June 4, 2013

City of Tracy City Council
333 Civic Center Plaza
Tracy, CA 95376

Council Members:

I write in regard to your failure to take action to responsibly deal with dishonesty and violation of law on the part of City staff, in particular Police Chief Hampton, City Manager Churchill, and City Attorney Sodergren. Consider the following questions:

How many times should the police chief be allowed to publically lie regarding serious misconduct on the part of his officers? Is this acceptable when the Council knows he is lying? How many times can he be permitted to deny, in writing, the commission of crimes by his officers when the proof is direct and irrefutable?

My answer to these questions is *not once and under no circumstances*. Once he has done so he has forever lost the public trust and the ability to lead by example. Professional law enforcement organizations clearly state that "there are no second chances when it comes to the integrity of our officers." Dishonesty at any level of a police organization cannot be tolerated. If basic standards of honesty are not met, no amount of competency in other areas can compensate.

Likewise, how many times should a City Manager or City Attorney be permitted to deliberately conceal criminal misconduct on the part of City Staff? What about produce official writings stating that the events never even occurred? My answer again is not once. There is an established legal doctrine of "harm to the public service" that indicates termination is the appropriate discipline. The courts have held that dishonesty is not an isolated act, it is a continuing trait of character.

I am doing nothing more than insisting that this City hold its employees to broadly accepted standards. Law enforcement officers in particular are to be held to a higher standard than the public at large, yet when I hold them to the same law that they enforce against others daily I am called obsessed and vengeful. This is a tragic double standard. It is particularly tragic that this Council will take no corrective action. While it is true that ex-chief Thiessen has been removed, the problem has not been corrected. Ms. Thiessen did not have the courage to address my complaints and hid from them for over a year. Mr. Hampton, unfortunately, had the courage to lie. I similarly see no evidence of reform on the part of Mr. Churchill or Mr. Sodergren – just continued instances of contempt for the law.

Ms. Young, Mr. Manne, and Mr. Rickman: jointly, you have the power to correct this. The only question is whether or not you have the collective integrity and political courage to do so.

Paul C Miles

Paul Miles

Attachments: LA Lawyer July-Aug., 24-27, 2005.
Police Chief Magazine, *Police Officer Truthfulness and the Brady Decision*, Oct. 2003

The PoliceChief
The Professional Voice of Law Enforcement

send to a friend

Police Officer Truthfulness and the *Brady* Decision

Jeff Noble, Commander, Irvine, California, Police Department

Truthfulness and the 1963 *Brady* decision have become hot topics in law enforcement circles. Although years went by without much concern with the *Brady* decision, recent U.S. Supreme Court decisions have enforced *Brady* to include evidence maintained in a police officer's personnel files. Under *Brady*, evidence affecting the credibility of the police officer as a witness may be exculpatory evidence and should be given to the defense during discovery. Indeed, evidence that the officer has had in his personnel file a sustained finding of untruthfulness is clearly exculpatory to the defense. To remind the reader, in 1963 the Supreme Court ruled in *Brady v. Maryland* that the defense has the right to examine all evidence that may be of an exculpatory nature. This landmark case stands for the proposition that the prosecution will not only release evidence that the defendant might be guilty of a crime but also release all evidence that might show that the defendant is innocent as well. Today many police executives have recognized the importance of officer credibility and have established a "No Lies" proclamation. As simple as No Lies sounds, it is far more complex and difficult to manage. Lies are not a fixed target; rather, deception exists on a continuum, from what is commonly called social lies or little white lies to egregious misconduct that warrants dismissal or prosecution. The true challenge is in dealing with deceptive conduct that lies somewhere in the middle of the continuum-not so far on one end of the continuum for termination and not far enough toward the other end of the continuum to be justifiable or excusable.

No Lies

Law enforcement executives have responded to these judicial decisions by imposing strict rules and, on the surface, No Lies seems great. This black-and-white rule certainly appears to be one upon which everyone can agree. To achieve a goal of maintaining the officer's and the department's credibility, ruling out all lies is the simplest solution and the easiest to enforce. But are police administrators really prepared to enforce the rule as it is communicated in the No Lies maxim?

There is an adage in management circles that rules should be explained and tools provided so employees can achieve the vision set out for them. No Lies, however, does not express the true concern of police administrators. Rather, the concern is with improper, intentional, deceptive conduct that affects an officer's credibility, whether that deceptive conduct consists of lying, making material omissions, or engaging in other unacceptable deliberate actions.

Not only should there be a policy defining improper, intentional, deceptive misconduct but there should also be a clear definition of deceptive conduct that is accepted by an agency. In police work, deceptive conduct in some areas is not only condoned but also encouraged or even required. The key to developing a policy is an understanding of the difference between deceptive conduct and deceptive misconduct.

What Is Lying?

In Lying (New York: Vintage, 1999), Sissela Bok defines a lie as any intentionally deceptive stated message. According to Bok, these are statements that are communicated either verbally or in writing. Lying is a subset of the larger category of deception, and deception is undertaken when one intends to dupe others by communicating messages meant to mislead and meant to make the recipients believe what the agent (the person performing or committing the act) either knows or believes to be untrue. Deception encompasses not only spoken and written statements but any conduct that conveys a message to the listener. Deceptive conduct can range from verbal statements or writings to physical expressions such as a shoulder shrug, eye movement or silence-any intentional action that conveys a message.

