

INTERNAL AFFAIRS  
Internal Affairs Policy & Procedures

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Dear Chief Executive:

The delivery of effective police service depends in large measure on the quality of leadership by the agency's chief executive. We all recognize the importance to police executives of timely and practical management resources.

For several years the Division of Criminal Justice and the New Jersey State Association of Chiefs of Police have worked together to develop the Police Management Manual as a standard for municipal police management. The manual is designed to provide police executives with practical guidelines necessary to address day-to-day operational concerns.

I am pleased to provide you with Chapter five of the Police Management Manual, "Internal Affairs Policy and Procedures" which deals with a matter of extreme importance to everyone in law enforcement. This chapter, which was prepared after consultation with numerous law enforcement officials, serves as a supplement to the New Jersey Law Enforcement Agency Standards Program begun in October of last year by the Division of Criminal Justice and the State Chiefs Association. It contains standards, policies and procedures for the internal affairs function.

Some highlights of "Internal Affairs Policy and Procedure" include:

It advocates the establishment of a formal Internal Affairs Unit or function in each police agency. While assignment of personnel may be on a full or part time basis, a structure must be in place to objectively review complaints of officer misconduct.

It calls for police departments to accept citizen complaints about police conduct from any person 24 hours a day, seven days a week, including anonymous complaints.

It provides for a police department representative to visit the complainant if the complainant cannot file the report in person.

It calls for all complaints about police officer conduct to be thoroughly and objectively investigated to their logical conclusions.

It calls for the immediate notification of the county prosecutor in the event of any allegation of criminal misconduct by a police officer, or whenever a firearms discharge results in an injury or death.

It provides that the accused officer is accorded all of the appropriate due process rights in the internal disciplinary process. This includes the right to be notified of the outcome of all complaint investigations.

It instructs that citizen complainants be advised of the outcome of an internal investigation or disciplinary proceeding.

It provides police departments with detailed information and guidelines on conducting thorough internal investigations of any complaints about police conduct.

It provides police departments with a sample Internal Affairs policy and procedures, as well as sample formats for use in the disciplinary process.

It calls for an annual report summarizing the types of complaints received and the dispositions of the complaints to be made available to the public. This report would not contain the names of complainants or the accused officers.

As I am sure you will agree, citizen confidence in the integrity of a police department is enhanced by the establishment of meaningful and effective complaint resolution procedures. Toward that end, this chapter is a reflection of our interest in having all police agencies in this state adopt and conscientiously implement these procedures for the handling of citizen complaints.

Recognizing the key role played by officers assigned to the internal affairs function, it is important that they are properly prepared for the task. In the near future we will be establishing a training program for those officers assigned by you to internal affairs responsibilities. Additional details concerning this program will be forthcoming in order that you may identify personnel

from your agency who would benefit from such training.

If you have any questions about this chapter or any other portion of the Police Management Manual, please call the Division of Criminal Justice, Police Services Section at (609) 984-0960.

Robert J. Del Tufo  
Attorney General

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## PART ONE INTERNAL AFFAIRS AND THE DISCIPLINARY PROCESS

### Introduction

Achieving the desired level of discipline within the police agency is among the most important responsibilities of the police executive. Yet, this is one of the most frequently neglected and outdated processes existing within many police agencies. While the word "discipline" was originally defined as instruction, teaching or training, its meaning has shifted toward a concept of control. This emphasis on control has resulted in discipline being viewed as a negative threat rather than a mechanism for instruction and counseling. Too frequently rules of conduct and disciplinary procedures are used as an end in themselves, their purpose as an aid to reaching department goals is forgotten. This dominance of the negative aspects of discipline diminishes morale and officer productivity.

### A First Step

A first step in approaching discipline positively is to rely more on emphasizing instruction and less on control. This requires the police executive to focus on organizational practices. He must first define the goals and objectives of all departmental units. He must then promulgate management's expectations to guide these units toward the realization of those goals. And finally, the police executive must establish a means to monitor performance and to correct improper actions.

This approach to management as it relates to discipline insures that all subordinates know and understand:

1. What must be done;
2. Why it must be done;
3. How it must be done;
4. When it must be done;
5. What constitutes satisfactory performance;
6. When and how to take corrective action.

To achieve this, management must establish workable procedures for documenting all expectations and advising individuals of their duties and responsibilities.

### Prevention of Misconduct

Prevention is the primary means of reducing and controlling misconduct. While disciplinary actions are properly imposed on officers who engage in wrongdoing, they are of limited utility if they shield organizational conditions which permit the abuses to occur. Too often, inadequate training and lack of appropriate guidance are factors that contribute to officers' improper performance. The agency should make every effort to eliminate the organizational conditions which may foster, permit, or encourage improper performance of employees. In the furtherance of this objective, special emphasis is placed on the following areas:

Recruitment and selection. Selecting and appointing the highest quality of individuals to serve as law enforcement officers must be a priority of every law enforcement agency. During the selection process, psychological tests and individual interviews should be completed by each candidate in an attempt to identify those who would be best suited for police work. These procedures may also be used for promotional testing, as well as assignment to especially sensitive responsibilities or those that pose the greatest opportunities for abuse or wrongdoing.

This procedure must be governed by local policy and contracts.

**Training.** Recruit and in-service training for police officers should emphasize the sworn obligation of those officers to uphold the laws and provide for the public safety of the citizenry. Police ethics should be a major component in the training curricula, as well as an in-depth examination of the rules, regulations, policies and procedures of the department, including the disciplinary process. There must also be a process to advise veteran officers of any new statutory requirements or significant procedural changes.

Proper training of agency supervisors is critical to the discipline and performance of police officers. Emphasis should be placed on anticipating problems among officers before they result in improper performance or conduct. Supervisors are expected to recognize potentially troublesome officers, identify training needs of officers, and provide professional support in a consistent and fair manner.

**Community outreach.** Commanding officers should strive to remain informed about and sensitive to the needs and problems of the community. Regularly scheduled meetings with citizen advisory councils as well as informal contact with community leaders should be used to hear the concerns of citizens. These meetings help commanding officers identify potential crisis situations and keep channels of communication open between the agency and the community. The disciplinary process should be publicized and clearly explained in these forums.

**Data collection and analysis.** The Internal Affairs Unit or function should prepare periodic reports for the police executive that summarize the nature and disposition of all misconduct complaints received by the agency. This report shall be prepared at least quarterly, but may be prepared more often if needed. The report shall include the age, sex, race and other complainant characteristics which might signal systematic misconduct by any member of the department. Terminated complaints should be recorded and the reasons for termination explained. Copies of the internal affairs report shall be distributed to all command and supervisory personnel, the county prosecutor, as well as a designated representative of the collective bargaining unit.

An annual report summarizing the types of complaints received and the dispositions of the complaints shall be made available to the public. The names of complainants and accused officers shall not be published in this report.

#### Policy Management System

The department's policy management system serves as the foundation for effective discipline. A

clearly defined policy management system is designed to move the organization toward its stated goals and set the standard for acceptable performance. The system must incorporate a mechanism for the distribution of policies and procedures and provide for periodic review and revision as required. The system should include a classification and numbering system which facilitates cross-referencing where necessary.

Police departments should have a policy management system that includes at least the following:

1. Rules and regulations: A set of guidelines outlining the acceptable and unacceptable behavior of personnel. The rules and regulations shall be promulgated by the appropriate authority as designated by municipal ordinance.

2. Policies: Statements of agency principles that provide the basis for the development of procedures and directives.

3. Procedures: Written statements providing specific direction for performing agency activities. Procedures are implemented through policies and directives.

4. Directives: Documents detailing the performance of a specific activity or method of operation. Directives includes general orders, personnel orders, and special orders.

The policy management system should clearly and explicitly state management's intentions. The reader must understand what management wants to accomplish and what behavior is expected. Each category of documents in the policy management system should be issued in a distinctive, readily identifiable format.

