Executive Misconduct
Investigating Allegations at the Highest Level

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Thomas was the City Attorney of Victoria for thirteen years, and a staff attorney at the Texas Association of School Boards for five. Outside of work, Thomas enjoys time with his family, including his wife, five kids and two granddaughters. He is an avid fisherman and sometimes cyclist, and has been Scoutmaster of Troop 364, President of the Kiwanis Club of Victoria, Chair of the Riverside Ride, and "beanmaster" for Our Lady of Victory Cathedral's annual church festival.

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Allegations of misconduct brought against a high-profile employee, like a city manager, department head, or police chief, can raise unique issues. This paper seeks to examine some of the considerations that arise when an allegation of employee misconduct is lodged against a high-profile city employee. This is not an instruction manual for how to conduct the investigation. Such a discussion would be too broad for this context.

Internal vs. Independent Investigation

In most employee investigations, the investigation should be conducted by an internal investigator. This person might be a member of the human resources team, might be the direct supervisor of the employee under investigation or it might be an employee dedicated to internal investigations, like a police department internal affairs division. However, in the case of allegations against a high-profile employee, the organization should consider whether an outside investigator is appropriate.

There are generally three regions to bring in an outside investigator. The first, and most important, reason for bringing in an outside investigator it to preserve the public trust. An objective, 3rd party investigator who provides a thorough and transparent report of the investigation can reassure the public that the ensuing employment action, or lack thereof, was based on consideration of the facts discovered in the investigation, and not on the personalities or relationships of the people involved.

A second, and similar situation, occurs when the internal investigators who might normally handle this investigation have an actual or apparent conflict. In situations where the organization's trained investigators work under the direct or indirect supervision of the person being investigated, the organization should always consider bringing in an outside investigator.

The final situation occurs when internal resources don't have the qualifications or experience necessary to handle the investigation. Very small cities may not have a department dedicated to human resources, or the human resources department might not have employees who are experienced conducting investigations. In these situations, it is generally better to bring in someone from the outside who has the experience and qualifications to conduct an effective investigation.

The Society for Human Resource Management (SHRM) has an overview of "how to conduct an investigation" that is a good overview for someone new to Employee Investigations. It can be found online at https://www.shrm.org/resourcesandtools/tools-and-samples/how-to-guides/pages/how-to-conduct-an-investigation.aspx. In discussing how to select the person to conduct the interview, SHRM says the following:

> **HR staff**. HR is the most common choice. Employers often assign the responsibility for investigations to HR professionals because of their specialized job training as well as prior experience in conducting workplace investigations. HR representatives hold a particular advantage because of their superior interpersonal skills; employees typically feel comfortable with them and are willing to confide in them. HR also has the

ability to remain impartial, is familiar with the employees, and has knowledge of the organization and of employment laws. The disadvantage is that employees may associate HR representatives too closely with the organizational management and therefore not perceive them as neutral in the investigation. Additionally, management may object if the HR professional has a close personal connection with the involved employee(s).

Internal security. These professionals typically have training in investigation methods that allow them to obtain information from sources that a lesser-trained investigator may overlook. Conversely, because of their training and assertive style, internal security representatives may be viewed as intimidating by employees and therefore may become less productive. Employers should consider the specific security personnel's interpersonal skills, personal relationships with those involved and personality or approach to conflict. Security personnel may also have less of an employment law background, thus limiting their ability to conclude whether sources are reliable and potentially admissible in court.

Outside or nonlawyer, third-party investigators. They are more commonly used when an employer does not have an internal person who possesses the necessary qualifications or the time to conduct the investigation, or if the person accused is among the senior leaders in the organization. They can provide objectivity that an internal investigator may lack. An employer may use former senior-level employees to conduct investigations because of their knowledge of the organization and employees, or a human resource consultant or other independent investigator because of his or her knowledge specific to investigatory methods and techniques.

Legal counsel investigators, both in-house and outside. These investigators have ethical and privileged considerations. They must disclose to the parties involved in the investigation the purpose of the investigation and the attorney-employer relationship. Legal counsel investigators should clearly disclose that the organization, not the accused employee, is the client. Outside counsel brings objectivity to the investigation but lacks knowledge of the employer's culture and the employees. In-house counsel does have knowledge of company culture and its employees. However, both in-house and outside counsel can be perceived as intimidating, which could restrict the employees' willingness to be open and provide information.