Historically, not all intentionally deceptive conduct in social interactions has been considered improper. Indeed, as early as the Middle Ages, Saint Thomas Aquinas classified deceptive conduct as helpful, joking, or malicious. Aquinas argued that lying helpfully and lying in jest may be acceptable forms of conduct, whereas telling malicious lies, lies told deliberately to harm someone, was a mortal sin.

Acknowledging that some deceptive conduct is acceptable helps to define deceptive misconduct. For example, the classic dilemma, argued about for centuries, is what to do if a murderer approaches you and asks the location of his intended victim. If you tell the truth, the murderer will kill the victim. If you lie, the intended victim will have the opportunity to escape. Although this hypothetical dilemma forces you to choose between insufficient options with no other choices, it is illustrative of Aquinas's argument. Lying to a murderer to protect a potential victim is helpful, and it may be both morally and ethically the proper thing to do because it is the lesser of evils under the circumstances.

Officer Truthfulness: Relevant Case Law

Haney v. City of Los Angeles, 109 Cal. App. 4th 1 (2003).
Ziegler v. City of South Pasadena, 73 Cal.App.4th 391 (1999).
Brogan v. United States, 118 S. Ct. 805 (1998).
LaChance v. Erickson, 118 S. Ct. 753 (1998).
Ackerman v. State Personnel Board, 145 Cal. App. 3d 395 (1983).
Gee v. California State Personnel Board, 5 Cal. App. 3d 713 (1970).
Brady v. Maryland, 83 S. Ct. 1194 (1963).

Lies Justified by Investigative Necessity

In the performance of their duties, police officers frequently engage in a significant amount of deceptive conduct that is essential to public safety. Consider lying to suspects, conducting undercover operations, and even deploying unmarked cars. Presenting a suspect with false evidence, a false confession of a crime partner, or a false claim that the suspect was identified in a lineup are but a few of the deceptive practices that police officers have used for years during interrogations. These investigatory deceptive practices are necessary when no other means would be effective, when they are lawful, and when they are aimed at obtaining the truth.

Some, like John P. Crank and Michael A. Caldero in *Police Ethics* (Cincinnati: Anderson, 1999), have argued that accepting these types of deceptive practices places the police on a slippery slope, which will create a belief by officers that all deception is acceptable, or a perception by the public that diminishes the trustworthiness of officers. It may be true that some persons who engage in serious misconduct began with minor acts of deception, but it does not follow that all deception is a gateway to serious misconduct. Most police officers can distinguish the differences and do not conclude that specific, lawful deception implies the rightness of all deception. The majority of police officers are quite capable of

applying the Constitutional test of whether that deceit would make innocent persons confess to a crime that they did not commit.

Lies Made In Jest

Where specific lies can be supported by rational argument as justified, other lies may be deemed excusable by the same type of ethical analysis. Lies made in jest, although sometimes callous and hurtful, do not affect an officer's credibility unless they are in such bad taste that they call into question the person's judgment in general. Between officers, embellishments and exaggerations are commonplace in the descriptions of the misfortunes of others. A sense of humor, even where some deception is involved, can and does help responsible persons cope with great stress and grim circumstances. Indeed, a sense of humor and a sense of proportion may be inseparable under the worst circumstances. Although humor is an acceptable practice at the appropriate time, humor is not a shield to the disciplinary process. When jokes become intentionally harmful to others, they become malicious lies that should be dealt with accordingly. Agency leaders should not strive to create such a sterile workplace that humor is forbidden, for they would succeed only in making themselves objects of derision and ridicule. Police leaders should seek to establish and enforce reasonable standards.

Deception concerning trivial matters, often told to spare another's feelings may also be excusable. These white lies are meant not for any personal gain but rather for social courtesy. Not every social situation calls for the whole truth. How do I look? What do you think? Sometimes benign statements or tactful silence are the most appropriate responses.

In *The Varnished Truth* (Chicago: University of Chicago Press, 1994), David Nyberg asserts that acts of deception are such common practice in human communication that deceptive conduct would be impossible to prevent entirely by any rule, law, policy, or manner of enforcement. From the social kindness of white lies to embellishments, exaggerations, and boastful behavior, we frequently conceal the truth for a variety of reasons. We not only condone these activities but also teach our children the art of deception from an early age. Children learn from their parents, friends, television, books, and other sources how to deceive. Children quickly learn how to maintain a poker face, so their hand is not easily identified by their body language, or in sporting activities where young athletes fake a throw or head-fake an opponent by looking one way and going another.

Our laws and culture have even created exceptions to the unvarnished truth such as in advertising, recognizing that there is speech that tends to embellish the value of a product, but because these speech patterns are so common and easily recognized, they do not dupe a reasonable, mature person into a false belief. This exception, called puffery, encompasses terms like "world's best," "the greatest," "the purest," and so on.

Malicious Lies

Although lies justified by necessity, lies told in jest, and white lies may be acceptable forms of deception in law enforcement, malicious lies are the true evil of officer misconduct. The difference between lies justified by necessity or lies made in jest and malicious lies is the presence of actual malice by the communicator. Here, malice would include not only lies told with a bad intent but also lies that exceed the limits of legitimacy.

