interview. Where the interview is to be conducted by personnel from two or more investigating agencies, it shall take place at the premises of one of the investigating parties. Unusual circumstances pertaining to an investigation will justify scheduling the interview at an appropriate time and place that is convenient to the investigating parties, such as when the incident giving rise to the inquiry involves officers from multiple jurisdictions.

C. Management's failure to comply with the foregoing procedures will not excuse an officer or employee's failure to attend the interview, but may form the basis of a

legitimate grievance.

Commentary

The Arizona *Model Policy* prohibits home interviews. Colorado *Standard* §170.10 mandates the adoption of a written directive concerning (a) the place, duration, conduct, and documentation of IA interviews and (b) who is authorized to represent the accused officer.

The Colorado Commentary prohibits threats, offensive language, and promises or rewards. It provides that officers are entitled to a copy of the audiotape or transcript. The Commentary also says:

> *The interview should be conducted at a reasonable hour, preferably at a time when the peace officer is on duty, or during the normal waking hours for the peace officer, unless the seriousness of the investigation requires otherwise. If such interview does occur during off-duty time of the peace officer being interviewed, the peace officer should be compensated for such off-duty time in accordance with regular department procedures, and the peace officer shall not be released from employment for any work missed.*

4. Statement of the Reasons for a Formal Interview; Identity of Complainants.

A. An officer or employee shall be informed of the name and rank, title or position and agency of employment of all persons who participate in asking questions at a formal interview.

B. An officer or employee who submits to a formal interview shall be informed :

a. of the general nature of the inquiry;

b. of the names and identities of any and all persons who have signed statements alleging misconduct by the concerned officer or employee, or alleging misconduct by another officer or person. The name of a complainant who refuses to make a public complaint, such as a confidential informant or an unrevealed undercover investigator, need not be released to the officer or employee, provided a superior informs the officer or employee that the complainant has requested anonymity.

C. Superiors may question an officer or employee about the contents of a letter, telephone call or other communication made by an unknown person, but must, on request, furnish the officer or employee with a verbatim copy of the letter or a transcript of the telephone call or other communication. If an exact transcript was not kept, the officer shall be provided with a written synopsis of the allegations. Management may "sanitize" the contents of the letter, call or communication by deleting those portions of the document that do not pertain to the current inquiry, or which allege misconduct by other persons not present at the formal interview.

Commentary

Under subsection 4-B, management is not required to provide an accused officer or employee with a copy of a signed complaint and/or witness statement. The name(s) and identities of complainants must be revealed, if known, unless the complainant has requested anonymity or the complainant is an undercover investigator.

Under subsection 4-C, if the complaint is made by an unknown person, the concerned officer or employee must be furnished a verbatim copy of the communication. A verbatim copy can be a transcription of the letter or other communication, rather than a photocopy, to prevent the accused officer or employee from recognizing the handwriting or typewritten style of the sender.

5. Conduct of Formal Interview Sessions.

A. At a formal interview, on the request of an officer or employee being interviewed, no more than two persons shall ask questions during any segment of a interview, although the interview process may involve multiple segments. If more than two interviewers are physically present at the same time, the officer or employee may decline to reply.

A person who records or transcribes an interview session is not an "interviewer." Management may authorize additional persons to simultaneously audit an interview via audio and/or video monitor devices placed elsewhere.

B. Officers and employees who are interviewed in noncriminal matters shall be treated with dignity and respect. They must not be subjected to angry accusations, shouts, ridicule, unlawful threats or harassment. They shall not be improperly offered a "reward" for their responses. However, the persons conducting the interview may remind an officer or employee that he or she has a duty to answer pertinent, job-related questions and can be disciplined or terminated for a failure to do so. An offer of immunity from disciplinary action or from criminal prosecution is not a improper reward, provided the offer is in writing or the offer is audiotaped.

C. Unless otherwise mutually agreed upon, no officer or employee shall be questioned for more than [50] minutes, without being given a rest break of at least [10] minutes.

