



LEGAL DEFENSE TRUST

TRAINING BULLETIN

PRESENTED BY

MICHAEL P. STONE, GENERAL COUNSEL

6215 RIVER CREST DRIVE, SUITE A., RIVERSIDE, CA 92507

PHONE (951) 653-0130 FAX (951) 656-0854

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THE NOTICE TO CORRECT DEFICIENCIES

A Smart Alternative To "Burn'em To Learn'em" And The Old Favorite, "Gotcha."

by

Michael P. Stone, Esq.

Los Angeles Police Department's Professional Standards Bureau Chief Mark R. Perez authored an article in PSB's monthly newsletter "Strategies" in January 2008, on using a "Notice To Correct Deficiencies (NTC)" instead of generating a personnel complaint or "1.28" as it is known in LAPD. The Chief writes that it is a favorable alternative to generating a cumbersome and costly personnel complaint investigation and disciplinary action, when a well-written NTC will do the job.

After all, the objective here is to correct behavior by identifying for the employee what he or she did wrong, and by teaching and training the employee to do it the right way. If these procedures successfully correct misbehavior or misconduct, what is the need for the traditional personnel complaint investigation protocol, adjudication, implementation of discipline, followed by perhaps, an appeal by the disciplined

employee?

We all know that the most effective police supervisors are those that take their responsibilities for training, counseling, mentoring, assisting and leading by example seriously. These supervisors "grow" younger officers into being good, reliable employees, and they motivate and sustain more experienced officers in staying the course in terms of work ethic, productivity, morale and esprit d'corps. This in turn helps the newer officers assimilate the right culture and values, rather than the wrong ones. The NTC is a valuable tool for the supervisor to employ in getting these things accomplished.

Chief Perez notes however, that an important part of the NTC process is to record for the employee in the same written instrument, a clear statement of consequences should the behavior or conduct be repeated.

Clearly, the NTC procedure is not appropriate for all instances of misconduct, even though they are a “first offense.” So how do supervisors and managers decide between going with an NTC or generating a personnel complaint? What are the kinds of employee misconduct that merit NTC consideration as the best option? Before getting to these questions, we look at the nature of the NTC itself.

What Are The Key Features Of Good NTC?

Chief Perez tells us that there are three central features of an NTC:

1. A clear statement of what the employee did wrong;
2. A clear statement of what the employee must do instead; and
3. A clear statement of what the likely consequences will be if there is repetition of the conduct.

How Is The NTC Affected By The Public Safety Officers’ Procedural Bill of Rights Act (“POBRA) Or Similar Enactments In Other States?

It is beyond the scope of the Chief’s article to address the question of how and where the NTC fits into the statutory regulation of law enforcement disciplinary investigations, adjudications and appeals promulgated in *Government Code* §§ 3300, *et seq.*, widely known as “POBRA.”

§ 3303 lists the forms of “punitive action” that are subject to the chapter: dismissal, demotion, suspension, reduction in salary, written reprimand, and transfers for the purpose of punishment. NTC’s and their functional equivalents in other agencies

(memorandum of direction, memorandum of counseling and employee comment cards, for example) are not listed. § 3304(b) provides that any “punitive action” carries with it the right to “administrative appeal.”

Here’s the rub: some appellate court opinions have reasoned that even such benign forms of correction as the NTC and the counseling memo can lead to a right to administrative appeal if, within the document, the officer is threatened with punitive action if there is a further incident of the same character. *See: Otto v. Los Angeles Unified School District* (2001) 89 Cal. App. 4th 985. This results from the statutory language of § 3303 in defining what is “punitive action.” This section says that punitive action is any action that “. . . may lead to dismissal, demotion . . .” and so on. Therefore, the courts have noted that where an NTC or a counseling memo (while not in itself a punitive action) *threatens* punitive action in the future, it is thereby an “action that may lead to punitive action” and is therefore appeal able under § 3304(b). *Id.* Yes, I know, it is tedious. But it is what it is. If we want to make the NTC and similar forms of written counseling viable, we have to acknowledge that the affected officer may want to exercise the right to administrative appeal. The key is to devise an appropriate appeal that (1) acts as a meaningful hedge against an improvident personnel document citing misconduct being placed in the officer’s personnel records; and (2) does not overburden the supervisory processes sought to be streamlined by the use of the NTC in lieu of formal investigation, adjudication and discipline. This requires the employee association and management to sit down and negotiate an appropriate appeal procedure for the NTC and its “punitive action” cousin, the

“written reprimand.” The NTC and similar documented corrective actions customarily have a limited life, usually six months or a year. Written reprimands are usually a permanent record. But it would be unwieldy to afford officers who receive these documents a full-blown trial-type adversary hearing normally reserved for more serious penalties. And for the NTC, it would defeat the benefits of the documented corrective action. There is no settled formula for the administrative appeal of such lesser forms of corrective action. Notions of due process only require a fair opportunity to convince the employer that the corrective action is mistaken or wrong, or that there is sufficient mitigation to make the action unfair or “overkill.” The solution is best left up to management and the bargaining unit, to fashion an appropriate “appeal” that suits the particular agency. But don’t overlook the officers’ rights under §§ 3305 and 3306. The officer may choose to forego appeal, and elect to exercise his rights to simply review and initial the document (§ 3305) or attach his or her written response or rebuttal within 30 days of receipt (§ 3306).