For example, a police officer may be tempted to testify falsely to imprison a criminal. The officer's intent may be a worthy objective to the public; removing a criminal from society and the officer may validate his intent in his own mind by believing that he is engaging in a greater good. But this lie would violate the standard by which we would say the lie was reasonable and appropriate under the circumstances given the status obligations of the person engaging in the lie. Although the intent may be legitimate, the actions are malicious. This malice is the motive by which any sense of limits or constraint or fidelity to law and policy is destroyed.

It is important to understand that motive or intentions can be mixed, so that a person may deceive in order to pursue some worthwhile, utilitarian goal (such as public safety) and at the same time have a malicious disregard for the rights of the suspect

and for the laws, policies, and limits that apply to policing. This willingness to betray basic principles of honesty attacks the very public safety that the person believes himself to be pursuing. A police officer who by malicious disregard goes beyond the limits of legitimacy is a threat to the public safety, since the officer may end up violating anybody's rights, and this poisons the idea that the lie is advancing public safety.

Deception Continuum

Perhaps it is easier to assess intentional deceptive conduct on a continuum. At one end is intentional, malicious, deceptive conduct that will take one of three forms:

- Deceptive action in a formal setting, such as testifying in court or during an internal affairs investigation
- Failure to bring forward information involving criminal action by other officers, also known as observing the so-called code of silence
- Creation of false evidence that tends to implicate another in a criminal act

Intentional, malicious, deceptive conduct in any of these three areas will permanently destroy an officer's credibility. Should an officer violate these standards, there is no alternative in an employment context other than termination or permanent removal from any possible activity where the officer could be called upon to be a witness to any action.

At the other end of the continuum are lies justified by necessity, which may be defended, based on the circumstances and excusable lies, including lies made in jest and white lies, which like minor embellishments and exaggerations are not intended to harm others or convey a benefit to the communicator. These types of deceptions are at least excusable if not acceptable.

Deceptive conduct at either end of the continuum can be dealt with easily. At one end, the conduct does no harm and no action is necessary. At the other end, there is great harm and there is no option other than the termination of the officer's employment. The problem is not the conduct at the ends of the continuum, but rather the conduct that falls somewhere in between. Consider the following example:

A supervisor asks an officer whether a particular report has been completed. The report itself is of very little consequence, and the question was prompted by a routine administrative action rather than any specific employee concern. The officer has not submitted the report but quickly replies that the report has been turned in, fearing what would be at most a minor counseling by the supervisor. The officer then immediately completes the report and turns it in before the supervisor can discover the lie.

In this example, the officer was dishonest. He was asked a direct question by a supervisor and he failed to respond truthfully. Although the officer had no opportunity for reflection, there is no excuse for his misconduct. The question was not posed as part of a formal process, the officer was not engaging in an action to protect another officer, and there was no conduct that would place a community member at risk of a false prosecution. Similarly, there is no evidence that the officer's deceit was either justified or excusable.

What is left is conduct that falls somewhere in the middle of the continuum. The officer's response is certainly not acceptable, but it leaves the question of whether it is far enough on the other end of the continuum to be grounds for termination. There is a strong argument for termination in this case. After all, the officer was asked a direct question by a supervisor about a work-related subject and the officer responded untruthfully. The difficulty for managers is balancing the need of the department and community to have officers that are beyond reproach against the recognition that all officers are human beings and that they have human failings. The officer's response may best be described as a spontaneous, unintelligent statement, and there are other factors that should be considered in making a final determination. Is the officer remorseful? Does the officer recognize the error? Does the officer have an otherwise acceptable record with the department? Was the underlying issue one of very little consequence?

Consider the following:

A dispatcher asks an officer if he is available for a call. The officer radios that he is out of service and unavailable, when in fact he does not want to receive a call because it is near the end of his shift. Based on the officer's statement, the dispatcher assigns the calls to another officer.

As in the last scenario, the officer's conduct is neither justifiable nor excusable. However, the conduct probably does not amount to the end of the scale that mandates termination. It is this type of intentional, deceptive, misconduct that can be termed "administrative deception" that creates consternation for police management. The conduct may not warrant termination, but a sustained finding of untruthfulness creates a *Brady* issue that many believe will prohibit the officer from continuing his employment. The question then becomes, does *Brady* mandate termination on the basis of any lie or act of deception?

Brady Analysis

The No Lies rule causes managers to deem that *Brady* has taken their discretion away on these cases that fall outside the justified or excusable categories. But removing management discretion is not the *Brady* rule. *Brady* stands for the proposition that evidence that may be exculpatory in nature must be given to the defense. In a case where an officer will be testifying as a witness to an event, the officer's credibility is a material issue and his lack of credibility is clearly potentially exculpatory evidence and therefore sustained findings of untruthfulness must be revealed.

It seems that the analysis often stops at this point, suggesting that if there is evidence regarding an officer's credibility, the officer can no longer be placed in a position where he may become a percipient witness in an investigation. If that evidence is that the officer violated the far right of the continuum-deception in a formal process, participation in a code of silence, or planting evidence-both *Brady* and responsible management principles dictate the termination of the employee. But what if the misconduct is in the middle area of the continuum? Working through the complete *Brady* analysis and court evidence admission process will help the manager make this determination.

