

Retaliatory Conduct

January 2012

The IACP Law Enforcement Policy Center creates four types of documents: Model Policies, Considerations Documents, Concepts & Issues Papers, and Need to Know one-page summaries. Typically, for each topic, either a Model Policy or a Considerations Document is created, supplemented with a Concepts & Issues Paper. This file contains the following documents:

- **Model Policy**: Provides police agencies with concrete guidance and directives by describing in sequential format the manner in which actions, tasks, and operations are to be performed.
- **Concepts & Issues Paper**: Designed to provide context and background information to support a Model Policy or Considerations Document for a deeper understanding of the topic.

Model Policy

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Retaliatory Conduct

I. PURPOSE

It is the purpose of this policy to complement departmental integrity and avoid hostile treatment of fellow employees by requiring the mandatory reporting of serious infractions of departmental policy, procedure, or rules and by prohibiting retaliatory conduct or action against employees who make such reports.

II. POLICY

This department prohibits retaliatory conduct against or interference with an employee who reports, assists, or seeks to report breaches of department policy, procedures, or rules or engages in activities protected by whistleblower statutes.

III. DEFINITIONS

Affirmative Duty: The personal responsibility and obligation of an employee to report wrongdoing— rather than to provide such information only when requested.

False Report: A report that is not made in good faith and is based on information that is known or reasonably likely to be inaccurate; intentionally or negligently ignores exculpatory or mitigating information; or is made with the purpose of harassing or wrongly incriminating another employee.

Good Faith Report: A report that provides allegations concerning an employee who is reasonably believed to have purposely committed a serious violation of departmental policy, procedures, rules, or laws.

Public Disclosures: Statements made to the media or information entered in any forum that is available to the public—such as social media websites—that provide information that is critical of this department, its personnel, or both.

Retaliatory Conduct: Conduct or action designed to serve as retribution against an employee who, in good faith, has reported or otherwise provided information regarding misconduct against another employee. In the context of this policy, retaliatory conduct includes any deliberate, purposeful actions or failures to act directed against employees that cause or that could reasonably be expected to cause physical harm, property damage, significant emotional stress, or other serious negative effect on another employee; designed to ridicule or embarrass; or could seriously impair the efficiency, safety, or effectiveness of that employee, this department, or both. Such conduct may take many forms, including but not limited to bullying; persistent offensive comments, threats, or intimidation; false accusations; isolation; ostracism; posting of secure or personal information on the Internet; or acts that malign or disparage an individual's reputation.

Serious Acts of Misconduct: A deliberate act or failure to act that could reasonably form the basis for significant disciplinary action against an employee. Such disciplinary action includes suspension, demotion, reassignment, or termination.

IV. PROCEDURES

A. Duty to Report Misconduct

1. All employees of this department have an affirmative duty to report serious acts of misconduct. Failure to report shall result in corrective or disciplinary action.
2. Serious acts of misconduct should be reported to the complaining employee's immediate supervisor. If the supervisor is suspected of involvement in the misconduct, the report should be made to the next higher ranking employee in the chain of command.
3. In situations involving highly egregious offenses or illegality that may have serious or broader implications, a complaint may be made directly to the chief executive officer. Examples include, but are not limited to, broad-based corruption, conspiracy among employees, or offenses involving or including high-ranking officers or members of government.
4. All employees have an affirmative duty to cooperate fully during the investigation of any allegation of employee misconduct whether conducted by this department or another authorized authority.

B. Retaliatory Conduct

1. Retaliatory actions against employees who make good faith complaints or disclosures of misconduct against another employee are forbidden. Such acts will form the basis for charges of misconduct, resulting in serious disciplinary action. Any complaint of retaliatory conduct shall be submitted to the complaining employee's supervisor. If the supervisor is the subject of, or is involved in the complaint, an employee shall submit the complaint to the next higher ranking employee in the chain of command.
2. Employees who have been subjected to retaliatory conduct by fellow employees are encouraged to seek assistance through personal counseling or other services, as available from this department's employee assistance program or human resources department.

