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**The Roots of Police Discipline - A Comparison of the Military  
Disciplinary System to its Adaptations by Law Enforcement  
Agencies**

Graduate Seminar: Labor Policy for the 21st Century

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# **The Roots of Police Discipline - A Comparison of the Military Disciplinary System to its Adaptations by Law Enforcement Agencies**

## **Introduction**

“How well we use our tools of discipline can determine how well we use our implements of war.”<sup>1</sup>

General George Washington, as one of his first actions during the American Revolution, insisted that a formalized system of military justice be established to maintain discipline within his army.<sup>2</sup> This action reflected General Washington’s understanding of the crucial connection between military discipline and military effectiveness. The importance of military discipline continues to be recognized by current American civilian and military leaders, and is manifested in both federal statutory law and in internal armed forces regulations governing military discipline.

For the individual, military law and discipline demands obedience to orders issued through an uncomplicated chain of command, adherence to high personal standards of conduct, dress, and appearance, and performance of assigned duties unhesitatingly regardless of personal risk. Military discipline supports and enforces these values and behaviors because they are essential for obtaining the ultimate goal of the armed forces - victory in combat. Fortunately, however, actual combat operations are relatively infrequent, and the military disciplinary system also is

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<sup>1</sup> Col. (Ret.) Henry Green, The Role of Punishment in the Military, The Reporter, Air Force Recurring Periodical 51-1, vol. 24 No. 2, 9 (June 1997).

designed to function in peace time to help foster an environment in which military readiness can be maintained.

The military, among its many societal functions, serves as a federal employer, responsible for recruiting and training soldiers, sailors, airmen and marines to make life or death decisions, handle deadly weapons, and preserve and protect the citizens of the United States. Very few non-military employers expect or require their employees to perform similar tasks. The very notable and obvious exception are the many federal, state, and local law enforcement agencies that employ dedicated officers who serve many of the same functions, and must face many of the same challenges, as members of the military. Perhaps not surprisingly, most American law enforcement agencies are organized along quasi-military lines.

The quasi-military structure and approach of the typical police department includes the same straight-forward chain of command, uniformity of dress and personal appearance for its officers, an emphasis on obeying orders, and required conformity to a higher standard of conduct than that expected of citizens or employees in general.<sup>3</sup> The typical law enforcement agency's military approach also includes the use of a classic military disciplinary model adapted to conform to the requirements of law enforcement and the constitutional due process protections to which public employees are entitled.

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<sup>2</sup> Id.

<sup>3</sup> Some leading authorities on the subject of police discipline disagree with the commonly-held belief that police officers are routinely held to a high standard of behavior than other employees generally. See Will Aitchison, The Rights of Law Enforcement Officers, 98 (3rd ed. 1996).

Comparing the military disciplinary system to law enforcement disciplinary systems adapted from the military model not only provides an understanding of the roots and evolution of police department disciplinary systems, such a comparison may also provide valuable ideas to elected officials, civil servants, law enforcement administrators, police officers, and union officials for modifying or improving existing police disciplinary systems.

To make this type of comparison more useful, a fundamental difference between the military disciplinary system and its law-enforcement cousins must first be understood. Military discipline originates directly from federal military criminal law, namely the Uniform Code of Military Justice<sup>4</sup> while the disciplinary systems used by police departments are not backed by the possibility of criminal action to punish an officer for failing to live up to the department's expectations. This is an important distinction. A Marine in battle, upon hearing the unwelcome sound of enemy machine gun bullets, cannot simply decide to quit the Corps and begin selling shoes for a living. A military member refusing to fight faces the possibility of a court-martial and a sentence to death.<sup>5</sup> A police officer, faced with a similarly lethal situation, could refuse to carry out his or her duties, and face far less serious potential consequences. A dismissal from the police force would be the likely result, instead of a federal conviction and a lethal injection or firing squad. In the military, even far less serious infractions are the subject of criminal statutes.

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<sup>4</sup> 10 U.S.C. §§ 801 - 946 (1995).

<sup>5</sup> Manual for Courts-Martial, [hereinafter MCM] ch. IV, ¶ 23(e) (1995).

For example, being late for work in the military is quite literally a federal offense.<sup>6</sup> Police supervisors can only dream of wielding such a big stick.

Although the fact that the entire military disciplinary system is based on criminal law must be kept in mind when making a comparison between the disciplinary systems, it is also important to note that the majority of disciplinary actions taken against military members are not criminal in nature. The Uniform Code of Military Justice (UCMJ) applies only to courts-martial actions<sup>7</sup>, and a unique UCMJ action known as non-judicial punishment.<sup>8</sup> Other disciplinary actions are not subject to the UCMJ, and are instead governed by internal rules and procedures generated by the individual branches of the armed forces. These non-criminal or “administrative” disciplinary actions are used to correct behavior and note lapses in duty performance of military members during day-to-day operations. As such, they are very much like disciplinary actions taken against police officers in a typical police department. These administrative military actions therefore are the key to a meaningful comparison.

As already mentioned, each branch of the armed forces promulgates its own regulations governing administrative disciplinary actions, and as a result, each service has developed similar, but not identical, administrative disciplinary systems. To both simplify the comparison, and focus on the expertise of the author, only the administrative disciplinary system of the Air Force will be discussed. Similarly, because police departments and the disciplinary systems that they use can vary widely based on the legal underpinnings of those systems and a variety of other

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<sup>6</sup> MCM, ch. IV, ¶ 10 (1995).

<sup>7</sup> The three types of courts-martial recognized by the UCMJ are general, special, and summary.

factors, only two specific police department disciplinary systems will be discussed, namely, that of the Fairfax County Virginia Police Department, and that of the Milwaukee, Wisconsin Police Department. Those police disciplinary systems provide excellent examples of the two major types of police disciplinary systems in use within the United States.

Both the Fairfax County Virginia Police Department and the Milwaukee, Wisconsin Police Department have developed disciplinary systems that reflect the increasing rights of public employees generally. Although now only the exception, in the past most police officers were considered "at will" employees who could be disciplined or discharged for any reason, or no reason at all.<sup>9</sup> Now most police officers are employed by police departments that have limitations on their ability to discipline officers imposed by collective bargaining agreements, civil service rules, state laws, or their own internal rules and procedures.<sup>10</sup> The Fairfax County Virginia Police Department disciplinary system for example is governed by state law, civil service rules, and their own internal rules and procedures. By way of contrast, the Milwaukee, Wisconsin Police Department not only is governed by state law, civil service rules, its own internal rules and procedures, its discretion is also further limited by a collective bargaining agreement between the city and a police officer's union. By examining these two specific police departments using related but dissimilar systems, more light can be shed on police disciplinary systems in general, and how they compare and contrast with the Air Force disciplinary system.

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<sup>8</sup> 10 U.S.C. § 815 (1995).

<sup>9</sup> Aitchison at 89.

<sup>10</sup> Id.

Since police disciplinary systems have evolved using a quasi-military model, the archetype military model, represented by the Air Force system, will be examined first.

## **The United States Air Force Disciplinary System**

### **Sources of Military Law - The Uniform Code of Military Justice and the Manual for Courts-Martial**

The Constitution of the United States provides that Congress shall have the power to “make Rules for the Government and Regulation of the land and naval Forces.”<sup>11</sup> Congress used its constitutional power to enact the Uniform Code of Military Justice<sup>12</sup> in 1950. The Uniform Code of Military Justice (UCMJ) sets forth a separate system of military criminal law for the armed forces.<sup>13</sup> Article 36 of the UCMJ authorizes the President of the United States to prescribe procedures for cases arising under the UCMJ, applying “..principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States District courts...” as far as practicable, and not contrary to or inconsistent with the UCMJ.<sup>14</sup> The UCMJ also states that “[t]he punishment which a court-martial may direct for an offense may not exceed such

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<sup>11</sup> U.S. Const. article I, § 8.

<sup>12</sup> 10 U.S.C. §§ 801 - 946 (1995). The UCMJ since enacted, has been substantially revised by both the Military Justice Acts of 1969 and 1983. See U.S. Army, Senior Officer's Legal Orientation Text JA 320, ch. 1 (1998). [hereinafter JA 320].

<sup>13</sup> Id. at 1.

<sup>14</sup> 10 U.S.C. § 838



limits as the President may prescribe for that offense.”<sup>15</sup> The Rules for Courts-Martial, Military Rules of Evidence, and the Punitive Articles (setting forth the maximum allowable punishments for offenses under the UCMJ) have been promulgated by the President as Executive Orders, and they, along with the UCMJ, form the essential parts of the Manual for Courts-Martial, 1995 Edition. A well-worn copy of this one-volume maroon-colored manual is found in the office of every judge advocate in the United States Air Force.

The other components of the Manual for Courts-Martial (MCM) flesh out the bare bone provisions of the UCMJ. Further detail is also provided by various regulations pertaining to military justice published by each branch of service. The Air Force refers to these regulations as “Air Force Instructions” (AFIs).

All of the sources of military law are interpreted by the various levels of courts in the court-martial system. The court-martial is the trial-level court in the military justice system. The Air Force Court of Criminal Appeals is the first-level Air Force appellate court. The next and highest appellate court in the military system is the Court of Appeals for the Armed Forces, consisting of five civilian judges appointed by the President. The United States Supreme Court and lower federal courts also may hear cases involving military criminal law, usually involving appeals based on lack of jurisdiction or constitutional issues.<sup>16</sup>

### **Offenses Under the Uniform Code of Military Justice**

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<sup>15</sup> 10 U.S.C. § 856

<sup>16</sup> JA 320 at ch. 1.

The entire military justice system revolves around the list of criminal offenses found in the UCMJ, and the maximum punishments authorized by the President for the commission of those offenses in the MCM. As a comprehensive statutory system of criminal law, the majority of enumerated offenses are essentially the same as those found in the criminal code of a state such as Virginia or Wisconsin. For example, punishable offenses under the UCMJ include murder, manslaughter, rape and carnal knowledge, robbery, arson, burglary, and assault.<sup>17</sup> The UCMJ also includes criminal offenses that are uniquely military. Being absent without leave (AWOL) is one such offense, which can simply consist of failing to go to the appointed place of duty at the time prescribed. Other examples of uniquely military criminal offenses include insubordination, disobeying a lawful order or being derelict in the performance of assigned duties, cowardice before the enemy, and committing "conduct unbecoming to an officer and a gentleman."<sup>18</sup> Conduct unbecoming an officer has two simple elements: (1) that the accused did or omitted to do certain acts; and (2) that, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman.<sup>19</sup> An officer, by committing an offense under the UCMJ, such as stealing property from another, may by committing that offense, also be found guilty of the offense of conduct unbecoming an officer.<sup>20</sup> Although this is

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<sup>17</sup> 10 U.S.C. §§ 918, 919, 920, 922, 926, 929, 928.

<sup>18</sup> 10 U.S.C. §§ 891, 892, 899(5), 133.

<sup>19</sup> 10 U.S.C. § 933.

<sup>20</sup> MCM, ch. IV, ¶ 59 (1995).

certainly a broad-ranging and rather amorphous offense, it is not the only, or most expansive, catch-all type offense in the UCMJ. That role is filled by Article 134, the General Article.

Article 134 of the UCMJ makes "...all disorders and neglects to the prejudice of good order and discipline in the armed forces," and "...all conduct of a nature to bring discredit upon the armed forces" that are not specifically covered by the UCMJ punishable as criminal offenses.<sup>21</sup> In other words, if a commander believes that some conduct disrupts discipline, or is service discrediting, an unique offense encompassing that act can simply be created and alleged using this provision.

Along with the increased exposure to potential criminal liability for behavior that would not be considered criminal outside of the military comes some increased due process rights for individuals that are governed by the UCMJ. These increased due process rights are particularly significant during the investigative stage and during any administrative or criminal proceedings that may result from the investigation. These military due process protections are not shared by police officers facing similar circumstances.

### **Rights of Individual Airmen During the Investigatory Stage**

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<sup>21</sup> 10 U.S.C. § 934.

Because the commission of even minor disciplinary infractions by Air Force members could be criminal offenses, the right against self-incrimination applies when airmen are questioned concerning any suspected disciplinary violations. Article 31 of the UCMJ<sup>22</sup> states in part:

“(a) No person...may compel any person to incriminate himself or to answer any question the answer which may tend to incriminate him.

(b) No person...may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a court-martial.”

The requirement that military members to be read their “Article 31 rights” predates Miranda warnings by more than a decade. Importantly, the requirement to read an airman his or her rights does not just apply to custodial interrogations. In the military, due perhaps to the ever present influence of rank and position and the potential for an airman to be intimidated into making an involuntary statement, an airman must be read his or her rights any time an airman is going to be questioned about suspected misconduct. These rights are more expansive than those guaranteed

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<sup>22</sup> 10 U.S.C. § 831.

by the 5th Amendment. Not only do airmen have the right to remain silent, they also have the right to free representation by military legal defense counsel.<sup>23</sup>

### **The Air Force Administrative Disciplinary System**

Many civilians equate "military discipline," with "court-martial," and may assume that any investigation of alleged disciplinary infractions routinely leads to court-martial action. This however, is not the case. The majority of disciplinary actions in the Air Force have little to do with courts-martial or federal criminal law.

Courts-martial and non-judicial punishment pursuant to Article 15 of the UCMJ<sup>24</sup> (referred to as "Article 15s" in the Air Force) are the only two disciplinary measures governed by the UCMJ and the MCM. They are referred to as "punitive" sanctions.<sup>25</sup> All other Air Force disciplinary tools are referred to as "administrative" actions. Most disciplinary actions in the Air Force are either Article 15s, which although punitive, do not result in any type of criminal conviction, or administrative actions. These disciplinary actions reflect the measures routinely used by the Air Force, and they are in many ways similar to the disciplinary measures used by both the Fairfax County and Milwaukee police departments.

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<sup>23</sup> The Air Force provides defense counsel through the Office of the Area Defense Counsel (ADC). The ADC is a military attorney (judge advocate) who operates independently of any commander at the Air Force base to which he or she is assigned. The ADC essentially serves in the role of "public defender" for Air Force members facing adverse administrative or criminal actions.

<sup>24</sup> 10 U.S.C. §815.

<sup>25</sup> U.S. Air Force, Military Commander and the Law 120 (3rd ed. 1996) [hereinafter Military Commander].

Air Force commanders, at all levels of command are responsible for maintaining good order and discipline.<sup>26</sup> In order to maintain good order and discipline, commanders have a full range of administrative disciplinary tools at their disposal. Although the concept of progressive discipline is recognized in the Air Force, and the disciplinary tools available reflect this concept, Air Force commanders do not have to use the disciplinary actions available in a rigidly progressive fashion. Instead, commanders are free to use their own discretion to determine the appropriate disciplinary action to fit the particular infraction committed, based on the commander's usually considerable military experience. The range of disciplinary tools available is considerable, and the amount of discretion to impose them is broad. Commonly used disciplinary tools include counselings, admonitions and reprimands, unfavorable information files, Article 15 punishment, and administrative discharge action.

#### Counselings, Admonitions, and Reprimands

Counselings, admonitions, and reprimands are frequently used disciplinary actions. The purpose of these actions is to "improve, correct, and instruct subordinates who depart from standards of performance, conduct, bearing, and integrity, on or off duty, and whose actions degrade the individual and unit's mission."<sup>27</sup> Any commander, supervisor, or other person in authority can issue one of these actions against a subordinate.

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<sup>26</sup> Id. at 119.

<sup>27</sup> Air Force Instruction 36-2907, ¶ 3.1, Unfavorable Information File (UIF) Program, (1 May 1997) [hereinafter AFI 36-2907].

The least severe of the three is the counseling. First line supervisors routinely use counselings, and they can be oral or written. If the counseling is in writing, it is labeled a "Record of Individual Counseling," or "Letter of Counseling" (LOC) that can be prepared on a standardized form, or typed out on plain bond paper.<sup>28</sup> No specific format or content is required, although the LOC should contain a statement of the facts or circumstances that made the counseling appropriate, recommendations or advice about how the person being counseled can improve his or her behavior, and a summary of any comments of the person being counseled.<sup>29</sup> LOCs can be used to help formulate the written performance evaluations that are done at least yearly on all Air Force members.

A letter of admonishment occupies the middle-ground between a LOC and a letter of reprimand. Although authorized, it is rarely used, and little guidance is given on when it is appropriate to use.<sup>30</sup>

A letter of reprimand (LOR) "is more severe than a counseling or admonition and indicates a stronger degree of official censure."<sup>31</sup> This written document includes the same type of information as that found in a LOC or LOA.

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<sup>28</sup> Id., ¶¶ 3.2.1 - 3.2.2.

<sup>29</sup> Military Commander at 121.

<sup>30</sup> AFI 36-2907 ¶ 3.3 states: "An admonishment is more severe than a LOC/RIC. Use it to document an infraction serious enough to warrant the LOA. Do not use it when a reprimand is more appropriate."

<sup>31</sup> Id. ¶ 3.4.

The member receiving any of these disciplinary actions has three days to respond by submitting written matters to the person who issued the administrative action. If submitted, this documentation becomes part of the disciplinary record. This right of reply has been known to come back to haunt both the member and his or her military defense counsel if other more severe disciplinary actions are later taken. Responses to these type of minor disciplinary actions are usually written on the spur of the moment without consulting legal counsel, and done while upset about being disciplined. On reflection, more than one member has wished he or she had the right to retract responses made in haste. On the other hand, if a member makes a compelling response, the person administering the action has the option of simply withdrawing the disciplinary action.