First, it is important to understand that even though the defense gets the information-and they should get it-there is no guarantee that the defense will be able to present the evidence of officer misconduct to the jury. It is the court, not the defense, that makes this determination. In its decision to admit evidence, the court will weigh the evidence to determine if it is more probative than prejudicial. Not all evidence of deceptive conduct by an officer will be admissible.

Think about an officer who engages in a secretive extramarital affair. At a minimum, the officer has lied to a spouse and broken a vow (an oath) to remain faithful. If there is evidence that the officer has maliciously lied for his own benefit, it certainly follows that the officer's credibility and testimony may be questioned. Although the officer may have committed a mortal sin according to Aquinas, the evidence of the officer's deception will probably never be heard in court. This type of evidence would be prejudicial against the officer's credibility, but at the same time it offers very little probative evidence on the officer's credibility while testifying in court and therefore most judges would not permit this evidence to be introduced.

Courts are likely to treat many administrative lies in the same manner. The court would probably view these administrative lies as evidence that would uniquely tend to evoke an emotional bias against the officer as an individual and would have very little effect on the issues. But even if the court allows the evidence to be presented to the jury the analysis has not been completed. The prosecutor will be able to present evidence in an effort to rehabilitate the officer. How long ago did the misconduct occur? Was it of a relatively minor administrative issue? Did the officer show appropriate contrition? Was the officer punished? Did the misconduct occur more than once? Has the officer received training as a result of the discipline? Did the officer that made the statement immediately make a subsequent truthful admission? Is there evidence that the officer's conduct has changed?

Police managers should weigh all of the factors of deceptive actions that fall at the middle of the continuum and use their management discretion on a case-by-case basis. In some cases, termination will follow. In others, it may not.

Managers should also be warned that there would be a strong temptation to use euphemisms in describing the officer's misconduct to protect the officer and the agency against potential *Brady* issues. In the examples cited above, managers may choose to discipline for the underlying misconduct-failing to complete a report and failing to respond to a call, rather than disciplining the officers for their statements. This type of discipline would send the wrong statement to both the officers and the organization. The officers should be disciplined for their deceptive misconduct as well as the underlying conduct. If management did anything else they would be engaging in intentional deceptive misconduct on a greater level than the officer. In the above examples, the officers' statements were spontaneous, where management's actions to discipline for only the underlying misconduct were thoughtfully chosen to hide the officer's deceit.

The key in making a decision regarding a particular middle-of-the-continuum deception is whether management can defend their decision or thoughtfully tell their story. The decision must be able to withstand rigorous analysis from those on all sides of the issue. In making the final decision, the chief of police must determine whether he or she can stand in front the community and defend the department's position. If so, then the chief should deal with the issue directly and honestly; if not, there is no alternative other than termination.

No Lies has started a conversation, but refinement of that discussion focuses our energy on the areas of deceptive conduct that cause the real concern for police administrators. In law enforcement, malicious deceptive conduct includes intentional deceptive conduct in a formal setting, the code of silence, and the false implication of another in a criminal act. A violation of any of these precepts should effectively and permanently end an officer's career. Both honesty and the reputation for honesty in law enforcement are absolutely essential. Those who are not able to meet these expectations simply are not able to fulfill the essential job requirements of a peace officer.

Law enforcement managers should be able to recognize deceitful conduct at either end of the scale and deal with the conduct appropriately. The issues that fall somewhere in the middle of the continuum are obviously much more difficult. The issue is not whether these middle ground deceptions are acceptable; they clearly are not. Any intentional deceptive conduct that is not justified or excusable is inappropriate. The issue for police managers is whether they have management discretion and whether there is any punishment available to them other than termination. The answer is that police chiefs have discretion available to them and that not every act of intentional deception may be worthy of termination. But management must be warned that with their discretion comes a duty to punish the inappropriate behavior and the willingness to deal with the officer's action for years in the future.

In life, there are often second chances, and sometimes even more. In law enforcement, there are no second chances when it comes to the integrity of our officers and ourselves. In law enforcement, malicious deceptive conduct is untenable and cannot be tolerated at any level in the organization. ■

Top

Return to Article

send to a friend

BY RAY JURADO

The Harm to Public Service Standard in Police Misconduct Cases

IN THE WEEKS FOLLOWING A CONTROVERSIAL police incident, the media may play a videotape over and over, but they rarely focus on issues related to the administrative investigation of the officers involved. Typically, there is no examination of the applicable law or administrative standard for disciplining officers if a subsequent investigation confirms that misconduct occurred. In California, police and sheriff's departments may terminate an officer's employment for misconduct determined to cause harm to the public service. Although the doctrine of harm to the public service has existed in California law for decades, police departments do not consistently apply the doctrine when imposing discipline for serious misconduct.