C. Public Disclosures and Legal Remedies

1. This policy does not limit an employee's right to make public disclosures that are deemed to be of public concern and are thus protected by the First Amendment. Protection of speech regarding employment has certain limitations, so employees are encouraged to consult with this department's policy on work-related speech and dissemination of information prior to making such public disclosures.
2. This policy in no way limits the right of employees to file complaints or grievances with outside governmental authorities or to initiate appropriate legal action. Individuals taking such actions are afforded the same protections against retaliatory conduct as other employees.

D. Prevention of Misconduct

1. Prevention of serious employee misconduct and promotion of a principled and effective work environment requires that all employees abide by this policy.
2. First-line supervisors bear a responsibility to ensure that all employees under their supervision fully understand the importance of adherence to departmental policies, procedures, and rules and that they also understand the department's commitment to ensuring employee compliance. First-line supervisors shall also monitor their staff and provide support to those who are directly affected by retaliatory conduct.
3. The department's training authority shall ensure that employees fully understand this policy.

Acknowledgment: This document was developed by the International Association of Chiefs of Police (IACP) Police Professional Standards, Image, and Ethics Committee in conjunction with the IACP National Law Enforcement Policy Center.

Every effort has been made by the IACP Law Enforcement Policy Center staff and advisory board to ensure that this document incorporates the most current information and contemporary professional judgment on this issue. However, law enforcement administrators should be cautioned that no model policy can meet all the needs of any given law enforcement agency. In addition, the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives, and demands; often divergent law enforcement strategies and philosophies; and the impact of varied agency resource capabilities, among other factors. Readers outside of the United States should note that, while this document promotes procedures reflective of a democratic society, its legal basis follows United States Supreme Court rulings and other federal laws and statutes. Law enforcement administrators should be cautioned that each law enforcement agency operates in a unique environment of court rulings, state laws, local ordinances, regulations, judicial and administrative decisions, and collective bargaining agreements that must be considered and should therefore consult their legal advisor before implementing any policy.

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Concepts & Issues Paper

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Retaliatory Conduct

I. INTRODUCTION

A. Purpose of Document

This paper was designed to accompany the Model Policy on Retaliatory Conduct by Employees established by the IACP National Law Enforcement Policy Center. It provides essential background material and supporting documentation to impart greater understanding of the developmental philosophy and implementation requirements for the model policy. This material will be of value to law enforcement executives in their efforts to tailor the model policy to the requirements and the circumstances of their communities and their law enforcement agencies.

The culture of policing has been widely studied. Recognized by most authorities in the field and attested to by practitioners is the matter of policing as a “brotherhood” – one that expects loyalty and mutual support from each of its members. This fraternalism factors large in most police departments as it contributes to cohesiveness, collective partnership, and adherence to commonly accepted principles. Sometimes however, loyalty to one’s peers can overshadow the values expected by the department and professional policing. Popular within many sectors of the policing society is the notion that officers will provide one another with particular “courtesies,” among which is to not report on the failures, mishaps, misdeeds, or transgressions of one another. When this code is broken, the offending officer is often the target of retribution in one form or another.

This paper and its accompanying model policy deal with a subject that is widely recognized but rarely addressed directly in department policies, procedures, or rules—retaliatory action for reporting misconduct by fellow officers. The importance of this policy was emphasized by the IACP Police Professional Standards, Ethics, and Image Committee, which played a large part in its development. The policy and paper are meant and designed to serve the interests of both officers and police agencies alike by promoting a positive culture of policing that places adherence to the police officer code of conduct and code of ethics above all else. In so doing, law enforcement agencies will promote a working environment that is collegial—as well as professional, effective, and publicly transparent.