D. An officer or employee is entitled to (a) elaborate on a response, or to (b) clarify or explain an answer, or (c) to refute a negative implication which arises during the interview or arose at a previous session.

E. If and when an inquiry is or becomes a criminal investigation, an officer or employee is entitled to remain silent and not answer incriminating questions until and unless he or she is advised that use immunity will apply. An officer or employee who is offered limited use immunity from criminal prosecution, by those conducting the

interview, shall answer fully and truthfully all questions posed at that interview, when required to do so. Even in the absence of an admonition concerning limited immunity, use immunity presumptively attaches by operation of law, whenever an officer or employee is compelled to be a witness against oneself in a criminal investigation.

F. Unless waived by the parties, there shall be a verbatim record made of all formal interviews. The record may be by videotape, audio tape or stenotype transcription by [an independent court reporter]. If the interview is being conducted by the agency that employs the officer or employee being interviewed, the officer or employee is entitled to make his own audio recording of the proceedings, unless superiors arrange for two simultaneous recordings to be made and to offer one copy for the officer.

Commentary

1. Courts have annulled the punishment given officers who have been subjected to abusive internal interrogations. See *Oddsen v. Board of Fire & Police Cmsnrs*., 321 N.W.2d 161 (Wis. 1982). Moreover, when an abusive interview has taken place, judges may assume erroneously that management was politically motivated, and the court may look for a technical reason to set aside all sanctions.

Just as important, superior officers and internal investigators should reflect the same professional attitudes and demeanor that is required of their subordinates.

2. The Arizona *Model Policy* requires that an interview be conducted in a professional manner and prohibits ridicule, mockery or outrageous conduct. The Colorado *Standard* prohibits threats, harassment or a promise of reward.

3. The Arizona *Model Policy* has a 90 minute interrogation period; because most people are used to a 50 minute classroom period, the lower duration was selected. The proposed federal version requires a "reasonable period" for the interview and rest breaks. Because "reasonable" is subject to wide interpretation, this document opts for a finite maximum of 50 minutes.

4. Subsection 5E restates the principles of law devolving from *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616 (1967) <http://laws.findlaw.com/us/385/493.html>; *Gardner v. Broderick*, 392 U.S. 273, 88 S.Ct. 1913 < http://laws.findlaw.com/us/392/273.html > (1968); and *Unif. Sanit. v. Cmsnr.*, 392 U.S. 280, 88 S.Ct. 1917 <http://laws.findlaw.com/us/392/280.html > (1968). The presumptive nature of the immunity was recognized in *Confederation of Police v. Conlisk*, 489 F.2d 891/at 895 (7th Cir. 1974) and subsequent cases pertaining to the use of compelled statements.

The Massachusetts Supreme Court has held that public employees who are interrogated in a disciplinary investigation are entitled to full and final immunity from prosecution. See *Carney v. Springfield*, 403 Mass. 604, 532 N.E.2d 631 (1988), and two companion cases. No other courts have adopted the view that "transactional immunity" applies. The U.S. Supreme Court favors the limited version; see *Zicarelli v. State*

Investigating Cmsn., 406 U.S. 472, 92 S.Ct. 1921 <http://laws.findlaw.com/us/406/472.html> (1972).

5. The Arizona *Model Policy* and the Colorado *Standard* require an officer to pay for the cost of a transcript. He is permitted to tape the interview himself so long as the process is not disruptive.

6. Scientific and Financial Examinations.

A. An officer or employee may be required to be photographed or videotaped or participate in a lineup for the purposes of identification by witnesses or complainants.

B. Absent valid medical or religious reasons, an officer or employee may be required to submit to a medical, laboratory or other scientific examination at the sole expense of the agency. Unless restricted by law, an officer or employee may be required to disclose all drugs and medication he or she has taken. An officer or employee may volunteer to take a polygraph examination, but may not be required to do so.