Specific categories of misconduct that are subject to disciplinary action must be precisely defined within the department's rules and regulations. Any incident of inappropriate behavior may fall into one or more of the following categories:

**CRIME:** Complaint regarding the involvement in illegal behavior, such as bribery, theft, perjury or narcotics violations.

**EXCESSIVE FORCE:** Complaint regarding the use or threatened use of excessive force against a person.

**ARREST:** Complaint that the restraint of a person's liberty was improper or unjust.

**ENTRY:** Complaint that entry into a building or onto property was improper or that excessive force was used against property to gain entry.

**SEARCH:** Complaint that the search of a person or property was improper, unjustified or otherwise in violation of established police procedures.

**DIFFERENTIAL TREATMENT:** Complaint that the taking, failing to take, or method of police action was predicated upon irrelevant factors such as race, attire, age, or sex.

**DEMEANOR:** Complaint that a department member's bearing, gestures, language or other actions were inappropriate.

**SERIOUS RULE INFRACTIONS:** Complaint such as disrespect toward supervisor, drunkenness on duty, sleeping on duty, neglect of duty, false statements or malingering.

**MINOR RULE INFRACTIONS:** Complaint such as untidiness, tardiness, faulty driving, or failure to follow procedures.

In addition, the rules and regulations shall clearly indicate the possible penalties an officer might receive when an allegation of misconduct is substantiated. A system of progressive discipline must be instituted within the department's rules. Progressive discipline serves an important role in the process by which the department deals with minor complaints of misconduct. In providing a range of penalties, the department can use the disciplinary process to achieve the basic goals of instruction and addressing inappropriate behavior before minor problems escalate into major problems. At the same time, the accused officer is made aware that repeated violations of department rules will lead to ever increasing penalties.

A progressive discipline can include:

1. Counseling
2. Oral reprimand or performance notice
3. Letter of reprimand
4. Loss of vacation time(1)
5. Imposition of extra duty1

6. Monetary fine(2)
7. Transfer/reassignment
8. Suspension without pay
9. Loss of promotion opportunity<sup>1</sup>
10. Demotion
11. Discharge from employment

The disciplinary process shall be thoroughly explained in department policy and procedure, including precise descriptions of the proper authority of the Internal Affairs Unit, the investigation process, the officer's rights, the hearing process and all appeal procedures available to the officer.

The rules and regulations which clearly describe and define categories of misconduct and the internal affairs policy and procedures shall be made available to all employees. In addition, a copy of the rules and regulations and a copy of the department's internal affairs policy and procedure shall be provided to a representative of any collective bargaining unit for employees.

#### Responsibility for Carrying Out Discipline

A system of rules and regulations specifying proper behavior will not in itself assure effective discipline. Unless there is some method of detecting violations of the rules, and bringing misconduct to the attention of the proper authorities, the written rules will have little meaning. If management fails to act promptly and appropriately when improper conduct has occurred, discipline and the agency's effectiveness will rapidly diminish. When not acted upon, violations of department rules, regulations, policies or procedures become the accepted practice making the written directives meaningless.

#### Authority to Discipline

Subject to the limitations set forth in N.J.S.A. 40A:14-147 et seq. and municipal ordinances, the police executive is vested with the authority and responsibility for all department discipline. Except for emergency suspensions, all disciplinary action must be approved by the police executive.

To carry out disciplinary tasks successfully, however, responsibility must be delegated by the police executive to individual units within the agency. Although the levels of authority vary

within the agency's hierarchy, the failure to carry out responsibilities at any level will contribute to the organization's ineffectiveness. The task of clearly delineating responsibility and authority is essential to effective discipline.

Every supervisor has a responsibility for knowing and following the procedures established by the organization to deal with employee performance which is contrary to expectations. If the supervisor fails to follow these procedures or avoids his responsibility, that supervisor is not conforming to expected behavior and must himself be subjected to some corrective action. Some supervisors occasionally need to be reminded that the fundamental responsibility for direction and control rests with the immediate supervisor at the execution or operations level, not with the police executive.

To provide such direction and control, supervisory personnel must be granted proper authority to carry out their responsibilities. In order to properly exercise this authority, supervisory personnel shall be fully familiar with applicable department rules and regulations. Individual supervisory personnel may be permitted to take certain disciplinary measures, subject to approval of the police executive. These measures include oral reprimand or performance notice, written reprimand, and written recommendations for other disciplinary actions. The extent of this authority must be clearly stated in the department's policy management system.

### Internal Affairs Unit

The Internal Affairs Unit, or responsibility, shall be established in each law enforcement agency. Depending upon the need, the Internal Affairs function can be full or part-time. In any event, this function necessitates either the establishment of a unit or officer, or the clear definition of responsibility for carrying out the Internal Affairs function on an as needed basis. The unit shall consist of those members of the department assigned to the Internal Affairs function by the police executive. Personnel assigned to the Internal Affairs function serve at the pleasure of and are directly responsible to the police executive or designated Internal Affairs commander.

The goal of Internal Affairs is to insure that the integrity of the department is maintained through a system of internal discipline where fairness and justice are assured by objective, impartial investigation and review.

### Duties and Responsibilities

The Internal Affairs Unit or officer shall conduct investigations of allegations of misconduct by members of the department and review the adjudication of minor complaints handled by supervisors. In addition, Internal Affairs shall be responsible for the coordination of investigations involving the discharge of firearms by department personnel. Internal Affairs will also be responsible for any other investigation as directed by the police executive.

Internal Affairs may conduct an internal affairs investigation on its own initiative upon notice to, or at the direction of the police executive or Internal Affairs commander. Internal Affairs may refer investigations to the employee's supervisor for action as permitted by department policy and procedures.

Internal Affairs members or officers temporarily assigned to that function should have the authority to interview any member of the department and to review any record or report of the department relative to their assignment. Requests from Internal Affairs personnel, in furtherance of their duties and responsibilities, shall be given full cooperation and compliance as though the requests came directly from the police executive.

The Internal Affairs Unit or officer designated by the chief executive shall maintain a comprehensive central file on all complaints received, whether investigated by Internal Affairs or assigned to the officer's supervisors for investigation and disposition. An Internal Affairs index file should be maintained which records the basic information on each case, including the accused officer, allegations, complainant, date received, Internal Affairs officer assigned, disposition and disposition date for each complaint.

### Staff Inspections

While the primary responsibility for enforcing department policies rests with the line supervisors, management can not rely solely on those supervisors for the detection of violations. Administrators should know whether or not the plans of the organization are being implemented and carried out as intended. It is necessary for management to know if behavior is, in fact, consistent with rules and regulations, policies and procedures. The task of detecting such defects should be delegated to an Inspection Unit or function.

Large agencies might establish an Inspection Unit operating directly out of the office of the police executive . Small and medium size agencies can successfully accomplish this function by periodically assigning the inspection task to selected unit commanders. Individuals so assigned

must be of unquestioned integrity and hold sufficient rank to achieve the objectives of the inspection function.

## Duties and Responsibilities

The inspection function should determine by actual on-site inspection whether the policies of management are being complied with by personnel at the operations level. This function is also responsible for reviewing and evaluating procedures. In addition, the inspection unit or function should evaluate the material resources of the department and their utilization. This includes but is not limited to motor vehicles, communications equipment, office machinery and supplies. The inspection function or unit should report any deficiencies to the police executive, as well as recommend any possible solutions and improvements.

## Training

Just as the original meaning of discipline is instruction, police agencies should view "discipline problems" as possible "training problems." Inappropriate behavior on the part of an officer or group of officers should prompt supervisors to review past training and evaluate the need for future training. Perhaps a particular officer needs a refresher course in a certain subject. Or perhaps changes in the law, the police department, or even within the community have given rise to a need for some training never before given to the officer or department as a whole.

From line supervisors up to the police executive, the potential need for training should always be considered when officers exhibit inappropriate behavior. The question should be, "Could training have prevented this behavior, and can training prevent it from happening in the future?"

Training in this sense can be anything from informal counselling of an officer about a particular policy or procedure, through formal department-wide training. The department may also take advantage of other agencies, including police academies, prosecutor's office, Division of Criminal Justice, or other outside entities.

