REPRESENTING FOP MEMBERS

Originally developed by:

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Fraternal order of Police

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OVERVIEW

- The FOP Representative
- The Duty of Fair Representation
- Grievances
- Officers' Rights
- Critical Incidents
- Just Cause

The FOP Representative

The Role of the FOP Representative

- The FOP Representative is the first line of defense of the CBA and the members.

Representing Your Members

The duty and responsibility vested in you as the individual designated to represent your members is grave and all-encompassing, it is **a legal obligation** requiring familiarity with all the following:

- The Collective Bargaining Agreement;
- Departmental Policies, Practices, Rules and Regulations, Policies and Procedures; and,
- Local, State, and Federal Law and Legislation.

The FOP Representative

- The representative must balance the needs of the membership with maintaining a positive, constructive relationship with management.
- In addition, the Duty of Fair Representation governs the activities of representatives and unions as a whole from collective bargaining to processing grievances.

FOP Labor Rep

As a labor representative you are **required** to recognize the following:

(1) Violations of the collective bargaining agreement;

(2) Violations of the policies and procedures; and,

(3) Violations of the Officer's rights when being disciplined.

Representative's Requirements

- Investigate and know the background, issues, and as many facts as possible.
- Meet with the subject officer *at least* 30 minutes (**EARLY AND OFTEN**) prior to:
  - A grievance hearing;
  - Internal Affairs interview; or
  - Disciplinary hearing.

The Duty of Fair Representation

- The Duty of Fair Representation requires Unions:
  - To represent all members fairly without discrimination;
  - To determine the merits of all grievances; and,
  - To act in good faith.

Duty of Fair Representation (cont'd)

This duty applies to virtually every action the union might take as the representative of employees, from its negotiation of the terms of a collective bargaining agreement to its handling of grievances arising under that agreement.

Duty of Fair Representation (cont'd)

One of the exceptions to this rule provides that the union has **no duty** to assist the employees it represents in filing claims under a workers compensation statute or other laws.

Duty of Fair Representation (cont'd)

- The courts have held a union only breaches its duty of fair representation if it acts Arbitrarily, in Bad Faith, or Discriminatorily.
- Accordingly, the courts have refused to overturn union decisions as arbitrary, so long as they were based on a reasoned decision by the union, even if the court might believe that decision was wrong.

Duty of Fair Representation (cont'd)

- Investigate.
- Pursue.
- Enforce the collective bargaining agreement and policies and procedures.

Conflicts

- The DFR includes representing all interests at the bargaining table.
- This does not mean that everyone gets what they want.
- The union can concede benefits on behalf of some members for the greater good of the unit as long as the union is acting in good faith.

Conflicts

When members of the same bargaining unit make claims of wrongdoing against each other the Union must:

- Not take sides;
- Provide representation to each member individually;
- Evaluate each claim or grievance separately and in good faith; and,
- Administer the CBA as to each member.

Conflicts

- Depending upon the law of the jurisdiction, a Union generally has no obligation to pursue any claim not based upon a CBA provision.
- Discrimination or other hostile work environment claims are usually outside the CBA.
- Perceived conflicts may arise when a member makes a claim against another member resulting in an investigation or discipline of the non-charging member.
- The perception is irrelevant to the DFR.

Conflicts

- Information and education are very important.
- Contact all interested parties and explain the Union's role.
- Call a special meeting.
- Bring in Lodge Counsel or outside expertise.
- COMMUNICATE

Representing FOP Members in Internal Investigations

- The CBA gives the employee the right to a REPRESENTATIVE, not a WITNESS
- Meet with the subject officer and get prepared.
- Grill the officer for every fact you can get.
- Dress appropriately for the occasion.

Representing FOP Members in Internal Investigations

- Demand to know the type of investigation being conducted.
- Demand *Garrity* warning- ON THE RECORD.
- Never ASSUME anything is OFF THE RECORD.
- Object to questions that are not narrowly tailored to the scope of the employee's duties.

FOP Representation

There is a difference between what a union contractually agrees to provide for members under a legal defense plan and what the union is obligated to do under the Duty of Fair Representation.

- Internal Affairs Investigations
- Critical Incidents

The BIG Picture

- Breaching the Duty of Fair Representation is not only an Unfair Labor Practice, it is the single biggest way to lose membership and entire bargaining units.
- Representation is not based upon popularity.
- There is a BIG PICTURE, the overall benefit to the membership as a whole,

  including effective bargaining.

What Is A Representative?

In short, a Representative is a

UNION

What is a Grievance?