C. When the allegation involves unlawful financial transactions or the receipt of funds obtained by illegal means, a superior or management representative may issue a written order to the officer or employee directing him or her, generally or specifically, to prepare a list of assets and liabilities, and to obtain and disclose his or her bank and other financial statements and to explain all significant entries.

Commentary

1. Colorado *Standard* §170.13 requires agencies to specify when "medical or laboratory examinations are administered." In some cases the Americans with Disabilities Act, 42 U.S. Code §12101-17 (1990) may restrict or prohibit an employer from requiring an employee to disclose what prescriptive drugs he has taken. See *Roe v. Cheyenne M.C.R.*, 920 F.Supp. 1153 (D.Colo. 1996).

2. A financial disclosure requirement is part of the Arizona *Model Policy*. The fourth part of Colorado *Standard* §170.13 is optional and states that "an employee may be required to submit financial disclosure statements." The Commentary limits this power to investigations where the data is "material to a particular internal affairs investigation."

Designated I.R.S. employees and persons with access to classified information are required to complete generalized federal disclosure forms. See Form SF-85P, upheld in *N.T.E.U. v. Dept. Treasury*, 25 F.3d 237 (1994) and Executive Order 12968, published at [1995] (2) U.S. Code Cong. & Ad. News (West) B80-B91 (2 Aug.1995). The requirement may be extended lawfully to state and local law enforcement personnel; see B*arry v. City of N.Y.*, 712 F.2d 1554 (2d Cir. 1983), cert. den. 464 U.S. 1017.

3. As compiled, this Section 6 allows voluntary, and prohibits mandatory, polygraph examinations. Optional Section 10 would make them obligatory. If Sec. 10 is

incorporated into Sec. 6, the last sentence of Subsection B should be deleted. What is now in Sec. 10 would then follow.

7. Personnel Files: Access, Adverse Information and Dispositions.

A. While in the continuous physical presence of a predesignated monitor, an officer or employee may view the contents of his or her personnel file during reasonable business hours. No items shall be removed from the file, except for photocopying purposes.

B. The progress of an internal investigation or inquiry shall be kept in one or more confidential case files. No materials contained in or intended for investigative case files shall be put in an officer's or employee's personnel file, until the internal inquiry concerning that person has concluded.

No other item of a negative or disparaging nature shall be put in an officer or employee's personnel file, without promptly advising the affected person. An officer or employee can submit a written response or letter of explanation concerning the contents of the document objected to. Such responses or letters will be kept in the personnel file as long as the adverse material is included.

C. An officer or employee will be notified promptly of the disposition of allegations made against him or her. If an investigation will continue for the purpose of scrutinizing others, an officer or employee can be ordered to keep confidential those findings pertaining to him or her, for the duration of the inquiry.

A closed investigation may be reopened when newly discovered evidence so warrants. The agency need not inform those officers and employees who were notified of the prior disposition, until such time as they are re-interviewed or otherwise are involved in the reopened investigation.

Commentary

In sections "O" and "Q," the Arizona *Model Policy* allows an officer to access his own files, provides for giving notice of IAD dispositions, and permits him to insert a statement or comment in rebuttal to any adverse or derogatory information.

Colorado has adopted an optional *Standard* (§171.2) which regulates the inspection of a peace officer's own personnel file. The Commentary to the standard allows him or her "a reasonable period of time within which to file a written response to any adverse comment... [which] should be attached to... the adverse comment." Optional *Standard* §170.11 covers notification of results; the Commentary specifies "within a reasonable time."

8. Miscellaneous Provisions.

A. Arbitration: An officer or employee who is a member of a recognized or certified

bargaining unit shall use the grievance processes established by the enabling law and the employment agreement conferring those privileges. If the employment agreement includes final and binding arbitration, the officer or employee's right to judicially litigate any complaints or grievances is waived irrevocably in favor of the grievance process.