Other than the right to respond to the disciplinary action within three days, the Air Force member receiving this type of disciplinary action has no other due process rights. There is no appeal process or other reviews of this action, which is significant, because this action, although of a seemingly minor nature, can have a direct negative impact on an airman's career. A LOC, LOA, or LOR can be used to document incidents that are in turn made part of an airman's performance evaluation report which plays a major role in deciding duty assignments, promotions, and other opportunities. This type of disciplinary action can have an even further detrimental effect on an individual if it is included in what is known as an "unfavorable information file."

#### Unfavorable Information File

An unfavorable information file (UIF) is officially defined as "an official record of unfavorable information about an individual" that "...documents administrative, judicial, or non-judicial



censures concerning the member's performance, responsibility, behavior, and so on."<sup>32</sup> If an UIF is established, this special record, filled with nothing but negative feedback on an airman, is reviewed when that individual is considered for promotion, re-enlistment, assignment to another Air Force base or new job, and before a performance report is completed, among other occasions.<sup>33</sup> Commanders have discretion whether or not to place a LOC, LOA, or LOR given to an enlisted member in an UIF.<sup>34</sup> An officer's LOR must be placed in an UIF. Commanders must notify subordinates in writing of discretionary decisions to place disciplinary actions in an UIF. The airman has three days to respond to this decision, and to provide additional information to the commander.<sup>35</sup> After considering any information submitted, if the commander decides to place the disciplinary action in an UIF, the member's additional matters are also included in the record. The member is then informed of the commander's decision. Again, there is no other appeal mechanism to this decision.

The fact that a LOC, LOA, or a LOR given to an enlisted member may or may not be placed in a UIF leads to a very significant dichotomy between those actions that are and those actions that are not filed in an UIF. A LOC, LOA, or LOR may be completed, and stay with the first line supervisor, never to be seen or heard from again - unless the member gets into further trouble. In Air Force slang, this is called a "desk drawer" action. The knowledge that a sergeant has decided to keep the action in his or her desk rather than submit it to the commander for a decision

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<sup>32</sup> Id. ¶ 1.1. The words "and so on" do appear in the AFI.

<sup>33</sup> See Id. ¶ 1.5.

<sup>34</sup> Id. ¶ 1.3.1.

<sup>35</sup> Id. ¶ 1.3.4.

whether or not to put it in an UIF allows the sergeant/supervisor to exercise both discretion and mercy - usually with the understanding that the next infraction will come to the commander's attention.

If these disciplinary actions do not prove effective in modifying a subordinate's behavior, or a more serious infraction has allegedly been committed, the next major rung in the disciplinary ladder is Article 15 action.

#### Non-Judicial Punishment (Article 15)

The gap between the Air Force's purely administrative disciplinary actions, and trial by court-martial is bridged by a unique disciplinary proceeding, Article 15 non-judicial punishment. Commanders are expected under normal circumstances to maintain good order and discipline within their commands by using the numerous administrative disciplinary tools at their disposal.<sup>36</sup> If administrative actions prove ineffective, but a court-martial is deemed too harsh considering the offense committed and the circumstances surrounding it, then the commander has the option of offering a member of his or her command Article 15 proceedings.<sup>37</sup>

An Article 15 is a proceeding that allows the member who is accused of committing a minor offense<sup>38</sup> to choose to either have his or her commander decide whether an offense was

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<sup>36</sup> MCM, ch. V, ¶ d (1995).

<sup>37</sup> *Id.* In the Air Force and Army, this disciplinary action is known as an "Article 15," while in the Navy and Coast Guard, it is referred to as a "Captain's Mast."

committed and if so what the punishment should be, or to reject this determination by the commander and demand trial by court-martial.

If Article 15 punishment proceedings are initiated against an airman, the commander serves a copy of Air Force Form 3070, "Record of Nonjudicial Punishment Proceedings" on the airman.<sup>39</sup> This form notifies the airman of what UCMJ offense was allegedly committed, and how it was violated. This language is usually drafted by an Air Force judge advocate who insures that an actual UCMJ offense is set forth<sup>40</sup> The standardized form given to the airman sets forth in detail the legal rights he or she is entitled to, and the options that the airman can exercise. Once this form is served, the airman has the right to examine all statements and evidence that is available to the commander.<sup>41</sup> This evidence is given to the airman, or supplied by the legal office to the Area Defense Counsel, or both.

An airman facing Article 15 proceedings has the right to consult with the ADC free of charge, and exercising this right is strongly encouraged. In fact, at the time the Article 15 action is served, the airman's squadron usually informs the member that an appointment has also been scheduled with an Air Force defense counsel at the ADC office so that his or her legal rights and options can be confidentially discussed.

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<sup>38</sup> Per the MCM, ch. V, ¶ d(3), an offense is not considered minor if a general court-martial could impose a sentence that could include a dishonorable discharge, or confinement for more than one year. Other factors to be considered include the nature of the offense and the circumstances of its commission, the offender's age, rank, duty assignment, military record, and experience.

<sup>39</sup> MCM, ch. V, ¶ 4.4.1 (1995).

<sup>40</sup> Air Force Instruction 51-202, ¶ 4.3, Nonjudicial Punishment, (1 Oct. 1996) [hereinafter AFI 51-202].

<sup>41</sup> Id. ¶ 3.4. Provided the evidence is not privileged or restricted by law, regulation, or instruction.

Once the commander offers Article 15 proceedings to an airman, the airman has three duty days to reply.<sup>42</sup> During these three duty days, the airman is encouraged to consult with legal counsel, and to decide whether to accept or reject Article 15 proceedings. In making this decision, the airman must consider the maximum punishments that may be imposed via an Article 15, the possibility that some of that punishment may be suspended, the due process rights that the airman is entitled to, and the risks involved with demanding trial by court-martial.

The maximum punishment that may be imposed by Article 15 depends on the rank or position of the commander, and the rank of the airman subject to punishment.<sup>43</sup> The maximum authorized punishment for enlisted members consists of correctional custody for 30 days or less, forfeiture of not more than one-half of one month's pay per month for two months, reduction to a lower pay grade, extra duties for not more than 45 days, or restriction to specified limits for not more than 60 days.<sup>44</sup> Correctional custody consists of a 24-hour-a-day mandatory assignment to a special facility where the work and living conditions resemble that of basic military training, complete with yelling instructors and unpleasant menial tasks. Correctional custody also uses classes and instruction designed to motivate the individual to want to conform to Air Force standards and correct perceived problems. Correctional custody is, as one might imagine, a

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<sup>42</sup> Id. ¶ 4.7.

<sup>43</sup> See Air Force Form 3070, table of maximum permissible punishments, for more information on specific punishment authority based on rank and position.

<sup>44</sup> MCM, ch. V, ¶ 5c. There are certain restrictions on certain combinations of these punishments. Restriction and extra duties may be combined to run concurrently, but the total may not exceed the maximum impossible or extra duties. If a reduction is imposed, forfeiture of pay is based on the rank to which the airman was reduced, even if the reduction is suspended. Id.

wildly unpopular form of punishment. Restriction to limits is simply a restriction of the airman to a designated geographical area, typically the limits of the Air Force base.<sup>45</sup> The airman may be required to report to a designated place at specified times if necessary to insure compliance.<sup>46</sup> Depending on the location of the Air Force base, and its proximity to interesting off-base activities or significant others, this punishment also can be particularly unpleasant.

An airman contemplating Article 15 proceedings also must consider that his or her commander is authorized to suspend portions of any Article 15 punishment imposed. Suspension of a reduction in rank or forfeitures of pay is not only authorized for first time offenders, but encouraged.<sup>47</sup> Although a commander has the authority in any case to impose the maximum authorized punishment, this is normally reserved for the most serious types of offenses punished under Article 15, or where past rehabilitative efforts have failed, or where a commander is dealing with a "recalcitrant offender."<sup>48</sup>

If an Article 15 punishment is suspended, the application of all or part of that particular punishment is postponed for a specific probationary period.<sup>49</sup> If the airman does not engage in further alleged misconduct during that probationary period, which is limited to a maximum

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<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> AFI 51-202, ¶¶ 5.4.2, 8.3.

<sup>48</sup> Id.

<sup>49</sup> AFI 51-202, ¶ 8.3. See Also MCM, ch. V, ¶ 6 (1995).

period of six months, the suspended portion of the punishment is automatically canceled.<sup>50</sup> If the airman does get in trouble during this probationary period, the suspended punishment can be carried out after notifying the airman of this intent, and allowing him or her a chance to respond to this decision.

The airman must also consider that if Article 15 proceedings are accepted, this is not an admission of guilt to the alleged offense.<sup>51</sup> The airman has the right to request a hearing of sorts, know as a "personal appearance" before the commander.<sup>52</sup> This personal appearance is usually attended by the commander, a senior enlisted advisor to the commander called a First Sergeant, and the accused airman.<sup>53</sup> The airman may present matters either orally or in writing in an attempt to show that the offense was not committed. The airman's defense counsel usually helps prepare these matters. The airman may also admit committing the offense, but present evidence in mitigation or extenuation. The airman can be accompanied by legal counsel or any other representative, although the Air Force will not pay for the travel of a representative, and is not required to delay the proceeding to allow the representative's presence.<sup>54</sup>

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<sup>50</sup> Id.

<sup>51</sup> Military Commander at 106.

<sup>52</sup> MCM, ch. V, ¶ 4c (1995).

<sup>53</sup> In all but the most high profile cases, the commander has no legal representative on hand. In many cases, no defense counsel is present at this appearance either. In cases where the issue presents no real legal issues, such as a clear case where an airman was repeatedly late to work, a commander may not only feel the presence of a defense attorney is unnecessary and annoying, but a sign that the airman is still not accepting both personal responsibility, and a sense of reality.

<sup>54</sup> MCM, ch. V, ¶ 4c (1995).

The airman also has the right to have witnesses present at the Article 15 presentation, including those adverse to the airman, if the commander deems these statements relevant and the witnesses are "reasonably available."<sup>55</sup> There is no subpoena power to compel the attendance of civilians. Military witnesses need only be ordered to appear. If a spokesperson does appear, the spokesperson "may speak for the service member, but may not question witnesses except as the non-judicial punishment authority may allow as a matter of discretion."<sup>56</sup> This means that there may or may not be the right of cross-examination, completely at the discretion of a commander who typically has no legal training, and who has already determined that Article 15 proceedings were appropriate.

The presentation is not designed to be adversarial in nature, and no evidence against the airman is presented by the commander. The commander has already reviewed the evidence, decided that Article 15 punishment proceedings were appropriate, and simply listens to the accused airman's side of the story.

In keeping with the commander's lack of legal acumen, a commander is not required to apply any formal standard of proof in determining whether Article 15 punishment is in fact appropriate after hearing the airman's presentation.<sup>57</sup> Notwithstanding this lack of a standard of proof, the official Air Force position is that:

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<sup>55</sup> *Id.* ¶ 4c(1)(F) Reasonable availability is defined as meaning it costs the United States nothing for their appearance, there will be no undue delay for their appearance, and if the witness is military, he or she can be excused from other important military duty. *Id.*

<sup>56</sup> MCM, ch. V, ¶ 4c(1)(b) (1995).

<sup>57</sup> AFI 51-202, ¶ 3.3.

“...[T]he commander should recognize that the alleged offender is entitled to demand trial by court-martial, in which case proof beyond a reasonable doubt by competent evidence is prerequisite to conviction and punishment. Therefore, the commander must consider whether such proof is available before initiating action under Article 15. If such proof is lacking, action under Article 15 is usually not warranted.”<sup>58</sup>

If trial by court-martial is demanded, the Air Force is usually only too willing to oblige. The Air Force’s position is strengthened by the fact it is not limited to only taking the charge or charges listed in the Article 15 to a court-martial. Additional charges can also be added if sufficient evidence is available, and resourceful prosecutors usually have little trouble developing additional evidence and charges. For these reasons, the overwhelming majority of airmen elect to accept Article 15 proceedings when given the opportunity. Also, and importantly, Article 15 proceedings do not necessarily lead to Article 15 punishment.

A commander, after hearing an airman’s personal presentation, may determine that no offense was committed and drop the proceedings. The commander also can determine that based on all of the evidence, Article 15 punishment is too severe, and instead use a lesser disciplinary action, such as a LOR. Some commanders believe that just having an airman go through the entire Article 15 process itself serves a very strong rehabilitative function and emphasizes the need to conform to Air Force standards.

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<sup>58</sup> Id.



If an airman is punished pursuant to an Article 15, the punishment is effective immediately. The airman, if he or she considers the punishment "unjust or disproportionate to the offense" may, within five days, appeal the decision to the next superior commander.<sup>59</sup> Again, the airman is entitled to consult with counsel, and may submit additional matters. The appeal first goes to the commander who imposed punishment, who may offer complete relief, partial relief, or no relief.<sup>60</sup> If complete relief on the appeal is not granted, the appeal must be forwarded to the next superior commander. There is no right to have any type of hearing, or even appear in person before the next superior commander. This commander, after hearing the appeal, can grant full, partial, or no relief, and that decision is final.

Even after Article 15 punishment has been unsuccessfully appealed, an airman still has one last opportunity for relief. Within four months after the date the Article 15 punishment is executed, the commander who imposed punishment may suspend, mitigate, remit, or set aside the punishment.<sup>61</sup> Any unexecuted portion of the punishment can be suspended, and a probationary period imposed.<sup>62</sup> The commander can mitigate the punishment by either reducing the quantity or quality of the punishment.<sup>63</sup> The commander can remit any portion of the punishment by

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<sup>59</sup> MCM, ch. V, ¶ 7a, d (1995).

<sup>60</sup> AFI 51-202, ¶ 7.4.6.

<sup>61</sup> MCM, ch. V, ¶ 6 (1995).

<sup>62</sup> Id. ch. V, ¶ 6a (1995).

<sup>63</sup> Id. ch. V, ¶ 6b (1995).

simply canceling any unexecuted portion of the punishment.<sup>64</sup> A set aside is an action whereby the entire Article 15 punishment is canceled, and all of the airman's rights and privileges are restored.<sup>65</sup> A set aside is only used when the punishment is later determined to have been "a clear injustice."<sup>66</sup>

Together, these procedures give an Air Force commander an extraordinary amount of discretion and flexibility in imposing discipline on members of his or her command. These disciplinary measures can also be supplemented with other actions, such as entering the airman into mandatory financial counseling or alcohol rehabilitative programs, withholding security clearances, or initiating involuntary administrative discharge proceedings.<sup>67</sup>

Administrative discharge proceedings are directly comparable to a discharge action taken by a civilian police department against an officer. The due process rights granted to airmen facing discharge can be dramatically different based on the amount of time the airman has been in the Air Force, the rank he or she has attained, the reason for the proposed discharge, and the proposed administrative characterization of the airman's service to the Air Force. For many airmen, the due process rights granted to them are remarkably few in comparison to those

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<sup>64</sup> Id. ch. V, ¶ 6c (1995).

<sup>65</sup> Id. ch. V, ¶ 6d (1995).

<sup>66</sup> Id.

<sup>67</sup> Military Commander at 116.

granted to police officers in the police departments that will be discussed. Nowhere is this more apparent than with the Air Force's notification discharge proceedings.

### **Air Force Administrative Discharge Proceedings**

Numerous reasons exist for the administrative discharge of airmen from the Air Force, and all airmen are eventually discharged administratively from the Air Force if they are not sentenced to a punitive discharge by a court-martial.<sup>68</sup> Most airmen are administratively discharged either at the normal expiration of their term of enlistment or upon retirement. Some airmen are discharged before the normal expiration of their term of service voluntarily, for example because of personal hardship, while others have their Air Force service cut short involuntarily. These involuntary administrative discharges include discharges for reasons similar to why a civilian police officer might be discharged.<sup>69</sup>

The Air Force does not consider an involuntary administrative discharge itself to be a disciplinary measure, and in fact, the applicable AFI states that an "involuntary administrative discharge is not a substitute for disciplinary action."<sup>70</sup> Before involuntary discharge action is

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<sup>68</sup> Two types of punitive discharges exist, Bad Conduct and Dishonorable Discharges. A punitive discharge can only be adjudged by a court-martial sentence. A special court-martial sentence may include a Bad Conduct Discharge if a punitive discharge is authorized for a given offense. Only a general court-martial sentence may include a Dishonorable Discharge if such a punishment is authorized for a given offense.

<sup>69</sup> Some involuntary discharges have nothing to do with disciplinary problems, such as a discharge for conditions that interfere with military service, for example, "incapacitating fear of flying," airsickness, claustrophobia, or mental disorders. See Air Force Instruction 36-3208, ¶ 5.11, Administrative Separation of Airmen, (14 October 1994). [hereinafter AFI 36-3208].

<sup>70</sup> AFI 36-3208, ¶ 5.1.2.

taken, an airman's commander is expected to attempt to "rehabilitate" the airman by the use of disciplinary actions. Since the administrative separation itself is not a disciplinary action, the discharge is usually proceeded by a "last straw" disciplinary infraction for which either administrative disciplinary action is taken, or Article 15 punishment is imposed.