## Citizen Complaints

Complaints from the public provide the police executive with invaluable feedback. These complaints, whether substantiated or not, increase awareness of actual or potential problems. The

police executive should view complaints from the public as a means of determining where the police department falls short of its intended goals. Similarly, complaints regarding officer behavior or allegations of misconduct can alert the police executive to problems which require disciplinary action or identify a need for additional training. The police executive must initiate a policy which provides that all citizen complaints are readily accepted and promptly and fully investigated.

A properly administered complaint review system serves both the special professional interests of the police and the general interests of the community. As a disciplinary device, it can promote and maintain standards of conduct among police officers by punishing -and thereby deterring- aberrant behavior. Just as important, it can provide satisfaction to those civilians who are adversely affected by misconduct. Harold Beral and Marcus Sisk, "The Administration of Complaints by Civilians Against the Police," *Harvard Law Review*, 77, No. 3, January 1964, p.500.

It is clearly in the interest of the police executive to initiate effective change in the administration of internal discipline. Otherwise, public or police employee groups, or court decisions in civil litigation, may force executives to follow a course other than the one they would have chosen, and thus diminish their control over their agency. National Advisory Commission on Justice Standards and Goals, *Report on Police*, (Washington, D.C. GPO), P. 470. Also see *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598 (1976).

## Complaint Process

Pursuant to N.J.S.A. 40A:14-147, administrative charges must be filed within 45 days of the date the department obtains sufficient information to file charges against an officer.

Agencies operating under the purview of Title 11A must comply with New Jersey Department of Personnel Rules (N.J.A.C. 4A:1-1.1 et seq.). Appendix Q contains the time table used by Department of Personnel for disciplinary action. While these steps are mandatory for all Department of Personnel agencies, the time table provides a model that should be adopted by all law enforcement agencies. Every law enforcement agency shall have its entire disciplinary process specified in writing.

## Accepting Reports Alleging Officer Misconduct

All complaints of officer misconduct shall be accepted from all persons who wish to file a complaint regardless of the hour or day of the week. This includes those from anonymous sources, juveniles and persons under arrest or in police custody. Internal Affairs personnel should accept complaints if available. If Internal Affairs is not available, supervisory personnel should accept reports of officer misconduct, and if no supervisory personnel are available, complaints should be accepted by any police officer. At no time should a complainant be told to return to file his report.

Citizens should be encouraged to submit their complaints in person as soon after the incident as possible. If the complainant cannot file the report in person, a department representative should visit the individual at his or her home, place of business or other location in order to complete the report.

The Internal Affairs officer, supervisor or other officer receiving the complaint will explain the department's disciplinary procedures to the person making the complaint. He should advise the complainant that they will be kept informed of the status of the complaint and its ultimate disposition. To best accomplish this, the department shall prepare a fact sheet for distribution to people who make complaints. This fact sheet should include information on the department's disciplinary process and what role the complainant can expect to play. In addition, the fact sheet shall advise the complainant that it is a criminal offense to provide statements which they do not believe to be true.

The supervisor or other officer receiving the complaint shall complete the appropriate internal affairs report form. The report form should have adequate instructions for proper completion. The officer accepting the report should then have the complainant sign the completed form.

If the complaint is anonymous, the officer accepting the complaint should complete as much of the internal affairs report form as he can given the information he has received.

Complaints of differential treatment, demeanor and minor rule infractions should be forwarded to the supervisor or commander of the accused officer. All other complaints should be retained by or forwarded to the Internal Affairs Unit.

Complaints might also be received from other law enforcement agencies, such as neighboring municipal police agencies, the county prosecutor or the F.B.I. In such cases, the complaint should be forwarded to Internal Affairs for immediate handling.

If a complainant comes to a municipal police agency to make a complaint about another police agency, he should be referred to that agency. However, if the complainant expresses fear or concerns about making the complaint directly, he should be referred to the county prosecutor.

All complaints should be investigated, so long as the complaint contains sufficient factual information to warrant an investigation. In cases where the identity of the officer is unknown, the Internal Affairs investigator should use all available means to determine proper identification. Each complaint should be investigated to its logical conclusion.

Some very minor complaints are merely a misunderstanding on the part of the citizen. If the supervisor accepting the complaint can resolve it to the complainant's satisfaction through an explanation of department rules or procedures, the complaint process will be terminated. In these cases, the resolution shall be noted on the report form which should then be signed by the complainant and the officer involved, and filed with Internal Affairs.

#### Immediate Suspension Pending Investigation and Disposition

In cases involving allegations of serious officer misconduct, the police executive may choose to suspend the accused officer pending the outcome of the investigation and subsequent administrative charges, if any. Before immediate suspension of an officer, with or without pay, the police executive in all law enforcement agencies, whether or not they are regulated by the Department of Personnel, should determine if any of the following conditions warranting immediate suspension have been met.

1. The employee is unfit for duty.
2. The employee is a hazard to any person if permitted to remain on the job.
3. An immediate suspension is necessary to maintain safety, health, order or effective direction of public services.
4. The employee has been formally charged with a crime of the first, second or third degree, or a crime of the fourth degree on the job or directly related to the job.

See Appendix Q for the use of immediate suspension in relation to the entire disciplinary time table.

In deciding whether or not to continue to pay an officer who has been suspended pending the outcome of the investigation or complaint, the police executive and appropriate authority shall consider the seriousness of the offense as well as the possible outcomes should the officer be

found guilty.

It should be clear that suspension of an officer before the completion of the investigation or disposition of the case is a serious matter. Such suspension may be immediately necessary, as in the case of an officer reporting for work under the influence of alcohol. In other cases, however, suspension might not be immediate but rather would follow a preliminary investigation into the matter which indicates one of the above criteria has been met. In any case, suspension prior to the disposition of the case must be clearly documented and justified. At the time of the suspension, the individual shall be provided with a written statement of the reasons the action has been taken. In the event of a refusal by the individual to accept that written statement, a copy shall be provided to the individual's collective bargaining representative as soon as possible. If the immediate suspension is imposed by a supervisor or commander authorized to do so, the chief executive must be advised without delay. He will then determine the status of the suspension given the facts of the case in light of the above criteria. In no case shall immediate suspension be used as a punitive measure.

#### Administrative Reassignment

In cases involving the use of force which results in death or serious bodily injury, there shall be a presumption in favor of administrative reassignment pending the outcome of the investigation, unless the officer is suspended as discussed above. Establishing a presumption in favor of administrative reassignment will ensure that officers who may have used unjustified force are removed from daily contact with the community. At the same time, such a policy will protect officers from disparate treatment and unjustified suspensions.

However, an inflexible rule governing the administrative reassignment of an officer under investigation would not be practical for departments or agencies of all sizes. Deciding whether or not to administratively reassign an officer under investigation requires consideration of factors such as the size of the department, the weight of the evidence against the officer, and community reaction to the incident. Until final disposition of the investigation or charges, the appropriate administrative status of an officer under investigation will turn on all of these factors.

#### Investigation and Adjudication of Minor Complaints

Complaints of differential treatment, demeanor and minor rule infractions should be forwarded to the accused officer's commanding officer. The commanding officer should require the officer's supervisor to investigate the allegation of misconduct.

Officers conducting the investigation of any allegation of misconduct must strive to conduct a thorough and objective investigation without violating the rights of the accused officer or any other police officer. Accordingly, all supervisors and any other officer who may be called upon to do an internal investigation must be thoroughly familiar with the department's entire internal affairs policy, including protection of the accused officer's rights and the procedures for properly investigating internal complaints.

The supervisor investigating the complaint should interview the complainant, all witnesses and the accused officer, as well as review relevant reports, activity sheets, or dispatcher forms. The supervisor should then submit a report to the commanding officer summarizing the matter and indicating the appropriate disposition. Possible dispositions include:

1. Exonerated: The alleged incident did occur, but the actions of the officer were justified, legal and proper.
2. Sustained: The investigation disclosed sufficient evidence to prove the allegation.
3. Not Sustained: The investigation failed to disclose sufficient evidence to clearly prove or disprove the allegation.
4. Unfounded:
  - a. The alleged incident did not occur; or
  - b. There is insufficient information to conduct a meaningful investigation.