- Whatever the parties to a collective bargaining agreement define it to be.
  - Very Broad-*Any* disagreement between employer and the union or an employee
  - Very Narrow- The CBA limits its use and excludes certain actions by the employer from the grievance procedure (e.g. termination of a probationary employee; promotions)

- Ultimately, a grievance is a complaint.

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There are two types of grievances

- Contract interpretation grievances
  - The parties cannot agree on the interpretation of the language of the CBA
  - The union has the burden of proof
- Disciplinary grievances
  - An employee has been disciplined and the parties cannot agree on whether the discipline is justified
  - The employer has the burden of proof

Contract Grievance Procedure

Include a clause in the CBA that outlines what constitutes a grievance:

- (example) The parties agree that a violation of the provisions of this agreement shall be deemed to constitute a grievance, which is subject to and shall be processed through the provisions as outlined below

Filing a Grievance

- The representative's job is to process the grievance on behalf of the member.
- Develop a grievance form.
- Complete all information: who, what, where, how, and when.
- List all Contract Articles, Rules and Regulations, Departmental Policies and Procedures which were violated.

Filing a Grievance

- List the date and nature of the violation.
- Provide a brief description of the violation.
- Provide a specific remedy requiring management to correct the violation.
  - (Example) Officer Smith was discharged without cause. The FOP requests that he/she be reinstated to his/her previous position and duties forthwith without loss of pay, seniority, or benefits and otherwise be made whole as if the discipline never occurred. Any and all information, material, or documents related to this incident be removed and destroyed.

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GOOD GRIEVANCE FORM

Name of Employee Roger Mayberry
Classification Patrolman
Immediate Supervisor Sgt. Weisman
Date May 28, 2011

STATEMENT OF GRIEVANCE:

List Applicable Violation: Article 1 and Article 2 – The City terminated Officer Mayberry without just cause. The City did not follow the termination article in the CBA.

Adjustment Required: To have Officer Mayberry reinstated with full back pay and benefits as if he were never terminated. To have the City remove any and all references to this matter from his file. To mandate that the City follow the termination article of the CBA in all future cases**, TO OTHERWISE MAKE OFFICER MAYBERRY WHOLE, and such other and further relief necessary**.

Date: 5-28-11 Signature of Employee _____

The Collective Bargaining Relationship

- Collective bargaining is a source of power that gives employees some leverage and equality in the employer-employee relationship
- The relationship must be maintained and, where possible, improved
- Credibility is crucial to the integrity of that relationship

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- Grievances can be an effective tool to help improve the relationship between management and labor
  - Identify and set boundaries
  - Identify and correct weaknesses in the CBA
- Grievances can destroy the relationship
  - Unwarranted bad faith grievances
  - Unreasonable conduct

Avoiding Grievances

- The Duty of Fair Representation
  - A union must represent all members
    - without hostility or discrimination
    - honestly
    - in good faith and not arbitrarily
  - All grievances must be fully investigated
    - to determine the merits
    - in accordance with the CBA
    - to determine the likelihood of successful adjustment
- If a grievance has no merit, it should not be pursued

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- All roads lead back to the CBA
- Grievances and how they are processed are governed by the CBA and can affect the successor CBA
- Grievances can lead to new or improved contract provisions
  - Ambiguity in CBA language
  - Missing/limited provisions
  - Cumbersome processes

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Follow the CBA requirements to the letter!

- Deadlines and time limits/ASAP
  - Cannot be filed after deadline
  - Cannot be advanced after time limit
  - Calendar days vs. working days
- Grievances can be withdrawn in whole or in part unilaterally by the union
- Cannot be amended w/o mutual consent
- Be consistent at each step

Settling the Grievance

- Can you be flexible?
- Grievances can be settled in whole or in part at any step
- Grievant must be consulted
- Grievant does not have to like it
- When you should settle
- What does the Duty of Fair representation require?

Arbitration

- The last step in the process
- All else has failed
- When does arbitration begin?

Officers' Rights

Officers' Right to Associate

The U.S. Supreme Court has inferred the "Freedom of Association" from the freedoms of speech and assembly found in the First Amendment to the U.S. Constitution.

Right to Associate (cont'd)

The Supreme Court has recognized the right to associate for the purpose of those activities that are protected by the First Amendment such as speech, the exercise of religion, and engaging in politics.