Once the decision to initiate involuntary discharge proceedings for disciplinary problems is made, the involuntary discharge action itself addresses two issues: (1) is the airman going to remain on active duty with the Air Force or be separated; (2) if separated, what type of discharge will the airman receive. An airman can receive a discharge characterized as either honorable, general (under honorable conditions), or under other than honorable conditions (UOTHC).<sup>71</sup> This characterization of discharge can be significant in the civilian world. For instance, an airman receiving a general discharge may forfeit thousands of dollars worth of educational benefits he has paid money toward under the Montgomery GI Bill.<sup>72</sup> An UOTHC discharge, the most onerous of administrative characterizations, may deprive the former airman of veteran's benefits from a variety of governmental agencies.<sup>73</sup> Needless to say, many employers, especially veterans, may not look favorably on potential employees who have something other than the word "honorable" on their military discharge certificate.

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<sup>71</sup>According to the Air Force, an honorable discharge is appropriate when an airman's service "generally has met Air Force standards of acceptable conduct and performance of duty or when a member's service is otherwise so meritorious that any other characterization would be inappropriate." *Id.* ¶ 1.18.1. A general discharge characterization is officially considered appropriate when an airman's service "...has been honest and faithful," but "when significant negative aspects of the airman's conduct or performance of duty outweighs positive aspects of the airman's military record." *Id.* ¶ 1.18.2. An under than honorable conditions (UOTHC) discharge is considered appropriate if the reason for discharge is a "...pattern of behavior or one or more acts or omissions that constitute a significant departure from the conduct expected of airmen." *Id.* ¶ 1.18.3.

<sup>72</sup> *Id.* ¶ 1.22.

<sup>73</sup> *Id.* ¶ 1.22.2.

Not receiving an honorable discharge makes an involuntary discharge from the Air Force worse than just losing a source of income and having to endure the stigma of being fired, and thus potentially more onerous than a police officer being discharged from a police department. Probationary police officers in many police departments, including those of Fairfax County, Virginia and Milwaukee, Wisconsin can be summarily discharged, but all others receive considerable due process rights. For many Air Force members facing involuntary discharge, there is also a period of time where the due process rights allotted are extremely limited. This period of time, however, is much longer. The Air Force's bifurcated involuntary discharge system is an interesting example of swiftness and limited due process rights for junior Air Force members, contrasted with significant due process rights for more senior Air Force members.

These two different types of Air Force administrative discharge proceedings are called "notification" and "board entitled" discharges. An airman facing involuntary administrative discharge is entitled to an administrative board hearing only if the airman meets very specific criteria, the three most common being that the airman is a non-commissioned officer (enlisted rank of staff sergeant or higher) at the time the discharge processing starts, or has 6 or more years of military service; or the commander initiating the discharge recommends the airman receive an UOTHC discharge.<sup>74</sup> All other airman facing involuntary discharge action are subject to notification discharge. The difference is dramatic.

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<sup>74</sup> AFI 36-3208, ¶ 6.2.2. An airman is also entitled to a board hearing if the basis for the discharge action involves homosexual conduct; the discharge is in the interests of national security; or the airman is a commissioned or warrant officer in the Air Force Reserves. Id.

### **Notification Administrative Discharge Processing**

The notification discharge process is also called "The Rapid Discharge Program." An Air Force "how to" informational pamphlet for commanders boasts that this rapid discharge program "...has been very successful with an average of just 7 days to complete the discharge of a member who is not board entitled."<sup>75</sup>

The end, as advertised, comes swiftly. Discharge action is usually initiated by the airman's squadron commander, who notifies the airman using a standardized letter format.<sup>76</sup> The airman is informed of the reason for the discharge action as set forth in the applicable paragraph of the discharge instruction, and told that the commander is either recommending the airman's discharge be characterized as honorable or general.<sup>77</sup> The airman is given copies of all information and records of prior disciplinary actions that form the basis for the discharge decision. For many, this is when the ill-advised words the airman wrote in response to LOCs or LORs are finally regretted. Each of these prior acts of misconduct, and the disciplinary action taken are set forth as individual allegations in the letter justifying the discharge action. As with an Article 15 action, the airman is also informed that he or she has the right to consult with

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<sup>75</sup> Military Justice Division, Office of the Staff Judge Advocate, 60th Air Mobility Wing (AMC) Travis Air Force Base, California, U.S. Air Force, Commanders Legal Deskbook, 25, (March 1996).

<sup>76</sup> See AFI 36-3208, figure 6.1.

<sup>77</sup> Id. ¶ 6.9. The "reason" for the discharge action is always one of a series of specific categories of misconduct set forth in the AFI. Categories of misconduct listed in AFI 36-3208, section H include, "a pattern of misconduct," which can consist of "discreditable involvement with military or civilian authorities" or "conduct prejudicial to good order and discipline" or "failure to support dependents" or "dishonorable failure to pay just debts"; "civilian conviction"; "commission of a serious offense" which can fall under one of three categories, "sexual perversion", "prolonged unauthorized absence," and "other serious offenses"; and "drug abuse"

counsel, and that an appointment with the local ADC has already been arranged.<sup>78</sup> Three days are given to the airman to consult with legal counsel, if desired, and to gather, prepare and submit any documentation for the "separation authority" to consider.<sup>79</sup> The separation authority (the person who can approve the final discharge) is the commander who has authority to convene a special court-martial under the UCMJ, usually the installation or wing commander at the Air Force base.<sup>80</sup> The entire discharge package is forwarded to the discharge authority, who makes a final determination, based on a preponderance of the evidence, whether the airman will be retained or discharged, and the characterization of service.<sup>81</sup> In this current age of a shrinking military, the chance of being retained is slim. The airman by this point has usually been disciplined on multiple occasions, the immediate commander has stated that he or she wants the airman discharged, and the separation authority, usually that commander's immediate superior, routinely obliges. Airman subject to notification discharge action are typically given a "general" discharge for misconduct. The odds of retention are better for an airman entitled to an administrative discharge hearing.

### **Administrative Discharge Hearing Procedures**

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<sup>78</sup> Id.

<sup>79</sup> Id.

<sup>80</sup> Id. ¶ 6.12.

<sup>81</sup> Id. ¶ 6.12.1.

An airman entitled to an administrative discharge hearing is notified of his commander's intent to discharge him via a standardized letter as in a notification discharge case. This letter informs the airman that he or she has the right, within seven work days, to either request or waive a board hearing.<sup>82</sup> The airman after being notified may offer in writing to waive his or her right to a discharge hearing in exchange for a more favorable discharge characterization than that authorized. For example, an airman could agree to waive the hearing contingent upon receiving a general discharge rather than risk receiving a UOTHC.<sup>83</sup> This offer can be accepted and if so no discharge hearing is held, or it can be rejected, and the hearing will then go forward if the airman so desires.

The actual hearing, referred to as an "administrative hearing board" or "board" makes findings of fact and recommendations. The board, after hearing the evidence, will make findings of fact regarding each allegation of misconduct that is set forth in the notification letter. Based on these findings of fact, the board members will make recommendations concerning separation or retention of the airman, the type of discharge characterization, and whether or not the discharge should be suspended to allow the airman to complete a period of probation and rehabilitation.<sup>84</sup>

There are at least three voting members of the hearing board, and the members are appointed by the special court-martial convening authority.<sup>85</sup> Board members are commissioned officers,

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<sup>82</sup> See Id. figure 6.6 for the form used to notify a board-entitled airman of pending involuntary discharge proceedings.

<sup>83</sup> Military Commander at 160.

<sup>84</sup> AFI 36-3208, ¶ 8.16.2.



unless the airman subject to the discharge board (called the “respondent”) is enlisted and requests enlisted board members.<sup>86</sup> In that case, the majority of members still must be officers.<sup>87</sup> The Air Force’s representative or “recorder” is a judge advocate that presents the case for discharge.<sup>88</sup> A “legal advisor” who is also a judge advocate presides in all open sessions of the board.<sup>89</sup> The legal advisor rules finally on the admissibility of evidence and on procedural matters, instructs the board members on their functions, duties, and procedures, and provides additional guidance throughout the board proceedings as necessary.<sup>90</sup>

Air Force defense counsel often perceive a problem with a too-close relationship among the personnel appointed and assigned to conduct the board hearing. The commander who has initiated the discharge action works for the special court-martial convening authority (SPCMCA), and in many cases was personally selected for command by the SPCMCA. This same SPCMCA selects all the board members. The base legal office also normally works directly for the SPCMCA convening authority, and is responsible for providing legal advice for administrative discharges to the SPCMCA. Both the legal advisor and the recorder routinely work at this base legal office. Although challenges for cause against the board members and the legal advisor are authorized, the members of the board, hand selected by the SPCMCA, rule on

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<sup>85</sup> Id. ¶ 8.3-8.3.1.

<sup>86</sup> Id. ¶ 8.3.1.

<sup>87</sup> Id. ¶ 8.3.1.1.

<sup>88</sup> Id. ¶ 8.7.

<sup>89</sup> Id. ¶ 8.3.2.

<sup>90</sup> Id. ¶ 8.6.

objections to the legal advisor. The legal advisor, who also works for the SPCMCA, in turn rules on challenges by respondent's counsel to the board members.<sup>91</sup> Despite these perceived problems, personnel assigned as board hearing officers are regarded as taking their job to impartially weigh the evidence seriously, and most recommendations reflect very careful deliberation.

At the board, the respondent has the right to legal counsel.<sup>92</sup> The respondent also has the right to have witnesses testify on his or her behalf. The legal advisor has the authority to arrange for the Air Force to pay for the travel of witnesses, but must consider a number of factors, including the availability of alternatives to live testimony.<sup>93</sup> In lieu of the personal appearance of witnesses, a variety of other methods are used, including eliciting testimony via speaker phone in the board hearing room, affidavits, videotaped testimony, stipulations, certificates, and unsworn written

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<sup>91</sup> *Id.* ¶ 8.3.3. To illustrate an example of the close relationship among personnel assigned to a discharge board, the author represented a respondent in a board hearing where the legal advisor was the chief of justice at the base legal office (roughly analogous to serving as a civilian district attorney), the recorder was the assistant chief of justice who worked directly for the legal advisor, and the senior-ranking member of the board was the commander of the base security police squadron. The allegations leading to the board in part stemmed from an altercation in which the security police commander's troops responded to the incident. Although challenges for cause were made, the legal advisor/chief prosecutor on base found no problem with the commander of the security police serving as the board president, and the board president in turn, after polling the other members, saw no conflict with the legal advisor, even though that legal advisor, as the chief of justice, had previously reviewed the Article 15 action the respondent received for the incident involving the security police and signed the Article 15 certifying that it was legally sufficient. The Article 15 was entered into evidence in the hearing.

<sup>92</sup> *Id.* ¶ 8.9.1. The airman has the right to be represented at no cost by military defense counsel, or by civilian counsel at the airman's own expense.

<sup>93</sup> The legal advisor, in making this decision, must consider factors such as whether the personal appearance of the witness is essential to a fair determination of the issues of separation and characterization of discharge, and written or recorded testimony will not accomplish the same objective. Other factors the legal advisor considers is the cost of producing the witnesses, the timing of the request, and the potential delay in the proceeding that might occur. See AFI 36-3208, ¶ 8.10.2.

statements. The respondent has the absolute right to remain silent at the hearing.<sup>94</sup> The respondent can also choose to be put under oath, give testimony, and be subject to cross-examination.<sup>95</sup> The other option available is to make an unsworn statement either orally or in writing. The respondent cannot be cross-examined on this statement, but the recorder may present evidence in rebuttal of the unsworn statement.<sup>96</sup>

The hearing itself is conducted along the lines of a trial. The legal advisor rules on the admissibility of evidence before the members of the board are seated. Strict rules of evidence do not have to be observed, although the legal advisor "may impose reasonable restrictions of relevancy, competency, and materiality of matters considered."<sup>97</sup> The members are then called, subjected to voir dire, and any challenges heard and decided. Members are instructed on their duties, and opening statements are given. The recorder presents the government's case, followed by the respondent. Closing statements are then given by each side.

The members of the board then vote in closed session through secret written ballot.<sup>98</sup> A majority vote decides each issue.<sup>99</sup> The burden of proof is on the Air Force to establish each allegation in the notification letter by a preponderance of the evidence. For instance, if the respondent has

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<sup>94</sup> Id. ¶ 8.9.4.

<sup>95</sup> Id.

<sup>96</sup> Id.

<sup>97</sup> Id. ¶ 8.13.

<sup>98</sup> Id. ¶ 8.15.

<sup>99</sup> Id.

four separate incidents of misconduct that are stated reasons for the discharge, consisting of being late for work twice, being disrespectful to a supervisor, and driving while intoxicated, the board members will determine for each alleged offense whether or not, by a preponderance of the evidence, the Air Force has proven the incident occurred. Based on these findings, and whatever mitigating or extenuating evidence is given by the respondent, the members then determine whether the respondent should be discharged from the Air Force. Not all of the findings need to be substantiated for the board members to determine that the respondent should be discharged. On the other hand, all of the findings could be substantiated, and the members of the board could still vote to retain the member, based on all of the evidence presented.

If the board recommends that the respondent be discharged, the board will also make a recommendation whether the respondent's service should be characterized as honorable, general, or UOTHC.<sup>100</sup> The board may also make a recommendation that the discharge be suspended for a period of "probation and rehabilitation."

After completion of the board, the findings and recommendations are forwarded for action to the separation authority, which is either the commander who convened the board, or a superior commander exercising general court-martial authority. The findings and recommendations of the board can be approved, or action more favorable to the member can be taken. The separation authority cannot take action more severe than that recommended by the board, except a recommendation for probation and rehabilitation can be disregarded. For example, if the board

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<sup>100</sup> Id. ¶ 8.16.

recommends retention on active duty, the separation authority cannot authorize the airman's discharge. The only option is to direct retention. If the board recommended discharge, the separation authority can either discharge or retain the airman. The separation authority, in considering the characterization of service recommended by a board, is free to upgrade this characterization, but does not have authority to approve a less desirable one. Therefore, if the board recommended an UOTHC characterization, the separation authority could upgrade this to a general discharge, or even, theoretically, to an honorable one.<sup>101</sup>

Not only does the respondent get this opportunity to have the results of the discharge board altered in his or her favor upon review, the Air Force system allows for one more rehabilitative opportunity, namely a recommendation for probation and rehabilitation. A recommendation for probation and rehabilitation suspends an approved discharge.<sup>102</sup> The board members can recommend that the discharge be suspended, but this recommendation can either be accepted or rejected by the separation authority. If it is accepted, or if the separation authority decides on his or her own authority to suspend the discharge, the airman is free to accept the offer or reject it. If accepted, the lucky airman is usually returned to his unit, and the execution of the approved discharge is suspended contingent on successfully completing a period of rehabilitation. This rehabilitation period cannot be less than six months or more than 12 months in length.<sup>103</sup> The purpose is for the airman to demonstrate he or she is "capable of good conduct for a reasonable

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<sup>101</sup> For more detailed information on what final action the separation authority can take in a variety of circumstances, See AFI 36-3208, tables 6.7, 6.8, 6.9, 6.10, 6.11, 6.12.

<sup>102</sup> Id. ¶ 7.2.1.

<sup>103</sup> Id. ¶ 7.6.2.

period of time and in varying conditions.”<sup>104</sup> No special rehabilitation program needs to be set up, and the airman is given duties appropriate to the airman’s rank, skill level and experience.<sup>105</sup> If the period of probation and rehabilitation is completed without further problems, the approved administrative discharge for cause is automatically and permanently canceled.<sup>106</sup> The airman may be eligible to re-enlist. If not, the airman is separated with an honorable discharge. If a member fails the program, the usual course of action is execution of the suspended separation.<sup>107</sup>

If an airman is administratively discharged for cause by either the notification process, or after an administrative discharge board, there is no method of appealing this decision to a military court, or any other commander. The only type of “appeal” that the military system officially recognizes is a request to the Board of Correction of Military Records in Washington D.C. for an upgrade of the discharge characterization. This request cannot be made until six months after the discharge is finalized, long after the “airman” is a civilian. The chances of any relief being granted using this avenue is remote.

The Air Force disciplinary system gives a great deal of discretion and authority to its supervisory personnel and commanders to make disciplinary decisions, with only limited means to review and appeal these decisions. A commander, who truly grasps his or her role as a military leader, can use the many rehabilitative tools at his or her disposal to fashion appropriate solutions to

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<sup>104</sup> Id. ¶ 7.8.1.

<sup>105</sup> Id. ¶ 7.8.

<sup>106</sup> Id. ¶ 7.9.

disciplinary problems in such a way that the effectiveness of the unit and the morale of the airmen in that unit are positively influenced. Unfortunately, this discretion and power also can be abused, and lesser-skilled commanders can impose discipline in a haphazard, inconsistent, or emotional fashion, with few immediate checks on his or her authority. The most effective deterrent to this type of arbitrary use of power is the commander's knowledge that such abuses are reflected in a unit's decreased morale and ability to perform, and that these problems in turn are noticed and normally result in the loss of command.

