

CIVIL SERVICE COMMISSION- ANNUAL CONFERENCE

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“Personnel Systems Management
to Prevent Civil Rights Claims”

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CIVIL RIGHTS CLAIMS

LEGAL AUTHORITY

- Federal sources of personal and department liability for damages to persons or property caused by government employees (i.e. civil rights violations):
 - ♦ 42 USC sec. 1983
 - ♦ Monnell v. Dept. of Soc. Security, 436 U.S. 658 (1978)
- State law torts (i.e. intentional acts and negligence)

LEGAL AUTHORITY

- 42 USC sec. 1983 states:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”



LEGAL AUTHORITY

What does 42 USC §1983 mean:

- Law enforcement officers or other government employees may be personally liable for civil rights violations (i.e. deprivation of life, liberty or property while acting under color of state law).
- Agencies may be liable for the employee's actions if the employee's actions are the result of a custom or policy of the agency. Monnell v. Department of Social Security, 436 U.S. 658 (1978)
- Remedies for claimants include compensatory damages and punitive damages (i.e. Big \$\$).
- Claimant is entitled to attorneys fees if they prevail.

LEGAL AUTHORITY

State law "tort" claims:

- Public employees (i.e. police officers) may be liable for negligent or intentional acts that result in damages to civilians (i.e. negligence, trespass, battery).
- Departments or employing agencies may be vicariously liable for the employee's conduct if performed in the course and scope of employment.
- State tort claims are more common for bystanders or other third parties injured by employee conduct (because the use of force or conduct resulting in injury or deprivation was not intentionally applied to the bystander or third party).

COMMON FACTS

- Sample of conduct that gives rise to civil claims:
 - Seizure at gunpoint (i.e. pointing gun at suspect)
 - Use of handcuffs on persons with prior injuries (i.e. behind back)
 - Use of taser on individual in vulnerable class of citizens (i.e. youth or elderly)
 - Seizure of property without warrant or probable cause
 - Engaging in discriminatory conduct

- Civil rights violation is evaluated based on whether force or conduct is intentionally applied to deprive citizen of life, liberty or property; also evaluates repeated versus isolated acts.

PRIVILEGES & IMMUNITY

- Special rights of action and special immunities are set forth in state statutes including, Chapter 4.24 RCW, RCW 46.55.370

- Immunity is either absolute (i.e. judges) or qualified (i.e. police)

- There is no absolute qualified immunity in Washington.
 - Law enforcement officers (as individuals) are only offered immunity from liability for performance of discretionary acts;

 - There is no immunity for intentional or nondiscretionary acts (i.e. pursuant to established policy).



CRIMINAL ACTS

- Intentional or willful deprivation of civil rights may result in criminal liability (Note: there is a distinction between willful use of force and willful intent to deprive civil rights)
- Federal prosecutor must provide that employee was not negligent or reckless, but that the employee willfully deprived another of civil rights
- Criminal charges are rare (just 4% of all cases referred in 20 years have resulted in criminal charges); BUT, recent events are causing them to become more commonly reviewed

PERSONNEL MANAGEMENT PROGRAMS

CIVIL SERVICE COMMISSION ROLE

What role or oversight does commission have with developing and/or administering department policies?

- Develop tests and make recommendations for hiring
- Help review or develop policies as part of task force or committee (i.e. review and comment on proposed policies)
- Make or submit policy recommendations to Agency leaders
- Investigate citizen complaints that could identify policy violations and lead to policy amendments or training opportunities
- Hear appeals as part of employee discipline proceedings

PROGRAM OUTLINE

➤ Elements of Personnel Management Program:

- Policies (including Operational)
- Recruiting and Hiring
- Training
- Evaluations
- Complaint Processing
- Early Warning or Intervention Program
- Internal Affairs
- Discipline
- Program Monitoring

POLICIES

- Adopt reasonably detailed personnel (including operations) policies for each department; policies should be easy to understand and apply by employees
- Adopt policies for special teams or operations that involve special risk (i.e. SWAT, Drug Task Force)
- Review and update policies regularly; Develop committees or task force to review and propose updates
- Failure to adopt personnel or operations policies can lead to assertion that agency is indifferent to the civil rights of other

