

Employment Law Regarding Police Officers

I. OFFICER COMPLAINTS

Police officers have special protections regarding their employment that other municipal employees cannot. Policemen and women regularly put their lives on the line to protect us, and as a result of their job duties, they regularly face hostile and unhappy citizens. For this reason, police officers tend to face a disproportionate number of complaints. Texas Law has developed certain employment procedures that afford extra protection to police officers that are subject of complaints.

The Law

SUBCHAPTER B.

COMPLAINT AGAINST LAW ENFORCEMENT OFFICER OR FIRE FIGHTER

§614.021. APPLICABILITY OF SUBCHAPTER.

(a) Except as provided by Subsection (b), this subchapter applies only to a complaint against:

- (1) a law enforcement officer of the State of Texas, including an officer of the Department of Public Safety or of the Texas Alcoholic Beverage Commission;
- (2) a fire fighter who is employed by this state or a political subdivision of this state;
- (3) a peace officer under Article 2.12, Code of Criminal Procedure, or other law who is appointed or employed by a political subdivision of this state; or
- (4) a detention officer or county jailer who is appointed or employed by a political subdivision of this state.

(b) This subchapter does not apply to a peace officer or fire fighter appointed or employed by a political subdivision that is covered by a meet and confer or collective bargaining agreement under Chapter 143 or 174, Local Government Code, if that agreement includes provisions relating to the investigation of, and disciplinary action resulting from, a complaint against a peace officer or fire fighter, as applicable.

§614.022. COMPLAINT TO BE IN WRITING AND SIGNED BY COMPLAINANT.

To be considered by the head of a state agency or by the head of a fire department or local law enforcement agency, the complaint must be:

- (1) in writing; and
- (2) signed by the person making the complaint.

§614.023. COPY OF COMPLAINT TO BE GIVEN TO OFFICER OR EMPLOYEE.

(a) A copy of a signed complaint against a law enforcement officer of this state or a fire fighter, detention officer, county jailer, or peace officer appointed or employed by a political subdivision of this state shall be given to the officer or employee within a reasonable time after the complaint is filed.

(b) Disciplinary action may not be taken against the officer or employee unless a copy of the signed complaint is given to the officer or employee.

(c) In addition to the requirement of Subsection (b), the officer or employee may not be indefinitely suspended or terminated from employment based on the subject matter of the complaint unless:

- (1) the complaint is investigated; and
- (2) there is evidence to prove the allegation of misconduct.

Complaints Against Law Enforcement Officers

Section 614.021 of the Texas Government Code notes that any complaint regarding a police officer must be in writing and signed by the complainant. A copy of a signed complaint against a police officer must be given to the officer within a reasonable time after the complaint is filed. Texas Govt Code § 614.023(a). Disciplinary action of any kind may not be taken against the officer unless a copy of the signed complaint is given to him. Id. at 614.023(a) The police officer may not be indefinitely suspended or terminated from his employment based on the subject matter of the complaint unless: 1) the complaint is investigated; and 2) there is evidence to prove the allegation of misconduct. Id. at §614.023(c)

These brief and rather simplistic laws set forth a baseline for any employment discipline decisions involving police officers. It will almost always be in the best interest of the City and the police officer to provide the written and signed complaint as soon as practical. The reported cases illustrate that hearing examiners and courts have found a reasonable time to mean several different things. The investigation into the incident can continue, but early dissemination of the complaint avoids the officer later arguing that the delay in presenting the complaint was “unreasonable.” Several reported decisions note that one of the purposes of providing the police officer with the signed complaint is that it allows him to investigate and defend himself against the complaint.

Understanding these laws requires seeing how hearing examiners and the courts have interpreted them.

Guthery v. City of Sugarland¹

In *Guthery*, a single officer attempted to break up a party, damaging the front door when he knocked with his flashlight. Several days later the homeowner registered a

¹ Guthery v. City of Sugarland, 112 S.W.3d 715 (TexApp.—Houston [14th Dist.], 2003)

complaint by telephone, without writing out or signing the complaint. A supervisor followed-up, interviewed the officer and met with the homeowner at her house. The investigation determined that the police officer damaged the door and that he committed procedural violations on the call.

Several months later, the Police Chief reviewed the investigation, signed a “Notice of Proposed Disciplinary Action” and proposed a three day suspension. The Notice instructed Guthery to appear at a meeting with the Chief “in order to respond” to the investigation. Following the meeting, the Chief approved the suspension. Upon appeal to the City’s Employee Board of Appeals, the suspension was reduced to one day.

Guthery appealed, arguing that the Chief violated Section 614.022 because there was no written and signed complaint from the homeowner. The officer also pointed out that the document signed by the Police Chief was completed after the investigation and therefore not within a reasonable time after the complaint was lodged. The City argued that the Chief’s correspondence was a signed complaint, and it was timely because it was given to the Officer prior to the imposition of the disciplinary action.

The court looked at the Texas Local Government Code Section 143.123(a)(1), which defines “Complainant” as “a person claiming to be the victim of misconduct by a police officer.” Considering this definition, the court construed that the written, signed “complaint” must be from the homeowner. Accordingly, the Chief’s “Notice of Proposed Disciplinary Action” could not be the written “complaint” contemplated by Section 614.022 and Section 614.023. The procedures followed in this case were not in compliance with the statutes, and the court ordered that the disciplinary action be withdrawn.