Harm to the public service is defined as misconduct committed by a public servant that is likely "to have a deleterious effect upon public service," or that is likely to cause "impairment or disruption of public service."[1] In 1975, in one of the first cases to address this issue, the California Supreme Court declared that when disciplining a public employee's on- or off-duty misconduct, the employing agency's "overriding consideration...is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, '[h]arm to the public service.'"[2] Other factors considered are the circumstances surrounding the misconduct and the likelihood of its reoccurrence.[3]

It remains unclear why police departments do not consistently apply the doctrine when imposing discipline in serious misconduct cases. Perhaps those who determine discipline—police captains and other high-ranking personnel—do not have the relevant legal background conducive to the application of a legal doctrine that, while established, lacks a bright-line test. Analysis of the cases that have applied the doctrine, however, reveal remarkably consistent holdings. Where the misconduct is serious—involving dishonesty, false statements, violence, threats, or sexual misconduct—courts have consistently found that the officer no longer deserves the public and department's trust and that termination is the appropriate discipline.

When firing of a police officer has been challenged, California courts have repeatedly upheld the firing in cases of harm to the public service. The near-uniform affirmation of severe discipline suggests that police departments should at least consider termination in such serious cases. However, some departments' disciplinary guidelines—internal guidelines that set forth low to high ranges of discipline—do not allow for termination as a possibility even when the conduct involves dishonesty, false statements, violence or threats of violence, or sexual misconduct.

Dishonesty and False Statements

When police officers are found to have lied to their superiors during investigations, courts have held that such misconduct harms the public service and discharge is the appropriate discipline. For example, *Talmo v. Civil Service Commission of Los Angeles County* concerned a Los Angeles County Sheriff's deputy who was discharged for several different acts of serious on-duty misconduct.[4] Specifically, the deputy battered an inmate by tipping over the bed the inmate was sleeping in, causing the inmate to fall onto the floor, which resulted in a bloody nose. The deputy then wrote a false report claiming that the inmate tipped over the bed himself. In another incident, the deputy placed a dead gopher in an inmate's pocket and lied about it when he was questioned by his supervisor. The deputy also made a threatening telephone call to a coworker, calling him a "fucking snitch" and the n-word, and then denied doing it.[5]

The court rejected the deputy's claims that a lesser discipline should have been imposed and that discharge was out of proportion to the misconduct. The court reasoned "we know of no rule of law holding every deputy sheriff is entitled to commit one battery on a prisoner before he or she can be discharged." The court also rejected the deputy's assertion that the department had not fired other deputies alleged to have committed similar misconduct. Noting that even if the deputy had proved this, which the court found he did not, the court held "there is no requirement that charges similar in nature must result in identical penalties." In upholding the deputy's discharge, the court opined that "when an officer of the law violates the very law he was hired to enforce and lies about it to his superiors he forfeits the trust of his department and the public." Further, the court emphasized that a "deputy sheriff's job is a position of trust and the public has a right to the highest standard of behavior from those invested with the power and authority of a law enforcement officer. Honesty, credibility and temperament are crucial to the proper performance of an officer's duties." By mistreating inmates and subsequently lying about it to his supervisors, the deputy caused harm to the public service.[6]

When a police officer engages in relatively minor misconduct, including falsely calling in sick, but lies about the misconduct in a subsequent investigation, courts have held officers to a higher standard and upheld their firing. In one case, *Paulino v. Civil Service Commission of San Diego County*, a deputy sheriff was dismissed for various causes.[7] The deputy had called in sick on eight days in one month. On at least two of those days the deputy was involved in recreational activities with friends, although he told his supervisor that he was ill. In addition, in order to avoid a shift change, the deputy lied to his supervisor regarding a doctor's orders. After being asked to file a report detailing his sick leave, the deputy convinced a fellow deputy to lie about his engagement in recreational activities during his sick leave. In upholding the deputy's termination, the court distinguished two cases involving public officials who were not peace officers.[8] In one case, the court of appeal reversed dismissal of a labor commissioner who pointed a gun at a fellow employee while off duty.[9] In another, the California Supreme Court reversed dismissal of a state Department of Healthcare doctor who took lunch breaks a few minutes longer than permitted and left the office without permission for several hours.[10]

In *Paulino*, the court noted that, unlike the civilians in the other

Ray Jurado is a former federal prosecutor who currently oversees police misconduct internal investigations in the Los Angeles County Sheriff's Department.

two cases, the deputy was a peace officer who was intentionally dishonest.[11] The court reasoned that "dishonesty is not an isolated act; it is more a continuing trait of character." The court also concluded that a "deputy sheriff is held to the highest standards of behavior," honesty and credibility were "crucial to proper performance of his duties," and "[d]ishonesty in matters of public trust is intolerable." Finally, the court held that "[u]nder the county's progressive discipline guidelines, dismissal was within the range of punishment for the first offense of dishonesty."[12]

The decision is not the only one to hold that officers are held to a higher standard. When an officer steals or misappropriates public property and is dishonest during the investigation of the theft, courts have found harm to the public service. In *Ackerman* v. *State Personnel Board*, a state motorcycle officer was discharged for misappropriating state-owned motorcycle parts and installing them on his privately owned motorcycle.[13] When questioned about where he obtained the parts, the officer lied to the investigator handling the case. Had the officer been a civilian, the court noted, punishment less than dismissal would probably have been sufficient. The court ruled, however, that the officer's discharge was proper because police officers "must be held to higher standard than other employees." "The credibility and honesty of an officer are the essence of the function." Consequently, the court reasoned that "[a]ny breach of trust must therefore be looked upon with deep concern." Although the officer admitted that his lie constituted "bad judgment," the court held that his theft of the parts and his initial failure to be forthcoming during the investigation affected the public's respect and trust of the California Highway Patrol, caused harm to the public service, and justified his discharge.[14]