If the supervisor determines that the complaint to have a disposition of unfounded, exonerated or not sustained, and the commanding officer concurs, the investigation report is to be forwarded to Internal Affairs for review and entry in the index file and filing. The subject officer shall be notified in writing of the outcome of the investigation.

If the complaint is sustained, the commanding officer should determine the appropriate disciplinary action. If the action is no more than a written reprimand, a summary of the complaint and notification of the disciplinary action taken should be forwarded to Internal Affairs. If, however, the commander determines that the matter is of a more serious nature it should be forwarded to Internal Affairs for further investigation.

When an oral reprimand or performance notice is given, the officer or employee shall be advised that the supervisor or superior officer is giving an oral reprimand. The supervisor shall complete

an oral reprimand report (a necessary record for progressive discipline) or performance notice and forward it to the commander. A copy shall also be given to the officer being disciplined.

Upon approving the oral reprimand or performance notice, the commanding officer will forward the report to be placed in the officer's or employee's personnel file. Six months after the date of the approved oral reprimand or performance notice, the disciplinary report shall be removed from the file and destroyed, provided no other breach of discipline has occurred. The subject officer shall be notified in writing that the oral reprimand or performance notice has been purged.

When a written reprimand is given, the supervisor or commanding officer giving such reprimand shall advise the subject officer of such and complete a written reprimand report. A copy of the written reprimand report is to be provided to or retained by the officer's supervisor and one copy of the report is to be provided to the officer or employee being disciplined. The original report, together with any supporting documentation, should be provided to the commanding officer for review.

The commanding officer should review the report and, in writing, either approve or disapprove the report. If disapproved, the commanding officer should direct what action, if any, be taken. Upon final approval, the report shall be forwarded to the Internal Affairs Unit and permanently placed in the officer's or employee's personnel file.

Upon final disposition of the complaint, a letter should be sent to the complainant explaining the outcome of the investigation.

### Investigation and Adjudication of Serious Complaints

Where preliminary investigation indicates the possibility of a criminal act on the part of the accused officer, or the investigation involves the use of force by the officer which results in serious bodily injury or death, the county prosecutor must be notified immediately. No further action should be taken, including the filing of charges against the officer, until directed by the county prosecutor.

All serious complaints shall be forwarded to the Internal Affairs Unit. This includes complaints of criminal activity, excessive force, improper or unjust arrest, improper or excessive entry, improper or unjustified search, serious complaints of differential treatment or demeanor, serious rule infractions, and repeated minor rule infractions.

The supervisor or commanding officer initiating such action shall complete a form recommending an internal affairs investigation. This form, together with any supporting documentation, should be forwarded through the chain of command to the Internal Affairs Unit. Where there is no full-time Internal Affairs Unit or function the report is forwarded to the police executive.

The Internal Affairs commander or police executive will direct such further investigation by the supervisor, commanding officer or Internal Affairs as deemed appropriate. Officers conducting these investigations must strive to conduct a thorough and objective investigation without violating the rights of the accused officer or any other police officer. Internal affairs officers and any other officer who may be called upon to do an internal investigation must be thoroughly familiar with the department's entire internal affairs policy, including protection of the accused officer's rights and the procedures for properly investigating internal complaints.

Internal Affairs shall serve the suspect officer with notification of the Internal Affairs investigation, unless the nature of the investigation requires secrecy. The Internal Affairs investigator should interview the complainant, all witnesses and the accused officer, as well as review relevant reports, activity sheets, and dispatcher forms and obtain necessary information and materials.

Upon completion of the investigation, the Internal Affairs Unit will recommend dispositions for each allegation through the chain of command to the police executive. As previously described, these dispositions may include exonerated, sustained, not sustained, or unfounded. Each level of review may provide written recommendations and comment for consideration by the police executive.

The police executive, upon reviewing the report, supporting documentation and information gathered during any supplemental investigation, shall direct whatever action is deemed appropriate. If the complaint is unfounded or not sustained, or the subject officer is exonerated, the investigation report shall be entered in the index file and filed. Internal Affairs shall notify the subject officer in writing of the disposition.

If the complaint is substantiated and it is determined that formal charges should be preferred, the police executive will direct either the commanding officer, supervisor or Internal Affairs to prepare, sign, and serve charges upon the accused officer or employee. The individual assigned shall prepare the formal notice of charges and hearing on the Charging Form. (See sample Charging Form in Appendix F.) This form will also be served upon the officer charged in accordance with N.J.S.A. 40A:14-147 et seq.

The notice of charges and hearing shall direct that the officer charged must enter a plea of guilty or not guilty, in writing, on or before the date set forth in the notice for entry of plea. The date for entry of plea shall be at least five days after the date of service of the charges. If the officer charged enters a plea of guilty, the police executive officer shall permit the officer to present factors in mitigation prior to assessing a penalty. Conclusions of fact and the penalty imposed will be noted in the officer's personnel file after he has been given an opportunity to read and sign it. Internal Affairs will cause the penalty to be carried out and complete all required forms.

If the accused officer makes a written request for a hearing, the police executive will set the date for the hearing as provided by statute and arrange for the hearing of the charges. Internal Affairs shall be responsible for or assist the assigned commander or prosecutor in the preparation of the department's prosecution of the charges. This includes proper notification of all witnesses and preparing all documentary and physical evidence for presentation at the hearing.

The hearing shall be held before the appropriate authority or the appropriate authority's designee. The hearing authority should be empowered to sustain, modify in whole or in part, or dismiss the charges stated in the complaint. The decision of the hearing authority must be in writing and should be accompanied by findings of fact for each issue in the case.

If the hearing authority finds the complaint against the officer is substantiated, he should fix any of the progressive penalties which he deems appropriate under the circumstances within the limitations of statute and the department's policy management system.

A copy of the decision and accompanying findings and conclusions shall be delivered to the officer or employee who was the subject of the hearing and to the police executive if he was not the hearing authority. Upon completion of the hearing, Internal Affairs will complete all required forms (Department of Personnel jurisdictions use the Final Notice of Disciplinary Action form DPF-31B) including the entry of the disposition in the index file. If the charges were sustained Internal Affairs will cause the penalty to be carried out. The report shall be permanently placed in the officer's or employee's personnel file.

Upon final disposition of the complaint, a letter should be sent to the complainant explaining the outcome of the investigation.

### Confidentiality

The progress of internal affairs investigations and all supporting materials are considered confidential information. The contents of the internal investigation case files will be retained in

the Internal Affairs Unit and clearly marked as confidential. Only the police executive or his designee is empowered to release publicly the dispositions of an internal investigation or disciplinary action. In addition, the subject officer may authorize the release of copies of formal disciplinary charges and their outcome to any third party.

All disciplinary hearings shall be closed to the public unless the accused officer requests an open hearing.

## Record Keeping

Due to the sensitive nature of internal affairs records, it is necessary to design specific security measures to insure the confidentiality of these records.

## Internal Affairs Records

Internal affairs personnel shall maintain a filing system accessible only to unit members and the chief. Other personnel may be given access based on a specific need, such as a deputy chief in the chief's absence. The list of those authorized to access these files must be kept to a minimum. Access to these records must be specifically addressed with department policy and procedures. Physical security measures also should be taken. Depending on the police department, this could include securely locked filing cabinets in secured offices. If a police department uses computers to maintain internal affairs records of any kind, special security measures must be taken. A stand alone personal computer is the most secure system to limit unauthorized access to internal affair records.

Internal affairs index file. The purpose of internal affairs index file is to serve as a record control device. It will serve as an inventory of internal affairs case files and provide an overview of case status to authorized personnel. The instrument used for such an index file will vary by police department and could include a log book or computerized data base.