Turner v. Perry²

Officer Perry was employed by Alief Independent School District Police Department. Perry posted information regarding school gang issues on a national website without first following the Department’s procedural requirements. Perry was demoted and placed on a growth plan as a result of the web posting. Specifically, his supervisor determined that he did not perform his job in a satisfactory manner, and further noted that Perry had problems following the chain of command.

Perry argued that the Department took an adverse employment action against him in violation of his right to due process by not providing him a written, signed complaint. The Department argued Perry was an at-will employee with no property interest in continued employment. Perry responded that he had a protected property interest in his job pursuant to Texas Government Code Sections 614.021-.023. The Fourteenth Court of Appeals in Houston found that “in the absence of complaints that were signed, delivered, investigated, and supported by evidence, Perry had a legitimate expectation of continued employment secured by Sections 614.021-.023 of the Texas Government Code.” The Court noted that these statutes were enacted to provide police officers with procedural safeguards.

² Turner v. Perry, 278 S.W.3d 806 (TexApp.—[Houston 14th.] Dist., 2009)

Nelson v. City of Dallas³

Police officers sued the City of Dallas, arguing that the Department was in the process of taking disciplinary action against them related to one or more investigations without following provisions in the Texas Government Code. The City's Charter authorized the Police Chief to discipline officers, and it provided an administrative procedure for contesting and appealing the Police Chief's discipline decisions. Although the opinion has a long discussion on multiple jurisdiction issues, one of its focuses is the police officers' assertion that the City violated Sections 614.022-.023. Specifically, the officers argued that the Police Chief had considered an anonymous unsigned letter in connection with the disciplinary proceedings. The City disputed this contention, arguing that the disciplinary investigation was based on a signed complaint detailing the specific allegations.

The Officers equated Sections 614.022-.023 with statutory prerequisites to an agency's jurisdiction and authority to act, and argued that a violation of the sections related to written, signed complaints and notice to the officers deprived the hearing examiner of jurisdiction and authority to act in disciplinary matters. The Court, citing *Dubai Petroleum Co. v. Kazi*, 12 S.W. 3d 71, 76-77 (Tex. 2000), rejected the position that failure to follow statutory provisions deprives a court of jurisdiction. The court noted that even if the City erroneously applied these sections, that the error can be addressed in an administrative process and ultimately in the courts under judicial review provided by the City Charter and Ordinances. This case seems to stand for the proposition that if there is a failure to comply with the statute regarding complaints and notice that a possible remedy would be to abate the administrative/legal process and allow for compliance with the statutes to protect the officers' rights.

Treadway v. Holder⁴

Treadway began her employment with Comal County Sheriff's Office in 1994, moving up through the ranks to the position of Administrative Sergeant in 2001. In 2005, her supervisor received a complaint from a Shift Sergeant that Plaintiff had met with her trainee only twice that month, despite a Department requirement that she meet with him weekly. Plaintiff claimed that she had met with the employee the required number of times, providing copies of her weekly observation reports to support her position. After review of the employee time sheets and jail camera footage, the Department ultimately concluded that Treadway had fabricated the observation reports. The Sheriff ordered her termination, not for failing to meet with the trainee on a weekly basis, but for falsifying government documents and lying during the course of the investigation. According to Plaintiff, she only learned of the allegations related to untruthfulness and falsification of records after her discharge. Specifically, she claimed she never received a signed, written complaint regarding these allegations.

Plaintiff filed a declaratory action in district court, arguing that the County violated Chapter 614, Subchapter B of the Texas Government Code. Specifically, she argued that she

³ Nelson v. City of Dallas, 278 S.W.3d 90 (TexApp.—Dallas, 2009)

⁴ Treadway v. Holder, 309 S.W.3d 780 (TexApp.—Austin, 2010)

was entitled to receive a signed complaint. The trial court granted the County's motion for summary judgment and denied Treadway's motion, upholding her termination.

In its motion, the County had argued that Subchapter B did not apply to Plaintiff's termination because she was not terminated on the basis of a complaint. As a result, this case would turn on whether the internal allegations leading to Plaintiff's termination constituted a "complaint" under Subchapter B. The County further argued that Subchapter B cannot be construed to include allegations made against an officer by her supervisors, as that would alter the at-will status of police officers in Texas. This argument was summarily set aside, with the court noting that her status as an at-will employee was irrelevant since she was terminated for cause.

The Court determined that under both the Civil Service Act and Subchapter B, a "complaint" triggers an investigation into allegations of misconduct. Neither statute makes any distinction based on the source of the allegation. Therefore, a "complaint" for purposes of Subchapter B is any allegation of misconduct that can result in disciplinary action, regardless of whether such complaint was an internal or external complaint.

Under this definition, the allegations against Plaintiff (dishonesty and falsifying training records) qualified as a complaint. The failure to provide a written, signed complaint to an officer before the discipline is imposed impaired the officer's ability to investigate and defend herself. Accordingly, this failure to provide a signed complaint violated the purpose of the statute, which was to protect police officers from disciplinary actions based on unsubstantiated allegations of misconduct. The Court of Appeals reversed the trial court's order granting Summary Judgment in favor of the County and remanded the case for further proceedings.