In a similar case, a correctional officer was discharged for insubordination, dishonesty, and misuse of state property.[15] After going off duty, the officer attempted to remove a box of recording equipment clearly marked as state property from his work place. When questioned about his activity by a security officer, the officer claimed to own the property. Several months later, the officer was suspected of being under the influence of drugs or alcohol while on duty and refused to submit to any urine or sobriety tests. During his hearing before the State Personnel Board, the officer claimed that an unknown person had told him that a box would be delivered for him and that he should pick it up. He did not know the identity of the person or why the recording equipment was delivered to him. He also denied he was under the influence of narcotics or alcohol and denied he refused to take a urine or sobriety test. The court rejected the officer's claim of insufficiency of evidence and found the evidence sufficient to sustain findings of insubordination, dishonesty, and misuse of state property. It held that "an officer's actions must be above reproach," and found that the officer's course of conduct was "anything but commendable." In assessing whether or not the officer's conduct amounted to harm to the public service, including the circumstances of the misconduct and the likelihood of its reoccurrence, the court held that the discharge was not excessive, despite his otherwise good work record.[16]

When an officer fails to perform his duties, including inadequately investigating crimes, and lies during the subsequent investigation, his dismissal will most likely be upheld on appeal. A Los Angeles police officer failed to conduct an adequate felony investigation, failed to prepare reports of the crime, lied to an investigator about this conduct, failed to write another report involving a different felony, and knowingly submitted a false daily field activities report.[17] The officer also had a history of similar misconduct. On two prior occasions he had neglected his duties and failed to take proper law enforcement action when victims reported serious crimes to him. His supervisors had concluded that as a result of these two prior incidents, he showed "a lack of concern for providing professional or acceptable level of service to the public."[18] Under these circumstances, the court found that dismissal was not an abuse of discretion.[19]

An officer's dereliction of duty may also amount to harm to the public service, especially where the misconduct is worsened by falsification of records or dishonesty. In *Haney* v. *City of Los Angeles*, a Los Angeles police officer was discharged from his position for dereliction of duty.[20] On Memorial Day, the officer planned a barbecue for himself and three other officers. The barbecue occurred while the officers were on duty and should have been performing foot patrol assignments in the San Pedro area. The officer then knowingly falsified his patrol log to indicate that he was on foot patrol while he was in fact attending the barbecue. In a subsequent separate allegation, it was determined that he failed to adhere to the LAPD's reporting requirements during a 14-month period of sick leave, by failing to maintain contact with his supervisors, and that on several occasions he lied about calling the station's desk when he had been told to call his supervisors. He also failed to submit a doctor's letter supporting his sickness claim until the end of the 14-month period. At his Board of Rights hearing, which he did not attend, his supervisors testified. They considered him disloyal to the LAPD, none wanted him under their command in the future, and if forced to retain him would assign him only to in-station duty or place him on patrol under very strict supervision. In upholding termination, the court ruled that the officer's actions caused harm to the public service in that he "deprived the public of police protection by his absence." Even though the officer admitted he did not have permission to stage the barbecue and admitted he falsified his patrol log to cover for this time, the court found he "demonstrated both disloyalty to the LAPD and a serious lack of integrity." Further, the court went on to say that "]p]olice officer integrity is vital to effective law enforcement. Public trust and confidence in the]LAPD] as an institution and in individual officers do not exist otherwise."[21]

Violence and Threats

Off-duty police misconduct involving violence or threats may constitute harm to the public service because the potential that such conduct may also occur on-duty places the public and the government at risk. In one case an off-duty Long Beach police officer swerved out of the way of another car and became involved in an argument with the other motorist. Believing the motorist might be arming himself, the officer pointed his gun at him, and held his finger on the trigger.[22] Even though the motorist began to drive away from the officer, and the incident appeared to be over, the officer still kept his gun pointed at the motorist. The officer claimed that his gun accidentally discharged when his car lurched forward. The motorist was shot in the chest and the bullet lodged within an inch of his heart. The police department's shooting review board found that the officer had violated procedures and training by cocking the hammer, which increased the likelihood of accidental discharge, and pointing the gun at the motorist. The officer was terminated but was eventually reinstated by the Civil Service Commission. In a rare reversal of a decision of the commission, the court of appeal ruled that the decision manifested "an indifference to public safety and welfare." The court reversed the commission's reinstatement and ordered the officer fired. The court found that the officer acted unreasonably when he pointed a loaded, cocked gun with a light trigger at the motorist. In support of its decision to fire the officer, the court reasoned that "[t]he public is entitled to protection from unprofessional employees whose conduct places people at risk of injury and the government at risk of incurring liability." The court further stated that because police officers are in a position of significant public trust, mandating that a police department retain "an officer who is unable to handle competently either his emotions or his gun

poses too great a threat of harm to the public service to be countenanced."[23]