If there is no bargaining agreement or it does not provide for alternative dispute resolution, an officer or employee has the right to bring a civil suit against his employing entity seeking injunctive relief, and where appropriate, an award of damages for injuries suffered.

B. No Retribution: No adverse action shall be taken against an officer or employee for the exercise of his or her civil and constitutional rights, provided the officer or employee's actions are taken in a reasonable, good faith manner. Neither management nor an officer or employee shall knowingly engage in an abuse of legal procedures or maintain vexatious litigation.

C. Confidentiality: No management representative, superior or other officer or employee, who has knowledge of a complaint of misconduct by another officer or employee, shall publicly release the contents of (a) that complaint, or (b) any statements made in a formal interview until (a) the complaint or statements become a public record or (b) the investigation relating to the concerned officer or employee has been concluded and the officer or employee has been notified of the disposition. This subsection does not limit an accused officer or employee's right to gain access to information he is otherwise allowed to receive.

D. Release of Photographs: Management shall not release to the news media a photograph or the home address of an officer or employee who is accused of misconduct, unless he or she has been formally charged with a criminal offense.

E. Waivers: An officer or employee may irrevocably or conditionally waive some or all rights, privileges and protections accorded him or her (a) under any part of these provisions, or (b) set forth in any statute or other law, or (c) contained in a bargaining agreement or "Memorandum of Understanding," if any. The waiver shall be in writing, unless made in the course of a recorded formal interview.

F. Immediate Obedience Required: The rights, privileges and protections accorded an officer or employee herein shall be enforced as set forth in Subsection 8-A above. An officer or employee does not have a legal right to refuse to cooperate in an internal investigation or to participate in an interview, even if management has failed to recognize or provide those rights, privileges and protections; the officer or employee must "obey now" and "grieve or complain later."

However, admissions or confessions obtained during the course of any interview not conducted substantially in accordance with these provisions may not be used by management in any subsequent disciplinary action, except for the limited purpose of impeaching the officer or employee's credibility for truthfulness, should he or she

subsequently testify at variance with those admissions or confessions.

G. Criminal Charges: In the event an officer or employee is in custody or is facing criminal charges, he or she shall have all the constitutional and civil rights accorded other defendants. None of the enumerated rights, privileges and protections provided herein shall apply to a parallel criminal investigation or prosecution, unless elsewhere provided by law.

H. Civil Claims: Nothing herein shall limit the right of an officer or employee to bring a civil claim or lawsuit for damages against any private citizen or private entity for the physical injuries, financial losses or mental suffering that was negligently or intentionally inflicted on the officer or employee as an individual, or while acting in his or her official capacity.

I. Tenure: Nothing herein shall confer upon an officer or employee (a) tenure or a "property right" to one's job or position, or (b) an expectation of continued employment. Tenure depends exclusively on any applicable laws, rules, policies and contractual rights that might arise independent of these provisions.

Commentary

1. Recently the U.S. Supreme Court has enforced arbitration agreements which replace the right to sue by all signatories. See *Gilmer v. Interstate*, 500 U.S. 20, 111 S.Ct. 1647 (1991) <http://laws.findlaw.com/us/500/20.html>. Lower courts have enforced arbitration clauses contained in collectively bargained agreements, even if the concerned employee did not waive his right to sue. See *Austin v. Owens-Brockway*, 78 F.3d 875 (4th Cir. 1996), involving ADA statutory claims.

While many police chiefs complain that arbitrators are too lenient in imposing punishment for misconduct, many employers would prefer to arbitrate claims of race, origin, gender or handicap discrimination and allegations of sexual harassment.

2. An officer's reputation is ruined quickly and sometimes irreparably when he is accused of brutality, corruption or sexual misconduct. A limited confidentiality clause protects an officer or employee in those frequently-encountered cases where the complaint is completely unfounded or the accuser drops the allegations.

Similarly an officer or employee must be formally charged with a criminal offense before the agency can release his or her photo to the media.