POLICIES

- Personnel policies should include:
 - Ethics
 - Code of Conduct & employment criteria
 - Harassment/Discrimination
 - Operations policies
 - Complaint Reporting
 - Discipline Procedures (i.e. Pre-hearing notice, hearing)
 - Brady Review and Reporting (for law enforcement)
 - What qualifies as "Brady" material
 - When must the material be disclosed to prosecutor
 - Internal Affairs procedures
- Personnel policies may be supplemented by collective bargaining agreement (CBA) and civil service regulations; when in conflict, CBA or civil service regulations prevail

POLICIES

Operations or procedural policies should address the critical functions of the agency or department:

- Law Enforcement Specific (i.e. critical tasks or situations):
 - Use of Force
 - Vehicle Maneuvers
 - Search and Seizure
 - Care, custody, and restraint persons under arrest
 - Domestic Violence (i.e. special duty to protect from harm of officer)
 - Treatment of Property or Evidence
 - Off Duty Conduct (i.e. “always on duty and always armed”)
 - Warrant application and execution
 - Discrimination
 - Report Writing
 - Special Teams (SWAT, K-9, Drug Task Force, Traffic, etc)
- Public Records
- Use of Electronic Devices and Social Media

POLICIES

➤ Any procedural policy that implicates use of force should give officer discretion to act.

- Mandating particular course of action could result in denial of qualified immunity if an officer violates the policy (because the officer is no longer performing a discretionary act).
- Strict compliance with the policy could result in a civil rights violation (i.e., mandatory handcuff policy may result in excessive use of force when applied to elderly suspect).

RECRUITING & HIRING

- Hiring and retention of employees who fail to meet standards, including ethical as well as performance, is an exposure to both liability and risk of safety to other agency or department members.
- A single bad hiring decision can lead to agency liability.
- An agency may be liable for negligent hiring if the background issues discovered are predictive of future misconduct (the pre-injury background must have a direct correlation to that which actually occurs).

RECRUITING & HIRING

- Hire the most qualified and not to fit a particular need or preference if qualifications are lacking (ie. stick to rule of three)
- Evaluate new recruits at academy and throughout field training process
- Develop and use probationary periods
- Make sure there is balance of new recruits to veterans (i.e. all rookie department can result in mistakes)
- Lateral hires should undergo supervised training to ensure orientation to department

TRAINING

- Make sure trainers/supervisors are properly qualified to provide training or supervision
- Conduct frequent training, especially on topics that have been identified as problematic issues for agency personnel or when practices change (i.e. work with prosecutor)
- Request feed back from supervisors regarding issues that employees are struggling with and address those issues as often as needed (i.e. when and how to execute search warrants)
- Make regular training a priority even if it costs money in overtime!

EVALUATIONS

- Develop evaluation standards and criteria (including self reporting)
- Conduct regular evaluations of individual employees
- Conduct evaluations of Agency or department to determine whether department is meeting mission objectives
- Use evaluations and reporting as a meaningful tool to improve employee and department operations!

COMPLAINT PROCESSING

- Develop a form and process for citizen complaints
 - Citizen complaints are inevitable and can offer helpful information for the department
 - Include specific instructions to encourage reporting of incidents that are detailed and meaningful to the agency (i.e. obtain data that will help the agency identify problems)
 - Make forms accessible (i.e. ADA, multi-lingual)
- Develop forms and process for internal complaints; encourage reporting of misconduct or performance concerns
- Tracking complaints can help identify problem areas that could result in civil rights violations if left unaddressed

EARLY WARNING PROGRAM

- Implement computerized “early warning” program (based on evaluations, citizen complaints, use of force reports, lawsuits, etc.) to identify and address problematic conduct not warranting formal discipline
 - If thresholds are exceeded, employee placed on performance mentoring program
 - Look for indications of at-risk behavior triggers, including stress and training deficiencies
- Program includes self corrective measure and employee monitoring
- Program provides employees with training, job performance feedback, opportunities for improvement, and oversight
- Note: SPD required to implement based on DOJ findings

INTERNAL AFFAIRS

- Internal affairs process exposes a department to two distinct liabilities:
 - Liability exposure when employees are disciplined and due to failures in the investigative process, the employee is able to file a lawsuit against the department (i.e. employee grievance, retaliation, wrongful termination).
 - Liability when a plaintiff sues an officer/department and is able to make a claim against the department due to failures in the department's internal affairs process that appear to ratify officer misconduct by failing to hold officers accountable for their actions.
- An agency that does not have a proper internal affairs process may be seen as "deliberately indifferent" to employee misconduct, or may be viewed as ratifying the conduct.

