

2018 TCAA SUMMER CONFERENCE

INTEGRATING THE MORTON ACT AND
COLORADO COUNTY V. STAFF INTO
LAW ENFORCEMENT DISCIPLINARY
PRACTICES

(INCLUDING ATTORNEY ETHICS)

- PRESENTED BY GEORGE E. HYDE, PARTNER



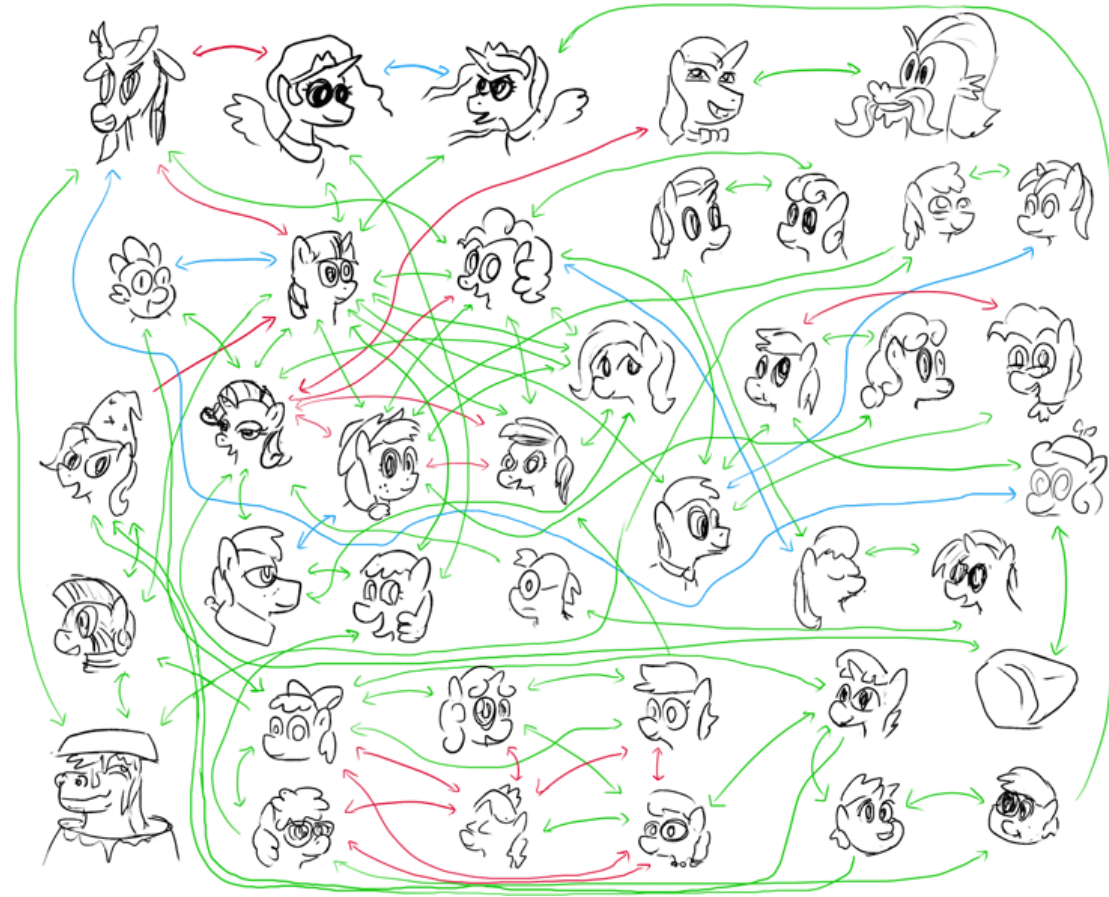
WHERE TO BEGIN?

We have 45
minutes.

This topic is your
ethics training,
so it is good that
you are here.

LAW ENFORCEMENT DISCIPLINARY PRACTICES

“POLICE DEPARTMENTS’
INTERNAL DISCIPLINARY
PROCEDURES, OFTEN
ESTABLISHED THROUGH THE
COLLECTIVE BARGAINING
PROCESS, CAN SERVE AS
BARRIERS TO OFFICER
ACCOUNTABILITY”



“POLICE DISCIPLINARY APPEALS SERVE AS AN
UNDERAPPRECIATED BARRIER TO OFFICER
ACCOUNTABILITY AND ORGANIZATIONAL REFORM”