City of Houston v. Wilburn⁵

Captain Shane Wilburn of the Houston Fire Department was placed on indefinite suspension (terminated) related to positive results in a random drug test. When selected for a random drug test, Wilburn signed the proper consent forms and submitted a urine specimen that tested positive for a cocaine metabolite.

After receiving the lab results, the City Medical Officer contacted Wilburn to determine whether he was taking any medications that might yield a positive test result. Two days later, Wilburn received a relief of duty status letter, signed by the Acting Chief. Several weeks later, a second test confirmed the positive result. Wilburn received a signed letter from the City's Medical Officer setting forth the test results. Two weeks later, the Fire Chief provided Wilburn a signed letter notifying him of the Department's decision to indefinitely suspend his employment.

Wilburn argued that he was entitled to have the indefinite suspension overturned and his employment reinstated because the City violated Chapter 614 of the Texas Government Code. Specifically, the City failed to provide him a signed written copy of a complaint

⁵ City of Houston v. Wilburn, 445 S.W.3d 361 (TexApp.—Houston [1st Dist.], 2013)

against him. The Trial Court agreed with Wilburn that the City's failure to comply with Section 614.023 invalidated the disciplinary action against him.

However, the Court of Appeals noted that before he received the letter of indefinite suspension, the City had provided him with two signed letters informing him of the complaint giving rise to the disciplinary action, specifically that he was on paid suspension pending an investigation of misconduct related to the cocaine metabolite in his urine specimen. These letters constituted a signed complaint provided to Wilburn within a reasonable time after the basis of the complaint arose. Further, the summary judgment evidence demonstrated that the Medical Officer investigated the veracity and accuracy of the urine test results before the City Department took any disciplinary action. Accordingly, Wilburn failed to satisfy his summary judgment burden, and the judgment of the trial court was reversed.

Baldrige v. Spring Branch Independent School District Police Department⁶

Following Baldrige's employment termination by the Spring Branch Independent School District Police Department, he filed suit claiming that the Department violated Texas Government Code Section 614.023. Baldrige sought Declaratory and Injunctive Relief. Specifically, he argued that the Department failed to provide him with a copy of any complaints filed against him that formed part of the basis for his termination.

Baldrige responded to a complaint of property damage on private property near the middle school baseball field. The complaining witness argued that some adult soft ball players looked "shady" and asked that they be removed, alleging they damaged a fence. Baldrige informed the complainant that it was a public facility, and he could not force them to leave. The witness then informed the Officer that he was friends with members of the School Board, and that he would make sure that the Officer was fired. The Officer then advised the adult softball players to stay off the complainant's property.

The complainant next called the School District's Associate Superintendent regarding the incident. At the request of the Department, the complaining witness submitted his complaint in writing. Several days later, Baldrige was seen wearing a Bluetooth device while on duty, violating the Department's dress code. The supervisor issued a written counseling report, which was signed and acknowledged by Baldrige. Three weeks later, the supervisor recommended Baldrige's termination.

The recommendation for termination discussed the internal investigation stemming from the property owner's complaint. It noted that the supervisor's investigation showed that Baldrige was "non-responsive and non-professional" during the incident. Based on this incident, the supervisor noted that he was recommending termination at that time. The recommendation also included a handful of other performance deficiencies and procedural violations that had taken place over the past ten years, including the Bluetooth incident the prior month. In summary, the Supervisor's recommendation stated "my recommendation based on complaints from the community, fellow officers, and other SBISD Departments" is

⁶ Baldrige v. Brauner, 2013 WL 4680219 (TexApp.—Houston[1st Dist.], 2013)

to terminate the officer. The evidence showed that Baldrige was unaware of the investigation into the softball player incident until he was presented with his termination notice. Baldrige was not provided a copy of the written complaint from the property owner or his supervisor's memo before his employment was terminated. He did not learn of the details of his supervisor's investigation until the discovery phase of the lawsuit.

On appeal, Baldrige argued that he should have been granted a summary judgment at the trial court level as his employment was terminated, at least in part, as a result of the softball incident. He noted that the Department failed to provide him with a copy of the written complaint before taking disciplinary action. Baldrige argued that compliance with §614.023 was not excused just because there existed other bases for terminating his employment. He also argued that he was not provided with a copy of his supervisor's "complaint" regarding the various internal policy violations. The Department argued that because the appellant was not terminated as a result of the softball incident, but rather as a result of internal performance issues, the summary judgment granted in their favor by the trial court was proper.

The Court of Appeals noted that the summary judgment evidence established that Baldrige was terminated based on his response to the softball incident as well as other unrelated internal performance issues. The Court noted that Section 614.023 applies to internal and external complaints against Peace Officers. The Court of Appeals resolved this matter by noting that Baldrige had been informed of the Bluetooth violation and had been provided a counseling report that advised him of the violation prior to his termination. He acknowledged receipt of the report, and the evidence substantiated that his supervisor had conducted an investigation of the matter by discussing the issue with Baldrige. Accordingly, the Court of Appeals determined that the Department met their burden of establishing that they were entitled to summary judgment upholding the termination based on the Bluetooth incident. They did not address the failure to provide the written complaint of the citizen.