The disciplinary system used by the Air Force works well, and its flexible approach provides many opportunities to manage personnel effectively and fashion appropriate responses to disciplinary problems. The disciplinary system of the Fairfax County Virginia Police Department has many similarities to the system used by the Air Force. Like the Air Force, the Fairfax County Police Department has a clear cut chain of command, stresses adherence to rules and regulations reflecting the same concern with conformity and obedience to orders, and a progressive disciplinary structure. The quasi-military disciplinary model used by the Fairfax County Police Department (FCPD) also is shaped by other influences and requirements, such as the laws of Virginia and applicable civil service rules. Some of these differences between the two systems are striking.

### **The Fairfax County Virginia Police Department Disciplinary System**

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<sup>107</sup> Id. ¶ 7.11.

### **The Law Enforcement Officers' Procedural Guarantees - Code of Virginia**

The Law Enforcement Officers' Procedural Guarantees in the Code of Virginia<sup>108</sup> forms the backbone of the Fairfax County Police Department (FCPD) disciplinary system. These procedural guarantees create a property interest in continued employment for non-probationary Virginia police officers, protected by the 14th Amendment.<sup>109</sup> What this means for the individual police officer is that he or she is not an employee at will who can be fired for a good reason, bad reason, or no reason at all, but is instead entitled to certain increased legal protections when faced with disciplinary actions.

The Law Enforcement Officers' Procedural Guarantees provide rights in four broad areas to police officers under investigation or facing disciplinary action. The statute gives police officers certain rights when being questioned and when evidence is being collected against them, provides requirements for notifying the officer of disciplinary charges and an opportunity to respond, and sets forth rights regarding an officer's ability to elect to either file a grievance or request an internal police department hearing concerning disciplinary actions already taken.<sup>110</sup> The statute makes clear that these specific rights are the minimum rights that will be afforded to police officers, and that all law enforcement agencies are free to provide additional rights to police officers.<sup>111</sup> These minimum rights, and what they mean for police officers facing

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<sup>108</sup> Va. Code Ann. §§ 2.1-116.1 - 2.1-116.9 (Michie 1950).

<sup>109</sup> See Himmelbrand v. Harrison, 484 F. Supp. 803 (W.D. Va. 1980). See Also Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972).

<sup>110</sup> Va. Code Ann. §§ 2.1-116.2 - 2.1-116.5 (Michie 1950).

<sup>111</sup> Id. § 2.1-116.9.



disciplinary action, will be discussed in terms of their incorporation into the FCPD general orders and regulations, that police department's equivalent of Air Force Instructions.

### **Fairfax County Police Department Regulations and General Orders**

The administrative and disciplinary system used by the FCPD is set forth in volume one of a two-volume set of regulations and general orders.<sup>112</sup> This comprehensive document sets forth, in a series of numbered paragraphs referred to as "regulations," what conduct will subject police officers to disciplinary action. These regulations are divided into six categories: (1) general responsibilities; (2) prohibited activities; (3) prisoner care and custody; (4) administrative activities; (5) orders; and (6) equipment.

The first regulation states that "every employee is required to establish and maintain a working knowledge of all laws and ordinances in force in the County and State, Regulations and General Orders of the Department, the divisions thereof."<sup>113</sup> If a police officer allegedly commits an improper action or breach of discipline, there is a presumption that the officer was familiar with the law, regulation or order in question.<sup>114</sup> A violation of any law, regulation or order is specifically set forth as a grounds for disciplinary action.<sup>115</sup>

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<sup>112</sup> County of Fairfax, Virginia, County of Fairfax Police Department Regulations and General Orders vol. I, (1993) [hereinafter FCPD Manual].

<sup>113</sup> Id. regulation 201.1.

<sup>114</sup> Id.

<sup>115</sup> Id.

FCPD officers are also instructed that they have a duty to obey all laws and regulations, perform their duties as required by law or as directed, report any employees who are knowingly or unintentionally committing violations, preserve the peace, protect life and property, and enforce the law.<sup>116</sup>

The "Standards of Conduct" section includes three broadly defined prohibitory regulations that provide the police department latitude to impose discipline for a wide range of conduct. These three provisions prohibit unbecoming conduct, immoral conduct, and associations with know or suspected criminals.<sup>117</sup> Two of these provisions, the unbecoming and immoral conduct prohibitions, track very closely with the prohibition against unbecoming conduct found in the UCMJ, and serve a similar purpose.<sup>118</sup> From the military or police department management standpoint, there are many occasions where conduct that is arguably objectionable cannot, even with a very active imagination, be anticipated or defined in advance, and a type of "we'll know

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<sup>116</sup> Id. regulations 201.3 - 201.6.

<sup>117</sup> Id. regulation 201.7(A) - (C).

<sup>118</sup> This third general category dealing with association with suspected criminals does not have a closely related provision in the UCMJ. The FCPD Manual regulation 201.7(C) associations prohibition states that FCPD officers "shall avoid regular or continuous associations or dealings with persons whom they know, or should know, are persons under criminal investigation or indictment, or who have a reputation in the community or the Department for present involvement in felonious or criminal behavior." Because of the nature of being a police officer, the regulation does contain an exception when such associations are "necessary to the performance of official duties." Another exception to the regulation reflects a concern by the drafters for the Constitutionally mandated right of free association. A police officer may have regular or continuous dealings with known or reputed criminal elements when they are "unavoidable because of other personal relationships" - for example, a rogue sibling, parent, or in-law. In the Air Force, if a commander heard that a member of a command was associating with a suspected criminal, an order could simply be given to the airman to cease contact with that individual. A violation of that order then could be actionable. The same freedom of association concerns are still present under military law, and they could potentially effect the lawfulness of the order depending on the relationship of the parties.

it's wrong when we see it" standard is deemed necessary. Providing a definition for immoral conduct is also important because this is a justification for immediate suspension.

Avoiding unbecoming conduct requires FCPD officers to conduct themselves at all times in a manner "as to reflect most favorably on the department." Conduct unbecoming includes: "...that which brings the Department into disrepute or reflects discredit upon the employee as a member of the Department, or that which impairs the operation or efficiency of the Department or employee."<sup>119</sup> This definition is fleshed out, like the definition of conduct unbecoming in the UCMJ, with some specific examples. The FCPD regulations prohibit the use of "harsh, profane, or insolent language or acts" in dealings with others, and "displays of bias toward any person on account of race, sex, religious preference or life-style shall be considered unbecoming conduct."<sup>120</sup>

FCPD officers, to avoid a charge of immoral conduct must "maintain a level of moral conduct in their personal and business affairs which is in keeping with the highest standards of the law enforcement profession."<sup>121</sup> To maintain this standard, police officers are instructed "not to

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<sup>119</sup> Id. regulation 201.7(A).

<sup>120</sup> Id. regulation 201.13. Sexual harassment, which is certainly another form of conduct unbecoming, merits its own separate prohibitive regulation. See FCPD Manual, regulation 201.14. Presumably, this was done to provide additional emphasis of the FCPD's non-tolerance for this type of discrimination, a subject that the military has also taken great efforts to address.

<sup>121</sup> Id. regulation 201.7(B).

participate in any incident involving moral turpitude which impairs their ability to perform their duties or causes the Department to be brought into disrepute.”<sup>122</sup>

Similarly, the Manual for Courts-Martial, in explaining the offense of conduct unbecoming an officer and a gentleman, states that “there are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty,...indecenty, indecorum,...or cruelty.”<sup>123</sup> Although “not everyone is or can be expected to meet unrealistically high moral standards,” there is “a limit of tolerance...below which the personal standards of an officer...cannot fall without seriously compromising the person’s standing as an officer...or character as a gentleman.”<sup>124</sup> Examples of this offense include using defamatory language to another officer in that officer’s presence or about that officer to other military persons, public association with known prostitutes, and committing or attempting to commit a crime involving moral turpitude.<sup>125</sup> Thus, both the military and the FCPD are concerned with their personnel meeting a standard of conduct that is above that which is expected of the average citizen not charged with carrying out such important societal duties.

The FCPD regulations also contain a list of prohibited activities similar to those found in any workplace, including a military workplace, such as no loitering, sleeping, or “loafing” on duty.<sup>126</sup>

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<sup>122</sup> Id.

<sup>123</sup> MCM, ch. IV, ¶ 59b(2).

<sup>124</sup> Id.

<sup>125</sup> Id. ¶ 59b(3).

<sup>126</sup> FCPD Manual, regulation 202.1.

Other prohibited activities are more specifically tailored to public employees and law enforcement personnel, such as prohibitions on using police officer status to promote any private enterprise,<sup>127</sup> and accepting gifts and gratuities.<sup>128</sup>

The FCPD regulations also contain one surprising prohibition. The use of tobacco products on or off duty by sworn police officers hired on or after October 1, 1989 is prohibited.<sup>129</sup> This shows an excellent example of a prohibition that clearly goes beyond anything the military has to date.

In keeping with the quasi-military structure of the FCPD, its regulations specifically address an officer's duty to obey orders. Generally, "defiance of lawful authority or disobedience to orders constitutes insubordination."<sup>130</sup> There are provisions for not obeying unlawful orders,<sup>131</sup> but a FCPD officer, like an airman, must decide not to obey an order at his or her peril, since "responsibility for refusal to obey rests with the employee and he shall be required to justify his actions."<sup>132</sup>

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<sup>127</sup> Id. regulation 202.7.

<sup>128</sup> Id. regulation 202.9.

<sup>129</sup> Id. regulation 202.3.

<sup>130</sup> Id. regulation 205.1.

<sup>131</sup> FCPD Manual regulation 205.2 states that no officer shall knowingly issue unlawful orders. Regulation 205.4 states that no officer "is expected to or shall obey any order which he knows to be contrary to federal or state law, or County ordinance."

The last section of the FCPD disciplinary regulation mandates proper wear of uniforms and authorized equipment. General Order 320.1 spells out in great detail exactly how the uniform and equipment will be worn, and states the reason for doing so: "[t]he quasi-military nature of policing and the need for visibility in the basic police function requires uniformity in appearance."<sup>133</sup> The spit and shine requirements for FCPD officers would make any Air Force Basic Military Training Instructor nod with approval.

A suspected violation of any regulation or order may be grounds for the FCPD to take disciplinary action against an officer, and hence also a reason to order an investigation into the action or conduct of a FCPD officer.<sup>134</sup> Both the rights and obligations of a FCPD officer under investigation differ markedly from the rights and obligations of an airman under investigation by the Air Force.

### **FCPD Investigation of Suspected Misconduct - Officer Rights and Obligations**

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<sup>132</sup> Id. regulation 205.4. FCPD officers are required to obey orders that they believe are improper, but not illegal, but may appeal that order at the earliest opportunity. Id. regulation 205.5. A provision for handling conflicting orders is also provided in the regulations. See Id. regulation 205.6.

<sup>133</sup> Id. general order 320.1.

<sup>134</sup> Id. general order 301, ¶ IV. An investigation could also be triggered by alleged or suspected acts of misconduct not covered by the regulations and general orders, and any incident involving a police officer which includes "the likelihood of civil action." Id.

A supervisor is responsible for conducting an initial review of any allegation of officer impropriety.<sup>135</sup> This brief initial review is done to determine if there is a “reasonable suspicion” of misconduct and whether further investigation is therefore merited.<sup>136</sup>

If an investigation is deemed necessary, the division or station commander is tasked with investigating relatively minor allegations, such as infractions of regulations or complaints arising from various “differences of opinion” between an officer and a citizen arising during the officer’s performance of duty.<sup>137</sup> More serious complaints are investigated by the Internal Affairs section.<sup>138</sup> Unlike in an Air Force investigation, FCPD officers can be compelled to cooperate and give statements in administrative investigations being conducted against them.

A FCPD officer under investigation has a duty “...to answer fully and truthfully any question pertaining to the investigation of an infraction of law or regulation which might be asked by the investigating authority.”<sup>139</sup> If the officer does refuse to answer questions, that officer is subject to disciplinary action, including discharge.<sup>140</sup> If the officer does make statements as required, no

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<sup>135</sup> Id. ¶ IV(B).

<sup>136</sup> Id. Further investigation is also warranted for certain types of incidents, such as the use of force, even when there is no reasonable suspicion of misconduct. Id. Reasonable suspicion is defined as “facts and circumstances which would lead a supervisory or command employee of the Fairfax County Police Department to reasonably suspect the existence of employee misconduct.” The manual further notes that “this is a significantly lesser standard of proof than probable cause...it is a suspicion of misconduct.” Id.

<sup>137</sup> Id. general order 301, ¶ IV(C)(1)(a)-(c).

<sup>138</sup> Id. general order 301, ¶ IV(C)(2).

<sup>139</sup> Id. general order 301, ¶ IV(E)(2).

<sup>140</sup> Id. regulation 201.21. This regulation states: “when questioned by competent authority, employees shall give complete and honest answers to any question related to the performance of their official duties or their fitness to hold public office.”

admissions made by the officer can be used against him in subsequent criminal prosecutions.<sup>141</sup>

The legality of this procedure has been established by a series of U.S. Supreme Court cases beginning with Garrity v. New Jersey.<sup>142</sup> Even though FCPD officers can be lawfully compelled to make statements during an investigation, the Code of Virginia does provide certain limitations on the manner, location, and scope of questioning.

Questioning of the officer must take place at a "reasonable time and place," preferably when the officer is on duty, and such questioning is recommended to occur at either the office of the investigating officer or at the office at the local precinct or police unit of the officer being investigated.<sup>143</sup> The officer being investigated must be informed of the name and rank of the investigating officer, the name of any other individual who will be present during the

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<sup>141</sup> Id. general order 301, ¶ IV(E)(3).

<sup>142</sup> In United States v. Garrity, 385 U.S. 493, 87 S. Ct. 616 (1967), police officers under criminal investigation for allegedly "fixing" traffic tickets, before being questioned were advised that any statements made could be used against them in criminal proceedings, that they had the right to not to answer questions that could incriminate them, but also told that a refusal to answer questions could subject them to dismissal. No grant of immunity was given, and the officers elected to answer questions. Over their objections, some of the answers given were used in subsequent prosecutions for conspiracy to obstruct the administration of traffic laws. The statements were determined to be involuntary, and were suppressed. The Court stated that the option of either losing their means of livelihood or to pay the penalty of self-incrimination was "the antithesis of free choice to speak out or to remain silent." See Also Gardner v. Broderick, 392 U.S. 273 (1968) and Uniformed San. Men Ass'n v. Commissioner of San., 392 U.S. 280 (1968). In Lefkowitz v. Turley, 414 U.S. 70 (1970), the Supreme Court, clarifying further the Garrity line of cases stated that while the 5th Amendment forbids the State to compel incriminating answers from its employees that may be used against them in criminal proceedings, the Constitution does permit that very testimony to be compelled if neither it nor its fruits are available for such use. (quoting Kastigar v. United States). Given adequate immunity, the State may insist that their employees either answer questions under oath about the performance of their job or suffer the loss of employment. If answers are to be required, the government employee must be offered immunity. Although the regulations of the FCPD state that an officer's compelled statements in an administrative investigation cannot be used against him or her criminally, it is interesting to note there are no provisions for providing immunity to the officer before requiring cooperation in answering potentially incriminating questions.

<sup>143</sup> Va. Code Ann., §2.1-116.2(1) (Michie 1950).



questioning, and the nature of the investigation.<sup>144</sup> The scope of the questioning is also limited in that a police officer cannot be required or requested to disclose information regarding his personal finances unless they are related to the investigation.<sup>145</sup> Unfortunately for the police officer under investigation, there is no right to have an attorney or other representative present during this stage of the questioning. If the investigation reaches “an accusatory stage and may result in a criminal prosecution,” the officer must then be read his or her rights.<sup>146</sup>

Not only may a FCPD officer be compelled to answer questions during the course of an administrative investigation, an officer is also obligated to submit to medical, physical, psychiatric, laboratory, or polygraph examinations once an investigating officer determines “reasonable suspicion exists” to justify this action, and consults with the chief of police.<sup>147</sup> The consultation with the chief of police is apparently designed as a kind of check against an abuse of discretion in ordering such tests. However, the chief of police could hardly be considered a neutral or detached source of review. A similar provision exists in the Air Force for collecting physical evidence without either consent or probable cause. An individual may be involuntarily ordered by his or her commander to provide a breath, blood, or urine sample also based on “reasonable suspicion.” The results of this type of “command directed” testing cannot be used in a court-martial, but the results of that test can be used in an administrative discharge action,

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<sup>144</sup> Id. §2.1-116.2(2) (Michie 1950).

<sup>145</sup> Va. Code Ann. §2.1-116.3 (Michie 1950).

<sup>146</sup> FCPD Manual, general order 301 ¶ IV(E)(3).

<sup>147</sup> Id. general order 301 ¶ IV(E)(5). The Commander of Internal Affairs does not have to get prior approval before testing for alcohol, because of how quickly the evidence may dissipate.

provided that the results can in no way be used to characterize the discharge. Interestingly, the Air Force, unlike the FCPD, cannot compel an airman under investigation to submit to a polygraph examination.

Once the investigation is completed, if the investigator determines that the allegation is supported by sufficient evidence, it is labeled “sustained.” Only a finding labeled as “sustained” is included in an employee’s personnel file, and subjects a FCPD officer to possible disciplinary action.<sup>148</sup> The disciplinary actions that may be taken against an officer are specifically listed in the County of Fairfax Police Department Regulations and General Orders.