Right to Associate (cont'd)

The freedom of association has been applied in the following contexts in cases involving law enforcement officers:

- Right to privacy in one's membership in organizations;
- Association with criminals regulations;
- Membership in organizations with divergent views;
- Personal relationships; and,
- The right to join a labor organization

Right to Associate (cont'd)

The right to join a labor organization:

- *Bivens v. Six Unknown Federal Narcotics Agents,* 441 U.S. 463 (1979).
  - However, the right to join does not, in and of itself, carry with it any right to compel an employer to bargain collectively.
  - Prohibits an employer from deliberately attempting to destroy an association of law enforcement officers for the purpose of preventing the exercise of First Amendment Rights.

Right to Associate (cont'd)

Local 491, IBPO v. Gwinnet Co., Ga., 510 F. Supp.2d 1271 (N.D. Ga. 2007)

- IA investigation into union member's active participation in attempt to replace chief for engaging in a "mutiny" and conduct unbecoming an officer.
- Questioning union officials was declared to be an unconstitutional infringement on officers' constitutional right of association.

Right to Associate (cont'd)

Membership in organizations

- The decision protects membership in organizations with divergent views as long as those organizations:
  - Are organized;
  - Take positions on public questions;
  - Engage in activities protected by the First Amendment, such as speech; and,
  - *Are engaged in activity that is lawful and has no impact on the officer's job performance or the agency or department.*

Right to Associate (cont'd)

Personal Relationships

- The U.S. Supreme Court views an officer's right to engage in personal relationships in the same manner as the right to privacy.
- The Court has noted "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."

Right to Associate (cont'd)

McCabe v. Sharrett, 12 F.3d 1558 (11th Cir., 1994).

- Police chief's secretary reassigned to general secretarial pool after marrying police officer in same department. Given officer's position in the rank and file and confidential nature of the chief's office, the transfer was deemed not in violation of the 1st Amendment.

Right to Privacy

Before a 4th Amendment violation can be found in public employment there must be:

- An expectation of privacy that **society** is willing to accept as reasonable

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- *Phillips v. Township of Cumberland*
  - No expectation of privacy in police cruiser
- *Quon v. City of Ontario Police Department*
  - U.S. S.Ct., allowing for the expectation of privacy in agency issued pager/text message content still found warrantless search of pager transcript reasonable given employer's limited search and legitimate interest in whether employer was being appropriately billed for pager use under its plan w/pager company.
- *Pennyfeather v. Tessler*
  - No expectation of privacy as to employer re information in personnel file freely given by

    employee

Officers' Right to Free Speech

- Speech is protected due to penalties suffered by colonists for criticizing the king;
- The law favors the free exchange of information and ideas;
- Discourse and debate are beneficial to democracy;
- Not all speech is protected;
- Must be the truth or in good faith.

Free Speech (cont'd)

- Yelling "FIRE!" in a crowded movie theater;
- Time, Place, and Manner restrictions
  - Signage
  - Permits
  - Employment
- *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968)
- *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006)

Free Speech (cont'd)

- *Pickering* balancing test
  - Weighs the need for the public discourse of certain information, matters of public concern
  - Against the potential harm to agency's mission.
- *Garcetti*
  - Scope of employment
  - Statutory obligations
  - Whistleblower rights

Garcetti Aftermath

There have been many cases decided in the federal courts applying *Garcetti*.

- The courts have rendered decisions both for and against employees.
- Most decisions focus on what the specific duties of the employee were at the time of the speech.
- There is no bright line rule.

DO NOT BE A TEST CASE!!

Garcetti

(1) whether the employee's speech is fairly characterized as constituting speech as a citizen on a matter of public concern,

(2) whether the employee's interest in speaking outweighs the government's legitimate interest in efficient public service,

(3) whether the speech played a substantial part in the government's challenged employment decision, and

(4) whether the government has shown by a preponderance of evidence that it would have made the same employment decision in the absence of the protected conduct.

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- The first two elements of this test are "questions of law designed to determine whether the employee's speech is protected by the First Amendment."
- The final two elements are questions of fact "designed to determine whether a retaliatory motive was the legal cause of the challenged employment decision."

The mere fact that the speech occurred at work and concerns the subject matter of a plaintiff's employment is not dispositive of the conclusion that plaintiff was speaking as an employee.

Rather, the controlling factor in such circumstances is whether the expressions were made pursuant to the employee's official duties.

Restricting speech that **"owes its existence"** to the employee's professional responsibilities does not infringe any constitutional liberties.

Critical Incidents

What is a Critical Incident?

Generic definition:

Any sudden event involving a police officer that results in an immediate investigation with no advanced notice to the subject officer and potentially resulting in the arrest or suspension or termination of the subject officer and includes:

- Shootings
  - Steadily increased year over year until 2011-2012
  - Over 30% involved multiple officers and a single offender
- In-custody deaths
- Use of force/weapon discharge
- Car accidents
- Any allegation of duty-related criminal conduct.

