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Nonmedical Employee Performance Deficiencies Part One - Traffic Enforcement

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This three-part series examines the case law relating to the discipline of employees for *nonmedical* performance problems. The articles do **not** analyze adverse employment action taken against persons who have an illness, injury or disability that impedes their ability to perform satisfactorily or those who suffer from chronic drug or alcohol abuse.

Part One focuses on traffic enforcement deficiencies that are proved by comparative statistics. Part Two will address incompetency as a commanding officer. The final part will examine negligent performance in three areas: loss of evidence or property, firearms handling negligence and vehicular negligence.

❖ Introduction

In 1976 the International Association of Chiefs of Police published 151 “Prototype Rules of Conduct.” [1] One of those rules addressed performance issues:

§1.11 *Unsatisfactory Performance*

Officers shall maintain sufficient competency to properly perform their duties and assume the responsibilities of their positions. Officers shall perform their duties in

a manner which will maintain the highest standards of efficiency in carrying out the functions and objectives of the Department.

Unsatisfactory performance may be demonstrated by a lack of knowledge of the application of laws required to be enforced; an unwillingness or inability to perform assigned tasks; the failure to conform to work standards established for the officer's rank, grade or position; the failure to take appropriate action on the occasion of a crime, disorder, or other condition deserving police attention; or absence without leave.

In addition to other indicia of unsatisfactory performance, the following will be considered *prima facie* evidence of unsatisfactory performance: repeated poor evaluations or a written record of repeated infractions of rules, regulations, directives or orders of the Department.

It has been noted that performance deficiencies usually are more difficult to prove than specific misconduct, such as driving while impaired or the mistreatment of a prisoner. Sometimes there are formalized performance standards; often there are none.

❖ Comparative statistics

Valid statistical evidence depends on *ceteris paribus*, a Latin phrase meaning that all other things are the same – although the variables rarely are completely identical. An example where data disparities resulted in the annulment of disciplinary action is a 2008 arbitration award in Florida. The police department had a rule, which is remarkably similar to IACP Prototype Rule 1.11:

“Unsatisfactory performance may be demonstrated by: (a) a lack of knowledge of laws to be enforced, (b) an unwillingness to perform assigned tasks, (c) the failure to conform to work standards established for the employee's rank or position, (d) the failure to take appropriate action on the occasion of a crime, instance of disorder or other incident, or (e) repeated work evaluations showing substandard performance.”

During a particular month, the grievant made fewer arrests than the platoon average, issued significantly fewer traffic citations, issued no parking citations, and also initiated fewer field interrogations.

However, it was learned that he worked in locations where there was little opportunity to issue citations, and there was no evidence that he had ignored traffic and parking violations. The union argued that the number of arrests made and the number of citations issued depends on the days of the week and the zones that officers are assigned to.

Because the areas patrolled were not the same, management failed to prove substandard performance. [City of Lake Worth and Florida State Fraternal Order of Police](#), AAA Case # 32-390-00425-06, 125 LA (BNA) 203 (Smith, 2008).

❖ Characteristics of valid statistical comparisons

A CHP motorcycle officer had been terminated for performance deficiencies. On appeal, a three-judge panel set forth several minimum rules for the use of statistical evidence to prove performance failures:

1. Comparisons must be made over a sufficiently *extended period of time* so as to eliminate the effect of any fluctuations due to transitory conditions;
2. The employee and members of the group must *perform comparable activities* under comparable conditions;
3. The criteria used for comparison must reflect the *range of activities* in which the employee and members of the group were engaged;
4. The group with whom the employee is compared must be *sufficiently large*; and
5. Group members must be selected in a way that assures a *fair representation* of those performing similar duties to the employee.

The judicial panel found that the studies, which included three calendar quarters, were both competent and relevant.

The appellant claimed that management had encouraged officers to engage in more enforcement activity than circumstances would warrant. The panel commented that if such policy or practice in fact existed, it would be “clearly against the public interest and the use of statistical evidence derived from enforcement experience under such policy to support a disciplinary action for inefficiency could not be sanctioned.”

However, the burden of proof was on the appellant. Here, there was substantial evidence to support a finding that the appellant's enforcement activity "was so far below that of those officers performing like duties under like conditions as to justify a finding of inefficiency."

The justices wrote that "a public employer such as the CHP, like any private employer, has a legitimate interest in hiring and retaining employees who capably discharge their assigned duties efficiently." [Bodenschatz v. State Personnel Board](#), #9808, 15 Cal.App.3d 775, 93 Cal.Rptr. 471, 1971 Cal. App. Lexis 947 (1971).

