Discipline In Practice:
Building, Evaluating And Defending Cases

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PUBLIC SAFETY OFFICER BILLS OF RIGHTS:
From Constitutional Rights To Statutory Rights

From Constitutional Rights to Statutory Rights

Yesterday: The Constitutional Floor

- *Weingarten*: Representation during investigatory interviews
- *Garrity*: Protection against criminal use of compelled statements
- Constitutional rights establish important protections — but not a comprehensive disciplinary procedure.
- POBOR statutes build a procedural framework around those rights.

There is No Single "Police Bill Of Rights"

- **Approximately 20 states provide POBOR protections.**
- **Some largely codify existing constitutional protections.**
- **Others create significant additional procedural rights.**
- **Coverage, procedures and remedies vary dramatically by state.**
- **Always start with the statute.**

California and **Florida** provide two different models.

Statutory Rights Can Change

- Maryland enacted the nation's first POBOR in 1974.
- In 2021, Maryland repealed it as part of broader police reform legislation.
- The replacement law imposed a new statewide disciplinary structure.
- Lesson: POBOR protections exist because legislatures create them — and legislatures can expand, restrict or repeal them.

What Can a POBOR Govern?

- Who is protected?
- When do statutory rights attach?
- Notice of the allegations
- Access to evidence
- Representation
- How questioning is conducted
- Recording of interviews
- Investigation deadlines
- Discipline and appeal
- Remedies for violations

POBOR can regulate the investigation from beginning to end.

When Do POBOR Rights Attach?

- **An officer is called into a supervisor's office and asked about an incident from the night before. *Is this a POBOR interrogation?***
  - *Covered employee?*
  - *Investigation?*
  - *Interrogation?*
  - *Potential discipline?*
  - *Who is conducting the questioning?*

California: When Do Rights Attach?

California POBOR

- **Applies when a public safety officer is:**
  - Under investigation
  - Subjected to interrogation
  - By the employing public safety department
  - Concerning conduct that could lead to punitive action
- **"Punitive action" includes:**
  - Dismissal • Demotion • Suspension • Salary reduction • Written reprimand • Punitive transfer

California: What Is *Not* Covered?

Section 3303 does not apply to interrogation during:

- Normal course of duty
- Counseling
- Instruction
- Informal verbal admonishment
- Routine or unplanned supervisor contact

Nor does §3303 apply to an investigation concerned solely and directly with alleged criminal activity.

When does supervision become an investigation?

Florida: When Do Rights Attach?

- **Florida covers a law enforcement or correctional officer who is:**
  - Under investigation
  - Subject to interrogation
  - By members of the officer's agency
- **For a reason that could lead to:**
  - Discipline
  - Suspension
  - Demotion
  - Dismissal

Before The Interview: What the Officer Must Know

California

Officer must be informed of:

- **Nature of the investigation**
- **Rank, name and command of officer in charge**
- **Identity of interrogators**
- **Others present**

Florida

Officer must be informed of:

- **Nature of the investigation**
- **Names of all complainants**
- **Identity of investigating/interrogating personnel**
- **Others present**

Florida: Show Me the Evidence

Before the investigative interview, the officer gets:

- Complaint
- Witness statements
- Existing statements from subject officers
- Incident reports
- GPS locator information
- Audio/video recordings
- Other existing evidence relating to the incident

and:

- **Identifiable witnesses should, whenever possible, be interviewed *before* the accused officer.**

Why Does Interview Order Matter?

INVESTIGATOR

"I want the officer's unrehearsed account."

OFFICER

"You're compelling me to answer. I should know the evidence against me."

Which produces the more reliable investigation?

The Legislature in the Interview Room

POBOR statutes may regulate:

- Time of interview
- Location
- Number of interrogators
- Identity of persons present
- Duration and breaks
- Threats or promises
- Representation
- Recording

These are <u>not</u> constitutional requirements. They are rules legislatures have imposed on the disciplinary process.

How Many Interrogators?

