CITY OF AURORA

Report on Independent Review

Aurora Police Department’s Response to March 29, 2019 Incident Involving an Aurora Police Officer

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TABLE OF CONTENTS

I. EXECUTIVE SUMMARY ...........................................................................................................1
II. BACKGROUND AND SCOPE OF THE REVIEW .................................................................4
III. FACTS .......................................................................................................................................7
    A. The Incident and APD’s Response ..................................................................................7
       1. The Incident – At the Scene ..................................................................................7
       2. The Incident – At the Hospital ..........................................................................10
    B. The IAB Investigation .......................................................................................................15
       1. Initiation of IAB Investigation and Its Scope .......................................................15
       2. Officer Meier’s Status During the IAB Investigation ...........................................16
       3. Steps Taken During the IAB Investigation ...........................................................16
       4. IAB Commander’s Recommendations ................................................................17
    C. The Disciplinary Process .................................................................................................18
       1. Chief’s Review Board .............................................................................................18
       2. Pre-Disciplinary Hearing .......................................................................................19
       3. Final Discipline & Approval by City Manager’s Office ........................................20
    D. Media Coverage of the Incident .....................................................................................21
    E. District Attorney Investigation .........................................................................................22
IV. FINDINGS AND CONCLUSIONS .........................................................................................23
    A. The Incident and APD’s Response ................................................................................23
       1. APD’s Response at the Scene ...............................................................................23
       2. APD’s Response at the Hospital ............................................................................24
       3. The Decision to Call off the Criminal Investigation and the IAB Investigation ....24
    B. The IAB Investigation .......................................................................................................26
       1. The IAB Investigation – Scope ..............................................................................27
       2. The IAB Investigation – Process and Procedure ...................................................27
    C. APD’s Disciplinary Process .............................................................................................28
V. RECOMMENDATIONS .............................................................................................................30
    A. Requiring Criminal Investigation of Possible DWAI or DUI and Prohibited Use of a Weapon .................................................................................................................................30
    B. Consultation with District Attorney’s Office ...............................................................30
C. Referring Criminal Investigations of APD Members to Outside Agencies........30
D. Recusal of Officers with Roles in the Wellness Unit or Peer Support Program..................................................................................................................31
E. The Independent Review Board..........................................................................................................................31
F. Clarifying Language Related to Consequences for a Member Driving Under the Influence in Directive Manual 14.1 Obedience to Orders, Directives and Laws..................................................................................................................32

VI. CONCLUSION..................................................................................................................................................33
I. EXECUTIVE SUMMARY

On December 16, 2019, the City of Aurora (“Aurora” or “the City”) engaged Wilmer Cutler Pickering Hale and Dorr LLP (“WilmerHale”) to conduct an independent review of the Aurora Police Department’s (“APD”) handling of the March 29, 2019 incident involving Aurora Police Officer Nathan Meier.

After a thorough review of the facts and applicable policies and procedures, this report concludes that high-ranking APD members made significant errors of judgment in their handling of the Officer Meier incident. As the report shows, critical missteps were made in APD’s immediate response to the incident, in the process of reviewing the adequacy of that response, and in the final outcome of the disciplinary process. The evidence is not sufficient to conclude, however, that these acts and failures to act were the result of improper motives or bad faith. Rather, they reflect failures of judgment and decision-making that APD members interviewed considered to be a failure of leadership, which altered the course of the response to the incident and have had the effect of undermining the public’s confidence in APD. Notably, at each stage of APD’s response, APD members themselves raised concerns about the appropriateness and adequacy of APD’s response.

The review came to the following findings and conclusions, as described in further detail below:

- APD’s response at the scene at the time of the incident was appropriate as a response to an officer in distress, but was materially incomplete as a response to a traffic incident and potential officer misconduct.

- As the ranking officer present at the incident, Deputy (“Dep.”) Chief O’Keefe had responsibility for APD’s response. In that position, Dep. Chief O’Keefe should have relied upon those officers present who were in a better position to conduct the investigation, rather than try to act as both leader and investigator.

- The exact nature of Officer Meier’s medical situation was confused and unclear both at the scene and at the hospital. However, Dep. Chief O’Keefe made decisions that resulted in APD failing to take reasonable and expected investigative steps to pursue a criminal investigation and initiate an Internal Affairs Bureau (“IAB”) investigation that day. Those reasonable additional investigative steps on March 29, 2019 would have led to evidence sufficient to pursue a criminal investigation and criminal charges against Officer Meier.

- Calling off these investigations without gathering all available information and without taking those additional investigative steps was premature, and represents a significant failure in judgment and decision-making that APD members interviewed considered to be a failure of leadership.