4 Things You NEVER Do

When a LEO is involved in a critical incident the LEO is the "suspect" in a criminal investigation. Therefore:

1. **NEVER** Give a Voluntary Statement
2. **NEVER** Take a Polygraph
3. **NEVER** Give Blood or Urine

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4. **NEVER** talk to :
   - Crisis Response Person/Team
   - Victim Advocate
   - Debriefing Team
   - Peer Groups (aka union/Weingarten rep)
- **NO confidentially unless covered by State Statute**
- **Chaplains = NO confidentially** **??ordained??**

On Scene

Officer involved must:

- Secure the scene and as much evidence as possible;
- Notify dispatch ***AND*** command;
- Contact EMS;
- **Contact the FOP Rep and Attorney; and,**
- **THEN REMAIN SILENT!!**
- Privileged communications

On Scene

The FOP Rep and uninvolved officers must:

- Ensure subject officer is o.k. (He/She ISN'T);
- Assist subject officer in contacting Rep/Atty;
- Stand by subject officer until Rep arrives;
- Not talk about the facts;
- Provide Rep/Atty w/as much info as possible;
- Remind subject officer to **REMAIN SILENT!!**

On Scene

Little things mean a lot.

- Put subject officer in an air conditioned/heated car;
- Get plenty of water;
- Get food;
- Notify family;
- Have EMS check if necessary;
- Talk about trivial matters;
- Ask Command to be released from the scene ASAP.

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The Chain Reaction

Critical Incidents set off a chain reaction

- Criminal investigation
  - Your own agency
  - "Farmed-out" to another agency
  - State attorney
  - Media
- Internal investigation
  - Mandatory cooperation
  - Paid leave
  - "Desk duty"

The Chain Reaction

- Civil litigation
- Possible POST review
- Coroner's inquest
- Citizen Review Board

The Homicide Investigation

- The shooting will be investigated as a HOMICIDE by:
  - Detectives from your own agency;
  - Detectives from a neighboring agency;
  - State or Federal Investigators; or,
  - All of the above.
- Only the PROSECUTOR can:
  - grant immunity;
  - make a filing decision; or,
  - clear the shooting (grand jury).

What To Do As A Suspect

Do what all suspects should do:

- Ask for an attorney
- Speak only to your attorney
- Do not answer **ANY** questions without your attorney present
- Do **EXACTLY** what your attorney tells you to do.

What You Can Expect

- You will be "Detained" for many hours, unless you are injured
- Your weapon(s) will be seized
- Your uniform will be seized
- You will be "processed"
  - Photographed
  - Swabbed
- You will be put on paid administrative leave
- You will see media reports

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What You Will "Feel"

Taking a life is the worst event in the life of any human being.

- There will be an adrenaline rush, followed by exhaustion, followed by euphoria, followed by depression, followed by…?
- Your memory will take days, if not weeks to fully come to you.
- You will begin second guessing yourself.
- You will want to talk.
- This is no time to play the "tough-guy".
- You are alive, that is all that matters!

What the FOP Will Do

- The FOP will ensure you are legally protected.
- The FOP will provide for any resources or services you and your family need.
- The FOP will deal with the bureaucracy.
- The FOP will stand with you, not just behind you or at your side, but in front of you as well.

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Garrity

Garrity Rule

Garrity v. New Jersey, 385 U.S. 493 (1966)

- Fifth Amendment Rights in Law Enforcement Disciplinary setting.
- *Garrity* rule stands for the premise that a law enforcement officer has a right to be free from compulsory self-incrimination in the disciplinary process.

Garrity (cont'd)

- Police Officers were questioned about ticket fixing.
- The LEOs were ordered to respond to the investigator's questions.
- Their answers were used to convict them.
- They appealed to the U.S. Supreme Court.

Garrity (cont'd)

The Court ruled that:

- The use of their statements violated the 5th Amendment;
- The officers were forced to choose between self-incrimination and job forfeiture; and,
- **That, "LEOs are not relegated to a watered-down version of their constitutional rights."**

The *Garrity* rule requires the agency or department to:

- Order the officer to answer the question under the threat of disciplinary action;
- Ask questions which were specifically, directly, and narrowly related to the officer's duties or the officer's fitness for duty; and,
- Advise the officer that the answers to the questions will not be used against the officer in a criminal proceeding.

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- If an officer refuses to answer the employer's questions, the officer may be disciplined for insubordination.
- Essential to the application of the *Garrity* rule is that the employer actually "orders" the employee to respond to questions, and that the employee be compelled by threat of possible discharge for failure to respond to the questions.