California

No more than TWO interrogators questioning the officer at one time.

Florida

Questions through ONE interrogator during an investigative interrogation unless the officer waives the requirement.

Time, Conditions and Tactics

- **Both states regulate the manner of questioning:**
  - Reasonable time
  - Preferably while officer is on duty
  - Reasonable interview periods
  - Personal necessities/rest periods
  - Restrictions on offensive language
  - Restrictions on threats
  - No promises/rewards to induce answers
- **California permits an officer to be informed that refusing to answer job-related investigative questions can result in punitive action.**
- **Florida's corresponding protections appear in §112.532(1)(e)-(f).**

Yesterday: *Weingarten*. Today: POBOR

WEINGARTEN

A labor-law right tied to represented employees and investigatory interviews.

POBOR

A statutory right that may independently guarantee representation and define when that right applies.

California: **Representative of officer's choice.**

Florida: **Counsel or other representative of officer's choice.**

What Does "Representation" Mean?

Can the representative…

- Confer privately with the officer?
- Clarify a question?
- Object to a question?
- Ask the investigator to rephrase?
- Ask questions at the end?
- Tell the officer not to answer?

A right to be "present" and a right to meaningfully "represent" are not necessarily the same thing.

Who Records the Interview?

CALIFORNIA

The interrogation may be recorded.

The officer may bring a recording device and record any and all aspects of the interrogation.

FLORIDA

The formal interrogation must be recorded — including recesses.

No unrecorded questions or statements.

What Does POBOR Add to *Garrity*?

***Garrity* asks:**

- Can the government use the officer's compelled statement in a criminal prosecution?

POBOR asks additional questions:

- How may the employer obtain that statement?
- What procedures must it follow?
- Where else may the statement be used?

Example: California law contains *additional* restrictions on use of statements obtained under duress, coercion or threat of punitive action in subsequent *civil* proceedings, subject to statutory exceptions

The Investigation Clock Is Running

CALIFORNIA - 1 YEAR

From discovery of misconduct by a person authorized to initiate an investigation.

Gov. Code §3304(d)

FLORIDA - 180 DAYS

From agency notice of misconduct received by a person authorized to initiate an investigation.

Fla. Stat. §112.532(6)(a)

Both generally require:

- Completion of the investigation
- Written notice of proposed disciplinary action
- Compliance with the deadline, subject to statutory exceptions

When Does the Clock *Stop*?

Both states recognize exceptions, including:

- Pending criminal investigation or prosecution
- Written waiver by the officer
- Officer incapacitation or unavailability
- Multijurisdictional investigations

Additional statutory exceptions differ.

- California: Gov. Code §3304(d)
- Florida: Fla. Stat. §112.532(6)(a)

Can the Employer Reopen the Investigation?

Both states permit reopening under limited circumstances.

- Significant new evidence likely to affect the outcome
- Evidence not reasonably discoverable during the original investigation, or arising from the officer's pre-disciplinary response
- Statutory conditions must be satisfied

Florida: Discipline resulting from a reopened investigation must be completed within 90 days of reopening.

California: Gov. Code §3304(g) Florida: Fla. Stat. §112.532(6)(b)

POBOR Goes Beyond the Interview

California's statute also provides:

- **Personnel files:** Inspection, notice of adverse comments and opportunity to respond
- **Polygraphs:** Protection against compelled lie detector testing
- **Locker searches:** Restrictions on searches of assigned storage spaces
- **Financial disclosure:** Limits on compelled disclosure of personal finances
- **Retaliation:** Protection for exercising statutory rights

Gov. Code §§3304–3309

Florida: *Brady* List Protections

Florida expressly addresses *Brady* identification systems.

- *Brady* list placement alone cannot justify discipline.
- The employer may discipline for the underlying misconduct.
- Where a CBA applies, discipline must conform to its procedures.
- Additional statutory protections govern *Brady* identification systems.

Fla. Stat. §§112.532(7), 112.536

What Happens When an Employer Violates POBOR?

