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## **Nonmedical Employee Performance Deficiencies Part Three – Negligence**

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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](#) focused on traffic enforcement deficiencies that were proved by comparative statistics. [Part Two](#) addressed inefficiency or incompetency as a commanding officer. Part Three, which concludes this series, examines substandard performance in three areas: loss of evidence or property, negligent firearms handling and vehicular negligence.

### **❖ Loss of evidence or property**

A law enforcement officer can be disciplined for damaging or losing his agency's property. Disciplinary action can also be taken for the careless loss of job-related, personally-owned property, such as a firearm, handcuff key or uniform.

New York appellate courts rarely modify disciplinary penalties. The question, on appeal, is not the justness of the punishment, but whether it “shocks” the court.

A Sheriff’s Dept. sergeant was terminated because he misplaced a personally-owned firearm. A four-judge appellate panel found that termination was “so disproportionate to [the] offense as to be shocking to one’s sense of fairness.” The lower court was directed to order the Sheriff’s Dept. to impose an 18-month disciplinary suspension. [Barresi v. Mahoney](#), #95-11816, 240 A.D.2d 570, 658 N.Y.S.2d 451 (2nd Dept. 1997).

Another officer did not fare as well in New York’s appellate court. A NYPD officer was fired for losing evidence in an assault case, and conducting an inadequate investigation. The victim of the assault died a week later.

The officer had failed to question witnesses at the scene or otherwise investigate the incident, and did not secure a bat, which was the murder weapon. [Rouse v. Brown](#), #44123, 176 A.D.2d 616, 575 N.Y.S.2d 57 (1st Dept. 1991).

In confirming a penalty, appellate courts are likely to examine several factors: [1]

1. *The magnitude of the careless or negligent act.* A loss of a murder weapon is more serious than the loss of a suspect’s item of clothing.
2. *The presence of mitigating or aggravating circumstances.* A loss of agency property while performing a life-saving rescue operation is excusable, e.g., Hurricane Katrina in 2005.
3. *The personnel record of the errant officer.* Officer Rouse, who was fired for losing an assault weapon, had an “extensive” record of disciplinary action.
4. *Whether the officer received relevant training.* Officers should be trained in how to secure evidence, to avoid contamination, and to protect personal property.

### ❖ **Negligent firearms handling**

A SWAT officer in California failed to clear his AR-15 of live ammunition. He left the gun with the magazine loaded and a live round in the chamber, and failed to place the safety switch in the “safe” position. Later, he took the rifle to an embroidery shop.

He unzipped the case at the butt end, pulled the gun from the bag, and it discharged -- striking the store owner's husband in the abdomen. The injured man lost one-third of his large and small intestines, and had to use a feeding tube. The shooting victim sued the county and officer for personal injuries.

The County Board found that the officer should have (a) cleared the chamber and removed the magazine; (b) engaged the safety switch; and (c) checked the weapon before taking it to a gun store. They terminated him for "inefficiency or negligence in the performance of duties."

A Superior Court judge confirmed the penalty, and a three-judge appellate court agreed. The panel wrote:

"With regard to the likelihood of recurrence, the Board acknowledged that [the appellant] had admitted the shooting was his fault. However, it concluded that 'instead of taking personal responsibility and showing at least some minimum level of insight and learning from this experience,'

"[The appellant] blamed his wife for suggesting they go into the embroidery shop, blamed [the store owner] for telling him to remove the gun from the bag, blamed the Sheriff's Office for not training him on the AR-15, blamed [a sergeant] for not giving him time off the day after the SWAT mission, and denied his finger ever engaged the trigger.

"[The appellant] excuses himself from compliance with the basic workplace firearms safety rules on the basis of tiredness and forgetfulness." The Board found this 'very discomfoting.' It concluded that [his] attitude about these matters 'opens the door for future firearm accidents and future unwarranted County liability' and that his "lack of insight into the causes of this negligent but accidental shooting makes it more likely than not that [he] will ... repeat the negligent acts that were the root cause of the ... shooting."