City of Lubbock v. Hensley⁷

This appeal involved Hensley's termination from the Lubbock Police Department. After seeking review through a Hearing Examiner, the termination was modified, and Hensley's discipline was set at a 15-day suspension. The City filed its petition with the district court for a review of the Hearing Examiner's decision. Hensley filed a plea to the jurisdiction in response, questioning the trial court's authority to entertain the proceeding. The focus of the dispute was whether the requirements of Section 614.023 had been met.

Approximately five months before his termination, Hensley received a copy of a memo from a supervising officer describing an incident involving Hensley, another officer and various occupants of a vehicle. The investigation of the incident resulted in the Police Chief issuing a letter of "charges" to Hensley on June 21, 2010. These charges included some of those matters encompassed in the earlier memo, as well as other concerns that had been uncovered during the investigation. Hensley was granted the opportunity to review

⁷ City of Lubbock v. Hensley, 2013 WL 5043360 (TexApp.—Amarillo, 2013)

and respond to the June letter before any discipline was levied. In fact, he drafted a reply to the accusations before later being terminated.

The procedural quirk in this case is that the Hearing Examiner opted not to address the validity of the accusations contained in the “charge” letter, but only those that were in both the original memorandum and the later “charge” letter. The Hearing Examiner supported this position by noting that Hennisley had not been provided notice of any concerns until the investigation had been completed. The Court of Appeals noted that Hennisley had received both the memorandum and the “charge” letter, and had the opportunity to both review and respond to the concerns in both documents. Combining both of the document contents constituted evidence of compliance with the statutory obligation and both documents should have been considered.

The prior written notice requirements of Section 614.023 were satisfied. The case was remanded based on evidence that the Hearing Examiner exceeded his jurisdiction by refusing to consider proper evidence.

Bracey v. City of Killeen⁸

Bracey was a police officer with the City of Killeen Police Department, which had adopted the Civil Service Act. However, this adoption of the Act did not constitute a “meet-and-confer or collective-bargaining agreement, which governs its employment relationship with its police officers.” Therefore, Subchapter B applied to discipline of Bracey.

In December 2010, following an internal investigation, the Police Chief indefinitely suspended (fired) Bracey based on his alleged violation of several Civil Service rules. Prior to termination, Bracey received a letter of disciplinary action detailing the Civil Service rules that his supervisor contended that had been violated. Following his indefinite suspension, Bracey insisted that his supervisor had failed to comply with the notice requirements imposed by Subchapter B. Specifically, Bracey argued that several factual allegations in the letter originated from two fellow officers who had investigated his alleged misconduct. Bracey argued that these concerns constituted “complaints” that were required to be reduced to writing, and signed and provided to him. He therefore argued that no disciplinary action could be taken against him.

The Hearing Examiner determined that the facts supported the indefinite suspension, and rejected Bracey’s argument regarding Subchapter B. The Hearing Examiner noted that he had ample opportunity to defend himself in the investigation. Bracey argued that the Hearing Examiner had “exceeded her jurisdiction” by “ignoring” the mandates of Subchapter B and upholding his dismissal, rather than reinstating him. The Court noted that while disciplinary action may not be taken unless a copy of the signed complaint is given to the police officer, nothing in Subchapter B nor the Civil Service Act states that automatic reinstatement is the sole remedy or means by which this statute can be enforced. The Court of Appeals concluded that the Hearing Examiner had no jurisdiction to award him the

⁸ Bracey v. City of Killeen, Texas, 417 S.W.3d 94 (TexApp.—Austin, 2013)

remedy of reinstatement based solely on the failure by the Department to provide him one or more written complaints required by Subchapter B.

City of Athens v. MacAvoy⁹

The Police Chief for the City of Athens placed MacAvoy on indefinite suspension after an investigation revealed he engaged in a sexual relationship with a woman while on duty, and committed various other violations of Department policy. MacAvoy appealed the termination and requested that the appeal be heard by an independent hearing examiner. In this case, the Police Chief had received a complaint from the woman and her husband, but did not forward their signed complaints to MacAvoy. Instead, the Police Chief treated himself as the complainant. Because the complaints of the woman and her husband were not provided to the police officer, the Hearing Examiner determined that the discipline could not be imposed and ordered MacAvoy reinstated. The City appealed, arguing that the Hearing Examiner was without jurisdiction to apply Section 614.023 and that his interpretation of the statute exceeded his jurisdiction.

The Court of Appeals determined that even though the statutory requirement for provision of the signed written complaint is mandatory, it is not jurisdictional. It also pointed out that there is no specific consequence in the statute for noncompliance. The Court seemed concerned that if the tendering of the complaining witness' written, signed statement prior to discipline is jurisdictional, a police officer cannot be relieved of duty even for very serious infractions. The Court noted that if the statement requirement is not jurisdictional, the Hearing Examiner can hear a case where the officer's right to due process is respected even if the statement is presented at a time after the initial discipline is imposed. The Court of Appeals found that the Hearing Examiner's ruling imposed a remedy that was not authorized by the Act and was therefore beyond his jurisdiction. Accordingly, they overturned the Trial Court's granting of MacAvoy's motion for summary judgment, sustaining the City's appellate issues.

Harris County Sheriff's Civil Service Commission v. Guthrie¹⁰

Guthrie was employed as a Lieutenant in the Harris County Sheriff's Office. He was terminated after conducting his own theft investigation in another jurisdiction related to the theft of \$17.00 from his wife's vehicle at a carwash. The Sheriff's Civil Service Commission upheld the termination, which Guthrie then appealed to a Harris County District Court. Guthrie argued that he had not received a signed copy of the written complaint resulting in his termination as required by Section 614.023 of the Texas Government Code. After a bench trial, the district court reversed the Commission's finding and remanded the matter further proceedings.