California provides an example of statutory enforcement:

- Superior court jurisdiction
- Injunctive and other extraordinary relief
- Potential injunction against punitive action
- Civil penalties and attorney fees for malicious violations intended to injure the officer
- Actual damages where established

Gov. Code §3309.5

The Investigation Ends: Now What?

1. Complaint to Investigation
2. Investigation to Interview
3. Interview to Findings
4. Findings to Proposed Discipline

What process must occur before the employer acts?

LOUDERMILL HEARINGS AND PRE-DISCIPLINARY DUE PROCESS

Cleveland Board of Education v. Loudermill (1985)

- James Loudermill. Security guard for Cleveland school system.
- During his application process, Loudermill truthfully disclosed a previous felony conviction.
- After months of employment, the Board of Education "discovered" Loudermill's felony and dismissed him for allegedly falsifying his job application.
- Board provided no prior notice, explanation of the charges, or any opportunity for Loudermill to respond before terminating him.

Cleveland Board of Education v. Loudermill (1985)

- Loudermill filed a lawsuit claiming that the Board violated his Fourteenth Amendment right to due process, arguing that he should have had a chance to defend himself before termination.
- Case makes it to US Supreme Court.
- Issue: Does the Due Process Clause of the Fourteenth Amendment require public employees to have a hearing before being terminated?

Cleveland Board of Education v. Loudermill (1985)

- **Supreme Court rules in favor of Loudermill, holding that public employees with a "property interest" in their jobs are entitled to due process before termination.**
  - Due process requires **notice** of charges, **explanation** of evidence, and **opportunity to respond** before job termination.
  - The hearing need not be extensive but must be sufficient for the employee to defend themselves.
- **Rationale: Public employment is considered a property right, which cannot be taken without a fair procedure.**

What Are *Loudermill* Rights?

- **The right to a hearing <u>before</u> an adverse employment action can be imposed.**
  - *Loudermill* hearings are conducted <u>after</u> the investigation has been completed.
  - Common mistake made by employers.
- **Intended to ensure basic fairness and provide an opportunity to defend against charges. That's it.**
- **Special considerations for public safety roles.**
  - Potential for immediate suspensions in cases of misconduct.

Key Components Of *Loudermill* Rights

- **Notice**
  - Employees must be informed of the charges against them.
- **Explanation of Evidence**
  - Employers must share the evidence used in reaching their determination.
- **Opportunity to Respond**
  - Employees can present their side of the story. Or not.
- **Rights must be afforded before any disciplinary action (termination or suspension) is imposed.**

Notice Requirements

- **Written notice required**
  - Must specify the charges and the basis for the disciplinary action
  - Must allow reasonable time to prepare for the hearing
- **Clear communication of potential outcomes**
  - Notice should explain possible sanctions, including termination or suspension

The *Loudermill* Hearing

- **Informal, pre-termination "hearing"**
  - Not a full evidentiary hearing like in a court
  - Designed to prevent wrongful terminations without due process
- **Purpose of the hearing**
  - For the employer to hear the employee's defense
  - Ensures the decision is well-informed and fair
- **What to expect**
  - May occur with HR, supervisors, or union reps present

Employee's Opportunity To Be Heard

- **Right to tell their side of the story**
  - Explain circumstances, present mitigating factors, offer explanations
  - Offer evidence or testimony from others? Not really.
- **Right to representation**
  - Union representation is common during hearings
  - Employees can request to have an attorney present, though not required
- **Guidelines for employee responses**
  - Be factual, avoid emotional outbursts, provide documentation

Employer Responsibilities

- **Providing adequate notice**
  - Specific, detailed charges to allow employee to prepare.
  - Don't hide the ball…
- **Conducting a fair and impartial hearing**
  - Objective decision-makers with no bias.
  - Ensure a fair opportunity to respond to all charges.
- **Documenting the process**
  - Employers must keep thorough records of the notice, hearing, and decision.