All internal affairs complaints shall be recorded in the index file. Entries should record the basic information on each case, including the accused officer, allegations, complainant, date received, Internal Affairs officer assigned, disposition and disposition date for each complaint. A unique case number assigned to each internal affairs complaint will locate the complete investigation file and simplify case tracking.

Investigation files. An internal affairs investigation file is needed for all internal affairs reports. Given the wide range of internal affairs reports received by a police department, these investigation files could consist of only the initial report form and the appropriate disposition document. On the other hand, investigation files could include extensive documentation of an investigation. The internal affairs investigation file should contain the entire work product of the internal affairs investigation, regardless of the author. This would include investigators' reports, transcripts of statements, and copies of documents relevant to the investigation. The file also should include all references to other department records as may be applicable. For instance, if an allegation is made of excessive force during an arrest, the internal affairs investigation file should contain copies of the reports from the arrest.

In those cases where an internal affairs investigation results in the filing of criminal charges, the prosecutor's office should review the entire internal affairs investigation file. It will be their responsibility to decide which items are admissible and which are discoverable. In these cases, the department must follow the instructions of the county prosecutor.

Retention schedule. Internal affairs investigation records are not specified as such by the New Jersey Department of State, Division of Archives and Records Management in the "Records Retention and Disposition Schedule for Local Police Departments" (revised 12/20/91). Of course, if criminal action arises out of an internal affairs investigation, the internal affairs investigation records must be maintained according to the provisions for criminal records.

Under the current "Records Retention and Disposition Schedule," non-criminal internal affairs reports and the respective investigation files are considered "Special Reports" (0075-0000). As such, these records must be maintained for a minimum of five years. An exception to that rule, documents relating to anonymous reports of non-criminal incidents that are unfounded are considered "Non-criminal incident report files" (0036-0003) and must be maintained for at least two years.

The records of any internal affairs complaint that has a disposition of exonerated, unfounded, or not sustained shall not be used in any fashion to effect progressive discipline. In addition, such records shall not in any way impact any condition of employment, including promotions.

## Personnel Records

Personnel records are separate and distinct from internal affairs investigation records. Internal affairs investigation reports shall never be placed in personnel records. When a complaint has a disposition of exonerated, not sustained, or unfounded, there shall be no indication in the employee's personnel file that a complaint was ever made.

In those cases where a complaint is sustained, the only items to go into the employee's personnel file will be a copy of the internal affairs charge form and a copy of the disposition form. No part of the internal affairs investigation report shall be placed in the personnel file.

## Conclusion

A clear and comprehensive policy management system delineating the procedures for dealing with allegations of officer misconduct or the improper delivery of police services, and its uniform application, bolsters the integrity of the police department. A responsive and consistent Internal Affairs Unit or officer is an indispensable part of the police administrative process. Its clear existence in the organizational structure gives notice to both the public and employee that the police agency is willing to "police the police."

## PART TWO

## INTERNAL AFFAIRS INVESTIGATIONS

### Selection of Personnel for the Internal Affairs Function

Internal affairs investigations must be considered as important to the community and department as any criminal investigation. An internal investigation may follow one of two divergent tracks or both simultaneously. These are the administrative proceedings track which may result in employment sanctions and the criminal prosecution track which may result in criminal sanctions. Each track may have different standards of proof. What may be admissible for one may not necessarily be admissible for the other.

Consequently, it is important that the Internal Affairs investigator be familiar with proper investigative techniques and legal standards for each type of proceeding. This is necessary so that evidence obtained will be admissible in the proper tribunal and the rights of the officer under investigation will not be inadvertently violated. Therefore, it is essential that experienced investigators be assigned to internal affairs investigations. They must be trained not only in the elements of criminal law, court procedures, rules of evidence and use of technical equipment, but also in the disciplinary and administrative law process. Each investigator must be skilled in interviewing and interrogation, observation, surveillance and report writing.

Personnel assigned to conduct internal affairs investigations should be energetic, resourceful and alert. They must have a keen memory and display a high degree of perseverance and initiative. The Internal Affairs investigator must hold the police responsibility to the community and professional commitment above personal and group loyalties. Internal Affairs personnel must be of unquestioned integrity and possess the moral stamina to perform unpopular tasks. It is important that these investigators possess the ability to withstand the rigors and tensions associated with complex investigations, social pressures and long hours of work. The investigator must possess the ability to be tactful and diplomatic when dealing with members of the department and the community. Finally, it is recommended that personnel assigned to the Internal Affairs function reflect the racial and ethnic spectrum within the community. This is helpful in gaining acceptance by and assuring access to all segments of the community.

However, law enforcement executives shall not assign any person charged with representation of members of the collective bargaining unit to the internal affairs function. The conflict of interest if such an assignment were made would be detrimental to the internal affairs function, the accused officer, the officer so assigned and the department as a whole.

### Investigation Standards

The most critical aspect of the disciplinary process is the investigation of an allegation of police misconduct. Only after a complete, diligent and impartial investigation can a good faith decision be made as to the proper disposition of the complaint. Decisions based upon such an investigation will support the credibility of the department among its ranks as well as the public at large.

As with all other investigations, lawful procedures must be used to gather all evidence pertaining to allegations against a police officer. Investigations for internal disciplinary or administrative purposes involve fewer legal restrictions than criminal investigations. Restrictions that do exist, however, must be recognized and followed. Failure to do so may result in improperly gathered evidence being overturned during the appeal process. Restrictions which apply to internal investigations may have their basis in case law, collective bargaining agreements, local ordinances, administrative regulations, Department of Personnel rules or municipal personnel department rules. Internal affairs investigators shall familiarize themselves with all of the above provisions.

Complaints must be professionally, objectively and expeditiously investigated in order to gather all information necessary to arrive at a proper disposition. It is important to document citizens' concerns, even those which might appear to be unfounded or frivolous. If such complaints are not

documented or handled appropriately, citizen dissatisfaction will grow, fostering a general impression of department wide insensitivity to citizens' concerns.

By statute (N.J.S.A. 40A:14-147), administrative charges must be filed within 45 days of the date the department has developed sufficient information to file such charges against an officer. In cases involving criminal activity, the forty-five day time period does not start until the final disposition of any criminal proceedings arising out of the incident against the accused officer. Investigation status reports should be prepared every seven days for review by the police executive or Internal Affairs supervisor. A 30-day time period in which to complete the investigation is recommended. Requests for an extension of time to complete an investigation should be submitted in writing. The request should state the reasons which necessitate the extension. Only the police executive, or the officer designated by him to direct the Internal Affairs function, should be authorized to grant an extension.

The filing of legitimate complaints pertaining to department personnel is to be encouraged as a means of holding those personnel accountable to the public. However, the department must simultaneously seek to hold members of the public responsible for the filing of false and malicious complaints. In such cases, complainants shall be informed that legal proceedings may be instituted against them to rectify such deliberate actions.

### Investigation Techniques

The investigator assigned an internal investigations case should initially outline the case to determine the best investigative approach and identify those interviews immediately necessary. The investigator should determine if any pending court action or ongoing criminal investigations might delay or impact upon the case at hand. If it appears that the conduct under investigation may have violated the law, or the investigation involves the use of force by the officer which results in serious bodily injury or death, the county prosecutor shall be immediately notified of the internal affairs investigation.

If the investigation involves a criminal filing against the complainant, wherein the accused officer is the victim of the offense charged, an initial interview should be conducted with the complainant. However, absent extenuating circumstances, no further contact should be made until charges against the complainant are adjudicated.

The Internal Affairs investigator may use any lawful investigative techniques including inspecting public records, questioning witnesses, interviewing the subject officer, questioning

fellow employees, and surveillance. Therefore, the investigator must understand the use and limitations of such techniques.

As in any criminal investigation, the following necessary materials, if available, should be obtained: physical evidence, statements or interviews of all witnesses, statements or interviews of all parties of specialized interest (such as doctors, employers, teachers, parents, etc.); all relevant documents, records and reports, activity sheets, complaint cards and radio logs. Special attention should be given to securing records which are routinely disposed of such as telephone and radio transmissions routinely recorded on department taping equipment. In addition, the investigator should check the record bureau files to determine if the subject, complainant, or witnesses have any prior police involvement.