### **Disciplinary Actions Available Under the FCPD Disciplinary System**

Like the Air Force system, the FCPD has a variety of disciplinary tools available. As in the Air Force, the first type of “discipline” is informal counseling by a supervisor regarding minor infractions of policy or procedure. This type of informal counseling is specifically authorized by the Code of Virginia.<sup>149</sup> Formal disciplinary measures pursuant to the FCPD system consist of:

- (1) Oral reprimand; (2) written reprimand; (3) suspension without pay for a period not to exceed

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<sup>148</sup>Id. general order 301 ¶ VII.

<sup>149</sup> Va. Code Ann. §2.1-116.8 states that nothing in the statute precludes informal counseling of law enforcement officers by a supervisor, when that counseling is in regards “to a minor infraction of policy or procedure which does not result in disciplinary action being taken against the law enforcement officer.”

30 days; (4) transfer for punitive reasons; (5) reduction in rank; and (6) dismissal from the FCPD.<sup>150</sup>

### Reprimands

An oral reprimand under the FCPD disciplinary system is somewhat of a misnomer. The “oral” reprimand is reduced to writing via a standardized “Oral Reprimand/Verbal Counseling Form.” The officer being reprimanded must be advised that a written record is being kept at the time of the counseling session, that the officer has the right to review the contents of the record and submit a rebuttal statement of 200 words or less, and that the form will be maintained by the supervisor and will not be included in the employee’s agency personnel file.<sup>151</sup> The standardized form includes a statement of these rights, and a signature block for the reprimanded officer to acknowledge these rights and confirm that he or she has seen this form and been counseled. The similarities between this oral reprimand and an Air Force “desk drawer” reprimand are readily apparent.

FCPD oral reprimands are not retained indefinitely. An oral reprimand will be retained for only one year by a disciplined police officer’s supervisor, unless within the one-year period the police officer is again disciplined, in which case the oral reprimand will be retained for a period of one year from the date of the most recent disciplinary action.<sup>152</sup>

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<sup>150</sup> FCPD Manual, general order 310.2, ¶ V(A).

<sup>151</sup> Id. general order 310.1, ¶ II.

Unlike an oral reprimand, a written reprimand is placed in the police officer's permanent personnel folder, along the lines of an Air Force LOR/UIF. No standardized format for this written reprimand appears in the FCPD regulations or general orders, but certain information is required to appear in the reprimand. A clear statement of the misconduct for which the disciplinary action is being taken is mandatory, along with notification that the reprimand is an "official written reprimand" that will be placed in the officer's permanent personnel file.<sup>153</sup> The reprimand also must state that similar occurrences of this type of misconduct could result in more severe disciplinary action, and the officer must be informed of his or her rights of appeal.

The FCPD written reprimand also can be used as a method to "boot strap" prior oral reprimands or verbal counselings into the employee's permanent personnel file. If a police officer has been previously orally reprimanded or counseled, and a later written reprimand is considered a "continuation of constructive discipline," then the written reprimand may include "a statement of previous offenses," such as those found in the oral reprimand forms.<sup>154</sup>

#### Suspension and Transfer for Punitive Reasons

The next most severe disciplinary action that can be taken against a police officer is a suspension, without pay, for a period not to exceed 30 days. A transfer to other less desirable or prestigious duties is the next step in the disciplinary hierarchy.

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<sup>152</sup> Id. general order 310.1, ¶ III(F).

<sup>153</sup> Id. general order 310.2, ¶ VII(B)(a-b).

<sup>154</sup> Id. general order 319.2, ¶ VII(B)(1)(c).

### Reduction in Rank and Dismissal

A FCPD officer may be reduced in rank “to any lower level deemed appropriate.”<sup>155</sup> The ultimate disciplinary action is dismissal from the FCPD.

### **FCPD Officer Right to Notice of Charges, and an Opportunity to Respond**

At the conclusion of the investigation of a FCPD officer, that officer’s bureau commander, deputy chief, and the chief of police all review the investigation, conclusions, and disciplinary recommendations, and a decision is made regarding what, if any, disciplinary action should be taken.<sup>156</sup>

If the disciplinary action consists of an oral reprimand, the officer has the right to be notified of the action and the opportunity to respond in writing as noted above. If the disciplinary action consists of a written reprimand from a superior below the rank of chief of police, the disciplined officer is informed of the right to submit a written appeal to the chief of police within 20 work days from the date of the receipt of the reprimand.<sup>157</sup> The chief of police considers this appeal when received, and must make a final disposition within 20 days. The provision regarding the appeal of written reprimands also states that during this appeal “...where additional information is developed which may lead to suspension, disciplinary transfer, demotion or unsatisfactory service separation or termination...,” the procedure for notifying the police officer of this

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<sup>155</sup> Id. general order 310.2, ¶ V(A)(5).

<sup>156</sup> Id., general order 310.2, ¶ VII(C)(7).

additional action may be initiated.<sup>157</sup> This provision may serve as a subtle psychological check on an officer's desire to appeal a written letter of reprimand, knowing that the result of submitting an appeal could be further scrutiny and investigation, resulting in more serious disciplinary action. Similarly, in the Air Force, airmen facing relatively minor disciplinary action are often advised by their defense counsel to accept the discipline and keep quiet, thereby insuring the case is concluded quickly without giving the commander any reason or incentive to examine the facts more closely, and find additional incriminating information. A FCPD officer who has received a written reprimand may also make use of other appeal rights that are also designed to provide increased due process protections to officers facing more severe disciplinary actions.

A FCPD officer facing disciplinary action more severe than an oral reprimand is entitled to several appeal options. These options are rooted in state statutory law and constitutional due process. The Law Enforcement Officers' Procedural Guarantees grants a form of job tenure, also known as a property interest in continued employment, to non-probationary FCPD officers. Probationary FCPD officers, during their initial 12-month probationary period, are not granted any property rights or expectations regarding continued employment by the FCPD. It is a matter of state or local law whether or not such tenure will be granted to police officers (or other public employees), but once it is, then Constitutional standards of due process must be met before an

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<sup>157</sup> Id. general order 310.2, ¶ VIII(A)(1-2).

<sup>158</sup> Id. general order 310.2 ¶ VIII(A)(3).

officer can be deprived of this property interest.<sup>159</sup> With more serious disciplinary action, more due process rights are mandated.

The Law Enforcement Officers' Procedural Guarantees incorporates into Virginia state law the constitutional standards of due process set forth in a series of United States Supreme Court decisions, including the Loudermill decision, which held that a public employee with a property interest in continued employment facing a discharge is entitled, as part of due process, to notice of the disciplinary action, an opportunity to respond before that disciplinary action is imposed, and a full post-discharge administrative hearing.<sup>160</sup> Other cases have held that if the disciplinary action being taken against a public employee with a property interest in continued employment is something less severe than discharge, the due process rights that the employee is constitutionally entitled to are correspondingly less, and an opportunity to be heard before disciplinary action is taken may not be necessary, if followed by a timely and full post-disciplinary hearing.<sup>161</sup>

The Law Enforcement Officers' Procedural Guarantees, reflecting this case law, provides three options regarding giving a police officer notice of disciplinary charges against him or her and an opportunity to respond to them.

The first option a law enforcement agency can exercise, before imposing any dismissal, demotion, suspension without pay or transfer for punitive reasons is to notify the police officer in

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<sup>159</sup> Bishop v. Wood, 426 U.S. 341 (1976).

<sup>160</sup> Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

writing of all charges, the basis for those charges, and the action which may be taken against the officer based upon those charges.<sup>162</sup> After receiving this written notice of the charges, the police officer must be given not less than five calendar days to respond orally and in writing to the charges, unless the police officer agrees to a lesser period of time to respond. After discipline is imposed after this response, the police officer is then informed of his rights to appeal this disciplinary action, either through the grievance procedure of the local governing body, such as a Civil Service Commission Board used in Fairfax County, or through an internal agency hearing.<sup>163</sup> This procedural option is the one most often by the FCPD.

Under the FCPD version of this first statutory option, a FCPD officer facing a recommended disciplinary action consisting of a suspension, disciplinary transfer, demotion, unsatisfactory service separation or discharge is entitled to a 20 work day advanced written notice of this proposed disciplinary action.<sup>164</sup> This written notification must include a statement of the charges for which the disciplinary action is proposed, and notify the officer that the action if implemented will become part of the officer's official personnel file.<sup>165</sup> If any previous offenses were considered, the officer must be given a statement of those previous offenses.<sup>166</sup> The notice must also inform the officer that he or she may respond to the charges within three work days and

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<sup>161</sup> See Gilbert v. Homar, 117 S. Ct. 1807 (1997).

<sup>162</sup> Va. Code Ann. § 2.1-116.4 (Michie 1950).

<sup>163</sup> Id.

<sup>164</sup> FCPD Manual, general order 310.2, ¶ VII(C)(1-2).

<sup>165</sup> FCPD Manual, general order 310.2, ¶ VII(C)(3)(a.-g).

<sup>166</sup> Id.



gives notice of appeal rights.<sup>167</sup> If the police officer chooses to respond, the police officer meets with either the chief of police, or the chief's designee, and in this meeting the police officer can explain his or her version of the incident or situation.<sup>168</sup>

The second statutory option for providing due process notice of more serious charges and an opportunity to respond to them involves giving the officer a written statement of the charges (including the basis of those charges and what action may be taken as a result of those charges), and providing a full due process hearing prior to taking disciplinary action.<sup>169</sup> The FCPD does not utilize this option. The Air Force, by way of contrast, does use this approach in Article 15 and administrative discharge board cases.

The third statutory option per Virginia law is for the law enforcement agency to immediately suspend the officer without pay, if that officer's "continued presence on the job is deemed to be a substantial and immediate threat to the welfare of his agency or the public."<sup>170</sup> A law enforcement officer also may be suspended immediately "for refusing to obey a direct order issued in conformance with the agency's written and disseminated rules and regulations."<sup>171</sup> Once the immediate suspension without pay occurs, the officer is entitled to the same hearing

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<sup>167</sup> Id.

<sup>168</sup> Carla Siegel and Mike Leibig, Enforce Your Rights: A Fairfax Cops' Guide to Job Protection, (Fairfax Coalition of Police Local 5000, IUPA, AFL-CIO 1997) (forthcoming 1998) (manuscript at 18, on file with authors) [hereinafter Enforce Your Rights].

<sup>169</sup> Va. Code Ann. § 2.1-116.5 (Michie 1950).

<sup>170</sup> Id. § 2.1-116.6.

<sup>171</sup> Id.

rights as other officers if he or she so requests.<sup>172</sup> The FCPD implementation of this portion of the state statute provides that a FCPD officer may be relieved from duty immediately by any supervisory employee if "there is sufficient evidence to indicate that the act complained of is immoral, indecent, involves the physical mistreatment of another person, or when the accused employee has been drinking."<sup>173</sup> The officer will remain relieved from duty until a disciplinary hearing is conducted.<sup>174</sup> A FCPD officer may also be suspended pending a hearing with pay, which causes no due process concerns, since no property interest (in the form of income or employment) has as yet been taken from the officer.

If one of these more severe forms of disciplinary action is taken against a FCPD officer, the officer as already noted is entitled to appeal this decision by using the grievance procedure that culminates in a hearing before the local Civil Service Commission Board or by using an internal FCPD hearing. These appeal mechanisms provide essential due process guarantees. The internal FCPD hearing has many similarities with the Air Force administrative discharge board, and this internal hearing provides a faster avenue of appeal than the grievance procedure. How this internal hearing process is to work is set forth in Virginia's Law Enforcement Officers' Procedural Guarantees.

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<sup>172</sup> Id. See Also Id. § 2.1-116.4.

<sup>173</sup> FCPD Manual, general order 301, ¶ V(I).

### The FCPD Internal Hearing Appeal

After being notified of the FCPD's intention to impose disciplinary action resulting in a suspension, disciplinary transfer, demotion, unsatisfactory service separation or termination, a sworn FCPD officer may elect to appeal this decision to a FCPD internal hearing panel.<sup>175</sup> The hearing panel consists of three FCPD members. As set forth in the statute, the FCPD officer subject to discipline selects one member of the hearing panel, the chief of police selects a second member, and these two panel members in turn select the third member.<sup>176</sup> This method seems to be a thoughtful way to avoid complaints of a biased panel by the aggrieved officer, while ensuring a variety of perspectives on the disciplinary matter. If the Air Force system for selecting administrative board members was used instead, the chief of police would select all three members of the panel, subject only to challenges for cause at the hearing.

There are several understandable limitations on hearing panel membership. Hearing panel members cannot be related to the accused, under investigation themselves for the same incident or a related one, and cannot have been disciplined within the last six months.<sup>177</sup> The panel member selected by the chief of police, who must be of equal rank or rank no greater than two ranks above the accused officer, serves as the chairman of the hearing panel.<sup>178</sup>

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<sup>174</sup> Id. ¶ VI(A).

<sup>175</sup> FCPD Manual, general order 310.2, ¶ VIII(B).

<sup>176</sup> Va. Code Ann. § 2.1-116.5(2) (Michie 1950). If the two members cannot agree on the third member, the chief judge of the judicial circuit where the police officer's duty station is located selects the third member. Id.

<sup>177</sup> FCPD Manual, general order 310.2, ¶ IX (B).

Unless agreed otherwise, the hearing is to be convened within 14 days of the disciplined FCPD officer making the hearing request.<sup>179</sup> The commander of the Internal Affairs Division schedules the hearing, arranges for testimony, and presents the case against the accused officer.<sup>180</sup>

The hearing panel is tasked to “..consider such testimony, documents, records or other information presented during the hearing that is deemed pertinent to the case or relative to any proposed disciplinary recommendations.”<sup>181</sup> To obtain this information, the hearing panel has subpoena power.<sup>182</sup> The accused officer is given the opportunity to present evidence, examine and cross-examine witnesses, and retain counsel at his or her own expense.<sup>183</sup> The hearing itself proceeds along the same lines as an Air Force discharge board or court-martial, with each side being provided the opportunity to make an opening statement, followed by the direct and cross examination of witnesses and closing statements. As in an Air Force discharge board, the board members may ask questions of the witnesses.

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<sup>178</sup> Id.

<sup>179</sup> Id.

<sup>180</sup> Id. ¶ IX(E). The presentation of the case also may be made by any other person designated by the Chief of Police. Id.

<sup>181</sup> Id. ¶ IX(F).

<sup>182</sup> Id.

<sup>183</sup> FCPD Manual, general order 310.2, ¶ IX(F).

At the conclusion of the evidence, the members of the hearing panel make findings and recommendations. The board determines whether or not each charge is sustained.<sup>184</sup> If any charge or charges are sustained, the board then must recommend what authorized disciplinary action is appropriate.<sup>185</sup> The board can recommend that the charges be dismissed, or that further investigation be accomplished.<sup>186</sup> Although the Law Enforcement Officers' Procedural Guarantees state that these findings and recommendations are only advisory and not binding upon the chief of police, the FCPD Chief of Police has issued a policy stating that the decisions of the hearing panel will be binding on the department.<sup>187</sup>

If the recommendation by the board is for disciplinary action more severe than an oral or written reprimand, the FCPD officer facing this decision has the option of appealing this recommendation to the county executive.<sup>188</sup> The county executive may, at his or her sole discretion, direct the appointment of a "special hearing panel" chosen in the same manner as the police hearing board to review this decision.<sup>189</sup> If a special hearing panel is convened, any findings and recommendations made are only advisory and not binding on the county executive.<sup>190</sup>

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<sup>184</sup> Id. ¶ IX(G).

<sup>185</sup> Id. ¶ IX(H).

<sup>186</sup> Id. ¶ IX(G).

<sup>187</sup> Enforce Your Rights at 47; Va. Code Ann. § 2.1-116.7 (Michie 1950).

<sup>188</sup> FCPD Manual, general order 310.2, ¶ X.

<sup>189</sup> Id.

<sup>190</sup> Id.

### FCPD Grievance Procedure

Rather than appealing to a hearing board, a sworn FCPD officer facing disciplinary action may choose to use the grievance procedure specifically provided for by state statute. FCPD officers serving their one-year initial probationary period are not eligible to invoke this grievance procedure, unless the complaint includes allegations of discrimination.<sup>191</sup> Once an officer who is entitled makes a decision either to proceed with the FCPD internal hearing panel or with a grievance, that decision is final and binding, and in no case will an officer be permitted to use both procedures.<sup>192</sup> The police officer facing disciplinary action must make the decision to use one of these two routes (or neither of them) within 20 work days following written notification by the department of an intent to impose discipline.<sup>193</sup>

The grievance procedure is a five step process. Through this process, the FCPD officer is able to present evidence concerning the allegations that led to the disciplinary action to supervisors at increasing levels of responsibility. The FCPD, in turn, must justify the disciplinary decision

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<sup>191</sup> Office of Personnel, County of Fairfax, Virginia, Personnel Regulations Regarding the Operation of the Fairfax County Merit System, ¶ 17.2-2b, (July 1994).

<sup>192</sup> FCPD Manual, general order 310.3, ¶ III(D).

