

# COPS INVESTIGATING COPS: THE NEED FOR FAIR AND OBJECTIVE INTERNAL AFFAIRS INVESTIGATIONS

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As evidenced by the recent and well-publicized scandals involving the Edison and Irvington police departments, internal affairs investigations are often improperly used as a means of intimidation, harassment and retaliation by law enforcement officers against fellow officers, and sometimes, even against private citizens. Since serious and permanent career and legal consequences can result for the targets of IA investigations, the legislature and courts of this state have established and enforced specific guidelines governing the scope and conduct of such investigations.

The Office of the Attorney General for the State of New Jersey ("OAG"), through its Division of Criminal Justice, Police Services Section, first issued its "Internal Affairs Policies and Procedures" ("AG Guidelines") back in 1991, and then updated them in 1992, 2000, and most recently, in 2011. The purpose of the AG Guidelines is to establish the procedures for investigating officer misconduct and for determining whether criminal or disciplinary action against a law enforcement officer is required. The goals of the AG Guidelines are "to enhance the integrity of law enforcement agencies in the State, improve the delivery of police services and assure the citizens of New Jersey that complaints of police misconduct are properly addressed."

Since initial creation of the policies, the OAG has acknowledged that the process of internal affairs has come under increasing scrutiny by the courts, the community and the media. Federal courts have particularly focused on the importance of the internal affairs function and have come to perceive it as a means of "protecting the constitutional rights and civil liberties of the citizens of this State." As a result, the OAG has concluded that "the proper administration of the internal affairs function by the State's law enforcement agencies is a critical issue for the criminal justice system in New Jersey today."

County and municipal law enforcement agencies conduct IA investigations under the general supervision of the OAG. Thus, for such local agencies, cooperation "in internal affairs matters begins with strict adherence to the requirements" established by the OAG. "This is particularly true when the agency is gathering evidence concerning allegations of criminal conduct." When criminal charges against a targeted officer may result, the local IA unit acts under the direct supervision of the relevant county prosecutor. In such cases, the local IA unit must confer with, and follow the instructions of, the county prosecutor at all critical points in the investigation process. As warned by the OAG, "law enforcement agencies that fail to implement a meaningful and objective internal affairs process may be found liable in civil lawsuits for their failure to effectively address officer misconduct."

The AG Guidelines provide detailed provisions for the internal affairs process that should be implemented by local units, including the conduct required of investigating officers and the appropriate procedures to be used during the investigation. The AG Guidelines also provide recommendations for the training and instruction of

law enforcement officers to prevent misconduct before it occurs. Further, the guidelines mandate protection of the substantive and procedural due process rights of targeted officers, such as the requirements that written notice of an investigation be provided to the subject officer and notification of the right to counsel be given in complaints involving serious charges against the targeted officer.

The AG Guidelines mandate that the internal affairs investigator conduct a thorough and objective investigation without violating the rights of the subject officer or any other law enforcement officer. Pursuant to the guidelines, the sole responsibility of the investigator is to gather all of the facts regarding the allegations and to be objective and thorough when submitting the report. To ensure maximum fairness, the AG Guidelines prohibit the IA investigator from interjecting his or her personal opinions, conclusions or personality into the case.

In 1996, the New Jersey State Legislature adopted the AG Guidelines as controlling New Jersey law when it enacted N.J.S.A. 40A:14-181, which requires that: "Every law enforcement agency shall adopt and implement guidelines which shall be consistent with the guidelines governing the "Internal Affairs Policy and Procedures" of the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the Department of Law and Public Safety, and shall be consistent with any tenure or civil service laws, and shall not supersede any existing contractual agreements."

Many state and local law enforcement agencies have simply adopted, in toto, the AG Guidelines as their own controlling IA policies and procedures. However, law enforcement agencies that choose to create their own policies still have to ensure that all of the important provisions and protections afforded to officers under the AG Guidelines are not distorted or omitted, since such drafting errors could undermine the integrity of IA investigations conducted by that particular department and potentially violate the due process rights of targeted officers.

As one New Jersey court has concluded: "A fair and objective investigation of the allegations is an essential part of the disciplinary process envisioned by the Attorney General's Guidelines." *O'Rourke v. City of Lambertville*, 405 N.J.Super. 8, 19-22 (App. Div. 2008). When "a law enforcement agency adopts rules pursuant to N.J.S.A. 40A:14-181 to implement the Attorney General's Guidelines, the agency has an obligation to comply with those rules," and, when it fails to do so, such deficiencies taint the disciplinary process and it "cannot stand." *Id.* "An agency representative's failure to comply with the Guidelines may necessitate that an employee be reinstated even when the employee engaged in conduct unbecoming a public employee." *Id.*

As many law enforcement officers are unfortunately aware, adoption of the AG Guidelines by their department means nothing if adherence to the guiding principles and protections embodied in those policies is ignored by the investigating IA officer and/or

Chief, when a final decision on discipline is made. The Edison and Irvington incidents show how internal affairs' investigations, even in larger police departments, often fail to comply with the AG Guidelines and/or the department's own facially valid IA policies.

An increasingly disturbing trend is the use of internal affairs investigations as the means to justify termination of one officer so that another officer can move up in rank. As the result of the severe budget constraints imposed on many State agencies, counties and local municipalities, there have been numerous forced reductions and hiring "freezes" in place over the last several years. Because of the entrenched national and state economic recessions, and the significant financial burdens placed on families as a result thereof, higher ranking law enforcement officers who might otherwise have retired are now remaining in their senior positions. This, in turn, creates a "log-jam" on promotions and a resulting loss of greater income for lower ranking officers, which only serves to encourage improper use of the IA function as a means to force openings in higher ranks.

As an attorney, I have represented law enforcement officers subjected to patently flawed and biased IA investigations that were solely intended to artificially create a job opening through trumped-up disciplinary charges so that another officer, either hostile to the targeted officer or personally aligned with the Chief, could move up in rank. This abuse of the IA function also wrongfully encourages complete termination of the targeted officer, even in cases where such extreme discipline is clearly not justified.

In creating the AG Guidelines, the OAG understood that abuse of the IA function could diminish morale in police departments when the focus is solely on punishment, rather than on remediation and improvement by the subject officer. "Too frequently rules of conduct and disciplinary procedures are used as an end in themselves, and their purpose in reaching department goals is forgotten."

For example, although they are held to a higher standard of responsibility and conduct than other public employees, the concept of "progressive discipline" has long been utilized when determining

appropriate penalties for the misconduct of law enforcement officers. The determination of the appropriate sanction for a disciplinary infraction by a police officer should not be evaluated in a vacuum. Under "progressive discipline," an officer's past record, including any history of promotions or commendations, as well as the lack of any prior serious disciplinary actions, should be considered when deciding the appropriate penalty for the current specific offense. Thus, an officer's past record can, and should, be used to mitigate the penalty for a present offense.

Law enforcement officers now perform their difficult and dangerous jobs under close and heightened scrutiny by the public and media. With budget constraints and the resulting reduction of manpower, their jobs have become significantly more difficult over the last several years. Given this current environment, it is important that the IA units of law enforcement agencies function fairly and objectively. If the internal affairs function is allowed to degenerate solely into a process for cop-on-cop harassment and abuse, both the law enforcement community and the citizenry of this State will lose an important safeguard in the protection of all our legal rights.

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