Opportunity To Respond

***Procell v. City of Baker*, (La. Ct. App. 2020)**

- **Police officer disciplined for allegedly covering up minor offense committed by son of deputy sheriff.**
- ***Loudermill* notice charged officer with violating discipline code section prohibiting the commission of a felony.**
- **After *Loudermill* hearing, employer terminated officer but <u>added</u> additional reasons for the termination.**
- **Officer appealed and won: "Because [the officer] was not informed of the nature of the additional charges against him by the *Loudermill* notice, he had no meaningful opportunity to response to those charges."**

Case featured in the Jan. 2021 issue of Public Safety Labor News.

Opportunity To Respond

***Borough of Gettysburg v. International Brotherhood of Teamsters, Local 776*, (Pa. Cmwlth. 2020)**

- Borough termination officer for placement on *Brady* list per letter from District Attorney.
- Borough refused to provide officer with a copy of the letter or identify the reasons underlying the restriction at his *Loudermill* hearing.
- Arbitrator reversed the termination on procedural grounds.
- CBA specifically required employer to provide "a due process proceeding of the type required by *Loudermill*" before disciplining any officer.

The Role Of The Union

- **Ensuring due process is followed**
  - Advocate for the employee's rights under *Loudermill*.
  - Help interpret charges and evidence for the employee.
- **Preparing the employee for the hearing**
  - Assist in gathering evidence, developing a defense.
  - Does the employee even want to make a substantive response?
  - Do you "save it" for the grievance process or Civil Service hearing?
- **Post-hearing follow-up**
  - Help file a grievance if due process wasn't followed.

The Role Of The Union – Information Requests

***Town of Auburn*, (MA LRC ALJ 2019)**

- Union requested investigation materials in advance of member's *Loudermill* hearing.
- Employer refused. Argued that union was not entitled to pre-hearing discovery in advance of *Loudermill* hearing because that was an informal proceeding which has different procedural rules from full evidentiary hearings (as opposed to grievance hearing).
- Labor board sided with Union. Required employer to provide requested information before, not after, *Loudermill* hearing.

Case featured in the Sept. 2019 issue of Public Safety Labor News.

Common Mistakes In *Loudermill* Hearings

- **Insufficient notice**
  - Failure to detail charges or provide reasonable preparation time.
- **Denying representation**
  - Not allowing the employee to have union or legal representation.
- **Failure to give a meaningful opportunity to respond**
  - Interrupting or disregarding the employee's defense.
- **Saying *too much* at the *Loudermill* hearing**
  - The employer has made up their mind, haven't they?

Loudermill Rights In Termination Vs. Suspension

- **Termination hearings**
  - *Loudermill* hearings must occur before permanent termination.
  - High threshold for employers to justify dismissal
- **Suspension hearings**
  - Short-term suspensions (*e.g.*, unpaid leave) may also trigger *Loudermill* rights.
  - Some jurisdictions may allow suspensions pending a final decision.
- **Importance of proportionality**
  - Discipline must be proportional to the offense.

When *Loudermill* Doesn't Apply

- **Probationary employees**
  - Employees on probation typically have fewer due process protections.
- **Emergency suspensions**
  - Employers may bypass *Loudermill* hearings in cases of immediate danger or safety risks, though post-action hearings are required.
- **Resignations vs. dismissals**
  - Employees who resign may forfeit *Loudermill* protections.

How Much Protection Is Required?

Straub v. City of Spokane, 738 Fed. Appx. 392 (9th Cir. 2018).

- Chief Of Police – at-will employee - was forced to resign. City did not provide Loudermill protections due to at-will status.
- Chief sued and lost.
- At-will employees lack a property interest in their employment, Hence, no related pre-deprivation obligation on their employers.
- Note: Chiefs may be entitled to a "name-clearing" hearing based on the attention surrounding their departure, due to a possible limitation of their liberty rights.
  - But lesser requirements than typical Loudermill hearing.

How Much Protection Is Required?