<sup>193</sup> Id. ¶ III(C).

and/or seek to resolve the grievance during this process.<sup>194</sup> If the complaint that initiates the grievance procedure is determined to be “grievable,” and the police officer is not satisfied with any proposed resolution along the way, the grievance process culminates in a hearing before, and a binding decision from, the Fairfax County Civil Service Commission. Certain non-grievable complaints are eligible for a hearing before a hearing officer appointed by the Civil Service Commission, but the decision rendered is only advisory. Therefore, the classification of a FCPD officer’s complaint is crucial when determining what rights are available under this process.

“Grievable” disciplinary actions consist of suspensions, demotions, unsatisfactory service separations, or discharges.<sup>195</sup>

If the proposed disciplinary action is a written reprimand, a FCPD officer’s request to use this system will be deemed to be “non-grievable,” but nonetheless eligible to receive an advisory decision from a hearing officer appointed by the Civil Service Commission.<sup>196</sup> An oral reprimand is non-grievable, and the Civil Service Commission will have no involvement in the matter.<sup>197</sup>

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<sup>194</sup> Enforce Your Rights at 22.

<sup>195</sup> Office of Personnel, County of Fairfax, Virginia, Personnel Regulations Regarding the Operation of the Fairfax County Merit System, ¶ 17.3-2a., (July 1994).

<sup>196</sup> Id. ¶ paragraph 17.3-3e.

<sup>197</sup> Id. ¶ 17.4-1b.

One of the goals of the grievance procedure is to attempt to have the dispute settled at the lowest level possible. "Any grievance shall be considered settled at the completion of any step if all parties are satisfied. In fact, it is expected that the great majority of grievances will be settled at the first or second step."<sup>198</sup>

The formal first step in the grievance procedure is for the FCPD officer (who has already stated in writing his or her decision to use the grievance procedure) to discuss the complaint directly with his or her immediate supervisor.<sup>199</sup> Once a face-to-face meeting regarding the disciplinary action is held between the officer and the immediate supervisor, the supervisor must make a verbal reply either during the meeting or within five work days.<sup>200</sup> If the immediate supervisor was not the individual who initiated or imposed the discipline, then the immediate supervisor will not have the authority to overturn the disciplinary decision,<sup>201</sup> and little can be accomplished at this step, despite the stated departmental goal.

If after this first step meeting, the dispute is not resolved, then the second step is for the officer to reduce the complaint to writing using a document called "Complaint Form - Second Step."<sup>202</sup> Using this form, the officer is directed to specify the relief sought through the use of this procedure. This form is to be delivered to the officer's division commander within five work

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<sup>198</sup> FCPD Manual, general order 310.3, ¶ X.

<sup>199</sup> Id. ¶ VI.

<sup>200</sup> Id. ¶ VI(A).

<sup>201</sup> Enforce Your Rights at 32.



days of the first step meeting or of the supervisor's reply.<sup>203</sup> The second step also involves a meeting, this time between the disciplined FCPD officer and his or her division commander. After the meeting, the division commander must make a written reply to the officer's complaint within five days of the meeting.<sup>204</sup>

If this second-step reply is still not acceptable to the officer, then another form, called "Complaint Form - Third Step" is completed by the officer and delivered to the chief of police, again within five days of receiving the division commander's reply.<sup>205</sup> The chief of police then meets with the officer, and the chief of police after the meeting also replies to the officer in writing.<sup>206</sup>

If the chief of police replies that the disciplinary decision still stands, or if the chief's response in some other way displeases the officer, the fourth step in the process is to submit a "grievability determination" to the county executive.<sup>207</sup> The county executive will determine if the complaint is grievable and entitled to a binding decision by the Civil Service Commission, or non-grievable, but entitled to an advisory opinion.<sup>208</sup> The police officer will be advised of this

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<sup>202</sup> FCPD Manual, general order 310.3, ¶ VI(B).

<sup>203</sup> Id.

<sup>204</sup> Id.

<sup>205</sup> Id. general order 310.3, ¶ VI(C).

<sup>206</sup> Id.

<sup>207</sup> Id. general order 310.3, ¶ VI(D).

<sup>208</sup> Id.

determination in writing. If the determination is favorable, the officer is eligible to file a request for a hearing before the Fairfax County Civil Service Commission.<sup>209</sup>

The Civil Service Commission consists of five volunteer citizens, usually with a background or interest in personnel matters, appointed by the Fairfax County Board.<sup>210</sup> The Commission is assisted by a hearing officer, an independent attorney retained by the Commission who conducts hearings on grievances which receive advisory decisions,<sup>211</sup> which would include grievance cases involving written reprimands given to FCPD officers. The hearing officer also assists the Commission on legal and procedural matters in hearings in which the parties are represented by legal counsel.<sup>212</sup> The hearing officer does not vote, and plays no part in deliberations other than advising the Commission concerning legal and procedural matters.<sup>213</sup>

Before the actual hearing, a pre-trial hearing is held before either the Civil Service Commission or the hearing officer to define the scope of the case, address any possible stipulations, and to exchange exhibits, documents, and witness lists.<sup>214</sup>

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<sup>209</sup> Id. general order 310.3, ¶ VI(E). Compare, Office of Personnel, County of Fairfax, Virginia, Personnel Regulations Regarding the Operation of the Fairfax County Merit System, ¶ 17.5.4, (July 1994) (setting forth the procedure by which a determination by the county executive that an issue is not grievable can be appealed to the Fairfax County Circuit Court of Appeal. See Also Va. Code Ann. §15.1-72(I) (Michie 1950).

<sup>210</sup> Enforce Your Rights at 23-24.

<sup>211</sup> Office of Personnel, County of Fairfax, Virginia, Personnel Regulations Regarding the Operation of the Fairfax County Merit System, addendum 1 to ch. 17 (July 1994).

<sup>212</sup> Id.

<sup>213</sup> Id.

The Civil Service Commission hearing is open to the public, unless either party requests that it be closed.<sup>215</sup> Witnesses are excluded from the hearing except when testifying, at the request of either party.<sup>216</sup> The Commission is bound by no formal rules of evidence during the hearing.<sup>217</sup> The County Attorney presents the case for the police department, and has the burden to demonstrate that the discipline imposed against the officer was warranted and appropriate.<sup>218</sup> As with the Air Force administrative discharge board and the internal police hearing board, the case proceeds like a trial. Opening statements are followed by the presentation of the FCPD's case, including direct and cross-examination of the department's witnesses. This is followed by the presentation of the officer's case, with direct and cross-examination of the officer's witness, then rebuttal, if any, followed by closing statements.<sup>219</sup> The members of the Commission during this hearing have the right to ask questions directly.

After the hearing is completed, the Commission's decision is filed in writing by the chairperson within 10 work days. The Commission can uphold or reverse the disciplinary action being grieved, or reduce the severity of the action taken.<sup>220</sup> The Commission can award back pay if

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<sup>214</sup> Id.

<sup>215</sup> FCPD Manual, general order 310.3, ¶ XI(B).

<sup>216</sup> Id.

<sup>217</sup> Office of Personnel, County of Fairfax, Virginia, Personnel Regulations Regarding the Operation of the Fairfax County Merit System, addendum 1 to ch. 17 (July 1994).

<sup>218</sup> Enforce Your Rights at 39.

<sup>219</sup> Office of Personnel, County of Fairfax, Virginia, Personnel Regulations Regarding the Operation of the Fairfax County Merit System, Addendum 1 to ch. 17 (July 1994).

<sup>220</sup> Id.

appropriate, but cannot award damages or attorney fees.<sup>221</sup> The decision of the Civil Service Commission is final and binding on both parties. If an advisory opinion is given by the hearing officer in a non-grievable case (i.e. a case involving a FCPD officer's written letter of reprimand), the recommendation is non-binding, and the final decision regarding the disciplinary action is made by the county executive.

### **Other FCPD Disciplinary Appeal Mechanisms**

If a disciplined FCPD officer requests neither an internal police hearing nor the use of the grievance process, and that punishment consists of a suspension, unsatisfactory service separation or discharge, the FCPD officer has the option of appealing this decision directly to the county executive within ten days after notification of the disciplinary action.<sup>222</sup> Oral and written reprimands are not appealable to the county executive.<sup>223</sup> If an authorized appeal is made to the county executive, that official must direct the appointment of a special police hearing panel, unless the FCPD officer being disciplined waives his right to this special panel in writing.<sup>224</sup> The special police hearing panel is selected in the same manner as the internal police hearing panel. The findings and recommendations of this special police hearing panel are advisory only, and not binding upon the county executive.<sup>225</sup>

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<sup>221</sup> Id.

<sup>222</sup> FCPD Manual, general order 310.2, ¶ X.

<sup>223</sup> Id. general order 310.2, ¶ X(1).

<sup>224</sup> Id. general order 310.2, ¶ X(3).

### **The Air Force Disciplinary System and the FCPD Disciplinary System**

At first glance, there are striking similarities between the administrative/non-judicial disciplinary system used by the Air Force and the disciplinary system used by the FCPD. Both systems require obedience to a series of orders or regulations that govern duties to be performed, personal appearance, personal conduct, and obedience to orders. Violation of these requirements are dealt with through a similar progressive system of disciplinary actions. FCPD oral reprimands resemble in many respects Air Force letters of counseling or reprimand. FCPD written reprimands resemble Air Force letters of reprimand placed in unfavorable information files. FCPD suspensions and demotions find their Air Force counterpart in the forfeiture of pay and reduction in rank punishments authorized by Article 15. Both the FCPD and the Air Force have a means to involuntarily separate members of their respective organizations. These parallels clearly reflect the FCPD's adaptation of a military approach to discipline, but this adaptation is certainly not complete, and there are marked and significant differences between the two disciplinary systems.

The Air Force administrative disciplinary system's foundation in criminal law (the UCMJ) provides certain protections to Air Force members not enjoyed by FCPD officers. Air Force members have an absolute right against self-incrimination during the course of an investigation. If an airman consents to interrogation, he or she has the right to have legal counsel present, and

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<sup>225</sup> Id. general order 310.2, ¶ X(4).

airmen do not have to submit to polygraph examinations. A FCPD officer under administrative investigation does not have these rights.

Not only does the Air Force provide more protection to airmen facing investigations than those under the FCPD system, the Air Force criminal justice system also has a number of progressive due process protections not found in the civilian criminal law, such as the right to free military defense counsel from the trial level through all levels of appeal, and the right to government funding of necessary defense expert witnesses regardless of the financial status of the airman. The numerous cutting-edge due process protections applicable to courts-martial, however, are not applicable to administrative disciplinary actions. The rights given to airmen facing administrative disciplinary actions similar to disciplinary actions under the FCPD system are significantly less than those enjoyed by FCPD officers.

An airman receiving a letter of reprimand filed in an unfavorable information file has only the right to make a written response to this action. A FCPD officer receiving a written reprimand from a superior below the level of chief of police can appeal that reprimand to the chief of police. If the reprimand is given by the chief, an advisory opinion from a hearing officer appointed by the Civil Service Commission can be sought. An airman can be demoted, forfeit pay, and suffer other serious consequences via Article 15 punishment from his or her commander without anything approaching the rights granted to a FCPD officer who facing similar disciplinary action, has the right to a full-blown internal hearing or a hearing before the Civil Service Commission. An airman facing discharge from the Air Force has a much longer "probationary" period than that of a FCPD officer - up to six years in the Air Force contrasted to one year with the FCPD.

During that six year period, an airman can under many circumstances be quickly discharged with no right to any type of hearing or personal presentation. Obviously, this is much less due process than that given to a FCPD officer facing discharge who has completed more than one year of service.

The similarities and differences between the FCPD disciplinary system and the Air Force's administrative disciplinary system provides insight into both the military and police disciplinary systems generally, but since the FCPD system represents only one of the two most common types of police disciplinary systems, the comparison at this point is incomplete. Collective bargaining between Fairfax county and the union representing FCPD officers is not authorized by state law. Other states, such as Wisconsin, do authorize such collective bargaining. The city of Milwaukee, Wisconsin currently has a collective bargaining agreement with a union representing Milwaukee police officers that includes a grievance/arbitration system. Examining the disciplinary system of the Milwaukee Police Department using this different system will provide additional perspective on how the traditional military disciplinary system has been adopted by a police department with a different labor-management relationship with its officers.

## **The Milwaukee, Wisconsin Police Department Disciplinary System**

### **Wisconsin's Law Enforcement Bill of Rights and Other Statutory Basis**

Like their brethren in the FCPD, police officers of the Milwaukee, Wisconsin Police Department (MPD) are not employees at will, and their property interests in continued employment, and specific due process rights come from two major sources, namely, Wis. Stat. § 62.50, which sets forth provisions that govern police and fire departments in large cities such as Milwaukee,<sup>226</sup> and Wis. Stat. § 164, the "Law Enforcement Officers' Bill of Rights."

No member of the MPD may be discharged or suspended except for just cause, and if the period of suspension is for a period of time exceeding five days, the MPD officer is entitled to a hearing before a Board of Fire and Police Commissioners (FPC), a body similar to Fairfax County's Civil Service Commission.<sup>227</sup> If disciplinary action taken against a MPD officer is not serious enough to meet the requirements to qualify for a FPC hearing, the MPD officer may use a grievance and arbitration process that is provided for in a collective bargaining agreement between the City of Milwaukee and the local police union, The Milwaukee Police Association, Local #21 I.U.P.A., AFL-CIO. This grievance/arbitration system incorporated into the collective bargaining agreement is made possible by state law that authorizes local governments to engage in collective bargaining with labor organizations, including those representing police officers.<sup>228</sup> Wisconsin also has a Law Enforcement Officers' Bill of Rights, directed at the same group of constituents as Virginia's Law Enforcement Officers' Procedural Guarantees.

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<sup>226</sup> See Also Wis. Stat. § 62.05(1)(a) (defines cities with a population of 150,000 or more as "first class cities," thereby making Wis. Stat. § 62.50 applicable to Milwaukee).

<sup>227</sup> Wis. Stat. § 62.50(11).

<sup>228</sup> Id. § 111.70.



The Law Enforcement Officers' Bill of Rights applies to all Wisconsin law enforcement officers.<sup>229</sup> This bill of rights primarily provides certain protections for a police officer facing an interrogation that could lead to disciplinary action. A police officer in Wisconsin under investigation and subject to interrogation that could lead to disciplinary action has the right to be informed of the nature of the investigation prior to any interrogation, and also has the right to have a representative of his or her choosing present during the interrogation. This latter and very important right is one that is not afforded to FCPD officers. The bill of rights also provides that a police officer cannot be subject to recrimination or the threat of recrimination based on the exercise of any of these guaranteed rights,<sup>230</sup> and makes clear that this bill of rights operates as a floor, and not a ceiling, on due process protections for police officers.<sup>231</sup>

Following the same general disciplinary structure as the Air Force, the MPD, like the FCPD, incorporates these state statutory mandates along with military-style disciplinary provisions into its day to day operations through a series of written rules and regulations, contained in a manual. These rules and regulations, while similar to those of the FCPD, have their own nuances.

### **Overview of the Milwaukee Police Department Rules and Regulations**

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<sup>229</sup> Wis. Stat. §164.01 defines law enforcement officers as "any person employed by the state or by a city, village, town or county for the purpose of detecting and preventing crime and enforcing laws or ordinances, who is authorized to make arrests for violations of the laws...which he or she is employed to enforce."

<sup>230</sup> *Id.* §164.03.

As with a FCPD officer, a new MPD officer must quickly become familiar with the MPD rules and regulations contained in the Milwaukee Police Department Manual.<sup>232</sup> The failure to become acquainted with and abide by these rules and regulations, or with the responsibilities of the rank or position held, or the standard operating procedures for conducting police business "...shall subject such member to disciplinary action."<sup>233</sup>

Not surprisingly, given the identical mission of the MPD and the FCPD, the general rules and regulations section of the MPD manual contain many of the same provisions as in the FCPD manual. Members of the MPD are charged, at all times to "...preserve the public peace, prevent crime, detect and arrest violators of the law, and protect life and property."<sup>234</sup> MPD officers are also instructed that they must conform to, abide by, and enforce the law, and "...render their services to the City with zeal, courage, discretion, and fidelity."<sup>235</sup> While this language is specifically tailored to law enforcement, other language contained in the manual would be equally at home in an Air Force Instruction.

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<sup>231</sup> Wis. Stat. § 164.04 states that the rights that have been granted by this statute "shall not be diminished or abridged by any ordinance or provision of any collective bargaining agreement," but that those rights "may be supplemented or expanded" either by ordinance or the terms of a collective bargaining agreement."

<sup>232</sup> City of Milwaukee, Wis., Milwaukee Police Department Manual, rule 2, ¶ 2/010.00 (Aug. 1994) [hereinafter MPD Manual].

<sup>233</sup> Id.

<sup>234</sup> Id. rule 4, ¶ 2/015.00.

<sup>235</sup> Id.

MPD officers must promptly obey any lawful order from any officer of higher rank,<sup>236</sup> refrain from using “coarse, violent, profane, or insolent language” when dealing with the public,<sup>237</sup> conform to specific personal appearance standards,<sup>238</sup> and be careful not to sleep, idle, or loaf on duty.<sup>239</sup> This quasi-military emphasis on obeying orders, decorum, and attention to duty, of course, is not only found in Air Force Instructions, but also parallel the regulations of the FCPD, right down to the inclusion of the word “loaf.” Despite the similarities between the MPD and FCPD rules and regulations, there are also differences both in approach and in substance.