In another case, *Gray* v. *State Personnel Board*, a state correctional officer saw a male stranger leaving his former girlfriend's house.[24] Becoming jealous, the correctional officer pushed the stranger and threatened to shoot him. The correctional officer's gun was in his car, but he simulated a weapon by placing his hand in his pocket. Once the stranger left, the correctional officer retrieved his gun from his car and broke through the door of the house. The police soon arrived, and the correctional officer was arrested for assault. He later pleaded guilty to battery and was placed on probation. Because of the incident, the Department of Corrections discharged the correctional officer. In upholding the discharge, the court of appeal found a sufficient nexus between the incident and the job of correctional officer. The court upheld the State Personnel Board's finding that the officer's "misuse of his weapon and loss of self-control raised doubts about his ability to remain calm under stressful circumstances at work." This constituted harm to the public service because "the ability to make calm and reasoned judgments under pressure was required of correctional officers and that [his] demonstration of lack of self-control and misuse of a weapon indicated that he could lose control in the life or death atmosphere of the prison."[25]

In cases of off-duty threats or violence courts have also upheld discharge by reasoning that officers should be held to a higher standard than other employees. In *Thompson* v. *State Personnel Board*, a state correctional officer was discharged for discourteous treatment of the public and poor off-duty behavior discrediting his agency.[26] Specifically, bar patrons reported the officer as being rude and obnoxious throughout an evening he spent at a bar. At one point, the officer became involved in an argument with two men whom he knew. Because the argument was getting heated, one of the men took his girlfriend home and returned to the bar. He put his arm on the officer's shoulder and said, "Let's go home."

The officer pulled his gun, which was loaded and the safety off, pointed it two inches from the man's head, and said, "Don't do that again." Upset, the man struggled with the officer, who was subsequently arrested for assault with a deadly weapon. In weighing whether his conduct amounted to harm to the public service, the court distinguished cases involving non-law enforcement personnel. The court held that the nature of the officer's employment was a controlling factor. Peace officers are held to a higher standard. In upholding the dismissal, the court found that "a correctional officer must be able to maintain self-control, particularly when armed with a deadly weapon."[27]

Off-Duty Sexual Misconduct

Courts have found that an officer's sexual misconduct causes discredit to the officer's police department, harms the public service, and may justify discharge. A California Highway Patrol officer was terminated for repeated off-duty public nudity.[28] The officer had appeared nude numerous times in front of neighborhood adults and children, even after being warned by the department that the conduct was unacceptable and that more discretion was required of him. The court stated "unquestionably, the actions of a law enforcement officer must be above reproach, lest they bring discredit on the officer's employer." The court sided with the officer's supervisor, who testified that the officer had undermined his credibility with other agencies and attenuated his effectiveness with his peers and subordinates. The court noted that law enforcement imposes on officers "certain responsibilities and limitations on freedom of action which do not exist in other callings." In upholding the officer's termination, the court held that the evidence clearly showed his public nudity actually offended neighborhood women and children. In addition, the court found that the officer's behavior discredited and embarrassed the department.[29]

When an officer commits sexual misconduct that may be criminal, courts have also found harm to the public service. A highway patrol officer was dismissed based on immoral conduct and failure of good behavior while off-duty causing discredit to the agency.[30] The officer had inappropriate and unwanted sexual contact with two teenage girls on two separate occasions and later refused to answer his supervising officer's questions regarding that behavior. In upholding the officer's termination, the court held that the officer's conduct constituted child molestation. In addition, the court found that the misconduct was not the type that might be corrected with a lesser form of discipline, such as suspension or demotion. There was a likelihood of reoccurrence because it had already happened on more than one occasion with more than one girl, and the officer would probably come into contact with teenage girls while on duty. The court reasoned that "a law enforcement agency cannot permit its officers to engage in off-duty conduct which entangles the officer with lawbreakers and gives tacit approval to their activities. Such off-duty activity casts discredit upon the officer, the agency and law enforcement in general."[31]

Even if off-duty sexual misconduct is consensual, the misconduct may support discharge, especially if the officer is associated with lawbreakers and the conduct is likely to reoccur. A highway patrol officer was terminated for failure of good behavior causing discredit to the agency and dishonesty.[32] During a San Jose City Police Department raid, the patrolman was engaged in oral sex at a commercially sponsored transvestite party at which prostitution was practiced.[33] Subsequently, the officer made false statements to the arresting officers and his supervisor concerning his misconduct. The court upheld the patrolman's termination because the "harm to the public service is evident." It concluded that the inappropriate behavior would negatively affect the patrolman's ability to work effectively within his own department and with other law enforcement agencies. In addition, the officer's conduct reflected adversely on him and his department and hindered the investigatory process regarding the incident. Further, since the officer had a long relationship with the party organizers, the conduct was likely to reoccur.[34]

Recently, the U.S. Supreme Court reviewed the issue of sexually related misconduct. A San Diego police officer was found to have sold sexually explicit videos on eBay, including one of him acting out a scene where he issues a traffic citation but revokes it after undoing his uniform and masturbating. The Court rejected the officer's claim that the sexually explicit videos constituted protected First Amendment speech. In language similar to California's harm to the public service doctrine, the Court upheld the officer's discharge and found that the misconduct was "detrimental to the mission and functions of the employer."[35]

A Useful Standard

"Harm to the public service" distinguishes between officers and civilians and establishes a higher standard for police officers. It affirms that because integrity is indispensable to the position of police officer, one whose misconduct undermines that integrity no longer deserves the public's trust. Further, when an officer's misconduct places the public at risk of future malfeasance, public safety and risk of liability weigh in favor of termination. Because of this higher standard, the doctrine supports dismissal of officers who commit serious misconduct, such as false statements, violence or threats, or sexual misconduct, and it provides a useful discipline barometer to police departments.

