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Investigative Detention of Employees – Part Two Non-testimonial Evidence

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Part Two - Non-testimonial Evidence

Scope of Article

A 2004 article addressed the issue of what *warnings* should be given to an officer who is interviewed (a) as an employee, in an administrative investigation, or (b) as a suspect, in a criminal investigation. See *Interviews and Interrogations of Public Employees: Beckwith, Garrity, Miranda and Weingarten Rights*, 4 (1) Law Enforcement Executive Forum 01-17 (Nov. 2004), viewable at: http://www.aele.org/interviews.pdf

This article reviews cases involving investigatory ***detentions*** of law enforcement employees, whether the purpose is administrative or criminal. In the former, management representatives investigate an employee for misconduct or unfitness. In the latter, an employee is investigated by other peace officers for possibly unlawful conduct, while on or off-duty.

Part One of this article discussed criminal interviews. This part focuses on non-

testimonial evidence.

Buffalo Police – lineup (1971)

In April 1970, Buffalo, NY, police officers came under a sniper's gunfire and called for assistance. Up to as many as 25 officers entered a residential building to apprehend the gunman. Later, the Police Commissioner received complaints that some officers had "burst unannounced into occupied apartments of the building and without justification beat the inhabitants severely, requiring hospitalizations in several instances."

An investigation revealed that 62 officers were on duty in the vicinity that night. Although several complainants viewed photographs of those officers, the identification process was deemed untrustworthy because of the age of the photographs.

The Commissioner ordered a lineup; officers were advised of their right of representation by counsel and/or a union official. After the officers challenged the order in federal court, the judge issued an injunctive order; the Commissioner appealed.

The plaintiff officers claimed that the lineup directive lacked probable cause, and thus was an unreasonable seizure. The Second Circuit disagreed, 3-to-0, writing:

> "Decisive to our conclusion that the lineup was indeed 'reasonable' is the substantial public interest in ensuring the appearance and actuality of police integrity.
>
> "We do not believe that the public must tolerate failure by responsible officials to seek out, identify, and appropriately discipline policemen responsible for brutal or unlawful behavior in the line of duty, merely because measures appropriate to those ends would be improper if they were directed solely toward the objective of criminal prosecution. * * *
>
> "The lineup was ordered by that official of the police department charged with running an efficient and law-abiding organization -- the Police Commissioner -- and was clearly and highly relevant to the legitimate end of assuring his employees' trustworthy performance of their assigned tasks."

The panel noted that the lineup was to be conducted at a time and place that were well within the usual demands of a policeman's job. To forbid the lineup would "unduly hamper the difficult task of supervising and maintaining a dependable and trusted police force, with little compensating gain to plaintiffs' individual rights." Biehunik v. Felicetta, #35543, 441 F.2d 228 (2nd Cir. 1971); *cert. den*. 403 U.S. 932.

Milwaukee Police – alcohol test (2000)

The Milwaukee Police Dept. had a rule that prohibited officers from being intoxicated, while off-duty. The word "intoxicated" was defined to "mean any abnormal state or condition resulting from the use of intoxicating liquor and/or fermented malt beverages which renders such member unfit to properly perform police duties."

A suit was filed in federal court by four Milwaukee police officers. A summary of the underlying facts follows.

(a) Officer Linsey's wife called the police after an argument; he was not accused of spousal abuse. Police supervisors went into his bedroom and confronted him. They noted a strong odor of alcohol on his breath and ordered him to accompany them to a police station for an alcohol test.

He tested at 0.18 grams of alcohol in 210 liters of breath. Subsequently, the police chief suspended him for five days without pay for violating the intoxication rule.

(b) Officer Docter attended a festival while off-duty. A fight broke out and she was struck in the head. She then called 911, and several on-duty police officers were dispatched to the festival.

A sergeant suspected that she was intoxicated and she was ordered to accompany two supervisors to a police station for an alcohol test. It resulted in a reading of 0.17 grams of alcohol per 210 liters of breath. The police chief suspended her for five days without pay in part for violating the intoxication rule.

(c) While on injury leave, officer Barwinski-Gipp, was seen in a bar by a sergeant. She was ordered to take an intoxication test, which was read at .00 grams of alcohol per 210 liters of breath.

(d) After an argument with his wife, supervisors entered the home of Officer Grow. He was alone; the supervisors ordered him to accompany them to a police station for an alcohol test. Before leaving, they searched his house, and retrieved an unloaded shotgun and his service revolver. He tested at 0.11 grams of alcohol per 210 liters of breath and was suspended one working day for violating the intoxication rule.

In their federal civil rights action they claimed violations of the Fourth Amendment. The judge applied a multipart test:

1. Whether the alcohol tests were "searches" under the Fourth Amendment and, if so,

by what standard their reasonableness should be judged;

2. Whether the supervisors' acts of taking control of and transporting the suspected officers to police stations prior to administering the tests constituted "seizures" under the Fourth Amendment and, if so, by what standard their reasonableness should be judged; and

3. If the plaintiffs were searched and seized, were the searches and seizures reasonable?

The judge then noted that the only legitimate justification for warrantless testing of such employees is a well-founded concern about public safety.

> "Public safety is the most compelling factor on the government's side of the balance. Thus, testing based on a goal other than public safety such as, for example, increasing productivity, would be unreasonable because the objective of enhanced productivity lacks sufficient importance when viewed in light of the intrusiveness of the testing and the fact that employee productivity can be measured in other ways."