Unlike both the FCPD regulations (and the UCMJ), the MPD regulations do not prominently feature broad “catch all” misconduct provisions. The MPD general regulations do not contain conduct unbecoming, or immoral conduct, or association with known or suspected criminals provisions like those found in the FCPD regulations. Conduct unbecoming and dereliction of duty language is used in the MPD regulations only to help define other behaviors that are unacceptable to law enforcement, such as cowardice. For instance:

“Members of the police force are required to discharge their duties with coolness and firmness, and in time of extreme peril they shall act together and assist and protect each other in the restoration of peace and order. Whoever shrinks from danger or

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<sup>236</sup> *Id.* rule 4, ¶ 2/030.00.

<sup>237</sup> *Id.* rule 4, ¶ 2/060.00.

<sup>238</sup> *Id.* rule 4, ¶ 2/070.00.

<sup>239</sup> *Id.* rule 4, ¶ 2/380.00.

responsibility shall be considered guilty of cowardice and gross neglect of duty and unworthy of a place in the service.”<sup>240</sup>

Although in legal terms, the quoted language is fairly broad, it is less so than the far-reaching conduct unbecoming provision in the FCPD regulations, which covers any conduct that “...brings the Department into disrepute or reflects discredit upon the employee.”<sup>241</sup> Instead of a sweeping “immoral conduct” provision, only one regulation even touches on this area, stating that no MPD officer shall knowingly “enter any house of ill repute, except in the performance of duty, and if required to enter any such place, they shall report the fact to their commanding officer...”<sup>242</sup>

Despite the absence of broad catch all prohibitory language in the general MPD regulations, buried within another section, entitled “Complaints and Inquires,” is a statement that formal disciplinary charges may be preferred for violations of the rules, regulations, standard operating procedures, orders, as well as “...*for any conduct or negligence to the prejudice or good order, efficiency, or discipline.*”<sup>243</sup> No definitions or examples of acts that would be considered conduct or negligence prejudicial to good order, efficiency or discipline are given.

The MPD rules and regulations, unlike the FCPD regulations, also give a nod to the ages old (but mostly unwritten) military axiom that “rank has its privileges.” Under the MPD system, rookie

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<sup>240</sup> Id. rule 4, ¶ 2/050.00.

<sup>241</sup> FCPD Manual, regulation 201.7(A).

<sup>242</sup> MPD Manual, rule 4, ¶ 2/260.00.

<sup>243</sup> Id. rule 7, ¶ 2/700.45 (emphasis added).

officers are assigned night duty, and officers get the opportunity to be assigned to day shift based on seniority.<sup>244</sup> Although all rookie MPD officers, unlike FCPD rookies, must start work on the night shift, some may find unhealthy consolation in the fact that they, unlike FCPD officers, may at least smoke when off duty and not in uniform.<sup>245</sup>

The MPD manual also has extremely detailed provisions on certain topics that are given only cursory coverage by the FCPD regulations. For example, five entire pages of the MPD manual address the department's attendance policy and sick leave. While a MPD officer is on sick leave, the officer cannot leave home without receiving the permission of a department physician and commanding officer.<sup>246</sup> MPD officers on sick leave must be granted permission to leave the house for one of seven specified reasons, but in making such a request, the officer must "...state the purpose or purposes in leaving the residence, the destination or destinations, the planned time of departure, the method of transportation, and the estimated time of return to the residence."<sup>247</sup> After returning home, the MPD officer must contact his or her commanding officer or shift commander to notify the MPD that they have in fact returned.<sup>248</sup> These tough and detailed provisions are not the result of collective bargaining, but reflect an historical point of emphasis

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<sup>244</sup> Id. rule 4, ¶ 2/405.00.

<sup>245</sup> Id. rule 4, ¶ 2/175.00.

<sup>246</sup> Id. rule 5, ¶ 2/500.30.

<sup>247</sup> Id.

<sup>248</sup> Id.

within the MPD.<sup>249</sup> Whatever the motivation for these provision, even the Air Force, where playing hooky is a federal offense, has not promulgated any such detailed, rigorous restrictions.

While the MPD manual devotes a significant amount of space and detail to attendance and sick leave matters, the MPD devotes only two pages to inquiries and internal investigations of police officers.<sup>250</sup> The FCPD section on administrative investigations is more than 20 pages long, but this more detailed treatment does not necessarily translate into more rights for FCPD than those given to MPD officers. As will be discussed below, MPD officers under investigation have one important right, guaranteed by statute, that FCPD officers under investigation do not have - the right to have a representative present during interrogation.

### **The Initial Investigation of Alleged or Suspected Misconduct by the MPD**

An entirely sensible MPD investigatory provision simply states when an investigation is not necessary. If a supervisor directly observes an officer commit a minor infraction or notices that the officer is in need of some minor correction in behavior, no investigation is necessary.<sup>251</sup> The supervisor handles the situation directly by issuing an oral "correction" or a written reprimand

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<sup>249</sup> Telephone Interview with Laurie Eggert, Esq., Eggert & Edmonds, S.C., Milwaukee, Wis. (Mar. 17 1998) (representing The Milwaukee Police Association, Local #21 I.U.P.A., AFL-CIO).

<sup>250</sup> See Id. rule 7.

<sup>251</sup> Id. rule 7, ¶ 2.700.05.

using a correction/disciplinary form (Form PD-30).<sup>252</sup> The officer is given a copy of this form, and since no questions are to be asked, supervisors are informed that no advisement of any of the officer's statutory rights are required to be given.<sup>253</sup>

If a minor infraction is not directly observed by a supervisor, or if more serious misconduct is alleged, the officer in question is subject to an investigation. All MPD district or bureau commanders, as well as all officers of higher rank are tasked to notify the Internal Affairs Division by written complaint of "any alleged violation of the Rules and Regulations, Standard Operating Procedures, or Department Orders, or for conduct to the prejudice of good order, efficiency, and discipline, which may come to their attention."<sup>254</sup> The Internal Affairs Division is then responsible for insuring that a "prompt and diligent inquiry" is made into every such complaint.<sup>255</sup> The actual investigation of the complaint is then either made by the Internal Affairs Division, or the investigative function is delegated by the Internal Affairs Division to the officer's district, division, or bureau commander. The current chief of police has preferred that most investigations be handled by the Internal Affairs Division, but this policy may change as the more cases are handled at this level instead of by other commanders, creating a backlog.<sup>256</sup>

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<sup>252</sup> Id.

<sup>253</sup> Id.

<sup>254</sup> Id. rule 7, ¶ 2/700.00.

<sup>255</sup> Id. rule 7, ¶ 2/700.10.

<sup>256</sup> Telephone Interview with Laurie Eggert, Esq., Eggert & Edmonds, S.C., Milwaukee, Wis. (Mar. 17 1998) (representing The Milwaukee Police Association, Local #21 I.U.P.A., AFL-CIO).

If an investigation is initiated against a MPD officer, then that officer must be advised of his or her statutory law enforcement rights, and a form setting forth those rights is also given to the officer.<sup>257</sup> Pursuant to this bill of rights, if a police officer is under investigation and subject to interrogation for any reason that could lead to disciplinary action, demotion, dismissal or criminal charges, the MPD officer must be informed of the nature of the investigation prior to any interrogation.<sup>258</sup> The police officer also has the right have a representative of his or her choosing present during the interrogation.<sup>259</sup> If the police officer is not informed of the nature of the investigation before the interrogation, or not given the opportunity to have representation during the interrogation, any evidence obtained during the interrogation cannot be used in any subsequent disciplinary proceeding against the officer.<sup>260</sup> Refusal to respond during the interrogation, or any response which is untruthful could be the basis for suspension or termination from the MPD.<sup>261</sup>

The MPD regulations also do not have any specific provisions requiring an officer under investigation to provide urine or blood samples. However, any MPD officer may be ordered to “submit to a medical examination, at any time, to determine whether or not such member is fit, physically and mentally, for the proper performance of duties.”<sup>262</sup> Through this provision, MPD

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<sup>257</sup> MPD Manual, rule 7, ¶ 2/700.05.

<sup>258</sup> Wis. Stat. § 164.02(1)(a).

<sup>259</sup> Id. §164.02(1)(b).

<sup>260</sup> Id. §164.02(2).

<sup>261</sup> Milwaukee Police Department form “Internal Investigation Informing the Member.”

<sup>262</sup> MPD Manual, rule 4, ¶ 2/450.00.



officers under investigation can be compelled to provide additional evidence that may be used against them administratively.

After the investigation is completed, the commanding officer of the Internal Affairs Division is given the results of the investigation, along with the original complaint, and any transcripts of testimony that were taken.<sup>263</sup> If the investigation is performed by the captain or commanding officer of a district, division, or bureau, he or she will also make and forward a recommendation to the commanding officer of the Internal Affairs Division as to the disposition of the matter.<sup>264</sup>

The commanding officer of the Internal Affairs Division reviews the evidence, and recommendation, if any, and determines if the evidence justifies formal charges against the officer investigated. If the commanding officer of the Internal Affairs Division believes that formal charges are appropriate, he or she is responsible for preparing and submitting those charges to the chief of police.<sup>265</sup>

These formal written charges must state the specific offense or offenses committed, with each distinct offense being made a separate charge.<sup>266</sup> Once the charges are drafted and submitted to the chief of police, the question then centers on whether or not disciplinary action will actually be taken against the officer.

#### **Authority to Impose Disciplinary Action/Available Disciplinary Actions**

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<sup>263</sup> Id. rule 7, ¶ 2/700.20.

<sup>264</sup> Id. rule 7, ¶ 2/700.15.

<sup>265</sup> Id. rule 7, ¶ 2/700.55.

<sup>266</sup> Id. rule 7, ¶ 2/700.50.

Once the chief of police reviews the formal charges that have been drafted by the Internal Affairs Division after the completion of the investigation, the chief decides if the charges should be approved. If the chief approves the charges, they are then preferred against the MPD officer.<sup>267</sup>

The MPD officer after being given notice of the charges by the referral, is given the opportunity to respond in writing. The current chief of police does not give officers the opportunity to make a personal presentation, as was once permitted.<sup>268</sup> After satisfying the Loudermill requirements of notice of the charges and the right (albeit limited) to respond to the charges, the chief of police either acquits the officer of the charges, or imposes disciplinary action.<sup>269</sup> The chief of police may impose punishment consisting of a reprimand, suspension without pay, demotion, or discharge from the MPD.<sup>270</sup> The judgment of the Chief of Police is then read at all district and bureau roll calls.<sup>271</sup>

This system gives the chief of police the sole authority for disciplining officers under his or her command in all instances except where a supervisor has directly observed an officer commit a minor regulatory infraction, in which case that supervisor can issue a reprimand. Not only is the

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<sup>267</sup> Id. rule 7, ¶ 2/700.45.

<sup>268</sup> Telephone Interview with Laurie Eggert, Esq., Eggert & Edmonds, S.C., Milwaukee, Wis. (Mar. 17 1998) (representing The Milwaukee Police Association, Local #21 I.U.P.A., AFL-CIO).

<sup>269</sup> MPD Manual, rule 7, ¶ 2/700.75.

<sup>270</sup> Id.

<sup>271</sup> Id.

authority to impose all discipline except the most minor disciplinary actions retained by the very top level of command, the right of the individual officer to respond to that top level of command before a decision is made on what action is appropriate is also very limited. These characteristics of the MPD disciplinary system are markedly different from those of the Air Force disciplinary scheme, where supervisors and subordinate commanders have a variety of disciplinary tools at their disposal, and where airmen facing Article 15 actions are given the right to make face-to-face presentations to their commanders, bring in witnesses, be represented by a lawyer, and have an opportunity to present, in a meaningful way, evidence that may prompt the commander to decide that disciplinary action is not warranted before it is imposed.

One characteristic that the MPD disciplinary system and the Air Force Article 15 process have in common is that the same person who initially functions in the prosecutorial role by determining that disciplinary action is warranted later functions in the judicial role by deciding whether to impose the disciplinary action they have already determined is appropriate. In the Air Force, many airmen facing Article 15 action wonder if the commander, after deciding that Article 15 action is appropriate, can really sit impartially through the airman's presentation and fairly weigh the evidence before deciding to go ahead and punish the airman. The right of airmen to meet personally with their commanders, present witnesses and documentary evidence, and the training commanders receive about the importance of impartiality in such presentations are all designed to help address this legitimate concern. The proceedings are purposefully designed to insure not only that the Article 15 system is fair, but that it is perceived as fair. By contrast, the MPD disciplinary system does not seem to reflect any similar concern with the perception of fairness at

this stage of the proceedings. The only meaningful opportunity for a MPD officer to respond and defend his or her actions appears to be on appeal.

### **Avenues to Appeal MPD Disciplinary Actions**

A non-probationary MPD officer has two potential avenues to challenge a disciplinary action. The grievance/arbitration process provided for in the collective bargaining agreement between the City of Milwaukee and the Milwaukee Police Association Local #21 is available to grieve disciplinary actions consisting of suspensions of five days or less. An appeal before the Fire and Police Commission is available for discharges or suspensions exceeding five days. The only MPD officers unable to make use of an appeal to the FPC are probationary officers, who during their initial probationary period are subject to discharge for proving to be "unsatisfactory."<sup>272</sup>

### **The MPD Grievance/Arbitration System**

The most obvious differences between the MPD disciplinary system, and the Air Force's administrative disciplinary system is the MPD's grievance and arbitration process. This grievance/arbitration process has two grievance steps before proceeding to final binding arbitration. This grievance process replaces an internal police hearing board similar to the one used by the FCPD.<sup>273</sup>

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<sup>272</sup> *Id.* rule 4, ¶ 2/335.00.

<sup>273</sup> Telephone Interview with Laurie Eggert, Esq., Eggert & Edmonds, S.C., Milwaukee, Wis. (Mar. 17 1998) (representing The Milwaukee Police Association, Local #21 I.U.P.A., AFL-CIO).

Matters of MPD discipline that are not subject to appeal to the FPC are valid grievances under this system, and matters that are appealable to the FPC are not valid grievances.<sup>274</sup> If a grievable disciplinary action is imposed on a MPD officer, to begin the grievance procedure, a disciplined MPD officer fills out a standard grievance form, and gives this form to the union steward.<sup>275</sup> Thereafter the MPD officer meets with the union steward. If after this meeting the officer wants the grievance processed, and the union steward agrees to proceed, then the written grievance is formally submitted to the department.

The grievance is formally initiated by submitting the written grievance immediately above the level of the chain of command at which the discipline was administered.<sup>276</sup> Therefore, if a written reprimand (the only type of MPD disciplinary action that can be initiated by someone other than the chief of police) was given by the officer's division commander (the lowest level of command), the grievance would be presented to the bureau commander, the next level of command within the MPD system. This constitutes "step one" of the grievance procedure. If the disciplinary action was instead imposed by the chief of police, then the grievance is initiated at "step two," which entails submitting the grievance to the chief of police.<sup>277</sup>

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<sup>274</sup> Agreement Between City of Milwaukee and The Milwaukee Police Association, Local #21 I.U.P.A. AFL-CIO, art. 7, ¶ I.A.1 (Effective January 1, 1995 through December 31, 1997). [hereinafter MPD CBA].

<sup>275</sup> MPD CBA, art. 7, ¶ I.B.

<sup>276</sup> *Id.* art. 7, ¶ I. A. 2.

<sup>277</sup> *Id.*

If the grievance is properly initiated at step one, the union steward must present the written grievance to the appropriate subordinate commander within 15 calendar days of the occurrence of the disciplinary action in order for the grievance to be valid.<sup>278</sup> A meeting to discuss the grievance "in a friendly manner" is then held with the officer, the union steward, the officer's immediate supervisor, and the subordinate commander all in attendance.<sup>279</sup> Given the reason for the meeting, mandating that it be friendly seems a rather tall order. After the meeting, the subordinate commander, in consultation with the officer's shift commander and immediate supervisor, must answer the grievance in writing, and give the reasons for whatever decision is made on the grievance.<sup>280</sup> If the grievance is not resolved at step one, or if the chief of police initiated the disciplinary action and step one was skipped, the process proceeds to step two.

Step two of the grievance process involves appealing the unacceptable step one response of the subordinate commander to the chief of police. The union grievance committee chairman has 15 calendar days from receipt of the step one response to submit a written appeal to the chief of police and to request a meeting.<sup>281</sup> If an appeal is not received within 15 calendar days, the grievance is deemed to be settled.<sup>282</sup> If an appeal is made, a meeting is held, attended by the chief of police, the chief's panel, and the union grievance committee chairman.<sup>283</sup> The

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<sup>278</sup> Id. art. 7, ¶ I.B.

<sup>279</sup> Id.

<sup>280</sup> Id.

<sup>281</sup> Id.

<sup>282</sup> Id.

<sup>283</sup> Id. art. 7, ¶ I.B.

disciplined officer also has the right to attend the meeting, the purpose of which is to discuss the step one decision "in good faith and attempt to resolve the matter."<sup>284</sup> Within 30 calendar days of this meeting, the chief of police is to make his decision on the grievance known to the disciplined officer and the union grievance committee chairman.<sup>285</sup> If the grievance is not settled at this second step, the union has the option of proceeding to final and binding arbitration.