3. Subsection 8-F reiterates the well-recognized rule than an officer or employee must "obey now" and "grieve later." Conversely, admissions and confessions obtained in an interview that is not conducted substantially in accordance with these provisions may not be used as evidence of guilt in a disciplinary hearing, except to contradict a subsequent denial or a fabricated excuse offered at that hearing.

Part Two - Optional Rights and Procedures

9. Right to Consult an Attorney or Union Representative.

A. At a formal interview, an officer or employee is entitled to the assistance of an attorney or a representative of his or her union (or association) if any. The interview shall be delayed, not more than [three] business days while the officer or employee obtains professional assistance.

A formal interview is a fact-finding inquiry and not an adversary proceeding. An attorney or other representative shall not be allowed to formally question his client, or to call or cross-examine other witnesses, or to introduce evidence favorable to his client. An attorney or other representative is entitled to ask his client to (a) elaborate on a response, or to (b) clarify or explain an answer, or (c) to refute a negative implication which arises during the interview or at a previous session.

While an attorney or representative can object to a question, if he advises his client to refuse to answer, the officer or employee is subject to termination or other disciplinary action for such refusal, even if the allegations against the officer or employee are without substance.

B. Unless serious misconduct is suspected, an officer or employee is not entitled to the assistance of an attorney or representative of his or her union (or association) at an informal interview.

C. When directed or otherwise required to complete a critical incident report (as defined herein), an officer or employee is entitled to the assistance of an attorney or representative of his or her union (or association) if any. The report may be delayed, for up to [three] business days while the officer or employee obtains professional assistance.

D. Notwithstanding the preceding paragraphs, for an appropriate stated reason, management may require an officer or employee to participate promptly in a brief, off-the-record interview, for the purpose of learning certain basic or preliminary information. No statements or admissions made by an officer or employee at an off-the-record interview may be used against him or her for any purpose whatsoever, and no transcription or audio recording shall be made during such interview.

Appropriate reasons shall include, but are not limited to (a) actual or anticipated requests by the news media for information, or (b) the prevention of a potential crime or violent act, or (c) the flight or concealment of a criminal suspect, or (d) the loss or dissipation of evidence in a criminal or civil investigation or (e) other exigent circumstance(s).

Nothing herein shall prevent management, during a subsequent and properly constituted formal interview, from repeating any questions asked in the course of a prior off-the-record interview, except that no reference shall be made to the responses given to any questions in the course of the off-the-record interview.

Commentary

1. In many states, legal counsel is entitled to attend disciplinary interviews of officers and employees they represent. Florida and Maryland police chiefs have adjusted to this right since 1975. The Maryland statute requires the attempted interrogation of a police officer to be suspended for up to ten days to allow him to employ "counsel or any other responsible representative."

Also in 1975, the U.S. Supreme Court concluded that §7 of the National Labor Relations Act [29 U.S. Code §157] requires covered private employers to permit an employee's "representative" to be present during an investigative interview. *N.L.R.B. v. Weingarten*, 420 U.S. 251, 95 S.Ct. 972 (1975) <http://laws.findlaw.com/us/420/251.html>. As of that year, 33 states had public employee-relations laws which were identical or similar to §7. Of those states, only West Virginia declined to follow *Weingarten*.

However, in right-to-work states, a police officer does not have a legally protected right to the presence of counsel (or union representative) at a disciplinary interview. The Sixth Amendment [Right to Counsel] does not apply to disciplinary proceedings; *L.A. Police Prot. League v. Gates*, 579 F.Supp. 36 (C.D.Cal. 1984).

Moreover, an internal affairs interview is non adjudicatory. Since "no possibility of sanctions exists at that point," said one court, "...the due process clause of the Fourteenth Amendment provides no right to counsel at the IAD interview." *Wilson v. Swing*, 463 F.Supp. 555 (M.D.N.C. 1978), relying on *Haines v. Askew*, 368 F.Supp. 369, aff'd 94 S.Ct. 2596 (1974).

