



OIR Perspectives **February 2005**



Rob Miller
Attorney,
Office of
Independent Review
r1miller@laoir.com

Issue 3

THE LYING DILEMMAS

Some have said that "zero tolerance" is the only proper response to law enforcement officers who are found to have made false statements. This approach is entirely understandable: falsehoods by those from whom we demand integrity are certainly serious transgressions of our trust. However, if by "zero tolerance" one means that every falsity in every situation demands prosecution and/or removal of the officer from the field of law enforcement, I beg to differ.

For example, consider this scenario: Three deputies use excessive force in making an arrest after a foot pursuit. They all write up the incident, leaving out key details they know may be questioned, such as a pair of improper flashlight strikes to the head. A day later, Deputy A is troubled by his lies and concerned that the arrestee's injuries may lead to an investigation anyway. He goes to his sergeant and unburdens himself, admitting that he and Deputy B hit the arrestee in the head with their flashlights and that he omitted the use of the flashlight strikes in his report.

Deputies B and C, when asked, deny any irregularities; Deputy C adds that he was looking in the wrong direction at the key moments and would not have seen any headstrikes. As for the arrestee, he is uncooperative and claims to have little memory of the arrest.

Where does this leave the law enforcement agency that must resolve the case? Clearly, Deputy A should be punished because of his admitted misconduct. However, Deputies B and C might very well escape discipline because even Deputy A's ultimate admissions about the event may not overcome the steadfast silence and denial of Deputies B and C. However, under a "zero tolerance for lying" approach, Deputy A could never be retained as a police officer after making the initial false statement. The result would be a troubling anomaly: Deputy A would be fired for his initial false statements, while Deputies B and C would continue in their careers – effectively rewarded for their greater determination as liars.

If discipline is seen as a way to influence behavior of other employees, what message does this type of disciplinary approach send?

In the real world of administrative discipline, the false statements that are uncovered by vigorous investigations are not a simple black and white issue. For one thing, the term "false statements" may cover a vast spectrum of untruths, ranging from calling in "sick" in order to go to the beach, all the way to committing perjury at a court hearing. Our life experiences teach us that all "lies" are not equal in severity or harmfulness. Additionally, the initial falsehood can be followed by recanting and remorse by the involved officer, sometimes within minutes, other times months later. The statement might be a deliberate, calculated fabrication or an impulsive shading of the truth through omission of relevant detail. It could occur in the context of a written police report with direct implications on the justice system, or in an oral interview during an internal investigation of off-duty conduct. Because of these variations, each case requires careful examination of the circumstances surrounding the false statement in order to properly assess the culpability of the officer.

The goal of an effective law enforcement disciplinary system should be to rid the agency of the most culpable police officers and to deter all other employees from engaging in similar acts. Considering the advancement of this goal as the priority might re-frame the issue of truthfulness in a beneficial way: how can the agency send the strongest, most productive message without painting itself into a corner through "zero tolerance?" Perhaps the best test comes when applying a law enforcement agency's approach to the starkest of situations – namely, when complete honesty about a significant incident will threaten the career of one or more fellow officers.

While not exhaustive, I propose the following considerations to increase the likelihood of a constructive and effective result:

1.) Increase the Likelihood That an Allegation of Lying Will Be Thoroughly Investigated, and If Established, Appropriately Charged.

One of the major reasons people tell the truth, besides virtue and habit, is fear of consequences. An ineffectual agency response to false statement allegations will suggest to its members that the department is not overly concerned about the allegation; accordingly, the deterrent value of the discipline system is lost. Thus, it is imperative that thorough investigations be conducted whenever there is an allegation of a false statement.

Achievement of this objective is more than just a matter of will. The unit assigned to do this critical work must remain robust in terms of resources and creativity. The technological advances of our society have certainly provided better and more frequent documentation of events that assist in resolving such allegations. Clearly, the video camera has countless times provided assistance to the fact finder in assessing allegations of law enforcement misconduct. While a few publicized and notorious events have resulted in public outcry about law enforcement actions, such documentary evidence does not usually work to the disadvantage of the police officer — many times such recordings of events have worked to the advantage of the accused law enforcement officer and have been able to establish the frivolity of allegations. The increased use of video cameras in patrol cars, jails, and public places will provide the fact finder with the means to assess employee conduct and, where applicable, pursue allegations of false statements.