POLICE DISCIPLINARY PROCEDURES - INTERNAL

- LONG BEEN A SOURCE OF FRUSTRATION
- POLICE EXECUTIVES ARE COMMONLY UPSET BY THE MONTHS — AND SOMETIMES YEARS — IT TAKES FROM THE TIME OF AN ALLEGATION OF MISCONDUCT, THROUGH THE INVESTIGATION, AND TO OBTAIN RESOLUTION
- FREQUENCY WITH WHICH DECISIONS ARE REVERSED OR MODIFIED
- DISCIPLINE IS ARBITRARY AND FAILS TO MEET THE FUNDAMENTAL REQUIREMENTS OF CONSISTENCY AND FAIRNESS

POLICE DISCIPLINARY PROCEDURES - EXTERNAL

- FEW IN THE COMMUNITY ARE INTERESTED IN THE PROCESS
- MYSTIFIED BY BOTH THE TIME INVOLVED IN DEALING WITH COMPLAINTS OF MISCONDUCT AND THE VARIOUS STEPS IN A LENGTHY, CONFUSING AND OVERLY LEGAL PROCESS

POLICE DISCIPLINARY PROCEDURES - MUTUAL

IT IS A FRUSTRATING EXPERIENCE THAT LEAVES EVERYONE WITH A SENSE THAT IT HAS FALLEN WELL SHORT OF THE PRIMARY PURPOSE OF HOLDING OFFICERS ACCOUNTABLE FOR THEIR ACTIONS AND ENCOURAGING BEHAVIOR THAT FALLS WITHIN DEPARTMENTAL EXPECTATIONS AND VALUES

IDEAL POLICE BEHAVIOR – CODE OF ETHICS

- PROTECT THE INNOCENT AGAINST DECEPTION, THE WEAK AGAINST OPPRESSION OR INTIMIDATION, AND THE PEACEFUL AGAINST VIOLENCE OR DISORDER
- RESPECT THE CONSTITUTIONAL RIGHTS OF ALL MEN TO LIBERTY, EQUALITY AND JUSTICE
- KEEP MY PRIVATE LIFE UNSULLIED AS AN EXAMPLE TO ALL

IDEAL POLICE BEHAVIOR – CODE OF ETHICS

- MAINTAIN COURAGEOUS CALM IN THE FACE OF DANGER, SCORN, OR RIDICULE; DEVELOP SELF-RESTRAINT; AND BE CONSTANTLY MINDFUL OF THE WELFARE OF OTHERS
- HONEST IN THOUGHT AND DEED IN BOTH MY PERSONAL AND OFFICIAL LIFE, I WILL BE EXEMPLARY IN OBEYING THE LAWS OF THE LAND AND THE REGULATIONS OF MY DEPARTMENT

IDEAL POLICE BEHAVIOR – CODE OF ETHICS

- WHATEVER I SEE OR HEAR OF A CONFIDENTIAL NATURE OR THAT IS CONFIDED TO ME IN MY OFFICIAL CAPACITY WILL BE KEPT EVER SECRET UNLESS REVELATION IS NECESSARY IN THE PERFORMANCE OF MY DUTY
- I WILL NEVER ACT OFFICIALLY OR PERMIT PERSONAL FEELINGS, PREJUDICES, ANIMOSITIES OR FRIENDSHIPS TO INFLUENCE MY DECISIONS

IDEAL POLICE BEHAVIOR – CODE OF ETHICS

- WITH NO COMPROMISE FOR CRIME AND WITH RELENTLESS PROSECUTION OF CRIMINALS, I WILL ENFORCE THE LAW COURTEOUSLY AND APPROPRIATELY WITHOUT FEAR OR FAVOR, MALICE OR ILL WILL, NEVER EMPLOYING UNNECESSARY FORCE OR VIOLENCE AND NEVER ACCEPTING GRATUITIES

WHAT HAPPENED?

- COLLECTIVE BARGAINING:
 - A SUBSTANTIAL NUMBER OF THESE CONTRACTS UNREASONABLY INTERFERE WITH OR OTHERWISE LIMIT THE EFFECTIVENESS OF MECHANISMS DESIGNED TO HOLD POLICE OFFICERS ACCOUNTABLE FOR THEIR ACTIONS
 - MANY OF THESE CONTRACTS LIMIT OFFICER INTERROGATIONS AFTER ALLEGED WRONGDOING, MANDATE THE DESTRUCTION OF OFFICER DISCIPLINARY RECORDS, BAN CIVILIAN OVERSIGHT OF POLICE MISCONDUCT, PREVENT ANONYMOUS CIVILIAN COMPLAINTS, INDEMNIFY OFFICERS IN CIVIL SUITS OR REQUIRE ARBITRATION IN CASES OF DISCIPLINARY ACTION