It is generally recommended that the complainant and other lay witnesses be interviewed prior to interviewing sworn members of the department. This will often eliminate the need for having to do second and third interviews with departmental members. However, this procedure does not have to be strictly adhered to if circumstances and the nature of the investigation dictate otherwise.

While the Sixth Amendment right to counsel does not extend to internal investigations, an officer shall be permitted to obtain an attorney if so desired. The Sixth Amendment applies to a criminal prosecution or to a proceeding which threatens a person's liberty. See *Middendorf v. Henry*, 425 U.S. 25, 34, 95 S.Ct. 1287, 47 L.Ed. 2d 556 (1976). However, a department must permit an employee to have a union representative present at an investigative interview if the employee requests representation and the employee reasonably believes the interview may result in disciplinary action. *N.L.R.B. v. Weingarten*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed. 2d 171 (1975). In addition, collective bargaining agreements may provide additional criteria for permitting a subject officer to have representation.

Where an internal affairs investigation takes the criminal prosecution track, it is important that the employee be made aware of his or her constitutional rights.

### Interviewing the Complainant

The complainant should be personally interviewed if circumstances permit. If the complainant cannot travel to the investigator's office, the investigator should conduct the interview at the complainant's home or place of employment. All relevant identifying information concerning the complainant should be recorded, e.g., name, complete address (street, apartment number, city, state), telephone number and area code, race or ethnic identity, sex, date of birth, hair color, eye color, social security number, FBI and SBI numbers, and place of employment (name and

address).

All relevant facts known to the complainant should be obtained during the interview. Once the interview is completed, an effort should be made to obtain a formal, sworn statement from the complainant. Depending upon the circumstances, such as a hospitalized complainant, taped statements may be considered in place of the sworn statement.

### Witness Interviews

Whenever possible, all witnesses to the matter under investigation should be personally interviewed and formal statements taken. The investigator should attempt to determine if the witness is motivated by prior arrests, a personal relationship with the complainant or member of the department, or other significant factors.

### Reports, Records and Other Documents

All relevant reports should be obtained and preserved as expeditiously as possible.

Internal department reports relating to an accused officer's duties should be examined. Examples of such reports are: arrest reports and investigation reports, radio logs, patrol logs, vehicle logs and evidence logs pertaining to or completed by the officer.

Records and documents of any other agency or organization that could prove helpful in the investigation should be examined. These may include: reports from other police departments, hospital records, doctors' reports, jail records, court transcripts, FBI or SBI records, credit bureau records, corporate information (Secretary of State's Office), specialized licenses (real estate, insurance, medical), motor vehicle abstracts and telephone toll analysis. In some instances, subpoenas or search warrants may be necessary to obtain the information.

### Physical Evidence

Investigators should obtain all relevant physical evidence. All evidence, such as clothing, hair or fabric fibers, stains, and weapons should be handled according to established evidence procedures.

With respect to radio tapes, the original tape is the best evidence and should be secured at the outset of the investigation. Transcripts or copies of the original recordings can be used as

investigative leads. Tapes should be monitored to reveal the totality of the circumstances.

## Photographs

In the event of a complaint involving excessive use of force, the following photographic documentation should be obtained when appropriate. Whenever possible, color photography should be used.

1. Photographs of the complainant at the time of arrest or following the alleged incident of excessive force.
2. Photographs of the subject officer in the event that officer was a victim.
3. A recent photo of the officer in the event a photo spread will be used for identification purposes. The photo spread must be properly retained for possible evidentiary purposes.
4. Photographs of the scene of the alleged incident, if necessary.

## Physical Tests

Police officers who are the subjects of internal investigations may be compelled to submit to various physical tests or procedures to gather evidence. Such evidence may be used against them in a disciplinary proceeding.

Evidence Rule 25 (a) states that "...no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics or his physical or mental condition.." Evidence that may be obtained or procedures that may be used to obtain evidence under this rule include:

1. Breath sample
2. Blood sample
3. Requiring suspect to speak
4. Voice recordings
5. Participation in a suspect lineup
6. Handwriting samples
7. Hair and saliva samples

Generally, a person cannot be physically forced to produce this evidence or submit to such tests, although a court order may be obtained to legally compel him to do so. Refusal to comply with the order can result in a contempt of court action, and may also result in a second disciplinary

action for failure to comply with a lawful court order.

## Polygraph

While a police officer who is the subject of an internal investigation may request a polygraph examination, an employer shall not influence, request or require an employee to take or submit to a lie detector test as a condition of employment or continued employment (N.J.S.A. 2C:40A-1).

An officer cannot be required to submit to a polygraph test on pain of dismissal.  
Engel v. Township of Woodbridge, 124 N.J. Super. 307 (App. Div. 1973).

If a polygraph is used the test must be administered by a qualified police polygraph operator.

## Search and Seizure

As a general rule, the Fourth Amendment applies to any action taken by government. Police officers have the right, under the Fourth Amendment, to be free from unreasonable searches and seizures. Fourth Amendment warrant requirements apply to any search of an officer's personal property including clothing, car, home or other belongings.

A voluntary consent to a search may preclude some Fourth Amendment problems from developing. A consent search eliminates the need to determine what threshold standard must be met before conducting the search or seizure, either for an administrative or criminal investigation. Under New Jersey law, for consent to be legally valid, a person must be informed that he or she has the right to refuse to permit a search. State v. Johnson, 68 N.J. 349 (1975). If a consent search is utilized, the Internal Affairs investigator shall follow standard police procedures and have the subject officer sign a consent form after being advised of the right to refuse such a search.

In a criminal investigation the standard to obtain a search warrant is probable cause. Generally, a search warrant should be sought to search an area belonging to the subject officer when the officer can reasonably expect to maintain a high level of privacy in that area. Areas and objects in this category include the officer's home, personal car, bank accounts, safety deposit boxes, etc.

Generally, during either administrative investigations or criminal investigations, workplace areas may be searched without a search warrant. The critical question is whether the public employee

has a reasonable expectation of privacy in the area or property the Internal Affairs investigator wants to search. The determination of a reasonable expectation of privacy must be decided on a case by case basis. There are some areas in the person's workplace where this privacy expectation can exist just as there are some areas where no such expectation exists. Areas where supervisors or other employees may share or go to utilize files or equipment would present no expectation or diminished expectation of privacy. Included here would be government provided vehicles (patrol cars), filing cabinets, etc.

If a department intends to retain the right to search property which it assigns to officers for their use, including lockers, it should put officers on notice of that fact. This notification will help defeat an assertion of an expectation of privacy in the assigned property by the officer. The agency should issue a directive regarding this matter, as well as include the notice in any employee handbook or personnel manual (including the rules and regulations manual) provided by the department. The notice should also be posted in the locker area and on any bulletin boards. The following is a sample of what the notice should contain:

The department may assign to its members and employees departmentally owned vehicles, lockers, desks, cabinets, etc., for the mutual convenience of the department and its personnel. Such equipment is and remains the property of the department. Personnel are reminded that storage of personal items in this property is at the employee's own risk. This property is subject to entry and inspection without notice.

In addition, if the department permits officers to use personally owned locks on assigned lockers and other property, it should be conditioned on the officer providing the department with a duplicate key or the lock combination, whichever is applicable.

At the present time, the law is unclear on the use in a subsequent criminal prosecution of evidence obtained during a warrantless administrative search or inspection of department property. It is therefore advisable to obtain a warrant whenever there exists probable cause to believe that the department property to be searched contains contraband or evidence of a crime.

Any search of departmental or personal property should be conducted in the presence of the subject officer and a property control officer.