The Arizona *Model Policy* is silent on the "right" of an accused officer to representation during a formal interview. Colorado adopted as part of *Standard* §170.10 optional language requiring a written directive on who shall be authorized to represent peace officers who are interviewed. The Commentary to the optional provision states:

> *Upon the filing of a formal written statement of charges, or whenever an interview focuses on matters which are likely to result in punitive action against any peace officer, that officer, at his request, should have the right to be represented by a representative of his choice to include legal counsel who may be present at all times during such interview.*

The Commentary to the *Standard* continues, and cautions that:

> *This section should not apply to any interview of a peace officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contract* [Sic] *with, a supervisor or any other peace officer, not should this section apply to an investigation concerned solely and directly with alleged criminal activities.*

2. Acting "under the advice of counsel" is no defense to an officer who willfully refuses to answer a question which is narrowly related and specifically directed to his employment or fitness for service. The refusal is made at the peril of an employee, although he might be able to collaterally challenge the question by an emergency civil action, as was done in *Buege v. Lee*, 372 N.E.2d 427 (Ill.App. 1978).

3. "Critical Incident Reports" are defined in Section 1. Some law enforcement agencies have allowed an officer or employee to consult with an attorney before completing a use of force report. This subsection can be omitted, as an option within an option.

A California appellate court has recognized that the assistance of counsel when completing critical incident reports is an important right, and if an agency has a past practice of allowing this, they must continue to do so during the life of a valid bargaining agreement or Memorandum of Understanding. The three-judge panel concluded also that the desire for an immediate report was not a managerial prerogative, and there was no public safety mandate which would impair or excuse the past practice. See *Long Beach P.O.A. v. City of L.B.*, 156 Cal.App.3d 996 [at 1010-11], 203 Cal.Rptr. 494 (1984).

A federal District Court issued a similarly worded opinion in *Watson v. Co. of Riverside*, 976 F. Supp. 951, 1997 U.S. Dist. Lexis 13797 (C.D.Cal.).

Also, a Michigan arbitrator extended *Weingarten* to a written report that was requested by a police supervisor. *Lansing* (City of) *and Capitol City Post* 141, 106 LA (BNA) 761 (Ellmann, 1996).

4. Police chiefs and sheriffs are well-aware that the first media reports concerning an officer-involved shooting or other critical incident can generate irreversible public opinion. Subsection 9- D allows an immediate "off-the-record" interview for the purpose of formulating a media response.

10. Polygraph Examinations.

When consistent with (a) federal and state law and (b) any enforceable employment agreements, an officer or employee may be required to submit to a polygraph examination. The results are to be kept semi-confidential; they may be considered for non- evidentiary investigative purposes by management and internal investigators.

The results shall not be made public without the consent of the person tested, and shall not be disclosed to an arbitrator, or a member of a disciplinary hearing panel, or a member of a duly constituted employment review board, or to any other disinterested person(s) who may be charged with the responsibility of adjudicating guilt on the basis of legally admissible evidence.

Commentary

By statute or court decisions, compelled polygraph examinations are illegal in a few states. In other jurisdictions they are prohibited under existing collective bargaining agreements.

The wording in this provision follows the Arizona *Model Policy* on this issue. Colorado *Standard* §1.714 is optional and limits polygraph examinations to those officers who consent to be tested. Colorado applicants and probationary officers are exempted and may be tested as part of the hiring process.

In this document, an agency may use the polygraph to screen applicants, until they are appointed an officer or hired as an employee.

11. Right to be a Candidate for Public Office.

A. Subject to any provisions or limitations of federal, state and local laws, an officer or employee is entitled to be a candidate for public office. If the office sought is (a) one within the parent government-entity of the employing agency, or (b) there is a statutory or common law conflict between the elected office sought and the agency position currently held, the officer or employee shall take a special, unpaid leave of absence while serving as an elected official. No agency benefits, including seniority rights, shall accrue while on special leave.

