

Personnel Actions For Police Chiefs & Command Staff

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The Employment Relationship

- Key Documents in the Employment Relationship:
 - Charter / Statutory Provisions
 - Collective Bargaining Agreement
 - Police Pension Statutes
 - City Ordinances
 - City Personnel Manual / Handbook
 - PD Policy Manual

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The Employment Relationship

- At Will Employment
 - Default Relationship in Oklahoma
 - Employee/Employer can end the relationship at anytime
 - “For the Good of the Service”
 - Can fire for any reason...except an illegal one
 - Have a reason!
 - Due Process – Not Required, but you *can* give it.

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The Employment Relationship

- “Property Interest”: when Employment is not At Will
 - Substantive, legal restriction on your ability to fire
 - Employee has an expectation that they will remain employed unless you meet that restriction
 - “Cause” “Good Cause”
 “Just Cause” “Merit and Fitness”
 - Employer burden to establish “Cause” before firing
 - Cannot Take Property (Interest) without Due Process

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The Employment Relationship

- Compare:
 - 11 O.S. §10-120 (Council-Manager form of government):
[R]emovals, demotions, suspensions, and layoffs shall be made solely for the good of the service.
 - 11 O.S. §50-123 (Police Pension Protection):
No member may be discharged except for cause.

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The Employment Relationship

- Internal Process vs. Constitutional Due Process
 - Policy typically far more formal than required
 - Failure to follow internal, policy process:
 - **At Will:** No Constitutional violation, but maybe actionable in litigation under a breach of contract theory. Kester v. City of Stilwell, 1997 OK CIV APP 1, 933 P.2d 952; Parker v. Town of Chelsea, 263 Fed.Appx. 740 (10th Cir. 2008).
 - **Property Interest:** Policy violation is not a Constitutional violation. Arbitrator / Pension Board may punish you for violating your own policy process

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The Investigation

- Due Process 101 – before you can discipline:
 - Notice
 - Opportunity to be Heard
 - Reasonable Time
 - Reasonable Manner

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The Investigation

- When Process is Due: Pre vs. Post-Deprivation:
 - Pre-termination process need not be extensive or formal if adequate post-termination procedures are in place. Hennigh v. City of Shawnee, 155 F.3d 1249 (10th Cir. 1998).
 - Adequate Process: Grievance Arbitration; Police Pension Hearing under 11 O.S. §50-123.
 - Probationary Cops = At Will. See F.O.P. v. City of Ardmore, 2002 OK 19, 44 P.3d 569 (no Arbitration) & City of Jenks v. Stone, 2014 OK 11, 321 P.3d 179 (no Pension hearing).

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The Investigation

- Notice
 - When:
 - Before the interview (Reasonable Time/Manner)
 - Your Policy likely requires more
 - What:
 - Enough to know what they are answering for
 - Your Policy likely requires more
- New Allegations = New Notice = New Interview

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The Investigation

- **101 on Garrity v. New Jersey**, 385 U.S. 493 (1967):
 - 5th Amendment / Miranda: waiver of rights must be knowing and voluntary.
 - Cannot be voluntary if compelled by threat of termination (insubordination).
 - Applies to ALL public employees
 - Does not apply to Job Applicants. Vogt v. City of Hays, 844 F.3d 1235 (10th Cir. 2017).
 - CBA and/or policy may require it to be given even where 5th Amendment would not be implicated (i.e. not crime).

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The Investigation

- Investigating Criminal Activity by Public Employees:
 - Your Duty as a Cop vs. Duty as a Boss
Criminal vs. Internal Investigation
 - Separate & Independent Investigations / Investigators.
 - Internal does not have to wait on Criminal.
 - Employee can violate policy without breaking the law.
 - Outsourcing criminal investigation (e.g. to OSBI) allows you to just be a Boss.

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The Investigation

- **101 on NLRB v. Weingarten, Inc.**, 420 U.S. 251 (1975)
 - Only applies to bargaining unit employees.
 - Right to a representative their choosing.
 - Employee must request.
 - CBA and/or policy may require it to be given earlier.
 - Applies if *reasonable* belief that discipline may result.

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The Investigation

- Triggers for Investigations:
 - Formal Complaint
 - Information of a possible serious criminal act
 - Rigid Chain of Command not Always Applicable
 - Faragher v. City of Boca Raton, 524 U.S. 775 (1998): Supervisor Bypass provision required to assert defense to harassment claim. To invoke, employer must exercise reasonable care to avoid and eliminate harassment and the employee must fail to act with reasonable care to exercise employer's safeguards.
- Beware the *Pre-Investigations*

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The Investigation

- Administrative Leave
 - Paying employee to be home instead of at work
 - Preserves *status quo* while investigation is conducted
 - Must be available to us – not a vacation
- Factors to consider:
 - Nature of allegations
 - Possible threat employee poses if the allegations are true
 - Impairment to investigation if employee is in workplace
- Alternatives: restricted duty; change shift

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The Disciplinary Action

- **101 on Loudermill Hearings**; Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)
 - Applicable to all employees with a property interest
 - Pre-Discipline Hearing with final Decision Maker
 - Employee gets notice of findings (factual and conclusions on violations)
 - Purpose of hearing:
 - Investigator bias or mistakes
 - Speak now or forever hold your peace
 - Typically one side conversation

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The Disciplinary Action

- Degree of Discipline:
 - Very few violations are absolutely terminable
- Factors to Consider:
 - Employee's tenure & history (documented and otherwise)
 - Prior violations (similarity; recency)
 - Type of mistake: Law Enforcement, Admin or Supervisory
 - Prior discipline handed out for same/similar offense
 - Frequency of this kind of mistake – problem with this employee or this shift (or even this Agency)
- The Downside to *Sending a Message*

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