### Eavesdropping

In accordance with N.J.S.A. 2A:156A-4b, law enforcement non-third party intercepts can be used during internal affairs investigations. Pursuant to that section of the New Jersey Wiretap Act, a

law enforcement officer may intercept and record a wire or oral communication using a body transmitter if that officer is a party to the communication or where another officer who is a party to the communication requests or requires that such interception be made. Procedures for such recordings are dictated by individual departmental or agency policy.

There is no prohibition against the monitoring of phones used exclusively for departmental business if an agency can demonstrate a regulatory scheme or a specific office practice, of which employees have knowledge. In such instances, there may be a diminished expectation of privacy in the use of these telephones and monitoring would be acceptable.

### Lineups

A police officer may be ordered to stand in a lineup to be viewed by witnesses or complainants. There is no need for probable cause and the officer may be disciplined for refusal. In *Biehunik v. Felicetta*, 441 F.2d 228 (2d Cir. 1971) cert. den. 403 U.S. 932, 91 S.Ct. 2256, 29 L.Ed. 2d 711 (1971), the court upheld a police department's order to 62 police officers to appear in a lineup for possible identification by citizens alleging they had been assaulted by city police officers. The department did not have probable cause nor a search warrant for this action. The officers had been advised that they faced criminal prosecution as well as administrative sanctions. The court applied the following test to the department's order:

Whether upon a balance of public and individual interests, the order...was reasonable under the particular circumstances, even though unsupported by probable cause [Id. at 203].

The *Biehunik* holding was cited as support of a court ruling that a police department could expose a police officer's hands, uniform and wallet to a "blacklight" to determine whether he was involved in criminal activity. *Los Angeles Police Protective League v. Gates*, 579 F.Supp. 36 (C.D. Calif. 1984).

The lineup must be constructed so as not to be unfairly suggestive. The same rule applies to photo arrays.

### Other Investigative Tools

The law regarding the use of most other investigative tools is the same for internal investigations as for criminal investigations. Constitutional precepts such as due process and right to privacy apply to investigative methods utilized in both administrative and criminal investigations. It must

be considered, however, that even those constitutionally permissible methods may be restricted or prohibited by ordinance, department rule, or contract.

### Interviewing Members of the Department

Interviews of fellow police officers are critical to the internal investigation process and must be carefully thought out and well planned. When interviewing a police officer as a witness, he must be made aware of the differences between a witness and the subject of the investigation, and advised that he is not the subject of the investigation at this time. If, at any time, the officer becomes a subject of the investigation, he shall be apprised of that fact and sign an acknowledgment form.

### Interviewing the Subject Officer

Whenever there is a possibility that the investigation may result in criminal prosecution of the officer or that the county prosecutor may be conducting a separate investigation, the internal affairs investigator should consult with the county prosecutor prior to interviewing the officer.

A public employer may demand that an employee answer questions specifically, directly, and narrowly related to the performance of his official duties, on pain of dismissal, without requiring him to waive his constitutional right against self-incrimination. However, if the employer offers the employee the choice between giving incriminating answers or losing his job, that choice makes any answer compelled in violation of the Fifth Amendment. As a result, the answer cannot be used in a subsequent criminal proceeding. *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), *Uniformed Sanitation Men Association v. Commission of Sanitation*, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968). An employer cannot force an employee to choose between surrendering a constitutional right or his job.

An employer can dismiss an employee for refusing to answer questions where the employee is granted use immunity<sup>(3)</sup> for his answers and the possibility of self-incrimination is thus removed. Once use immunity has been granted, as a prerequisite to the imposition of discipline for refusal to answer, the employee must be clearly, unambiguously, and expressly advised of the grant of use immunity and of the possible imposition of discipline, including dismissal, for a refusal to answer. Silence can be the basis for a misconduct charge only when there has been a

prior explanation of the use immunity to which the employee's statements are entitled. *Banca v. Phillipsburg*, 181 N.J.Super. 109 (App. Div. 1981).

A public employee has a duty to appear and testify, under pain of removal from office, before any court, grand jury, or the State Commission of Investigation, on matters directly related to the performance of his duties. N.J.S.A. 2A:81-17.2a1. If the employee claims the privilege against self-incrimination after having been informed that his failure to appear and testify would result in removal from office, N.J.S.A. 2A:81-17.2a2 confers use immunity on the testimony and any evidence derived from it, except where the employee is subsequently prosecuted for perjury or false swearing while testifying. This is a self-executing legislative grant of immunity. *State v. Gregorio*, 142 N.J.Super. 372 (Law Div. 1976). This statute has been held to apply to a departmental/internal investigation to the extent that an employee under investigation is entitled to be clearly, unambiguously, and expressly advised of the grant of use immunity at the outset as a prerequisite to the subsequent imposition of discipline for refusal to answer questions. He is further required to be told that refusal to answer could subject him to that discipline. *Banca v. Phillipsburg*, 181 N.J.Super. 109 (App. Div. 1981). During a departmental investigation, where an employee is granted use immunity and still refuses to answer questions, the employer's sole recourse to compel a response is to impose discipline. The employer cannot resort to any special court proceeding. *In re Toth*, 175 N.J.Super. 254 (App. Div. 1980).

Depending upon the circumstances and nature of the complaint, the subject officer may be required to either submit a report detailing his understanding and knowledge of the relevant facts of the investigation or provide a formal statement. As with an officer's statements, an officer required to submit a report has a right not to incriminate himself in a criminal matter. The officer must exercise this right to remain silent. If he waives this right, any report he submits in writing can be used against him in subsequent criminal proceedings.

However, an officer does not have the right to refuse to submit a report on the grounds that the report may reveal a violation of a department policy, rule, or regulation that is not a criminal offense. The officer may be subject to departmental discipline for refusal to submit a report that would not implicate him in a criminal offense.

Interviews shall take place at the Internal Affairs office or a reasonable and appropriate location designated by the investigating officer. The subject officer's superior shall be made aware of the time and place of the interview so the officer's whereabouts are known. Interviews shall be conducted at a reasonable hour when the officer is on duty, unless the seriousness of the matter requires otherwise.

Prior to the commencement of any questioning, the officer shall be advised of the following:

1. You are being questioned as part of an official investigation of this agency into potential violations of department rules and regulations. This investigation concerns (the matter under investigation).
2. You will be asked questions specifically directed and narrowly related to the performance of your official duties and your fitness for office.
3. You have the right to refuse to answer any questions or make any statements that might incriminate you in a criminal matter.
4. If you fail to exercise this right, anything you say may be used against you in a criminal proceeding.
5. The right to refuse to answer a question on the grounds of your right against self-incrimination does not include the right to refuse to answer on the grounds that your answer may reveal a violation of a department policy, rule, or regulation that is not a criminal offense.
6. You may be subject to departmental discipline for refusal to give an answer that would not implicate you in a criminal offense.
7. Anything that you say may be used against you not only in any subsequent department charges, but also in any subsequent criminal proceeding.
8. You have the right to consult with a representative of your collective bargaining unit, or another representative of your choice, and have them present during the interview.

This information shall be contained in a form which the subject officer signs and which signature is witnessed. See the sample form in Appendix H.

The employee shall be informed of the name and rank of the interviewing investigator and all others present during the interview. The interview can then begin. The questioning must be conducted in an orderly, non-coercive manner, without threat of punitive action or promise of reward. The questioning session must be of reasonable duration, taking into consideration the complexity and gravity of the subject matter of the investigation. The officer must be allowed time for meal breaks and to attend to personal physical necessities.

The department may make an audio or video recording of the interview. A transcript or copy of the recording shall be made available to the officer as soon as possible upon request, at his expense.

Any questions asked of officers during an internal investigation must be "narrowly and directly" related to the performance of their duties and the ongoing investigation. *Gardner v Broderick*, 393 U.S. 273 (1968). Officers do not have the right to refuse to answer questions directly and narrowly related to the performance of their duties. All answers must be fully and truthfully given. However, officers cannot be forced to answer questions having little to do with their performance as police officers or unrelated to the investigation.

Unless the officer specifically waives his Fifth Amendment rights, any incriminating statements obtained under direct order will not be admissible in a criminal prosecution, however, they will be admissible in an administrative hearing.