⁹ City of Athens v. MacAvoy, 353 S.W.3d 905 (TexApp.—Tyler, 2011)

¹⁰ Harris County Sheriff's Civil Service Commission v. Guthrie, 423 S.W.3d 523 (Tex.App.—Houston [14 Dist.], 2014)

Following an internal affairs investigation, Guthrie was terminated for a number of reasons, most of which related to the carwash incident. Several exhibits were attached to the termination letter, including the theft investigation report by the appropriate jurisdiction, a letter regarding the incident at the carwash signed by Guthrie's supervisor, Guthrie's own sworn statement, a sworn statement by the carwash manager, a sworn statement by a carwash employee, and documentation purporting to show several other businesses in Harris County in which Guthrie was involved (but for which he had not received permission to operate).

At the conclusion of the initial hearing, Guthrie's counsel argued that Guthrie could not be disciplined because there was not written report signed by Hogan (Hogan was the vice president of the Mister Car Wash). Mr. Hogan had called but not written the Internal Affairs Department, recounting what he had learned about the incident and expressing his displeasure.

Guthrie pointed out that in the termination letter, his supervisor mentioned that Hogan had "filed a complaint" against Guthrie. However, the Court of Appeals noted that the fact that the telephone call had been mentioned did not foreclose discipline against Guthrie in an absence of a written complaint signed by Hogan. The Court of Appeals noted that the record established that Guthrie received the proposed termination letter and its attachments, which included multiple signed statements. The Court noted that the statement from General Manager Rodriguez was of particular importance, as it provided considerable detail regarding Guthrie's conduct and its impact on Rodriguez and the carwash. Rodriguez could therefore be properly considered a "complainant" as that term is used in Section 614.023, and his written, signed complaint sufficient to meet the standards of Subchapter B.

The Court did note that it was clear that Guthrie's termination was not based on an anonymous or unsubstantiated complaint. Guthrie received sufficient information to allow him to investigate or defend himself against the complaints. Because Guthrie in fact received a signed complaint and other documentation sufficient to meet the requirements of §614.023, the City prevailed.

II. F5 DISCHARGE REPORT

When a law enforcement officer's employment is terminated for any reason, the employing agency must complete a termination report informing the Texas Commission on Law Enforcement Standards and Education of the officer's employment status. 37 Tex. Admin. Code §217.7(g) 2008.

A law enforcement officer is "honorably discharged" if he is terminated or otherwise leaves his employment "while in good standing and not because of pending or final disciplinary actions or a documented performance problem". A "general discharge" is warranted when termination "was related to disciplinary investigation of conduct that is not included in the definition of dishonorably discharged" or "was for a documented performance problem and was not because of an at will employment decision". "Dishonorably Discharged" means a license holder who was terminated by a law enforcement agency or resigned in lieu of termination by the agency in relation to allegations

of criminal misconduct or was terminated by a law enforcement agency for insubordination or untruthfulness.

A Texas Police Officer is allowed to contest a termination report. 37 Tex. Admin. Code §217.8(a)(d). When a termination report is contested, the employing law enforcement agency must prove that information in the termination report was correct. *Id.* §217.8(e). A final order by the administrative law judge in a termination contest is appealable in accordance with Chapter 2001 of the Texas Government Code. 37. Tex. Admin. Code. §217.8(h). The legal standard employed by the court system is whether there is “substantial evidence,” which means the test is “whether the evidence as a whole is such that reasonable minds could have reached the conclusion that the agency must have reached to justify its action”. Texas State Bd. Of Dental Exam’rs v. Sizemore, 759 S.W.2d 114, 116 (Tex. 1988). There must be more than a mere *scintilla* of evidence, but the evidence can “preponderate against the decision” and still amount to substantial evidence. Board of Law Exam’rs v. Coulson, 48 S.W. 3d 841, 844 (Tex. App.-Austin 2001). Put another way, the court is concerned with the reasonableness of the administrative order, not its correctness. See State v. Public Utility. Comm’n, 883 S.W. 2d 190, 203 (Tex. 1994). If reasonable minds could have reached the conclusion that the agency reached, the decision will be upheld.

An officer can appeal the F5 determination, must do so in a timely manner by submitting a written petition for correction of the report to both TCOLE and the issuing law enforcement agency. When TCOLE receives the petition, they are required to directly refer the matter to the state office of administrative hearings. The state office of administrative hearings will conduct an administrative hearing. This hearing is like a mini-lawsuit, and allows for discovery and depositions. This hearing can cost a City tens of thousands of dollars. At the hearing, the City maintains the burden of proof to show, by preponderance of the evidence, that the alleged misconduct in fact occurred. The law enforcement officer is permitted to also present evidence and witnesses to support his or her case.

The fact that the head of the law enforcement agency submits the F5 report and that the report is an official government document carries a lot of weight. A negative (or incorrect) F5 report can negatively affect a peace officer’s career. Peace Officers with a general or dishonorable discharge often have a difficult time being hired by another law enforcement agency. In fact, an officer given a dishonorable discharge is subject to TCOLE suspending or revoking the officer’s certification.