These protections that must be afforded to peace officers do not render the NTC “more trouble than it is worth.” We just need to accept that as the law now stands, they are the rules of the game. You plan for it, and you deal with it.

As a police defense lawyer, if I have an officer who has somehow stepped over the line or misstep in some way, I would much prefer to have his or her supervisors utilize the NTC protocol as opposed to generating a personnel complaint, investigation, interrogation, rendition of findings, *Skelly* procedures, adjudication, implementation of

discipline, and appeal.

If there is a good chance that the officer can correct his or her behavior by these methods, then why opt for traditional *disciplinary* methods which may breed resentment and the “us against them” attitude that often results from the “burn’em to learn’em” methodology?

NTC vs. Suspensions And Other Forms Of Punitive Action

Chief Perez asks the question: What is gained by a 5-day suspension, for example, that is not already achieved on an NTC described above?” He suggests that if a well-worded NTC results in the correction of the conduct sought to be addressed in NTC, there is no need for a complaint, investigation, interrogation and penalty. On the other hand, if the officer fails to correct the problem as required in the NTC, then he/she is already on notice of what should be expected in terms of consequences. These might be things like administrative transfers, change of assignments, downgrades, and suspensions. But if it is necessary to exact a penalty for repetition of the problem, that penalty will be supported by NTC. If the conduct or poor performance is addressed by a suspension in the first instance, that penalty may be difficult to support. The NTC puts the officer on notice to improve and explains clearly *what’s wrong, why it’s wrong, and what’s going to happen next, if it is repeated*. Suspensions don’t do that very well. A benefit, among many others, is that an NTC is *fast*. If it gets the employee’s attention and he/she makes the necessary adjustment, it’s over with before a complaint investigation even gets underway.

Is It Necessary To Suspend To Achieve “Progressive Discipline”?

No. The NTC, as Chief Perez points out, *replaces* small steps in “progressive discipline,” and permits the agency to set the penalty for repetition in advance, which may, as the Chief observes, be a very *large* step in severity of discipline . But again, the idea here is to develop those employees who are capable and willing to improve, without adding sting to the reed.

What Kind Of Employee Mistakes Are Appropriate For The NTC?

Complaints from the public about misconduct almost invariably require that a personnel complaint be taken. The advent of Penal Code § 832.5 many years ago and the resulting mandatory duty to take and investigate “citizen complaints” make this situation what it is today. We are too far along the path laid out for us by the legislature, public opinion, citizen oversight commissions and elected officials showing the way, to ever return to “resolving citizen complaints informally.” Does it go something like this?

Watch Commander: (approaching citizen at front counter) Hi there, sir. I understand you want to complain about one of our officers?”

Citizen: “Well, ‘complain’ may be a bit too strong. I just don’t know whether the officer was right to do what he did.”

Watch Commander: “Do you think the officer did something wrong?”

Citizen: “I don’t know; well . . . maybe he did.”

Watch Commander: “Well, if you think he may have done something wrong, we have a complaint procedure for you to tell us about that. Then we will investigate.”

Citizen: “Is all this really necessary? I mean, can’t I just tell you what he did, and leave it in your hands?”

Watch Commander: “That’s not the way it’s done. You have to complete this face sheet, and describe what happened and then sign it. Pay particular attention to the warning above your signature about filing a false personnel complaint, it is a crime.”

Citizen: “But I really don’t want to do this. Can’t we just talk about it?”

Watch Commander: “That’s the problem, sir. We can’t do anything or say anything that might *dissuade* you from making a complaint. So, it will only take you a few minutes to complete that face sheet.”

Citizen: “You know, I don’t want to do this. I just wanted to know whether what the officer did was right . . . thank you, I’m leaving.”

Watch Commander: “Sir . . . Sir? Why don’t you take the form with you and fill it out later and mail it to us. Rest assured, we will promptly investigate your citizen’s complaint!”

Citizen: (walking out the door): “Aaaaggghhh!”

But a fair percentage of punitive action cases arises from *internal* complaints. It is these that the NTC can actually resolve when

there is no *necessity* or *requirement* to pen a formal complaint.

Chief Perez lists these tips to look for in the quest to make the NTC a valuable tool in the supervisory process:

1. *The facts are simple, known and undisputed;*
2. *The employee has no recent history of doing the same thing; i.e., for all practical purposes, it can be treated as a "first offense;"*
3. *Is there a specific and clear rule or standard that the employee violated?* Will the NTC permit the supervisor to focus the employee's attention on the rule and explain the importance of and principles behind the rule?
4. *Does the personnel complaint and discipline process supply a necessary element to the "employee development strategy?"* No?
Then why do it?
5. *Does the employee demonstrate a desire to improve or conform to standards?* The NTC is a powerful motivator.

6. **Think Strategy!**

Chief Perez counsels us to "think strategy;" not penalty. Having an "employee development strategy" may dispense with the need for a penalty.

The "Punitive Model" vs. "Strategic Model"

Chief Mark Perez is just getting started. He is presenting his ideas for a "strategic model" rather than a "punitive model" to national police executive conferences. So far he is pleased with the reception he is getting along the way. The "NTC" concepts discussed herein are a small part of what he hopes to develop into broad reform of how we train, motivate, correct and discipline our officers. Stay tuned. I'll be back with more about this later.

Stay Safe!

Michael P. Stone

Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced almost exclusively in police law and litigation for 29 years, following 13 years as a police officer, supervisor and police attorney.