Garrity Warnings

Appellants in *Garrity* were police officers in certain New Jersey boroughs who were accused of fixing traffic tickets. Before being questioned, each appellant was warned (1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer he would be subject to removal from office. The appellants answered the questions, and then, over their objections, some of their answers were used in subsequent prosecution for conspiracy to obstruct the administration of traffic laws. Upon their convictions, they appealed, arguing that their statements had been coerced. The U.S. Supreme Court reversed their convictions, determining that their statements were not voluntarily made:

> The choice imposed on petitioners was one between self-incrimination or job forfeiture. Coercion that vitiates a confession under *Chambers v. State of Florida*, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716, and related cases can be 'mental as well as physical'; 'the blood of the accused is not the only hallmark of an unconstitutional inquisition.' *Blackburn v. State of Alabama*, 361 U.S. 199, 206, 80 S.Ct. 274, 279, 4 L.Ed.2d 242. Subtle pressures (*Leyra v. Denno*, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948; *Haynes v. State of Washington*, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513) may be as telling as coarse and vulgar ones. The question is whether the accused was deprived of his 'free choice to admit, to deny, or to refuse to answer.' *Lisenba v. People of State of California*, 314 U.S. 219, 241, 62 S.Ct. 280, 292, 86 L.Ed. 166.

Garrity v. State of N.J., 385 U.S. 493, 496, 87 S. Ct. 616, 618, 17 L. Ed. 2d 562 (1967). The doctrine in *Garrity* stands for the proposition that employers investigations can create a level of coercion which deprives defendants of a free choice to admit to conduct or refuse to answer. If those statements are later used in a criminal conviction, the *Garrity* doctrine would hold that the statement's use was thus a violation of their 5th Amendment rights:

> We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic. *Garrity v. State of N.J.*, 385 U.S. 493, 500, 87 S. Ct. 616, 620, 17 L. Ed. 2d 562 (1967).

Garrity is not analogous to *Miranda*. That is, there is no obligation on a government employer to provide a *Garrity* notice to an employee prior to conducting an internal investigation. A government employer's failure to provide a *Garrity* warning does not make the internal investigation void, or prevent the employer from disciplining the employee based on facts learned or statements made during the investigation. Likewise, a government employer's failure to provide a *Garrity* warning does not deprive the employee of their rights under the 5th and 14th Amendment in a separate criminal proceeding.

Nevertheless, the use of Garrity warnings in internal investigations which involve allegations that may overlap with a criminal investigation is a common practice. The Garrity warning can be effectively used as both an educational device to tell the employee that they have an obligation to participate in the investigation, as well as an interview management technique, to relax employees who may be nervous about potential criminal investigations.

I've seen several versions of Garrity warning statements, the one I use is this:

> I, _____ am an employee of the City of _____. I was ordered by the City of _____ to submit to an interview to be conducted by _____, an attorney for the City of _____.
>
> It is my belief and understanding that the City requires this interview solely and exclusively for internal purposes and will not release it to any other agency. It is my further belief that any statement I give during this interview will not and cannot be used against me in any subsequent proceeding, including criminal proceedings, other than disciplinary proceeding within the confines of the City itself.
>
> For any and all purposes, I hereby reserve my constitutional right to remain silent under the Fifth and Fourteenth Amendments to the United States Constitution and other rights prescribed by law. Further, I rely specifically

upon the protection afforded me under the doctrines set forth In *Garrity vs. New Jersey* 385 U.S. 493 (1967), and *Spevack vs. Klein*, 385 U.S. 511 (1967).

Police/Fire employees

If the initial allegation of misconduct is a "complaint" against a peace officer or fire fighter, the investigation must comply with Chapter 614 of the Texas Government Code, which provides a measure of procedural protection for law enforcement officers, protecting them from adverse employment action based on unsubstantiated accusations. *See, e.g., Turner v. Perry*, 278 S.W.3d 806, 823 (Tex.App.—Houston [14th Dist.] 2009, pet. denied). Chapter 614's protections also apply to a school district police department. Tex. Att'y Gen. Op. GA-0251 (2004)

Chapter 614's procedural protections apply whenever there is a complaint against an officer or fire fighter, but that procedure is not imposed as a precondition to every adverse employment action that may be taken against a law enforcement officer. *Paske v. Fitzgerald*, 499 S.W.3d 465, 475 (Tex. App. 2016) (where Chief terminated officer's employment based on the Chief's personal observation of misconduct, the disciplinary action was not based on a "complaint"). However, when allegations of misconduct are serious enough to warrant termination—independently or as a component of cumulative discipline—a complaint must be filed, investigated, and substantiated. *Colorado Cnty. v. Staff*, 510 S.W.3d 435, 447 (Tex. 2017). Chapter 614 also applies to internal complaints by an officer's supervisors. *Treadway v. Holder*, 309 S.W.3d 780, 784 (Tex. App. 2010). Chapter 614 does not abrogate the right to discharge an employee at will or require cause for termination. *Colorado Cnty. v. Staff*, 510 S.W.3d 435, 446 (Tex. 2017); *see also Rogers v. City of Yoakum*, C.A.5 (Tex.)2016, 660 Fed.Appx. 279, 2016 WL 4536520