Following the conclusion of the hearing, the administrative law judge issues a final order. If the administrative law judge determines that the alleged misconduct is not supported by a preponderance of the evidence, they will order the report to be changed.

In the Matter of Earnest Spradling¹¹

Mr. Spradling was employed as a police officer for 10 weeks in 2005. Following a traffic stop, he found part of a marijuana cigarette. Based on advice from his supervisor at the scene, he destroyed the marijuana by grinding it into the ground. After completing his

¹¹ Texas State Office of Administrative Hearings, 2006 WL 4488774 (May 31, 2006)

report stating what he had done, a different supervisor concluded that he might have illegally destroyed evidence in a criminal case. Mr. Spradling resigned from the Department, and the Police Chief subsequently submitted an F5 report stating that Spradling was “generally discharged” for leaving the Agency while under the investigation for a criminal violation or in lieu of disciplinary action, including suspension, demotion, or termination.

At the administrative hearing, Spradling testified that his supervisor provided him the opportunity to resign before an investigation began. The Department provided testimony that the officer was already under investigation when he resigned. Both statements appear to be true.

The Hearing Officer determined that the evidence established that the police officer was under investigation by the Department for a criminal violation and was subject to disciplinary action when he resigned. The Hearing Officer also noted that any agreement or understanding that the officer might have had with a supervisor was not binding on the Police Chief, because the F5 determination is the responsibility of the head of the Agency. Because the police officer was under investigation when he resigned, the F5 report was accurate and the “general discharge” was upheld.

In the Matter of Artemio Salazar¹²

Mr. Salazar was a licensed jailer who left his shift without notice before the work day was over. Although he was a licensed jailer, his primary duties focused on maintenance. The F5 report from his supervisor contained a “general discharge” stating that he left the Agency for less than honorable reasons, but did not leave because of a pending or final disciplinary act. There was also a characterization of job abandonment, which Mr. Salazar disputed.

At the hearing Mr. Salazar focused on the fact that he did not abandon any inmates, because he was a maintenance man. He did concede that he left work early that day.

The Hearing Officer determined that the evidence supported the F5 report characterization of Mr. Salazar’s termination from his job. He left work before his shift was over, and while he had work to do. He did not return to work, or complete the duties that had been assigned. Accordingly, the report’s characterization of this scenario as a “general discharge” following job abandonment was accurate, and Mr. Salazar’s request for an honorable discharge was denied.

In the Matter of Tammy Lewis¹³

Officer Lewis was employed as a police officer from 1998-2005. In 2005, she was terminated after exhausting all of her medical leave time and being unable to work due to illness. The City Police Department claimed her termination occurred for excessive tardiness and failure to report for duty after her leave had expired. After many weeks of leave, Lewis

¹² Texas State Office of Administrative Hearings, 2006 WL 4488984 (September 11, 2006)

¹³ Texas State Office of Administrative Hearings, 2006 WL 4470573 (September 27, 2006)

had a meeting with her supervisor and the City Secretary on October 13, 2005. They let her know that her leave would expire on October 15, 2005. Knowing this, she still failed to report to work, and did not provide any information to the City until October 19, 2005. When she appeared at the office to drop off her FMLA leave form, she was instead given notice of her termination. She was given a “dishonorable discharge.”

The Hearing Officer focused on the fact that she had been provided notice and warning of the change in her employment status, but neither went to work nor turned in a leave form for four days after her leave was exhausted. This delay constituted a clear and obvious policy violation, and the Police Chief was compelled to report this as such on the F5 report. Accordingly, the “dishonorable discharge” was upheld.

In the Matter of Kenneth Singleton¹⁴

Mr. Singleton was employed as a police officer. On April 10, 2007 he resigned under the impression that the F5 report of separation would not reflect that he had resigned while under investigation. In the designation of separation segment of the report, the Police Chief marked the box next to the statements “general discharge-retired or resigned while under investigation for an administrative violation and after the officer was advised in writing of the investigation.” The police officer claimed that he relied on the Police Chief’s word when he resigned that the F5 report would not reflect that he resigned while under investigation. The City argued that the police officer was already under investigation when he resigned, and the Police Chief had no other option but to submit an F5 report that reflected that fact. There was also a supplement to the F5 that contained numerous statements not related to or substantiated by the investigation.

The factual background of the case involved a sexual relationship between the officer and a nineteen year old female. There was a complaint forwarded to several police officers regarding the affair. At the hearing, the police officer admitted that the complaint was based on fact, but argued that he did not conduct the relationship while on duty or while in a police uniform or vehicle.

After initially agreeing to resign, the officer talked to his wife who had him reconsider and not resign. Later that day, he again changed his mind and decided to resign. He asked if the original offer to let him resign before an investigation began was still available, and Singleton testified that the Police Chief replied that he could in fact do that. Accordingly, the police officer argued that the report should be changed to reflect that he was not under investigation or subject to disciplinary at the time he resigned.¹⁵

The Hearing Officer found that the evidence supported that the police officer was under investigation at the time he resigned. Once that investigation had begun, the Police Chief was legally obligated to tell the truth on the F5 report and he had to mark the general discharge option. However, the Hearing Officer determined that the police officer was

¹⁴ Texas State Office of Administrative Hearings, 2007 WL 3287160 (October 18, 2007)

¹⁵ A later investigation determined that the sexual relationship was consensual, and that the female was an adult at the time. Accordingly, he had only violated a single City policy based on a personal phone call he had made.

correct that the explanation attached to the F5 report was full of statements not substantiated by the investigation. The only substantiated finding involved the personal phone call on a department phone. Accordingly, the contents of the explanation were required to be changed to reflect that the petitioner resigned while under investigation for violating the single policy.