ACROSS MANY OF THE NATION'S LARGEST CITIES, SUPERVISORS CANNOT EASILY RESPOND TO EXTERNAL LEGAL PRESSURE BY PUNISHING PROBLEMATIC OFFICERS OR IMPLEMENTING RIGOROUS DISCIPLINARY PROCEDURES

INSTEAD, MANY COURTS HAVE HELD THAT INTERNAL-INVESTIGATION AND DISCIPLINARY PROCEDURES ARE APPROPRIATE SUBJECTS FOR COLLECTIVE BARGAINING UNDER PUBLIC-EMPLOYEE LABOR LAWS

THIS COLLECTIVE BARGAINING PROCESS HAPPENS LARGELY OUTSIDE OF THE PUBLIC VIEW AND WITH MINIMAL INPUT FROM COMMUNITY STAKEHOLDERS MOST AT RISK OF EXPERIENCING POLICE MISCONDUCT

WHAT HAPPENED?

- COMPETITIVE EMPLOYMENT:
 - LAW ENFORCEMENT EMPLOYERS COMPETE FOR APPLICANTS AND EMPLOYEE RETENTION
 - NON-COLLECTIVE BARGAINING CITIES INCREASE COMPENSATION AND BENEFITS AND ADOPT POLICIES TO COMPETE WITH OTHER CITIES FOR EMPLOYEES
 - STANDARDS CHANGE BASED ON TRENDS IN THE MOST ATTRACTIVE WORKPLACE

WHAT HAPPENED?

- INDEPENDENT ARBITRATION & APPEALS OUTSIDE CONTROL GROUP:
 - THIRD-PARTY DECISION MAKERS
 - CONTROL DISCIPLINARY FINDINGS & PUNISHMENT

2013 TEXAS LEGISLATURE PASSES THE MORTON ACT

- APPLIES TO ALL CRIMINAL CASES
- AMENDS CCP 39
- PLACES DUTIES ON OFFICERS AND PROSECUTORS
- WHEN CONSIDERING *BRADY* EVIDENCE, WE HAVE THREE CATEGORIES

2013 TEXAS LEGISLATURE PASSES THE MORTON ACT

- EXCULPATORY INFORMATION- INCLUDES WHAT IS COMMONLY CALLED "BRADY MATERIAL" AS WELL AS INFORMATION THAT MUST BE DISCLOSED UNDER CODE OF CRIMINAL PROCEDURE CHAPTER 39
 - "BRADY MATERIAL" IS EVIDENCE IN THE GOVERNMENT'S POSSESSION THAT IS FAVORABLE TO THE ACCUSED AND THAT IS MATERIAL TO EITHER GUILT OR PUNISHMENT
 - IT INCLUDES EVIDENCE THAT MAY IMPACT THE CREDIBILITY OF A PROSECUTION WITNESS, INCLUDING LAW ENFORCEMENT OFFICERS

2013 TEXAS LEGISLATURE PASSES THE MORTON ACT

CHAPTER 39 INFORMATION -- A BROADER CATEGORY OF INFORMATION THAN BRADY MATERIAL

- IT IS EVIDENCE THAT IS MATERIAL TO ANY MATTER INVOLVED IN A CRIMINAL ACTION THAT IS IN THE POSSESSION, CUSTODY OR CONTROL OF THE DEPARTMENT OR THE DEPARTMENT'S INVESTIGATING OFFICERS

2013 TEXAS LEGISLATURE PASSES THE MORTON ACT

WITNESS CREDIBILITY INFORMATION (COMMONLY REFERRED TO AS "IMPEACHMENT" EVIDENCE OR "GIGLIO/KYLES INFORMATION") - EVIDENCE THAT CAN BE USED TO EXAMINE THE VERACITY OF THE WITNESSES

- TESTIFYING ON BEHALF OF THE GOVERNMENT INCLUDING COOPERATING CIVILIANS, INFORMANTS AND INVESTIGATING LAW ENFORCEMENT OFFICERS AND EMPLOYEES

**THIS INCLUDES DISCIPLINARY HISTORY OR SANCTIONS OF LAW ENFORCEMENT OFFICERS
AND EMPLOYEES WHO ARE CALLED UPON TO TESTIFY ON BEHALF OF THE PROSECUTION**

OBLIGATIONS OF AN ATTORNEY

- EVERY PROSECUTOR IN TEXAS IS CHARGED BY LAW WITH THE DUTY “**NOT TO CONVICT, BUT TO SEE THAT JUSTICE IS DONE.**” TEXAS CODE OF CRIMINAL PROCEDURE ART. 2.01
- THIS SECTION INCLUDES: “**THEY SHALL NOT SUPPRESS EVIDENCE OR SECRETE WITNESSES CAPABLE OF ESTABLISHING THE INNOCENCE OF THE ACCUSED**”