If during the course of an internal investigative interview an officer refuses to answer any questions specifically directed and narrowly related to the performance of duty and fitness for office on the grounds that he may incriminate himself, and if the department deems that in order to properly conduct its investigation it must have the answers to those specific questions, the department should then contact the county prosecutor to obtain use immunity for the answers to the questions. Upon obtaining a written grant of immunity, the department shall advise the subject officer of the following:

1. You are being questioned as part of an official investigation of this agency into potential violations of department rules and regulations. This investigation concerns (the matter under investigation).
2. You will be asked questions specifically directed and narrowly related to the performance of your official duties and your fitness for office.
3. You have the right to refuse to answer any questions or make any statements that might incriminate you in a criminal matter.
4. The right to refuse to answer a question on the grounds of your right against self-incrimination does not include the right to refuse to answer on the grounds that your answer may reveal a violation of a department policy, rule, or regulation that is not a criminal offense.

5. You have invoked your right to remain silent and not to incriminate yourself.
  
6. You have been granted immunity from criminal prosecution in the event your answers to the narrow questions asked implicate you in a criminal offense. No answer given by you, nor evidence derived from the answer, may be used against you in any criminal proceeding.
  
7. You must now answer questions specifically directed and narrowly related to the performance of your official duties and your fitness for office.
  
8. If you refuse to answer, you may be subject to disciplinary charges for that refusal which can result in your dismissal from this agency.
  
9. Anything that you say may be used against you in any subsequent department charges.
  
10. You have the right to consult with a representative of your collective bargaining unit, or another representative of your choice, and have them present during the interview.

This information shall be contained in a form which the subject officer signs and which signature is witnessed. See the sample form in Appendix I.

The department shall permit officers who have been informed that they are a subject of an internal investigation to consult with counsel or anyone else prior to being questioned about matters concerning their continuing fitness for police service or matters concerning a serious violation of rules and regulations. Such counsel must be sought within a reasonable period of time, without causing the investigation to be unduly delayed. As a general rule, an officer shall be allowed at least two hours to consult with counsel or other representative of his choice.

No constitutional right to counsel exists during an internal administrative interview; therefore, in the absence of contract provisions or personnel rules providing otherwise, an officer has no right to have counsel present unless a criminal prosecution is contemplated. However, if it appears that the presence of counsel or another police officer requested by the subject will not disrupt the investigation, there is no reason to prevent their presence as observers. If the investigation involves criminal allegations, it may be inappropriate to allow a union representative to be present. However, in such instances the subject officer shall be allowed to consult with a union representative or an attorney if he so desires. In any case, the representative cannot interfere with the interview.

If the representative is disruptive or interferes, the investigator can discontinue the interview,

documenting the reasons the interview was ended. The investigator must be in control of the interview and cannot allow the representative or subject to take control. It should be made clear that by allowing a representative during a specific interview, the department is not adopting a general policy to permit counsel during other internal investigation interviews. This clarification must be made because if a subject officer is denied the opportunity to have a representative present, this decision may be deemed arbitrary and unfair.

At the conclusion of the interview, the investigator shall review with the subject officer all the information furnished during the interview. This should be done to alleviate any misunderstandings or misinterpretations and to prevent any controversies during a later hearing or trial.

### The Officer as a Subject of a Criminal Investigation

Throughout any internal investigation, it is necessary to determine whether the allegations and evidence warrant criminal prosecution of the officer. If it appears that a criminal charge may be warranted, the county prosecutor must be notified immediately. Pursuant to his instructions, the investigation may then proceed. The investigation must adhere to all of the restrictions of a normal criminal investigation. The Miranda warning must be given and a waiver signed prior to any questioning of the accused officer. Search and seizure restrictions and constitutional safeguards must be applied.

### The Internal Affairs Report and Conclusion of Fact

At the conclusion of the internal affairs investigation, the investigator will submit a written summary report which should consider all relevant documents, evidence, and testimony in order to determine exactly what happened. A complete account of the situation and any gaps or conflicts in evidence or testimony must be noted. The following should be included in the report:

1. Statement of allegations made by the complainant.
2. Statement of the situation as described by the officer involved.
3. Description of the facts and issues to which the complainant and police officer agree.
4. Description of the issues and allegations to which the complainant and police officer disagree.

5. Evidence which supports or refutes any facts, issues or allegations made.
6. Reference to any pertinent attachments and a synopsis of the attachments.
7. Summarized statements and interviews of witnesses arranged sequentially in terms of time and significance.
8. List of the evidence obtained, its relevance, and its relationship to statements and interviews.
9. Background information on persons named in the report in order to demonstrate their character and credibility (e.g., S.B.I. or F.B.I. records, intelligence information, etc.)

The report must contain a conclusion of fact for each allegation of misconduct. The conclusion of fact should be recorded as exonerated, sustained, not sustained, or unfounded.

If the conduct of any officer was found to be improper, the report shall cite the agency rule, regulation, or order which was violated. Also, any mitigating circumstances surrounding the situation, such as unclear or poorly drafted agency policy, inadequate training or lack of proper supervision, shall be noted.

If the investigation reveals evidence of misconduct not based on the original complaint, this must be reported. A full-scale investigation concerning evidence of misconduct not based on the original complaint should not be instituted until disposition of the original complaint.

#### Investigation of Firearms Discharges

Whenever a firearms discharge results in an injury or death the county prosecutor is to be notified immediately. Internal affairs personnel will proceed in the investigation as directed by the prosecutor.

All incidents involving officer firearms discharges, whether occurring on or off duty (except at the firearms range), must be thoroughly investigated. The Internal Affairs investigator should review all administrative reports required by the department. These reports should include a description of the incident; the date, time, and location of the incident; the type of firearm used

and number of rounds fired; the identity of the officer; and any other information requested by a superior officer.

Agencies that have established a "Shoot Team" to investigate officer firearms discharge incidents should place those teams under the supervision and control of the Internal Affairs commander when they are engaged in weapons discharge investigations.

Officers investigating firearms discharges must strive to conduct a thorough and objective investigation without violating the rights of the subject officer or any other police officer. Accordingly, all supervisors and any other officer who may be called upon to do a firearms discharge investigation must be thoroughly familiar with the department's entire internal affairs policy, including protection of the accused officer's rights and the procedures for properly investigating firearms discharges.

In the event of an injury or death, the Internal Affairs Unit shall be notified immediately. The involved officer's superior should assist the Internal Affairs investigator as needed.

The primary goal of the internal affairs firearms discharge investigation is to determine the reasonableness of the officer's actions under the circumstances which existed at the time of the incident. In order to make such a determination, the investigator must consider relevant law, Attorney General's policies and guidelines, and department rules and regulations, and policy. In addition to determining if the officer's actions were consistent with the department regulations and policy, the Internal Affairs investigator should also examine the relevance and sufficiency of these policies. The investigator should also consider any relevant mitigating or inculpatory circumstances.

The investigation of a shooting by police should include photographs and ballistics tests as well as interviews with all witnesses, complainants, and the officer involved. All firearms should be treated as evidence according to departmental rules, regulations, and policies. A complete description of the weapon, its make, model, caliber, and serial number must be obtained and, if appropriate, N.C.I.C. and S.C.I.C. record checks should be made.

In a firearms discharge investigation, the investigator must determine if the weapon was an approved weapon issued to the officer, and if the officer was authorized to possess the weapon at the time of the discharge. The investigator must also determine if the weapon was loaded with authorized ammunition.

The weapon must be examined for its general operating condition and to identify any unauthorized alterations made to it.

1. Penalties not available to agencies covered by New Jersey Department of Personnel regulations.
2. Agencies operating under the Department of Personnel statutes (N.J.S.A. 11A:2-20) and

regulations may only assess a fine in lieu of a suspension where loss of the officer from duty would be "detrimental to the public health, safety or welfare" or if the assessment is restitution or is agreed to by the employee.

3. Use immunity can only be granted by the county prosecutor.