There is an exception for cities that have meet and confer agreements or collective bargaining agreements. TEX. GOV'T CODE § 614.021(b). If the meet and confer agreement or a collective bargaining agreement contains provisions related to the investigation of, and disciplinary action resulting from, a complaint against a peace officer, then peace officers covered by the agreement are not covered by Subchapter B. *see Graves v. Mack*, 246 S.W.3d 704, 708 (Tex. App. 2007). The agreement in question need only include provisions having a connection with or reference to the investigation of, and disciplinary action resulting from, a complaint against peace officers or fire fighters; the agreement need not provide or set forth procedures for investigation and disciplinary action. *Id.*

Chapter 614 provides that a complaint must be submitted in writing and be signed by the person making the complaint before the complaint can be considered by the chief. TEX. GOV'T CODE § 614.021. However, the person making the complaint does not need to be the same person as the victim of the misconduct. *Colorado Cnty. v. Staff*, 510 S.W.3d 435, 451 (Tex. 2017).

A copy of the signed complaint must be given to the officer "within a reasonable time." TEX. GOV'T CODE § 614.023(a). Disciplinary action may not be taken against an officer unless the complaint is delivered to the offcer. TEX. GOV'T CODE § 614.023(b). The officer may not be indefinitely suspended or terminated based on the subject matter of the complaint unless the complaint is investigated and there is evidence to prove the allegation of misconduct. TEX. GOV'T CODE § 614.021 (c).

City Managers and other Contract Employees

Employment contracts require additional consideration. The investigator should review employment contracts of any victim or respondent to determine whether any term of the contract impacts the investigation.

City Managers are typically employed under a written employment contract. The Texas City Manager's Association ("TCMA") provides a sample employment contract that is commonly used by cities

employing a city manager. The TCMA Sample contract provides that the city manager can be terminated for "good cause" or by a "unilateral severance."

Good cause is defined by the TCMA sample contract as:

> (a) Any willful, knowing, grossly negligent, or negligent breach, disregard or habitual neglect of any provision of this Agreement, or any willful, knowing, grossly negligent, of negligent breach, disregard or habitual neglect of any duty or obligation required to be performed by City Manager under this Agreement or under the Charter and ordinances of the City and/or the laws of the United States or the State of Texas.
>
> (b) Any misconduct of the City Manager involving an act of moral turpitude, criminal illegality (excepting minor traffic violations), or habitual violations of the traffic laws, whether or not related to City Manager's official duties hereunder.
>
> (c) Any willful, knowing, grossly negligent, or negligent misapplication or misuse, direct or indirect, by City Manager of public or other funds or other property, real, personal, or mixed, owned by or entrusted to the City, any agency or corporation thereof, or the City Manager in his official capacity.

Absent conduct that meets the definition of good cause, the city may choose to terminate the city manager's employment under a process called a "unilateral severance." The TCMA sample contract requires that the city manager be paid various amounts of money on a unilateral severance, including the value of a certain number of months of the manager's then current salary, continued health benefits, and professional out placement services. The payments due under a unilateral severance are often negotiated at the time of hire, and may include more or fewer terms than the sample.

Public Officials

In a home rule city, the Charter may set forth specific conduct that can be grounds for discipline. Many charters have language prohibiting conflicts of interest, nepotism, and acceptance of certain gifts. Some charters may include penalties for knowing charter violations. The City of Palacios, for example, includes the following language:

> Forfeiture of Office. The Mayor or a Councilmember shall forfeit his/her office if he/she:
>
> > (1) Lacks, at any time during the term of office for which elected, any qualification for the office prescribed by this Charter or by State Law;
> >
> > (2) Intentionally violates any express prohibition of this Charter, as determined by a majority vote of all remaining members of the City Council;

In a general law city, an officer of a municipality's governing body may be removed from office by the district court for (1) incompetence; (2) official misconduct; or (3) alcoholic "intoxication on or off duty." TEX. GOV'T CODE § 21.022, 21.025. Incompetence is (a) "gross ignorance of official duties"; (b) discharging duties with gross carelessness; or (c) "inability or unfitness to promptly and properly discharge official duties because of a serious mental or physical defect" acquired after the election. *Id.* § 21.022(2). "Official misconduct" is "intentional unlawful behavior relating to official duties by an officer entrusted with the administration of justice or the execution of the law. The term includes an intentional or corrupt failure, refusal, or neglect of an officer to perform a duty imposed on the officer by law." *Id.* § 21.022(4).