INTERNAL AFFAIRS

- Agencies must have proper IA policy or system that results in fair and thorough investigation
 - Develop standard procedures for documenting and investigating complaints
 - i.e. conduct interviews, search for witnesses/evidence, and reconcile inconsistent statements similar to investigating crime
- The IA process is a quality control that must be validated by reaching reasonable conclusions based on agency policy and training.
- Failure of IA process to acknowledge violations of policy and training may lead to a finding of an improper custom and practice of the agency as well as deliberate indifference to misconduct.

PROGRAM MONITORING

- Appoint or engage independent “auditors” or committee to review operations and identify problem areas

- Review evaluations, citizen complaints, use of force or internal reports, and lawsuits collectively and look for problem performance areas or employees

- If problems areas identified:
 - Adjust hiring process (i.e. hire more experienced personnel)
 - Adopt or revise policies to address deficiencies
 - Train employees
 - Discipline, if necessary

DISCIPLINE

- Implement discipline following a fair and complete investigation as needed to correct behavior

- Discipline should be progressive based upon the severity of the conduct and taking into consideration prior discipline

- Failure to discipline may lead to employee liability for conduct that violates policies and could have been corrected or addressed through discipline and agency liability for systematic failure to adopt or enforce discipline

SUIT FOR DAMAGES...NOW WHAT?

LAWSUIT STEPS

1. Consult agency legal counsel
2. Tender to insurance carrier (note: allow monitoring by regular legal counsel in case of “reservation of rights”)
3. Determine whether separate counsel is necessary for agency and officers named in suit
4. Freeze all documents, evidence, recordings, etc. related to the events at issue in the lawsuit (i.e. do not destroy records even if pursuant to authorized destruction schedule)
5. Investigate & Defend (or settle as appropriate)
6. Use information learned in lawsuit to adjust policies or procedures (if necessary)

COURT OF PUBLIC OPINION

- No comment unless authorized by legal counsel
- Especially important in digital age to avoid public comments or apologies until investigation of alleged misconduct of personnel or department is concluded



QUESTIONS?

Contact US

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Biography

Julie Norton is a member of Ogden Murphy Wallace's Wenatchee office, where her practice emphasizes municipal law, labor and employment law, land use, and general business.

Ms. Norton's municipal law practice includes focus on public safety operations (including civil service), public contracting, personnel management and discipline, compliance with open government requirements, including the Public Records Act and Open Public Meetings Act.

Ms. Norton's labor and employment practice emphasizes labor relations (including negotiations, discipline, and grievances), personnel contracting, policy development, management oversight, and employer compliance with state and federal rules and regulations.

Ms. Norton is a member of the Washington State Association of Municipal Attorneys. She has been a speaker at police liability, public records, hearing examiner, land use, open meetings, and basic municipal governance seminars and workshops sponsored by organizations throughout the state.

Ms. Norton was born and raised in Boring, Oregon. She received her B.A. in Business Administration and Finance from the University of Washington. Ms. Norton then earned her law degree, graduating cum laude, from the Seattle University School of Law. Ms. Norton is married to a Chelan County Sheriff's Deputy, which explains her focus or emphasis on public safety operations and civil service matter.

Areas of Emphasis

**Municipal
Labor & Employment
Real Estate & Land Use
Healthcare
General Business**

Association Memberships

Washington State Bar Association
Chelan-Douglas County Bar Association
Federal District Court (Eastern District of Washington)
Washington State Association of Municipal Attorneys

Education

B.A., Business Administration and Finance, University of Washington, 2003
J.D., *cum laude*, Seattle University School of Law, 2006

Professional and Community Activities

President-elect Chelan-Douglas Young Lawyers Division, 2007-08
American Red Cross (Apple Valley Chapter) Board of Directors, 2010 to 2015
Wenatchee World's Top 30 Professionals under 35 - 2011
Wenatchee Valley Sports Foundation Board of Directors, 2015 to present