When the term of elected office has been served or otherwise vacated, the person on leave shall, if otherwise qualified, be eligible for reinstatement with the agency of prior employment. However, the person returning from special leave shall be reinstated at the appropriate rank or position that he or she would be entitled to hold, based on the seniority rights held at the time the special leave of absence commenced.

"Otherwise qualified" includes any generally applicable, job-related, physical, mental, educational or legal qualifications, including the completion of any omitted mandatory training or certifications. This means that an officer, who has been absent for a long period, might have to (a) pass a preservice physical exam and (b) receive extensive training before he is eligible for recertification and reinstatement.

B. The above right shall not apply if the leave period is for more than [*four*] consecutive years. No agency is required to reinstate an officeholder if he or she does not apply for reinstatement within [*thirty*] days before or after leaving office.

Commentary

This subject was included as an optional section because it was one of the nine topics included by the National Association of Police Organizations on its Internet website.

The rights of returning workers may be covered by (a) civil service rules or (b) is addressed specifically in a bargaining agreement or (c) may be a recognized past practice

enforceable under the labor agreement.

The intent of this section is to prevent a person who returns, from a term as an elected official, from displacing a person who has accumulated greater seniority rights.

References:

Aitchison, Will, *The Rights of Law Enforcement Officers* (5th edit.): Ch. 5, Law Enforcement Officer Bills of Rights, 209-221, I.S.B.N. 1-880607-22-0 (Labor Relations Information Services: Portland, Oregon, 2004), info. at <http://www.lris.com>.

Arizona Association of Chiefs of Police, *Model Policy Regarding the Rights and Responsibilities of Law Enforcement Employees in Internal Investigations*, (Tempe, Arizona, 1992), by Snell & Wilmer, attorneys for the association, and published in 93 (1) Legal Defense Manual 17-19 (Law Enforcement Legal Publications: Glen Ellyn, Illinois, 1993). Website at <http://home.xnet.com/~lelp/>.

Arnold, John, *Internal Affairs Investigation: The Supervisor's Role*, 67 (1) FBI Law Enforcement Bulletin 11 (Jan. 1998) viewable at <http://www.fbi.gov/publications/leb/1998/janleb.pdf>.

Brooks, Michael E., *Statements Compelled from Law Enforcement Employees*, 71 (6) FBI Law Enforcement Bulletin 26 (June 2002) viewable at <http://www.fbi.gov/publications/leb/2002/june02leb.pdf>.

Clymer, Steven D., *Compelled Statements from Police Officers and Garrity Immunity*, 76 N.Y.U.L. Rev. 1309 (2001) viewable at <http://www.nyu.edu/pages/lawreview/76/5/clymer.pdf >.

Colorado Association of Chiefs of Police, *Professional Standards* (§170.1-13, Internal Affairs and §171.1-7, Administrative Procedures for Sworn Personnel) (Denver, Colorado, 1986; Rev. 1990).

Crawford, Kimberly A., *Constitutional Rights to Counsel During Interrogation: Comparing Rights Under the Fifth and Sixth Amendments*, 71 (9) FBI Law Enforcement Bulletin 28 (February, 2003) and *Compelled Interviews of Public Employees*, 62 (5) FBI Law Enforcement Bulletin (May, 1993).

Human Rights Watch, *Shielded From Justice: Police Brutality and Accountability in the United States* (1998) viewable at <http://www.hrw.org/reports98/police/index.htm>.

International Association of Chiefs of Police, *Prepared Testimony of I.A.C.P. Vice President Darrell L. Sanders* (and submitted by Roy C. Kime, IACP Legislative Counsel), before the House Subcommittee on Crime (Washington, D.C., June 18, 1996), and accompanied by *An Analysis of Proposed Law Enforcement Officers' Bill of Rights*

Legislation (S. 334, 104th Cong. 1st Sess.) written by Wayne W. Schmidt, vice chair of the IACP Legislative Committee (Alexandria, Virginia, 1995) viewable at <http://www.aele.org/pobor.html>.