The ranges of discipline considered in police misconduct cases in some police departments are set forth in disciplinary guidelines. These guidelines operate somewhat like sentencing guidelines in criminal law. For different types of misconduct, the guidelines set forth a range of discipline, from low to high. For example, for relatively minor policy violations, such as preventable low-impact traf-

fic accidents, the prescribed discipline may range from a written reprimand to a few days of suspension without pay. More egregious violations, such as insubordination, may range from a few to 15 days of suspension. Disciplinary guidelines also allow for consideration of mitigating and aggravating factors, as well as an officer's past disciplinary history. Usually the indicated ranges of discipline are not mandatory but operate as a discretionary guide and can vary depending on the circumstances in aggravation or mitigation and the officer's disciplinary past.

When officers are alleged to have committed conduct that may amount to harm to the public service, disciplinary guidelines should allow for consideration of termination at the high end of the disciplinary range. California courts usually have upheld termination in such cases. Departments should at least be able to consider whether the evidence of the misconduct is strong enough to sustain the allegations, and if so, whether termination is the most appropriate discipline. If disciplinary guidelines do not list termination as the ceiling of potential discipline in these cases, they may be unnecessarily limiting their discipline to less than what the law allows. Given the serious nature of these cases, police departments should not unnecessarily limit the range of discipline they are allowed to consider under the law. Accordingly, departments should modify their disciplinary guidelines so that termination is within the range of discipline permitted in cases involving harm to the public service.

Police and sheriff's departments should use the doctrine of harm to the public service as a guide in drafting their disciplinary guidelines. By allowing termination to be within the permissible range of discipline in serious misconduct cases found to constitute harm to the public—dishonesty, false statements, violence or threats of violence, or sexual misconduct—departments would bring their disciplinary guidelines in line with this established legal standard. ■

---

[1] Blake v. State Pers. Bd., 25 Cal. App. 3d 541, 550-51 (4th Dist. 1972).
[2] Skelly v. State Pers. Bd., 15 Cal. 3d 194, 218 (1975) (citing Shepard v. State Pers. Bd., 48 Cal. 2d 41, 51 (1957); Blake, 25 Cal. App. 3d at 550-51, 554).
[3] *Id.*; Warren v. State Pers. Bd., 94 Cal. App. 3d 95, 107-08 (3d Dist. 1979).
[4] Talmo v. Civil Serv. Comm'n of Los Angeles County, 231 Cal. App. 3d 210 (2d Dist. 1991).
[5] *Id.* at 214-15.
[6] *Id.* at 229-31.
[7] Paulino v. Civil Serv. Comm'n of San Diego County, 175 Cal. App. 3d 962 (4th Dist. 1985).
[8] *Id.* at 965-72.
[9] Blake v. State Pers. Bd., 25 Cal. App. 3d 541, 553-54 (4th Dist. 1972).
[10] Skelly v. State Pers. Bd., 15 Cal. 3d 194, 219-20 (1975).
[11] Paulino, 175 Cal. App. 3d at 971-72.
[12] *Id.*
[13] Ackerman v. State Pers. Bd., 145 Cal. App. 3d 395 (1st Dist. 1983).
[14] *Id.* at 398-401.
[15] Flowers v. State Pers. Bd., 174 Cal. App. 3d 753, 756 (2d Dist. 1985).
[16] *Id.* at 756-61.
[17] Marino v. City of Los Angeles, 34 Cal. App. 3d 461, 463 (2d Dist. 1973).
[18] *Id.* at 465.
[19] *Id.*
[20] Haney v. City of Los Angeles, 109 Cal. App. 4th 1 (2d Dist. 2003).
[21] *Id.* at 3-12.
[22] Hankla v. Long Beach Civil Serv. Comm'n, 34 Cal. App. 4th 1216, 1218-20 (2d Dist. 1995).
[23] *Id.* at 1221-26.
[24] Gray v. State Pers. Bd., 166 Cal. App. 3d 1229 (1st Dist. 1985).
[25] *Id.* at 1231-33.
[26] Thompson v. State Pers. Bd., 201 Cal. App. 3d 423 (3d Dist. 1988).
[27] *Id.* at 426-30.
[28] Anderson v. State Pers. Bd., 194 Cal. App. 3d 761 (2d Dist. 1987).
[29] *Id.* at 763-72.
[30] Fout v. State Pers. Bd., 136 Cal. App. 3d 817 (2d Dist. 1982).
[31] *Id.* at 819-22.
[32] Warren v. State Pers. Bd., 94 Cal. App. 3d 95 (3d Dist. 1979).
[33] *Id.* at 100.
[34] *Id.* at 105-08
[35] City of San Diego v. John Roe, (No. 03-1669 2004) 543 U.S. ____ (per curiam 2004).