❖ Performance standards must be reasonable

A patrol officer in a busy suburb near Chicago's O'Hare airport was given a short suspension for his failure to issue an average of four traffic citations a week. In one month, he issued one citation over 21 workdays. He claimed that the moving offenses he saw were not "of a hazardous nature that would require a ticket." He offered that a rolling stop with no traffic present was an example of this type of infraction.

The union contested the suspension, and a trial court judge found that management had used an *unlawful traffic quota*. The intermediate appellate court reversed that finding, and the Illinois Supreme Court affirmed.

The justices noted that the officer did not present any evidence to demonstrate that the traffic index standard was unreasonable. Nor did he claim that he was forced to issue more tickets than were justified in order to meet the traffic index standard.

Noting that while any regulation can be abused, that does not mean that a regulation itself is invalid or against public policy. The officer had the burden of establishing that the regulation was arbitrary and unreasonable and that he failed to meet that burden. [Begg v. Bd. of Fire and Police Cmsnrs. of Park Ridge](#), #57721, 99 Ill.2d 324, 59 N.E.2d 925, 1984 Ill. Lexis 220 (1984).

Similarly, a former Iowa police officer brought an action in federal court, claiming that he was constructively discharged for failing to enforce a citation quota system. The District Court dismissed the action and a three-judge appellate panel affirmed.

Instead of finding an illegal quota, the court said that management had “implemented an employment policy for evaluating one component of an officer’s performance based on the number of tickets the officer has written versus the shift average.” He was not asked to violate the law, but only to improve his traffic enforcement work.

The city did not make his working conditions so “intolerable” that he was “forced to resign involuntarily.” [Hendriks v. City of Muscatine](#), #03-2541, 94 Fed. Appx. 403; 2004 U.S. App. Lexis 5088 (Unpub. 8th Cir.).

❖ **Must agencies bargain over performance standards?** [2]

A police union charged a Pennsylvania township with an unfair labor practice, claiming that it had imposed a traffic citation performance standard without negotiating with the FOP. The state’s Labor Relations Board rejected the ULP charge and the union appealed.

The agency used a weekly report that measured an officer’s activity in twelve categories: arrests made; traffic citations issued; non-traffic citations issued; motor vehicle written warnings issued; parking tickets issued; vehicle stops made; selective assignments completed; bank checks made; pedestrian investigations completed; vacant house checks made; foot beats walked; and incident reports written. Those officers with above average performance records were eligible for the Special Response Team, which consisted of 13 of the agency’s 44 members under the rank of lieutenant.

A three-judge appellate panel noted that the evidence showed that officers who were removed from the SRT had experienced personnel problems or had systemic low productivity, and not only in the “traffic citations issued” category. Moreover, some SRT officers with below average in the traffic citations category remained on the SRT.

The FOP was unable to prove that performance ratings were based solely on the number of traffic citations issued. The panel concluded the rating system was not an illegal quota because no officer had been told that certain a number of citations was necessary.

Turning to the mandatory bargaining issue, management began tracking productivity to further its managerial interests in evaluating, selecting and directing its employees. The judicial panel said that these interests involve managerial policy and substantially outweigh the impact of the tracking method on the officers. They wrote:

“It is within a Township’s prerogative to establish and utilize a method to aid in selecting and directing its personnel and in measuring and evaluating their performance. The ability to formulate policies in these areas is essential for the proper and efficient functioning of a police force.”

[Delaware Co. L-27, FOP v. Pennsylvania Labor Relations Bd.](#), #767-CD-1998, 722 A.2d 1118, 1998 Pa. Commw. Lexis 959, 160 L.R.R.M. (BNA) 2252.

- The Pennsylvania decision did not involve a new performance standard for the purpose of justifying a termination or lesser disciplinary punishment. While management may have an inherent right to evaluate and direct its police officers, bargaining is often required over the *implementation* of a new policy or penalty. State labor boards have widely divergent views on what is a mandatory subject of bargaining.

❖ Specimen policies [3]

- North Las Vegas, Nevada, Police Department, Policy Manual
[PO-3.01 Performance Issues](#)
- Portland, Oregon, Police Bureau, Manual of Policy and Procedure
[315.30 Unsatisfactory Performance](#)

Notes:

1. *Managing for Effective Police Discipline*, pp. 134-135, Glen R. Murphy (editor), International Assn. of Chiefs of Police (1976). [LCCN 76-42120](#).
2. Assuming [mandatory collective bargaining](#) in the jurisdiction.
3. Specimen policies are just that. They are displayed for illustrative purposes only and were not selected as models for adoption elsewhere.

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