Keenan, Kevin M. and Walker, Samuel, *An Impediment to Police Accountability? An Analysis Law Enforcement Officers' Bills of Rights*, a pre-published article (as revised Jan. 13, 2004).

National Association of Police Organizations, *Legislative Priorities: Law Enforcement Officers' Bill of Rights*. (Washington, DC, 1998) info. at <http://www.napo.org>.

New York Office of the Governor, *Executive Order No. 39*: §5.39, *Reforming the Office of the State Inspector General* (Albany, 1996) viewable at <http://www.gorr.state.ny.us/gorr/EO39_fulltext.htm>.

Police Executive Research Forum, Document 2001-06-14: *Highlights of Concerns on* [*Proposed*] *Police Officer Bill of Rights & Collective Bargaining* [*Legislation*] (2001) viewable at <http://policeforum.org>.

Reiter, Lou, *Law Enforcement Administrative Investigations*, 2nd edit., Ch. 5 Interviews (Reiter and Associates, Greenville, Rhode Island, 1998) info. at <http://www.aele.org/leaibook.html>.

Schofield, Daniel L., *Ensuring Officer Integrity and Accountability: Recent Court Decisions*, 67 (8) FBI Law Enforcement Bulletin 28 (Aug. 1998) viewable at <http://www.fbi.gov/publications/leb/1998/aug98leb.pdf>.

Notes:

***** The author is vice chair of the IACP's Legislative Committee (since 1988) and has closely followed its work since 1969. He also is the editor of the *Fire and Police Personnel Reporter*, a monthly employment law publication, since 1975, and serves as the senior legal advisor to the Illinois Association of Chiefs of Police, since 1974. He is a member of the Bars of Illinois, New Mexico, New York and the District of Columbia. He can be contacted at wws@aele.org

1. Biaggi also was a founder of the *National Law Enforcement Officers Memorial Fund* (1984). In connection with the 1986 *Wedtech Scandal*, he was convicted of racketeering, extortion, bribery, filing false tax returns, and perjury. He resigned from the Congress and went to federal prison. *U.S. v. Biaggi*, #87-CR-265, 705 F.Supp.864 (S.D.N.Y. 1988); *affirmed*, 909 F.2d 662 (2d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991).

2. Some of the legislative information is taken from the Keenan and Walker

manuscript (2004).

3. Members of the *Internal Affairs Legislation Subcommittee*, at the time the document was drafted, were Wayne W. Schmidt (Chair) AELE Law Enforcement Legal Center, Chicago, IL; Jody M. Litchford, Chief Assistant City Attorney, Orlando, FL; Charles R. McDonald, [then] Chief of Police, Southern Illinois University, Edwardsville, IL; Dana G. Schrad, Executive Director, Virginia Association of Chiefs of Police, Richmond, VA; and Col. Carl R. Wolf, Chief of Police, Hazelwood, MO. The Legislative Committee Chair, then and now, is Chief Edmund Mosca from Old Saybrook, Connecticut.

4. For example, the IACP steadfastly opposed the passage of the *Law Enforcement Officers Safety Act of 2004*, which authorizes active and certain retired officers to carry concealed firearms. In July 2004, the 108th Congress enacted H.R. 218 as 18 U.S. Code §926B and C, without including any provisions to limit agency liability that could have been offered by the IACP.

5. Legal citations and website references were recently updated. Since this document was drafted new issues have emerged. It is unlikely the subcommittee will meet to revise its work to address those matters. Readers should keep in mind that additional judicial decisions have been issued which might supplement or modify the cases cited.

6. The Arkansas legislature, for example, *recommends* but does not mandate POBR municipal ordinances. Arkansas (1992) Code §14-52-301.