B. Background

A police corporal, while on routine patrol, observes a motor vehicle being operated in a manner that provides reasonable suspicion that the driver may be under the influence of alcohol. The officer performs a traffic stop and approaches the driver’s side of the vehicle on foot. But, before he can ask for license and registration he recognizes the driver as a patrol sergeant from the same department. Two backup units arrive and both of these officers also recognize the sergeant behind the wheel of the car. The sergeant is clearly intoxicated and admits to having numerous drinks at a local tavern. The

corporal talks with the senior of the two backup officers. He decides not to conduct a sobriety check, but instead, directs the junior officer to drive the sergeant home and “forget about it.” The rookie officer voices his concern but is overruled by the senior officers.

Before reporting for his shift the following day, the rookie officer decides that he can’t turn a blind eye to the actions of his colleagues under the code of conduct and regulations of the department.

As such, he files a report about the actions taken by the officers with his shift supervisor. Over the coming days, the officer becomes aware that he is being shunned by his fellow officers. He notices that he is not receiving back-up in a timely manner and is shortly transferred to the night shift in one of the worst areas of the city. The officer knows that his report to the lieutenant has become common knowledge and that he is being singled out for retribution. After months of harassment, the officer resigns from the force—another casualty of retaliatory conduct.

This scenario of retribution and retaliatory action continues to play out in various ways in law enforcement agencies—as well as in the private employment sector—time and again across the United States.

“Retaliation” as it is defined in the law, is illegal under federal and most state laws and occurs when such action is taken against those who file complaints about harassment and discrimination in the workplace or other forms of workplace discrimination under Title VII (78 Stat. 241 as amended). Under Title VII, harassment of or retaliation against an employee is actionable in state and federal courts if it affects the terms and conditions of employees based on their sex, age, religion, or other protected classes under the law.

Although “retaliation” is illegal, situations involving retaliatory conduct by peer employees are not—unless the conduct rises to the level of creating a hostile work environment. However, retaliatory conduct has a corrosive and extremely detrimental effect on the workforce and can ultimately create liability for individual officers and the agency for a host of claims including workplace harassment and violation of civil rights. To the extent supervisors or managers know about, or acquiesce in, such conduct, it can give rise to agency and municipal liability. This document examines situations in which employees are subjected to retaliatory conduct because they have filed a complaint or are preparing to file a complaint against another employee or their employer. Retaliatory conduct, as discussed in this paper and the model policy, addresses the impact of such conduct on employees who are not necessarily protected by traditional retaliation laws.¹ More specifically, it addresses conduct by fellow officers that is designed to serve as retribution against an employee who, in good faith, files a complaint against another employee(s) or the department for acts of serious misconduct as defined in departmental policies, procedures, rules, and law.

Policies prohibiting retaliatory conduct, as described here, are uncommon, but they are necessary in order to protect three important organizational needs—maintenance of departmental and employee integrity, adherence of employees to the rule of law and the departmental code of conduct, and promotion of a positive and cooperative work environment. All of these organizational requirements are negatively affected when employees engage in serious misconduct and then take measures to intimidate; threaten; harass; or, in any other way, coerce others not to report such misdeeds or punish those who do report such wrongdoing.

II. PROCEDURES

A. Reporting Serious Misconduct

The model policy makes clear that the control of serious misconduct by employees is a shared responsibility of all personnel within a police department. In order to stress the importance of this responsibility, the policy clearly states that an employee has an affirmative duty to report serious wrongdoing rather than to withhold such information until specifically directed to do so. Personnel who fail to report serious acts of misconduct may themselves be subject to

¹ For a discussion of retaliation and related employee/employer discrimination practices actionable under Title VII, see the IACP *Model Policy and Concepts and Issues Paper on Harassment and Discrimination in the Workplace* (Alexandria, Va.: International Association of Chiefs of Police).

disciplinary or other corrective action under the model policy. In this way, it serves to remove the stigma from reporting misconduct by making it an affirmative obligation of all employees.