The appellate panel noted that reasonable minds could differ as to the punishment in this case, but the appellant failed to show an abuse of discretion in the decision to terminate him. *Operating Engineers L-3 v. County of Monterey*, #H030460, 2007 WL 3020036, 2007 Cal. App. Unpub. Lexis 8394 (6th Dist.).

## ❖ **Vehicular negligence**

Traditionally, management has dealt with negligent driving in two ways. One involves

requiring the employee to pay for the vehicle's repairs or replacement. The other is to impose a disciplinary suspension or termination.

### ***A - Reimbursement assessments or fines***

In response to an off-duty officer's call for assistance, the appellant responded both lights and sirens on his police vehicle. About nine blocks away from his destination, he turned his siren off, but left his lights on. As he approached a stop sign, he slowed to 25 M.P.H. and was struck by another vehicle.

He was fined \$8,718, the value of the destroyed police vehicle, and was ordered to attend a defensive driver's course at the police academy on his own time. He appealed and the New Orleans Civil Service Commission annulled the fine, worried that it would set a precedent where officers might drive to cautiously to emergencies. In lieu of the fine, the Commission imposed a thirty-day suspension.

The officer then appealed to the courts. A three-judge panel wrote:

“Considering the evidence that [the officer] failed to yield to a stop sign, and with a partially obstructed view during daylight hours entered an intersection with no warning other than flashing lights, we cannot say that the Commission erred in finding him at fault.

“Likewise, taking into account that police officers were not apprised that they had to pay for damages to vehicles insured by the City and the ‘chilling effect’ that such a penalty would have on them while in pursuit of their duties, we agree with the decision of the Commission to reduce the fine to a suspension.”

[Williams v. Dept. of Police](#), #CA-4693, 487 So.2d 528, 1986 La. App. Lexis 6599.

Also in New Orleans, an off-duty officer smashed up a marked patrol car after a night of heavy drinking. He had borrowed the car from another officer, and was not authorized to use it for personal activities. He tested .08% two hours after the collision.

Management imposed a suspension plus a fine of \$9,766.80, which was the amount of damage to the vehicle. On appeal, he contested the fine, noting that in the [Williams](#) case the Police Commission had expressed a concern that police officers may become overly

cautious in answering calls and pursuing their duties if they are held liable for damages to their city-owned vehicles.

The appellate court disagreed. Officer Williams was on duty, responding to a call when the damages occurred, whereas the appellant was off-duty and on personal business. [\*Hussey v. City of New Orleans Dept. of Police\*](#), #CA-5615, 502 So.2d 1103, 1987 La. App. Lexis 8451 (4th Cir.).

### ***B - Suspensions or terminations***

An at-will Arkansas police officer was fired after he had engaged in a high-speed chase that resulted in a collision. He sued both the city and its police chief. The jury awarded him \$5,000 against the city and \$10,000 against the chief for wrongful discharge, plus \$22,000 against the chief for the tort of outrage.

The jury was persuaded that Arkansas officers have a statutory duty to pursue and arrest fleeing offenders; Ark. Code Ann. [§14-44-113](#) (1987). The state's Supreme Court disagreed, 3-to-1. The majority wrote:

“It does not mean that a police officer is required to drive a police car at high speeds in contravention of departmental policy and [is] required to endanger lives of others, in order to immediately arrest a misdemeanor. ...

“Rather, cities have a legitimate public policy interest in preventing such dangerous chases. There is no damage to a substantial public policy if cities are allowed to discharge police officers for engaging in dangerous high speed chases of misdemeanants.”

A dissenting justice wrote that “by dismissing [the appellant] for a high speed chase of a DWI offender, [the chief] appears to have terminated [him] for doing precisely what he was supposed to do – pursue one who violates the law and flees from authority.”

The dissenting justice also noted that the officer and chief “had a personality problem” and that the chief allegedly used the chase and accident as a means of getting rid of him. [\*City of Green Forest v. Morse\*](#), # 93-1021, 316 Ark. 540, 873 S.W.2d 155 (1994).