OBLIGATIONS OF AN ATTORNEY

- ATTORNEYS ALSO MAINTAIN AN OBLIGATION IN COURT TO ONLY MAKE FACTUAL ASSERTIONS WHICH ARE TRUE OR REASONABLY BELIEVED TO BE TRUE BASED UPON A REASONABLY DILIGENT INQUIRY
- A LAWYER MAY NOT AID IN A DECEPTION OF THE TRIBUNAL OR JURY AND SUBVERT THE TRUTH-FINDING PROCESS WHICH OUR ADVERSARY SYSTEM IS DESIGNED TO IMPLEMENT
- ATTORNEYS ARE OBLIGATED TO ACT TO RECTIFY THE PRESENTATION OF FALSE TESTIMONY OR OTHER EVIDENCE AS LONG AS THERE IS A REASONABLE POSSIBILITY OF TAKING CORRECTIVE LEGAL ACTION BEFORE A TRIBUNAL

MORTON'S IMPACT ON EMPLOYMENT DISCIPLINE

- A POLICE OFFICER IS DEEMED UNSUITABLE AS A WITNESS BY THE DISTRICT ATTORNEY, BASED ON MORTON INFORMATION. THE DISTRICT ATTORNEY ANNOUNCES HIS POLICY TO REJECT ALL CASES IN WHICH THE OFFICER IS INVOLVED
- THE MORTON INFORMATION WAS USED TO TERMINATE THE OFFICER, BUT THE OFFICER WAS RETURNED TO EMPLOYMENT ON APPEAL
- WHAT IS THE OFFICER'S ROLE IN THE DEPARTMENT
- DOES THE DISTRICT ATTORNEY NOW HAVE THE DE FACTO AUTHORITY TO REMOVE POLICE OFFICERS

COLORADO COUNTY V. STAFF

- STAFF WAS A DEPUTY SHERIFF WHO SERVED AS A COLORADO COUNTY DEPUTY SHERIFF FOR NEARLY FIVE YEARS
- HE WAS ISSUED A “PERFORMANCE DEFICIENCY NOTICE” AND WAS ABRUPTLY TERMINATED, PURSUANT TO THE AT-WILL EMPLOYMENT DOCTRINE
- BEING “RUDE,” “UNACCEPTABLE,” “UNPROFESSIONAL,” “GROSSLY UNPROFESSIONAL” AND CONTRARY TO DEPARTMENTAL POLICY

COLORADO COUNTY V. STAFF

THE COURT, AFTER CONSIDERING THE CIRCUMSTANCES AND THE VARIED INTERPRETATIONS OF TEXAS GOVERNMENT CODE § 614, RULED:

- CHAPTER 614, SUBCHAPTER B DOES NOT ALTER THE AT-WILL RELATIONSHIP, BUT PRESCRIBES PROCEDURES THAT APPLY WHEN THE EMPLOYER ELECTS TO TERMINATE EMPLOYMENT BASED ON A COMPLAINT OF MISCONDUCT RATHER THAN TERMINATING AT WILL;
- THE STATUTORY PHRASE “THE PERSON MAKING THE COMPLAINT” IS NOT LIMITED TO THE “VICTIM” OF THE ALLEGED MISCONDUCT; AND
- IN THIS CASE, A SIGNED DISCIPLINARY NOTICE PROVIDED TO THE EMPLOYEE CONTEMPORANEOUSLY WITH SUSPENSION OF EMPLOYMENT WAS SUFFICIENT TO MEET CHAPTER 614, SUBCHAPTER B'S NOTICE REQUIREMENTS AND ALLOWED THE OFFICER AMPLE OPPORTUNITY TO DEFEND HIMSELF TO THE FINAL DECISIONMAKER

REINVENT DISCIPLINARY PROCEDURES TO REGAIN CONTROL OVER WORKPLACE

- REGAIN LOCAL AUTHORITY OVER EMPLOYMENT DECISIONS WHICH IMPLICATE MUNICIPAL LIABILITY ISSUES AT A MINIMUM
- DEVELOP POLICIES THAT PROVIDE NON-MISCONDUCT SEPARATIONS FROM EMPLOYMENT FOR AT-WILL EMPLOYMENT RELATIONSHIPS
- REWORK COLLECTIVE BARGAINING AND MEET & CONFER AGREEMENTS TO BUILD TRANSPARENCY, INTEGRITY AND EQUITY BACK INTO THE DISCIPLINARY PRACTICES OF THE DEPARTMENT WITH PUBLIC INVOLVEMENT AND BUY-IN