Admittedly, mandatory reporting presents an often difficult responsibility for individual officers. It goes without saying that most police officers share a close bond, one that, when used positively, promotes camaraderie, mutual support and assistance in times of crisis or danger. This informal code emphasizes that each officer will look out for others and particularly be there when support or aide is needed. But, wrongdoing by officers has negative effects on this mutual support system. It places involved officers in direct violation of their pledge of mutual trust and support for one another. Those not directly involved but who are aware of misconduct face the often difficult choice of damaging their relationship with fellow officers by reporting such offenses or by simply being passively compliant in the face of wrongdoing. This dilemma pits officer against officer and serves to tear down the camaraderie and esprit that takes so long to build, but which takes even longer to regain.

As difficult as it may be, it is essential for sworn officers and other employees to understand that true mutual support between them does not include covering up or failing to report acts of serious misconduct. Such acts are a breach of a higher responsibility to themselves, the profession, and the community, and are violations of their oath of office. This extends from accountability for one's own actions to a collective responsibility to safeguard the integrity of the overall department. Mandatory reporting underscores the moral and ethical responsibility of each individual to do the right thing and to put personal integrity and the police profession first.

Mandatory reporting does not necessitate or even encourage personnel to file reports for every misstep or misjudgment by their fellow officers. Such an environment would undermine the collegial spirit and harmony of a department that is so necessary to support a positive working environment, mutual cooperation, and interpersonal trust. By contrast, the model policy endorses reporting of "serious" acts of misconduct. Whether or not acts are considered serious on their face is, to some degree, a matter of personal and collective judgment that is left to individual departments to determine. Rather than attempt to draw a threshold between serious and less serious acts of misconduct, the model policy defines serious misconduct in the context of the level of disciplinary action that may be imposed. As such, serious misconduct is defined as: *A deliberate act or failure to act that could reasonably form the basis for significant disciplinary action against an employee. Such disciplinary action includes suspension, demotion, reassignment, or termination.*

Actions such as demotion, loss of seniority, loss of pay, unpaid leave, or similarly severe administrative actions up to termination of employment are within the realm of discipline that could be expected for serious misconduct. Of course, this also includes any act or failure to act that could form the basis for criminal charges.

Reports of serious misconduct must, however, be filed in good faith. That is, the employee filing the complaint must have facts that form the basis for a reasonable person to believe an act of serious misconduct has taken place.

While reporting is required, it should not be taken lightly. Reports should not be based on rumor or hearsay, and must incorporate all the factors surrounding the act or incident in question. Information that is known to be suspect or reasonably likely to be inaccurate should not be included. Reports that negligently or intentionally ignore information that could be exculpatory or form the basis for mitigating the charge(s), or reports that are purposely made in order to harass or incriminate another employee, should form the basis for severe disciplinary action against the reporting employee.

B. Definition of Retaliatory Conduct

Retaliatory conduct includes, but is not limited to, purposeful acts or failures to act that could result in bodily harm to the person or property of the reporting employee; significant emotional distress; or actions that affect the efficiency, safety, or effectiveness of that employee.

Actions characteristic of retaliatory conduct include, but are not limited to, bullying, persistent offensive comments, harassment, direct or indirect threats, intimidation, false accusations, ostracism, or acts that negatively

affect the reporting employee's professional or personal reputation.

Employees may not (1) engage in retaliatory actions against an employee, an applicant for employment, or probationary officer who has made a good faith disclosure of wrongdoing, nor (2) directly or indirectly use or attempt to use their position of authority or influence for the purpose of interfering with another employee's attempt to file a report of wrongdoing.

The second type of retaliatory conduct noted above involves abuse of authority, such as interference in reporting wrongdoing by means of authority, influence, or position, and may rise to the level of illegal retaliation. For example, it may include promises to confer a benefit on, or threats to take negative employment or related actions against the employee, or directing others to do so through failure to promote, negative transfers or assignments, poor performance evaluations, suspensions, or similar actions.