In the Matter of Donald Fisher¹⁶

Officer Fisher was employed as a police officer for approximately five years. The Police Chief terminated his employment when the Chief was unable to find certain paperwork regarding search warrants, arrests, and the towing of vehicles from the previous shift. The Police Chief filled out the F5 report, checking the box for “honorably discharged,” with the assertion that the police officer had been “terminated at will.” Because the F5 form at time required an explanation be attached if that category was selected, Chief Gentry attached an explanation.

The police officer appealed this matter, asking that the explanation be removed or reworded because it contained statements that it impugned his conduct and integrity. The explanation stated that he had been fired for violating various unwritten policies and long standing procedures, but the police officer denied that any such policies or procedures existed and denied that he had violated them.

The Hearing Officer found that the explanation should be revised to reflect only that the police officer was terminated at the discretion of the Chief of Police under the at-will employment provisions of the City. The Hearing Officer was critical of the lack of organization, wordiness, and confusing statements contained in the explanation. The Hearing Officer noted that he would be at a loss to determine what the police officer had done wrong if he had to rely on the explanation. As a result, the explanation was so revised.

In the Matter of Truett Pool¹⁷

Officer Pool was employed as a police officer with TABC for seven years. In June 2007 he voluntarily resigned to take a law enforcement job with the Attorney General. He was provided a “general discharge,” noting that he had retired or resigned while under investigation for administrative violations and after the officer was advised in writing of the investigation. TABC officers were not allowed to work side jobs while under suspension. The issue was that Officer Pool had been discovered working off duty employment while serving a two day suspension. However, at the hearing it was learned that while his two day suspension had been approved by a supervisor, Pool had not been informed of this determination.

The Hearing Officer determined that Pool was correct in arguing that he was entitled to an “honorable discharge.” Because there was no evidence that he knew that he was suspended when he worked on July 2, 2007, the TABC had failed to meet its burden of proof. The Hearing Officer also noted that he believed that the explanation attached to the report was troubling, and was unhappy with the fact that the report was unsigned (as required by

¹⁶ Texas State Office of Administrative Hearings, 2008 WL 95240 (January 2, 2008)

¹⁷ Texas State Office of Administrative Hearings, 2008 WL 194956 (January 14, 2008)

law). The Hearing Officer was also critical of the agency for terminating the investigation on the date of retirement, as these investigations provide a basis for future departments to have a good understanding of the work and conduct history of the officer. Because Pool's misconduct was not supported by a preponderance of the evidence, the Hearing Officer ordered that the most appropriate category on the F5 report was "honorably discharged."

In the Matter of Alison Lange¹⁸

Ms. Lange was employed as a police officer with the City for approximately seven months. She was then fired, and an F5 report was completed, but not signed. She was given a "dishonorable discharge," noting that she was terminated for an administrative violation of untruthfulness or insubordination. Per the rules at the time, the Department was required to attach a copy of the policy or rule violated. They did include an explanation that she claimed to be hit with a mirror of a car following a traffic stop, when the video evidence did not support that statement. During her meetings with her supervising officer, she repeatedly stated that she was not filing any type of claim.

The Hearing Officer found that there was nothing to corroborate the police officer's claim that she had been hit by the mirror of a passing vehicle. There was also no evidence to support her claim that a sheriff's deputy or fireman had stopped the vehicle that had struck her. In fact, these claims were shown to be false. However, the evidence was inconclusive as to whether she made a "false claim" or what policy or rules she violated.

The F5 report form required the agency to attach a copy of the policy or rule that had been violated, which was not done.¹⁹ The Hearing Officer also noted that the F5 report is required to be signed by the agency's chief administrator, which was not done. Because the City failed to provide any evidence as to what rule or policy had been violated, there was insufficient evidence to establish that the F5 report designation was correct. Without proof of a violated policy or rule, the most appropriate designation available on the F5 report is "terminated at-will" under the "honorably discharged" category. At the time, that designation did also require an explanation to be attached. Interestingly, the Hearing Officer (after changing the designation) determined that the current explanation of her false statements should remain attached.

In the Matter of Dennis Stephens²⁰

Officer Stephens began his employment as a deputy with the Sheriff's Office in 2004, before leaving that position in 2008. Sheriff Wagner had received numerous reports that Officer Stephens was making derogatory remarks about other local towns in the county and their law enforcement officers. Although he did not dispute his controversial statements, Mr. Stephens became very upset when he was moved to a different part of the county. He

¹⁸ Texas State Office of Administrative Hearings, 2008 WL 538896 (February 19, 2008)

¹⁹ Interestingly, the Hearing Officer claimed that the police officer had the burden of proof in this matter, which shifted to the City to establish the existence of an official policy or rule that she violated. As a matter of law, the burden of proof in an F5 hearing lies with the agency/department.

²⁰ Texas State Office of Administrative Hearings, 2008 WL 5383831 (December 19, 2008)

claimed that he was being punished for failing to support the Sheriff and his reelection campaign.