The AELE law library has compiled a summary of other decisions:

- An Ohio arbitrator found that the sheriff lacked just cause to suspend a deputy for eight hours for the reckless operation of a patrol car. During a high-speed pursuit of a man who had abducted a woman in neighboring city, he drove off a sharp drop-off, causing \$1,997 damage to the vehicle. The deputy was not aware of the drop-off and he successfully captured the suspect. *Marion Co. Sheriff's Office and FOP Ohio*, 126 LA (BNA) 90 (Cohen, 2008).
- A Texas arbitrator concluded that management had just cause to issue a three-day suspension to a police officer who, during a high-speed pursuit, collided with an SUV. The grievant was in the third chase car, which was not as critical as the first two. *City of Houston Police and Individual Grievant*, AAA Case #70-390-00035-08, 125 LA (BNA) 134 (Moore, 2008).
- An Oklahoma arbitrator upheld a one-day suspension of police officer who was involved in three-vehicle collision while responding to a burglar alarm. The officer either failed to activate, or waited too long to enable the Opticom™ priority control traffic system, and did not turn on his lights and siren until at the intersection. *City of Broken Arrow and FOP L-170*, FMCS Case #02/04541, 117 LA (BNA) 1454 (Goodman, 2002).
- A Pennsylvania arbitrator rejected the appeal of a police officer who, during a routine non-emergency call, backed his car into the path of an oncoming vehicle. He previously had been reprimanded for causing another collision. However, the penalty was reduced in the current case from a five, to a three-day suspension. *Borough of Dormont and the Dormont Police Assn.*, 115 LA (BNA) 106 (Dean, 2000).
- A New York appellate court upheld a five-day suspension of an officer who failed to exercise due care at an intersection and by traveling at an excessive rate of speed, causing a collision. *Dwyer v. City of White Plains*, #93-01292, 205 A.D.2d 534, 613 N.Y.S.2d 44 (2nd Dept. 1994).
- An appeals panel in New York upheld a fine of three-days pay plus a disciplinary suspension of two days for operating a patrol vehicle in a careless and negligent manner, causing a collision with another vehicle. *Spillman v. Town of Ramapo*, 134 A.D.2d 266, 520 N.Y.S.2d 598 (2nd Dept. 1987).

- A Louisiana appellate court upheld a four-day suspension of an Alexandria officer who was responding to a disturbance. He struck another vehicle when he ignored a red traffic light. *Powell v. Alexandria Munic. Civil Service Board*, #84-690, 476 So.2d 1109, 1985 La. App. Lexis 10016 (3rd Cir. 1985).

### ***C - Policy implications***

Adoption of a policy requiring officers to reimburse the agency for vehicular damage affects a *condition of employment*, and is a mandatory subject of negotiation in jurisdictions that mandate collective bargaining. Depending on the amount of reimbursement sought, it also could implicate minimum wage laws.

Moreover, if total reimbursement costs are imposed in instances where officers are responding to a perceived emergency, a punitive policy could seriously impair backup response times and imperil officer safety. A more reasonable approach is to assess a reasonable collision co-pay, not to exceed \$500, which is a common retention deductible for privately operated vehicles.

The duration of unpaid suspensions should be minimal when a collision does not result in serious injuries. Although a speeding vehicle can kill or maim more people than a speeding bullet, an officer is not asserting deadly force when he or she loses control of a vehicle or misjudges stopping distances. Requiring an employee's attendance at a defensive driving course is more likely to be effective than a suspension. The National Safety Council offers an 8-hour [online course](#).

Conversely, a deliberate violation of an agency's policies pertaining to pursuits, emergency responses, and speed limits (when disregarding stop or yield signs or traffic lights), are not negligent errors. They are either intentional or reckless conduct, and may be punished more severely than "ordinary" negligence.

In some agencies, the fear of civil liability has resulted in the adoption of policies that do not fix a finite response, allowing greater flexibility and discretionary action. The trade-off is that disciplinary action is more difficult to sustain, if challenged judicially.

## Notes:

1. In the 1981 *Douglas* case, the federal Merit Service Protection Board listed [twelve factors](#) to consider when assessing disciplinary action. [Douglas v. Veterans Administration](#), 5 M.S.P.R. 280 (at 305-6), 5 M.S.P.B. 313 (at 331-2), 1981 MSPB Lexis 886 (at \*38-9).

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## **AELE Monthly Law Journal**

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