Final and binding arbitration is initiated by the union serving upon the chief of police and the City of Milwaukee labor negotiator a written notice of that intent within 30 calendar days of receiving the second step answer.<sup>286</sup> The collective bargaining agreement provides for a specific arbitrator to hear cases.<sup>287</sup> At the arbitration hearing, the arbitrator "shall take such evidence as in his/her judgment is appropriate for the disposition of the case."<sup>288</sup> Statements of position on behalf of both the disciplined officer and the MPD can be made, and witnesses may be called. Pursuant to state law, the arbitrator has the authority to issue subpoenas<sup>289</sup> and can petition any court in the county to direct the taking of depositions to be used in the proceeding.<sup>290</sup> If the

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<sup>284</sup> Id.

<sup>285</sup> Id.

<sup>286</sup> Id. art. 7, ¶ II.A.

<sup>287</sup> Id. art. 7, ¶ II.B.3.

<sup>288</sup> Id. art 7, ¶ II.C.

<sup>289</sup> Wis. Stat. § 788.06(2). If any person so served neglects or refused to obey the subpoena, the issuing party may petition the circuit court for the county in which the hearing is held to impose a remedial sanction in the same manner provided for witnesses in circuit court. Id.

<sup>290</sup> Id. § 788.07.

disciplinary action related to the application of MPD rules or regulations, the chief of police is also permitted to participate in the proceeding and state the MPD's position on the dispute.<sup>291</sup>

The collective bargaining agreement makes clear that the arbitrator cannot add, detract or modify the language of the rules and regulations, and must confine the inquiry to the precise issues submitted for arbitration.<sup>292</sup> The arbitrator, per the terms of the collective bargaining agreement, is also prohibited from impairing the ability of the chief of police to maintain, establish and modify rules and regulations not in violation of specific collective bargaining agreement provisions, or from impairing the chief of police's ability to execute MPD rules and regulations "in a fair and equitable manner."<sup>293</sup>

The cost of the arbitration proceedings is split equally between the union and the city.<sup>294</sup> Expenses relating to the calling of witnesses or obtaining depositions or any other similar expense is paid by the party requesting the witness or deposition.<sup>295</sup>

The final arbitration award is to be issued in writing within 60 calendar days after the arbitrator has been appointed to the case, unless the parties agree to extend this time.<sup>296</sup>

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<sup>291</sup> MPD CBA, art. 7 ¶ II.C.

<sup>292</sup> *Id.* art. 7 ¶ II. D.-E.

<sup>293</sup> *Id.* art. 7 ¶ II. F.-G.

<sup>294</sup> *Id.* art. 7 ¶ II. G.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* art 7, ¶ I.



Although this procedure in theory provides a quick, structured way to attempt to resolve disputes over disciplinary matters, there are several practical problems. Formal written briefs are required by the arbitrator, all matters are reduced to writing, and a transcript is prepared by a stenographer.<sup>297</sup> Adherence to these procedural requirements slows down the process and makes it more expensive.<sup>298</sup> Another even more serious problem has currently led to the complete break down of the arbitration process, and that has also impeded the right of officers to appeal to the FPC.

As already noted, disciplinary action consisting of more than a five day suspension entitles the disciplined officer to appeal this action to the FPC. The current chief of police however has circumvented this appeal mechanism by issuing to disciplined officers multiple five-day-or-less suspensions, stating that because none of the suspensions are more than five days in length, there is no entitlement to a FPC appeal.<sup>299</sup> This allows the discipline to begin immediately, subject only to the grievance and arbitration procedure after discipline is imposed, rather than the enforcement of the disciplinary action being held in abeyance pending an appeal to the FPC.<sup>300</sup> The MPA is currently embroiled in legal action in the county court to stop this practice by the

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<sup>297</sup> Telephone Interview with Laurie Eggert, Esq., Eggert & Edmonds, S.C., Milwaukee, Wis. (Mar. 17 1998) (attorney representing The Milwaukee Police Association, Local #21 I.U.P.A., AFL-CIO).

<sup>298</sup> Id.

<sup>299</sup> Id.

<sup>300</sup> Id.

chief of police, but in the interim, the union is taking no cases to arbitration.<sup>301</sup> Unfortunately for disciplined MPD officers who are being disciplined with suspensions, the chief of police is able to impose this discipline with impunity.

Certainly another drawback to this system from the standpoint of the individual MPD officer, when compared to the Air Force disciplinary system is that even when the grievance/arbitration system is working, it can only be utilized if the union determines that it should be grieved.

Although the union owes a duty of fair representation to each police officer within the bargaining unit, the overall needs of the bargaining unit may dictate that the disciplinary action should not be grieved for the benefit of the unit as a whole without violating this duty of fair representation.

In the Air Force system, the disciplined airman has the option of exercising any and all appeal avenues at his or her discretion, with legal help, no matter how futile, time consuming, or costly the individual's case or position is - and the Air Force will pay the entire cost of the proceedings.

### **Appeals of Disciplinary Actions to the Fire and Police Commission**

No member of the MPD can be discharged or suspended for a term exceeding five days by the chief of police, except for cause and after being given the option for a trial by the FPC.<sup>302</sup> The FPC is in many respects similar to the Fairfax County Civil Service Commission. The FPC is

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<sup>301</sup> Id.

<sup>302</sup> Wis. Stat. §62.50(11).

established pursuant to state law.<sup>303</sup> The FPC consists of five members, appointed by the mayor, who hold staggered lengths of office.<sup>304</sup> The FPC reviews the policies of the Milwaukee Fire and Police Departments, and has rule-making authority to prescribe rules for both departments.<sup>305</sup> This rule-making authority can be delegated to the fire and police chiefs.<sup>306</sup>

If the chief of police intends to discharge or suspend a MPD officer for a period exceeding five days, the chief of police must notify the officer, and the FPC is also notified by providing "a complaint setting forth the reasons for the discharge or suspension..."<sup>307</sup> Within 10 days after the date of service of this notice, the MPD officer has the right to file an appeal with the FPC. Since Wisconsin law provides that no police officer may be discharged or suspended for more than five days without pay or benefits until the matter is disposed of by the FPC or the time for requesting an appeal passes without a request for an appeal being made, it is probable that most officers opt to appeal, if for no other reason than to delay the loss of pay.<sup>308</sup> This is the statutory provision that the chief of police is currently attempting to avoid with his multiple five-day-or-less suspension policy.

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<sup>303</sup> Id. § 62.50.

<sup>304</sup> Id. § 62.50(1).

<sup>305</sup> Id. § 62.50(1m), (3).

<sup>306</sup> Id. § 62.50(3).

<sup>307</sup> Id. § 62.50(13).

<sup>308</sup> Id. § 62.50(18).

If the disciplined officer does appeal, the FPC, within five days of being notified, serves the officer with a copy of the complaint and a notice fixing the time and place of trial. The FPC trial date should be scheduled to take place not less than five days nor more than fifteen days after service of the notice and a copy of the complaint.<sup>309</sup>

The FPC employs a hearing examiner to assist the commission, performing tasks similar to those performed by the Fairfax County Civil Service Commission's hearing officer. The FPC hearing examiner may arrange for a pre-trial conference before the actual appeal is heard. The purpose of this pre-trial hearing is to "narrow the issue to be tried and also to shorten the length of time necessary to complete the presentation of evidence."<sup>310</sup> The MPD officer may or may not be represented by a union attorney or his or her own attorney. The MPD is represented by the city attorney. At the pre-trial conference, if it is held, witness lists, exhibit lists, copies of prior recorded statements of witness, and reports written by witnesses are exchanged.<sup>311</sup> Each party is also to allow the other party to physically inspect exhibits. FPC members can secure subpoenas for both the attendance of witnesses and for the production of records.<sup>312</sup> The police officer specifically is entitled to secure the attendance of all witnesses necessary for his or her defense at the expense of the city.<sup>313</sup> This is certainly an advantage over the grievance/arbitration process,

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<sup>309</sup> Id. § 62.50(14).

<sup>310</sup> City of Milwaukee, Wis., Rules of the Board of Fire and Police Commissioners, rule XXIV, § 3 (Jan. 13, 1994). [hereinafter FPC]

<sup>311</sup> FPC rule XXIV § 3.

<sup>312</sup> Wis. Stat. § 62.50(16).

<sup>313</sup> Id.

where the union would have to decide whether or not it was willing or able to pay for the travel expenses of defense witnesses. FPC members can enforce their orders because they have the same contempt powers as given to municipal judges.<sup>314</sup>

The trial itself is held before the members of the FPC, who listen to the evidence and decide the case. The hearing examiner performs the duty of presiding officer at the trial, provided that FPC members are in attendance, and all decisions, determinations, and dispositions are made by FPC members.<sup>315</sup> The city attorney represents the interests of the city, and the union may or may not provide legal counsel for the MPD officer, depending on the particularities of the case, including the severity of the proposed disciplinary action, and the facts and circumstances surrounding the alleged misconduct.<sup>316</sup> The trial is open to the public, with no procedures like those of the Fairfax County Civil Service Commission for closing it.<sup>317</sup>

Civil rules of evidence apply at the trial, but the FPC has the liberty to relax these rules.<sup>318</sup> Currently, no members of the FPC are attorneys, and as a consequence, FPC members are sometimes impatient and non-receptive to precise legal arguments or distinctions.<sup>319</sup>

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<sup>314</sup> Id.

<sup>315</sup> FPC rule XXIV § 4(e).

<sup>316</sup> Telephone Interview with Laurie Eggert, Esq., Eggert & Edmonds, S.C., Milwaukee, Wis. (Mar. 17 1998) (representing The Milwaukee Police Association, Local #21 I.U.P.A., AFL-CIO).

<sup>317</sup> Wis. Stat. § 62.50(16).

<sup>318</sup> FPC rule XXIV § Section 4(c).

<sup>319</sup> Telephone Interview with Laurie Eggert, Esq., Eggert & Edmonds, S.C., Milwaukee, Wis. (Mar. 17 1998) (representing The Milwaukee Police Association, Local #21 I.U.P.A., AFL-CIO).

At the trial, the officer has the option of “pleading guilty,” by admitting to the truth of the charges, and focusing his or her presentation on reducing the disciplinary sanction.<sup>320</sup> This defense strategy is supported by the rules that allow for the presentation of evidence pertaining to the officer’s work record, his or her character, and the circumstances mitigating the wrongful conduct.<sup>321</sup>

After the hearing concludes, the FPC must determine, by a preponderance of the evidence, whether the charges are sustained against the officer.<sup>322</sup> This determination is made by a majority vote.<sup>323</sup> If the charges are sustained, the FPC will also determine whether, “for the good of the service” the officer should be permanently discharged or be suspended without pay for a period not exceeding 60 days, or reduced in rank.<sup>324</sup> If the charges are not sustained, the officer is immediately reinstated.<sup>325</sup> If the charges are sustained, the disciplined officer has one last bite at the due process apple - an appeal to the circuit court to review the order of the FPC.

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<sup>320</sup> FPC rule XXIV § Section 4(e).

<sup>321</sup> FPC rule XXIV, § 4(d).

<sup>322</sup> Wis. Stat. § 62.50(17).

<sup>323</sup> Id.

<sup>324</sup> Id.

<sup>325</sup> Id.

### Appeal of the FPC Decision to the Circuit Court

Any police officer who has been discharged, suspended or reduced may, within 10 days after the FPC decision and findings have been filed with the secretary of the board, bring an action in the Milwaukee county circuit court to review the order.<sup>326</sup>

This judicial review is easy to initiate. The MPD officer sends a simple notice to the FPC secretary and the city attorney requesting review.<sup>327</sup> Within five days of this notice being filed, the FPC must supply the clerk of the circuit court with all charges, testimony, and other information relevant to the trial and the disciplinary action taken.<sup>328</sup> Review of the order is given precedence, and a trial date, unless otherwise mutually agreed between the parties, is set for no later than 15 days after the officer makes the review application.<sup>329</sup>

The circuit court will review the information supplied by the FPC, and render a decision without a jury. The circuit court, by statute, is limited in the review to one question: "Under the evidence was the decision of the board reasonable?"<sup>330</sup> As part of this review, the court may require the

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<sup>326</sup> Id. § 62.50(20).

<sup>327</sup> Id. The proper form of the notice, set forth in this statutory provision is very simple: "Please take notice that I hereby demand that the circuit court of .....County review the order made by the Fire and Police Commissioners on the .....day of .....A.D. ....discharging, (or suspending).....from the ..... department. (Signed)....."

<sup>328</sup> Id.

<sup>329</sup> Id.

<sup>330</sup> Id. § 62.50(20).

FPC to supply additional documentary evidence, or require the FPC to take additional testimony and provide that to the court.<sup>331</sup>

If the decision of the FPC is reversed, the discharged or suspended MPD officer will be reinstated in his or her former position and will be entitled to the same pay as if not discharged or suspended. On the other hand, if the decision of the FPC is upheld, the order of discharge, suspension, or reduction will be final and conclusive in all cases.<sup>332</sup>

Win or lose, no costs can be allocated to either party, and the clerks' fees are paid by the City of Milwaukee.<sup>333</sup> Therefore, the disciplined officer has absolutely nothing to lose from taking advantage of this judicial appeal, unless he or she decides to pay for the services of a lawyer if one is not provided by the union.

### **The Air Force Disciplinary System and the MPD System**

The MPD disciplinary system bears less resemblance to the Air Force disciplinary system than the FCPD disciplinary system. The most obvious difference is the MPD system's collective bargaining agreement that includes a grievance/arbitration provision. The grievance/arbitration

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<sup>331</sup> Id.

<sup>332</sup> Id. § 62.50(22).

<sup>333</sup> Id.



system is a substantial departure from the traditional military discipline system. Adopting a similar system for the Air Force would be viewed by most Air Force officers as not only completely at odds with military necessity, but also as an act of heresy. The MPD system, even more than the FCPD disciplinary system, places little importance on allowing the officer pending disciplinary action a meaningful right to respond to the allegations before a disciplinary decision is made. Before punishment is imposed pursuant to the FCPD system, the officer at least has the opportunity to respond both in writing and to meet with the chief of police. In the MPD system, the chief of police will not meet with an officer facing disciplinary action before determining what disciplinary action is appropriate, leaving to the aggrieved officer only the grievance/arbitration process or the FPC appeal as the only means of redress. Of course, this may actually provide no relief at all, since currently no disciplinary matters are being arbitrated, and the chief of police is structuring many disciplinary actions in such a way as to attempt to make them subject to arbitration rather than FPC appeal. The fact that the MPD system is malfunctioning is the most glaring factor that sets it apart from the Air Force disciplinary system. The Air Force system does work as advertised.

## **Conclusion**

Comparing the Air Force's administrative disciplinary system to that of the FCPD and the MPD leads to several conclusions. While these police departments, like the vast majority of law enforcement agencies in the United States, have organized themselves on a military model and

adopted quasi-military disciplinary systems, these disciplinary systems are inherently different because they are not based on a criminal justice system like the UCMJ. Police disciplinary systems have also been further modified from the military model to reflect the evolving constitutional requirements of public employment law, state statutes, and labor relations.

Air Force members have greater rights during the investigatory stage than those of either the FCPD or the MPD, most importantly the right against compulsory self-incrimination. Air Force members also enjoy more expansive pre-disciplinary rights to be heard and present evidence in their defense before the imposition of punishment. Prior to Article 15 punishment, an airman has the right to a presentation before the commander which may include witnesses, documentary evidence, and the presence of legal defense counsel. Similarly, an airman, if meeting the minimum requirements, is also entitled to an administrative board hearing before a decision is made concerning whether that airman will be discharged from the Air Force, rather than waiting until the decision has already been made before having a right to provide a full defense on appeal, as is the case with the FCPD and MPD systems.

While the Air Force administrative disciplinary system provides greater protections and due process opportunities to its members at the investigative and pre-disciplinary phases, this is not the case with the post-disciplinary appeal phase, where both the FCPD and MPD systems provide much more substantial due process protections in the form of hearings or grievance/arbitration proceedings. This emphasis on providing a right to a full hearing and other due process protections after the imposition of punishment is fully consistent with the Loudermill line of cases and the constitutional protections mandated for public employees

granted property interests in continued employment. Although FCPD and MPD officers after the imposition of disciplinary action receive due process protections equaling or exceeding those that Air Force members receive prior to the imposition of disciplinary action, (at least when the police systems are properly functioning), the FCPD and MPD systems could benefit from providing more opportunities for officers to respond to allegations before the imposition of punishment. Allowing officers, like airmen, to present a more detailed explanation and response to allegations under their own terms (not just in response to interrogation during the investigatory stage) could improve department morale by providing an increased sense that supervisory officers are interested in impartially and fairly administering discipline. Gathering information before an appeal could also lead to savings for the department or the local government. Learning of valid defenses or of mitigating or extenuating circumstances early could prompt the department to drop unjust or ill-advised disciplinary actions before incurring the expense of an appeal or arbitration.

Although the military administrative disciplinary system cannot serve all of the legal and practical needs of a police department, this system, which has continued to evolve, also continues to offer disciplinary approaches and procedures capable of being incorporated into police disciplinary systems already built upon a military model. The variations on this common foundation as seen in the FCPD and MPD systems provide further ideas how the military disciplinary model can be adapted to fit the needs of civilian law enforcement agencies.