***Upchurch v. City of Orange Township* (N.J. App. 2017)**

- **Police officer was issued a reprimand for insubordination without a pre-discipline hearing.**
- **Officer challenged the alleged lack of due process, and lost:**
  - "A reprimand is not a suspension, with the attendant loss of pay and advancement potential because of the loss of a day of service. A reprimand is nothing more than a warning advising an employee of conduct with which the employer is dissatisfied. That is not the equivalent of a compensable loss."

Legal Remedies For *Loudermill* Violations

Filing Grievances

- Internal remedies available through the collective bargaining process

Lawsuits And Appeals

- Employees may sue in federal or state court if due process is violated
- Appeal to administrative bodies for reinstatement

Possible Outcomes

- Reinstatement to position, back pay, damages for emotional distress

Final Reminders On Procedure

- **Rights must be invoked — train your people**
- **Improper handling can sink cases or prosecutions**
- **When in doubt — assert the right**

CHALLENGING DISCIPLINE: KEY LEGAL & CONTRACTUAL PROTECTIONS

Discipline For "Cause"?

- Most workers in the US can be fired *without* cause.
- All forms of *statutory* protections against improper discipline will require that discipline be for "cause."
- But what constitutes "cause" under one standard may not suffice in the other.



Just Cause: The Basics

- Did the employee do something wrong?
- Does the "punishment fit the crime?"

Just Cause – The Basics

- The concept of "just cause" is well established in labor law.
- Most arbitrators will apply the "seven tests" rule:
  - *"The concept of just cause was famously laid out in Enterprise Wire Co., 46 L.A. 359 (1966) by Arbitrator Carroll R. Daugherty in his well known and respected* ***'seven tests.'*** *When one of the tests has been violated, 'just cause either was not satisfied or at least was seriously weakened in that some arbitrary, capricious, or discriminatory element was present.'" KOVEN & SMITH, JUST CAUSE: THE SEVEN TESTS, (Kendall/Hunt 2d ed., 1992) at 23.*

- Arb. David Reilly (4/19/2023 - reinstating police officer)

Elements of Just Cause

1. Notice: Did the officer receive adequate notice of the work rule or performance standard and the possible consequences of failure to comply?
   - Is the violated work rule or directive published?
   - How was the officer made aware of the rule?
   - What evidence establishes that the officer was aware of and understood the rule?
   - Has this issue been raised in performance appraisals or previous disciplinary actions? If so, how recently?
   - Prior notice may not be necessary in cases of serious misconduct such as theft, insubordination, or job abandonment.

What Does the Rule Actually Require?

Hypothetical

- Officers must transport a "semiconscious" person to a hospital.
- An officer transports an intoxicated individual to the station instead.
- The individual subsequently dies.
- The department suspends the officer for violating the policy.
- The department cannot explain what "semiconscious" means.

Question: *Can the employer enforce a rule it cannot clearly define?*

Elements of Just Cause

2. Reasonable Rule/Work Order: There is a rule or work order reasonably related to the orderly, efficient, and safe operation of the department. Consider:

   - Whether the rule is straightforward and written in easily understood language.
   - Whether the rule is applied consistently/without bias.
   - Common sense.

Following the Training

Hypothetical

- Officer uses a knee strike while assisting in an arrest.
- Body camera captures the incident.
- The suspect was not actively resisting but made a threatening statement.
- Department training permitted the technique.
- Officer is terminated for excessive force.

Question: *Can employer discipline an officer for following its own training?*

Elements of Just Cause

3. Sufficient Investigation: This focuses not only whether there was an investigation, but whether the Department looked at all aspects of the allegation and defenses.
   - When did the Department learn of the issue/misconduct?
   - What evidence is there that the employee knew what to do/not do?
   - Whether policies or processes that have bearing on case were reviewed/considered.
   - Whether the Department identified and interviewed those with knowledge of the issue.
   - Proper documentation of the investigation.