C. Reporting Retaliatory Conduct

Reports of retaliatory conduct by employees should be submitted to any supervisor in the reporting officer's chain of command. However, if the supervisor is the subject of the complaint, the report should be filed with the next higher member in the chain of command. In the case of reports involving highly egregious offenses that may have wide-ranging consequences or departmental or governmental implications, reports should be made to the department's chief executive officer, the office of the state's attorney, or other investigative agency, depending on the nature of the offense in question. Charges of systemic corruption and conspiracy and those that may invoke whistleblower statutes, should generally be filed with outside investigative agencies.

The policy does not limit an employee's options on filing complaints with authorized outside governmental agencies or to address grievances through appropriate legal channels. However, employees who make complaints of wrongdoing or retaliatory conduct are cautioned to seek qualified legal advice before making any public statements about misconduct or retaliatory conduct. In general, information released in a public forum has First Amendment protection if it is a matter of public concern. However, the line between matters of purely departmental concern opposed to a public concern is often difficult to draw. In some cases, whistleblower statutes provide some protection to persons reporting high-level offenses in public offices. First Amendment freedom of speech by public employees has some limitations, so officers should seek legal counsel before making any public statements that may have a negative impact on the department or individual employees. Employees may also wish to consult department policies regarding employee speech and dissemination of information to the public.

All employees are required to cooperate fully in any such investigation and are also provided with protection from retaliatory conduct under the model policy. The accused should be notified of the complaint as is customary in any internal investigation of possible employee misconduct. Investigations of retaliatory employee conduct should be conducted separately from the original allegation of misconduct in accordance with established department policy. Even though an employee may be protected by an anti-retaliation policy, investigations of misconduct and retaliatory action may place the reporting officer in an awkward position with respect to the accused and potentially, other employees. For that reason, such investigations should be expedited to the degree reasonably possible. During that period, the accusing employee may be provided with temporary remedial aid as deemed appropriate. For example, a no contact order may be issued to the accused officer. Additionally, the accusing officer is encouraged to seek any assistance that may be available through the department's employee assistance program or human resources department.

D. Discipline

The final component of the reporting process is discipline. Discipline fulfills a number of related goals for law enforcement agencies. An employer must strive to provide a workplace free of retaliatory conduct. The law enforcement executive implementing this policy will want to ensure compliance. Where a proven case of retaliatory action is met with swift and meaningful discipline, the agency philosophy against such conduct becomes clear.

By contrast, when officers perceive that a strong policy against retaliatory conduct exists, but that the agency metes out little or no discipline for such acts, they often lose the incentive to comply with the policy. Thus, effective discipline deters prohibited conduct and reinforces the agency philosophy.

The goal of the disciplinary process in such instances is to stop identified retaliatory action and prevent its recurrence through punitive measures. Employers are required to correct such misconduct through the agency's disciplinary process.

Again, employer liability for maintenance of a hostile and retaliatory work environment will turn on whether the agency used effective and meaningful discipline that fits the misconduct. An agency will not be held automatically liable for every retaliatory act that occurs during working hours. Where the agency has initiated an effective program prohibiting such conduct in the workplace and has responded in a quick and meaningful fashion to investigate and punish acts of retaliatory conduct, it will likely be able to deflect liability. In essence, to avoid liability the agency must show "clean hands" and a good faith effort to confront and discipline wrongdoers.

The need to show due diligence is essential for the department even in situations where the complaint of retaliatory action is deemed baseless or even fabricated. In no way, should a department take any action that could be construed to be a punishment against an individual who reports retaliatory action. Even actions that are well intended, such as reassignment of a complainant to a different squad or office during the course of the investigation to protect a complainant against retribution, may be viewed as retaliatory by third parties.

Upon the conclusion of any investigation, both the alleged victim and harasser should be notified of its outcome. In addition, where the investigation confirmed the allegations of retaliatory conduct, the agency should continue to check on the involved parties to ensure that the behavior has stopped. The agency should work with the victim to find ways to make the workplace a more comfortable situation for both parties.

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