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

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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. ■

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[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).