2.) Clearly Inform Peace Officers of The Consequences of Making a False Statement.

While, as stated above, each false statement allegation must turn on the individual circumstances, a law enforcement agency should do its best to communicate guidelines to its employees regarding how falsehoods are to be assessed. The peace officer should know whether a lie can be mitigated by a subsequent recantation. Moreover, to the degree possible, the law enforcement organization should relate to its employees which type of false statements will call for termination and which might allow the employee to retain employment.

One device that exists in progressive law enforcement agencies that helps to advance this goal is disciplinary guidelines or matrices. These give everyone the opportunity to know the approximate range of penalties for policy violations, and provide examples of consequences for specific sub-categories of misconduct. This goal of clear and well-publicized expectations can be further assisted by providing transparency within the organization about actual case results. While law enforcement agencies have been reluctant to do this in the past, they should recognize that real-life scenarios have the potential to be highly instructive and influential in shaping behavior.

It is absolutely vital to promote truth-telling in law enforcement. To promote this ideal, supervisors and investigators should make sure that employees receive the clear message that telling the truth will usually improve your prospects of receiving mitigated discipline, and telling the truth early will maximize that mitigation.

3.) Refrain from Removing a Finding of False Statements Simply to Achieve a Disciplinary Settlement.

Some law enforcement agencies agree to remove proven false statement charges in disciplinary cases in an attempt to achieve a disciplinary settlement with the employee. This practice sends the message that, either the original false statements finding was wrong or the agency is not serious about following through on such charges. Though this column obviously advocates a calibrated approach to the consequences of false statement violations, it does not support the misleading and counter-productive practice of “disappearing” the violations as part of a broader resolution.

Similarly, the concern about “Brady” implications for a peace officer should not be used as a rationalization to withdraw false statements charges that have been proven. The group of appellate court decisions, known collectively as Brady, requires prosecutors and police agencies to divulge to the court any impeachment information about peace officers. If the agency determines that the false statement transgression is so serious that it prevents the employee from being a witness, such a fact should be considered in determining whether to seek termination. If the agency determines that it is willing to live with the Brady implications of the transgression, it should then do so. But it should not attempt to hide the false statement transgression from judicial purview by removing the charge. Such a practice obviously undermines the spirit of the Brady disclosure obligations, and is a short-sighted response to a sensitive – but important and still-evolving – issue.

4.) Close the Responsibility-Dodging Loophole of Claimed Failures to Observe or Recall.

A related and troubling scenario is the willful rush toward “neutrality” by witness officers who are reluctant to offer harmful evidence against their peers, and who therefore claim that they did not see or cannot recall significant aspects of the incident in question. Such an approach may be attractive to the witness officer for a couple of reasons. For one, he or she may see such testimony as less blameworthy than a more affirmative lie. There is also a strategic advantage, in that it is very difficult to establish that individuals are lying when their subjective memories or observations are the material in dispute.

However, a determined police agency need not simply shrug and shake its head in the face of this tactic. Instead, it can remind such an officer that, unlike the average citizen, police officers are specially trained to witness and recall events. And indeed, such observation is often critical to officer safety. If an officer does not perform to the standards expected of such a specially trained individual, that agency can hold the officer accountable – not for lying, but for failing to live up to those standards. Holding a peace officer to such a standard will discourage officers from deploying the memory or observational lapse strategies and require them to live up to their responsibility as the eyes and ears of the agency.

The discussion above is intended to begin the dialogue about how law enforcement agencies in general can best promote integrity among their members while recognizing the human frailties of us all. There is no easy fix to the problem of truth telling. Agencies, however, should realize that the wait for an elusive cure-all is no reason for inaction now: there are concrete and pragmatic measures that can make a difference, and should be embraced.