The Plaintiffs did not dispute that the supervisors' observations amounted to reasonable suspicion of intoxication. The judge wrote:

> "Although off-duty officers may encounter such situations infrequently, it is critical that when emergencies do occur officers be prepared for them. Situations requiring emergency police action may involve life and death. Public safety requires that off-duty officers who encounter emergencies be capable of responding competently. If an off-duty officer encountered such a situation in a state of intoxication the officer would endanger public safety.
>
> "When suspected of intoxication, Docter and Barwinski-Gipp were in public places and might have had to perform police duties. Thus, they were seized under circumstances where, if intoxicated, they would have presented a danger to the public. Further, while in public places they had diminished expectations of privacy."

He found that no reasonable jury was likely to find that the seizures of Docter and Barwinski-Gipp were unreasonable. He denied their motions for summary judgment.

However, officers Lindsey and Grow were at home and presented no immediate danger to public safety. The judge found that the entry into Grow's home was improper.

Moreover, the search of the house for weapons violated his rights under the Fourth

Amendment. Grow v. City of Milwaukee, #97-C-0572, 84 F.Supp.2d 990 (E.D. Wis. 2000).

Subsequently, the Seventh Circuit reviewed another Milwaukee Police decision, Driebel v. City of Milwaukee, #01-1689, 298 F.3d 622 (7th Cir. 2002). That case was highlighted in part one of this article.

In Driebel, a three-judge panel addressed the issue of whether a police officer is "seized" when he or she is ordered to come to a police station for the purpose of submitting to a breath test. If the compulsion is a threat of job loss only, the panel concluded that the individual is not "seized." They wrote:

> "We thus disagree with the Grow court's statement concluding that patrolmen are considered to be seized if they are 'threatened only with job loss and not physical force' and a detention of some type." 298 F.3d 642, quoting from 84 F.Supp.2d at 1001.

Nashville Police – alcohol test (2008)

An off-duty Nashville officer was involved at a barroom altercation and identified himself as a police officer. Superiors ordered him to submit to a breath test, pursuant to a policy requiring off-duty officers "to be subject to all of the policies and procedures of the police department, one of which is not being intoxicated."

The officer also was ordered to write and submit a report of the incident. He complied, but later filed a civil rights suit against the Nashville Metro Government and two named defendants.

The district court granted a motion for summary judgment, finding that the Breathalyzer test did not constitute an unconstitutional seizure, that the individual defendants were entitled to qualified immunity, and that the claim against the Nashville Metro Government was without merit because the claims against the individual defendants had failed.

On appeal, the officer argued that the district court erred in granting summary judgment to the individual defendants; he did not appeal the grant of summary judgment to the Metropolitan Government.

Applying the totality-of-the-circumstances test, the appellate panel concluded that the officer was not seized when he submitted to the Breathalyzer test -- and because he submitted to the Breathalyzer test, there was no need to decide whether he could have been lawfully discharged if he had failed to comply. Pennington v. Metro. Nashville,

#07-5180, 511 F.3d 647 (6th Cir. 2008).

Summary

1. Officers may be required to stand in a lineup when a citizen alleges misconduct at a particular event or during a specified time period. This is an on-the-clock duty, and officers are entitled to consult with legal counsel and association or union representatives. It is a reasonable order under the Fourth Amendment.

2. Assuming the employing entity prohibits officers from being under the influence of alcohol while on duty **and** when exercising the powers of a peace officer while off-duty, officers may be required to submit to a breath test:

a. After a vehicular collision, where someone is injured **or** where alcohol use is reasonably suspected; or

b. After an officer has used a firearm in the line of duty.

Unless a bargaining agreement provides otherwise, they are not entitled to consult with legal counsel before or while participating in a breath test. If off-duty, officers should be paid overtime for the periods of travel and testing.

3. A refusal to submit to a lineup or a breath test is insubordination and may be punished by appropriate disciplinary action.

Specimen and Model Policies

AELE has collected post-incident testing policies from five municipal law enforcement agencies in Arizona, Colorado, Missouri, and South Carolina — and the Washington Department of Corrections.

These provide for a breath or blood test for alcohol, or a drug screen, after a specified event. They may be viewed at http://www.aele.org/law/2008FPMAY/specimen-testing.html

In October 1998 the IACP issued *Model Policy No. 73* (accompanied by a Concepts and Issues Paper) on the topic of "Standards of Conduct." The IACP recognized "the potentially serious problem" when an officer in a public setting is "required to take emergency police action while under the influence of alcohol."

The Model Policy directs that supervisors shall order a drug or alcohol-screening test when they have "reasonable suspicion" that an officer is under the influence of drugs or alcohol.

The IACP also added that some law enforcement agencies might want to adopt more stringent restrictions on the off-duty use of alcohol, such as "restrictions on officer consumption of alcoholic beverages within a specific time of reporting for duty."

On the issue of employee lineups, the IACP professional staff has advised:

> "A police officer may be ordered to stand in a lineup to be viewed by witnesses or complainants of police misconduct. There is no need for probable cause and the officer may be disciplined for refusal."

Murphy, Glen R., et al. (1976). *Managing for Effective Police Discipline* 67, 154. Gaithersburg, MD: IACP Press. Lib. of Cong. CCN 76-42120; ASIN: B000C7043E.

Similarly, "a firefighter who refuses to stand in a properly conduct lineup can be disciplined for insubordination." §15 Lineup Identification Procedures, *Fire Personnel Research Manual* 61-62, Evanston, IL: Public Safety Personnel Research Institute (1978 edition). ASIN: B0006WZRGY.

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