The Police Chief argued that Mr. Stephens quit without notice, but also testified that the F5 report did not list that circumstance as an option to select. Instead, the completed F5 report indicated that Officer Stephens resigned with mutual agreement with the Sheriff's Office and was not eligible to reapply. However, the evidence at hearing was that there was no mutual agreement concerning his resignation. Officer Stephens argued that he instead should have received an honorable discharge for "terminated at-will." The Hearing Officer was noted that he was not terminated at will, but quit in a hateful manner.

The Hearing Officer paid particular attention to the fact that Officer Stephens had never been written up, was not under investigation, and had not been alleged to have violated any policies. Based on this lack of documentation, the Hearing Officer determined that while Officer Stephens was the cause of his own circumstances and was not a sympathetic figure, he was simply a person who had resigned with a lack of formality. Because he was not alleged to have committed any violations, and there was no investigation pending, it was determined that he should receive an "honorable discharge," with a notation that he resigned in good standing.

In the Matter of Jennifer Dodgen ²¹

Dodgen was a new police recruit under the training of Officer Rick Garza. Because Officer Garza was going to be out of town for two days, he assigned her to desk duty to complete administrative tasks, including sixteen hours of training. Because she would be working on training materials, and not patrolling, she received permission to work from 2 p.m. to 10 p.m. instead of the midnight shift. During the first day, one of the Sergeants told her that the police department was sponsoring the Relay for Life, and that she should come to the event. The evidence at hearing was disputed as to whether this was an invitation, or required by the Sergeant. Ms. Dodgen stayed for approximately 14 hours, and then told another supervising officer that she would not be in on time for her shift the next day. The supervisor responded "no problem, don't worry about it". Officer Dodgen did not show up for her shift at all and later claimed she thought that is what the supervising officer had meant. Officer Dodgen was terminated, and received an F5 discharge rating of "dishonorable discharge" which she appealed. During the investigation, Officer Dodgen repeatedly requested a polygraph examination, which was denied based on the consistent stories of all of the other officers.

At hearing, the Hearing Officer learned that Officer Dodgen had paid for a private polygraph examination, which she passed. The Hearing Officer then made the determination that since Officer Dodgen passed the polygraph examination, that everybody else must necessarily be lying. She determined that the more appropriate discharge rating would be a "general discharge" for failing to complete the Department's probation period.

²¹ 2010WL 2686057 (Tex. St. Off. Admin. Hgs.), July 1, 2010.

In the Matter of Keith Preusse²²

Officer Preusse was given a general discharge with a notation that he had “retired or resigned through mutual agreement with the governmental entity and agent is not eligible to reapply.” At the hearing, DPS testified that they had checked the wrong box, and that they should have instead chosen the category “retired or resigned after receiving notification of pending disciplinary action, up to and including termination for an administrative violation.” Either would have been considered a general discharge as well.

Officer Preusse had been employed with DPS for approximately 17 years. In February 2008, he investigated an accident involving a fatality. As the investigation continued, Officer Preusse had a disagreement with his supervising officer as to whether a charge of driving while intoxicated was appropriate. He was disciplined, and took the necessary steps to appeal the discipline.

While the appeal was pending, Officer Preusse continued to have problems regarding a long term knee injury. He asked to be assigned to desk duty, but no such position was available. He eventually used up his paid disability leave and then went on leave without pay. During this time, he was told that his appeal of the disciplinary action could not be resolved until he returned to full duty.

In the summer of 2009, Officer Preusse retired, as he had planned for over 12 months. He returned to work for one day so that his paperwork could be processed and then retired due to permanent disability in his left knee. Because the appeal had not been resolved, he was given the “general discharge.”

The Hearing Officer noted that the “general discharge” was not proper, because the statute at the time required that the separation be **related to** a disciplinary investigation. Even though there was a disciplinary investigation, the evidence showed that the retirement was not related to the investigation, but instead was related to his disability and to his long term plans to retire. It should have been an honorable discharge.

In the Matter of Lauren Green²³

Officer Green was hired by the Department in October 2008. She successfully completed her initial hand gun qualification, but later failed to qualify on her first attempt at her semiannual qualification. After remedial hand gun training she passed. She later attended a police academy training in 2009, where it was believed that she had failed the shooting course.²⁴ Later in October of 2009, she failed to qualify on her first attempt with two separate weapons. She eventually passed with one, but not the other. She was terminated from her employment, and was given a general discharge-failed to complete her agency probation period assessment.

²² 2010WL 3260787 (Tex. St. Off. Admin. Hgs), August 9, 2010.

²³ 2010WL 3260801 (Tex. St. Off. Admin. Hgs.), August 10, 2010

²⁴ This turned out to not be true.

At hearing, the police chief acknowledged that she had qualified under the terms of the fire arms policy in both March 2009 and May 2009. It was also noted that she had passed the shooting course at the training academy unlike the chief had previously claimed. Finally, the qualification in October 2009 had not been conducted in accordance with the established procedures, because Officer Green was 5 months pregnant, and could not wear a holster or draw her weapon. Because there was not a failure to qualify on three separate attempts, it was not appropriate to award a “general discharge.” Instead, the Hearing Officer determined that Officer Green should be honorably discharged, with the notation that she had been terminated at will.