When and how does *Garrity* attach?

- Some pre-requisites:
  - *Garrity* warnings/rights are actually read to the subject officer;

or,

  - The officer is threatened with the loss of employment for failure to speak rendering the responsive statement compelled.

"Implied" *Garrity*

When *Garrity* warnings are not given and no threat of termination is made, *Garrity* can still attach **if** the officer:

- Subjectively believes that failure to follow an order to cooperate in an internal investigation will result in discipline; and,
- That belief is objectively reasonable under the facts and circumstances.

Garrity (cont'd)

- Scope of Immunity:
  - A compelled statement under *Garrity* gains immunity in a subsequent criminal proceeding.
- However, a statement given under *Garrity* can be used for a wide variety of other purposes:

Garrity Immunity:

- Use and derivative use immunity is required under the Federal Constitution.

- Most courts now agree that *Garrity* immunity is self activating and automatic once an employee is compelled to give a statement.

Garrity (cont'd)

Cropsey, v. School Board Of Manatee County, 2009 WL 1161345 (2nd DCA, 2009)

A government employee who has been threatened with an adverse employment action by her employer for failure to answer questions…immunity arises because the government cannot use the threat of discharge to obtain incriminatory evidence against the employee.

Garrity (cont'd)

(1) against the officer in a disciplinary process;

(2) civil lawsuit brought against the officer;

(3) criminal prosecutions of the other officers;

(4) against other officers; and,

(5) Perjury.

Garrity and Other Proceedings

U.S. v. Vangates, 287 F.3d 1315 (11th Cir. 2002)

- Corrections officer investigated for battery on inmate.
- Cleared in IA but sued in Civil Rights case.
- Ordered to appear and cooperate.
- IA admitted in civil case and she testified.
- Testimony was used to convict in federal criminal trial.
- Subjective belief that she had to testify was not objectively reasonable.

Garrity and Other Evidence

People v. Carey, --- N.E.2d ----, 2008 WL 4891383 (Ill.App. 1 Dist., 2008)

- LEO charged with DUI and Aggravated Assault
- Submitted to BAC test upon being ordered to do so by IA investigator during administrative investigation
- May have been threatened w/termination for refusal
- Court ruled *Garrity* inapplicable as BAC results are non-testimonial
- Consent irrelevant to BAC admissibility in Illinois

Just Cause

- At Will vs. Contract
  - At will employees can be terminated at the will of the employer for
    - Good cause
    - Bad cause (but not an illegal cause)
    - No cause at all
- Employees under Contract
  - Can negotiate discipline and due process provisions
    - Just Cause
    - Good cause
    - Reasonable cause
    - Cause

Just Cause: The 7 Tests

1. Reasonable rules and orders;
2. Notice;
3. Investigation;
4. Fairness of the investigation;
5. Proof;
6. Equal treatment; and,
7. Fairness of the penalty.

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1. Reasonable Rules & Orders

- Is there a specific policy that the officer is accused of violating?
- Can the agency consistently explain its own rules and policies?
- Are the policies consistent?
- Has there been training?
  - What type of training?
  - Was conduct consistent with training (Rodney King)?
  - Was training consistent with policy?
  - Was the training done properly?
  - Was the grievant proficient in the trained subject?

2. Notice

- Have the officers been issued policies and procedures?
- Is the specific policy at issue in writing?
- Is the policy clear and unambiguous?
- Has the policy been recently changed?
- Do the policies specify penalties for categories of violations?

3. Investigation

- Was there an investigation?
- Were the statements & other evidence preserved?

4. Fairness of the Investigation

- Did the investigator explore ALL the facts or the just the incriminating facts?

- Were all potential witnesses questioned?

5. Proof

- Did the investigation reveal evidence of the alleged violation?
- Was there evidence of mitigation?
- Was there evidence of justification?

6. Equal Treatment

- If guilty, were other officers punished in the same way as other officers also guilty of the same offense or an offense of the same degree?
- Did the other guilty officers have similar employment histories? Are they truly similar/equal?
- Has there been a disciplinary policy change?

7. Fairness of the Penalty

- Does the punishment fit the offense?
- Has mitigation or justification been taken into consideration?
- Has employee history been taken into consideration?
- Evaluations consistent?
- Was the agency harmed or disrupted?
- Was the discipline “progressive”?
  - Blind progression (any offense will do)
  - Progression of similar offenses/penalties
  - Were corrective measures taken?
- Was there some other bias?

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