An officer convicted of any felony or misdemeanor involving official misconduct "operates as an immediate removal from office." *Id*. § 21.031(a). *Wenger v. Flinn*, 648 S.W.3d 448, 456 (Tex. App. 2021)

Certain employees are also public officers. In a Type A general law city, in addition to the members of the governing body of the municipality, the other officers of the municipality are the secretary, treasurer, assessor and collector, municipal attorney, marshal, municipal engineer, and any other officers or agents authorized by the governing body. TEX. LOC. GOV'T CODE ANN. § 22.071. These other public officers may be removed from office by a majority vote of City Council only for incompetency, corruption, misconduct, or malfeasance in office after providing the officer with due notice and an opportunity to be heard. TEX. LOC. GOV'T CODE ANN. § 22.077(a); however, with a supermajority of two-thirds of the elected aldermen, these additional officers can be removed for a lack of confidence. TEX. LOC. GOV'T CODE ANN. § 22.077(b). These are two clear and distinct methods for removal. Tex. Att'y Gen. Op. KP-0061 (2016). "If an officer is charged with incompetency, misconduct, corruption or malfeasance, he may be removed after due notice and an opportunity to be heard in his defense. Otherwise—and this is clear—a city officer can be discharged at any time for "a want of confidence" by a two-thirds vote of a city council." *Hamilton v. City of Wake Village*, 593 F. Supp. 1294, 1296-97 (E.D. Tex. 1984).

A general law city may by election adopt a city manager form of government. TEX. LOC. GOV'T CODE ANN. § 25.021. The city manager is appointed by and serves at the will of the governing body of the municipality. TEX. LOC. GOV'T CODE ANN. § 25.028. Consequently, any disciplinary action would need to be approve by a majority of Council, unless the city has adopted an ordinance stating otherwise. TEX. LOC. GOV'T CODE ANN. § 25.029. In a general law city that has adopted the city manager form of government, the other public officers, except members of the governing body of the municipality, are appointed as provided by ordinance. TEX. LOC. GOV'T CODE ANN. § 25.051.

Municipal Court Judge

The judge of a municipal court serves for a term of office of two years unless the municipality provides for a longer term pursuant to Article XI, Section 11, of the Texas Constitution. TEX. GOV'T CODE ANN. § 29.005. A municipal judge of a general law municipality may be removed from office at any time for the reasons stated and by the procedure provided for the removal of members of a municipal governing body in Subchapter B, Chapter 21, Local Government Code. As discussed above, an officer of a general law municipality's governing body may be removed from office by the district court for (1) incompetence; (2) official misconduct; or (3) alcoholic "intoxication on or off duty." TEX. GOV'T CODE ANN.§ 21.022, 21.025. A municipal judge of a home-rule municipality may be removed from office by the governing body for the reasons stated and by the procedures provided for the removal of judges in the charter of the municipality. TEX. GOV'T CODE ANN. § 30.000085.

Public Relations

In the context of an investigation into allegations of misconduct, the goal of public relations activities should always be to preserve the credibility and trustworthiness of the organization and its processes in the eyes of the public.

I've heard crisis managers describe the three steps of public relations as "1. Tell the truth, 2. Tell it all, and 3. Tell it first." However, a crisis management public relations strategy is more effectively developed with input from risk managers and legal counselors, who will likely advise that some truths need not be told. Finding an effective balance between these two ideals is both difficult and necessary.

As an initial consideration, I usually advise clients that they should make a public statement about the allegations being investigated if the public is already aware of them. For example if a senior level official, like a finance director, is suspended from work during the pendency of the investigation, and members of the public are aware of the allegations, social media comments may need to be addressed. In

that situation, I typically advise the organization to release a very general statement at the time the employee is suspended:

> "Finance Director Bob Role was placed on temporary administrative leave today to allow time to investigate allegations of misconduct within the finance department. The city will not comment further on the allegations until the investigation is completed and the city can provide an accurate description of what occurred."

On the other hand, I believe that the organization should not create a story that does not yet exist. If the allegations have arisen internally and are being addressed before the public has become aware of the allegations, I usually recommend that the organization not release a statement about the allegations or the investigation. There are two reasons for this. First, and most importantly, we should treat our employees with dignity and respect, even if they are alleged to have violated some internal policy. It may be that the investigation proves the alleged misconduct never occurred. Second, I believe that negative stories are difficult to overcome, and to the extent that we can handle the allegations internally, we shouldn't "hang our dirty laundry on the line."