The Investigation That Missed The Defense

Hypothetical

- Lieutenant is accused of concealing decades-old criminal charges.
- Department terminates him for dishonesty.
- Lieutenant explains that the matters were expunged or resolved without convictions.
- Department does not investigate his explanation.

Question: *Must the employer investigate evidence that could undermine its own charges?*

Elements of Just Cause

4. Fair Investigation: The investigation must be both fair and objective.
   - When did the misconduct occur? When did the Department know of it? How quickly did the Department move to investigate/act?
   - Was the investigator objective and uninvolved in the underlying issue(s)?
   - Did the Department make efforts to reconcile conflicting statements or evidence? What it did it do when it couldn't reconcile them?
   - Did the employee get notice of the alleged misconduct/problem and an opportunity to appear with their representative to respond to the evidence?

The Investigator Has Already Decided

Hypothetical

- Sergeant accused of working outside assigned jurisdiction and falsifying activity logs.
- Chief calls the sergeant a "fucking liar" before investigation is completed.
- Sergeant offers a plausible explanation.
- Department terminates the sergeant.

Question: *Can an investigation be fair when the decisionmaker has already made up his mind?*

Elements of Just Cause

5. Proof: There must be substantial evidence that the employee engaged in the misconduct.
   - Employer, not the Union, bears the burden of proof.
6. Equal Treatment: The Department must treat all employees equally and without discrimination. This includes consistent application of work rules and holding all employees accountable for established performance standards.

Dishonesty or Imprecise Memory?

Hypothetical

- Nine firefighters provide conflicting accounts of time spent at training and a gentlemen's club.
- Investigator tells them their time estimates need not be precise.
- Department suspends them for dishonesty.
- Statements are vague and inconsistent, but no deliberate lie is established.

Question: *Is an inaccurate statement necessarily a dishonest statement?*

Criminal Acquittal = Just Cause?

Hypothetical

- Two police officers participate in a drug raid during which $13,620 is stolen.
- Both officers are acquitted of federal criminal charges.
- Officers admit knowing that other officers intended to steal the money.
- Department terminates both officers.

Question: *Does a criminal acquittal prevent the employer from establishing just cause for termination?*

Same Misconduct, Different Punishment

Hypothetical

- Sergeant violates rules governing rest periods and preventive patrol.
- Three other sergeants committed similar violations without discipline.
- Department had not warned employees that the practice would result in termination.
- Sergeant is fired.

Question: *When does inconsistent enforcement defeat just cause?*

The Special Problem of Demotion

Hypothetical

- Police captain fails to adequately investigate a crash.
- Captain also fails to request an alcohol test of the driver.
- Department demotes captain for poor judgment.
- Misconduct is established but does not demonstrate an inability to supervise.

Question: *Does misconduct justify removing an officer from supervisory rank?*

Elements of Just Cause

7. Proportionality: The punishment must fit the proven offense. Consider:
   - Whether there is a reasonable relationship between seriousness of infraction and the termination, considering the employee's record, tenure, and prior discipline.
   - Whether termination was properly imposed by a person with authority to issue discipline.
   - Whether the termination is consistent with the disciplinary code?

Provocation Is Not An Excuse

Hypothetical

- Handcuffed inmate curses and spits at corrections officer.
- Officer pokes inmate in forehead and swings elbow toward inmate's face.
- Officer admits he wanted to teach inmate respect.
- Officer later acknowledges misconduct.
- Department terminates him.

Question: *Can provocation and rehabilitation justify reducing discipline for serious misconduct?*

Just Cause: The Bottom Line

Two fundamental questions:

- *Did the employee engage in misconduct?* The employer bears the burden of proof.
- *Was the discipline justified?* The penalty must be fair and proportionate.

The seven tests provide the framework:

Notice and reasonable rules
Proof of misconduct
Proportionality
Thorough/impartial investigation
Equal treatment

Remember that proving misconduct alone will not necessarily establish just cause for the discipline imposed.

THANK YOU