- Two ranking officers within the Department recommended to Chief Metz that Dep. Chief O’Keefe’s handling of the Officer Meier incident should be the subject of an IAB investigation. Chief Metz’s failure to take action to address those concerns – either through the IAB process itself or through a performance review of Dep. Chief O’Keefe – was inappropriate.
Chief Metz’s decision to demote Officer Meier rather than terminate him was within the Chief’s legal discretion, and was approved by the City Manager’s office. Nevertheless, the decision failed to take into account the totality of the circumstances surrounding the incident, and failed to consider fully the impact on the community and public safety. Chief Metz’s decision to retain Officer Meier despite the aggravating facts of the incident has had a negative impact on the Department internally and the public’s perception of whether APD is able to police itself.

The evidence from the review, however, is not sufficient to conclude that these acts and failures to act were the result of improper motives, bad faith, or an intention to obstruct justice. Instead, these errors reflect failures of judgment and a significant failure of decision-making that APD members interviewed considered to be a failure of leadership.

In light of these conclusions, this report makes the following recommendations:

- **Required Criminal Investigations.** In response to the incident, APD recently revised its Directive Manual 14.5 to require a criminal investigation in three scenarios, if there is reasonable suspicion that an APD member is under the influence of alcohol and/or drugs: (1) the APD member is found to be driving a motor vehicle on or off duty; (2) the APD member recently operated a motor vehicle; and/or (3) the APD member has in his/her possession a firearm. This revised policy should be fully implemented and APD officers trained regarding it.

- **Consultation with the District Attorney’s Office.** Where evidence establishes a reason to believe that an APD member is or has been under the influence of alcohol or drugs while operating a motor vehicle or while in possession of a firearm, the APD member responding to the incident must consult with the District Attorney’s Office for assistance in advising on investigative steps and making a determination as to whether reasonable suspicion and/or probable cause exists.

- **Referral to Outside Law Enforcement Agencies.** As a best practice, in any case in which an APD member is suspected of serious criminal misconduct, APD should consider referring the criminal investigation to an outside law enforcement agency for investigation, taking into account practicality and the totality of the circumstances.

- **Maintaining the Separation of Officer Wellness/Peer Support Programs from Investigations.** To prevent confusion and potential conflicts of interest, APD members with a role in the Wellness Unit or Peer Support Program should not function both in a peer support role and in an investigatory role in responding to an incident involving an APD member. Under such circumstances, officers should clearly recuse themselves from one or the other role and proceed accordingly.

- **Increased Use of Independent Review Boards.** In cases of serious misconduct or with substantial community impact, the Chief of Police should always consider an Independent Review Board (“IRB”) as part of the APD disciplinary process as a means of fostering transparency and enhancing the relationship between law enforcement and the community.

- **Clarification of Policy Regarding Consequences for Officer DUI.** Finally, language in Directive Manual 14.1 related to consequences for members driving under the influence
should be clarified to make clear that an arrest is not necessary to sustain a finding of driving under the influence ("DUI") and to broaden the conduct that is considered aggravating factors under the policy.
II. BACKGROUND AND SCOPE OF THE REVIEW

Officer Meier was found unresponsive behind the wheel of an unmarked APD motor vehicle in Aurora, stopped in an active traffic lane (the “incident”). Officer Meier was on duty, in uniform, and armed with his duty weapon. During its administrative investigation, APD IAB discovered that at the time of the incident Officer Meier was intoxicated with an extraordinarily high blood alcohol content (“BAC”). Officer Meier was not charged with a crime. In October 2019, the Chief of Police decided not to terminate Officer Meier from APD, but to demote him, impose a 260-hour suspension without pay, and impose other conditions. In December 2019, the local media reported on the incident and the subsequent discipline. The incident received extensive public attention both locally and nationally and generated public concern and complaints.

Former Colorado United States Attorney John Walsh oversaw the independent review. Walsh, a partner at WilmerHale’s Denver office, has practiced law for over 30 years, 14 of those years as a federal prosecutor, including six years as the United States Attorney for the District of Colorado. From 2003 to 2005, he served as a member, and then vice-chair, of the City & County of Denver’s Public Safety Review Commission, Denver’s law enforcement civilian oversight board, later replaced by the current Independent Monitor system. In each of these roles, he reviewed law enforcement conduct and misconduct and has become familiar with Colorado and national best practices concerning police management and investigations. To assist with the independent review, WilmerHale engaged, as law enforcement consultants, Michael Rankin and Robert Evans, both former FBI Special Agents. Rankin served as an Assistant Special-Agent-in-Charge in the FBI’s Denver Division, and subsequently as Director of the Colorado Bureau of Investigation from August 2015 to September 2017. Evans also served as Assistant Special-Agents-in-Charge of the Denver Division. Both are also lawyers. Between them they have 54 years of experience with the FBI in 13 different states and Washington D.C. They have worked the full range of criminal investigations including public corruption and officer involved shootings.

We were engaged by the City to conduct an independent policies and procedures review of the APD’s handling of the March 2019 incident involving Officer Meier. Specifically, the scope of our work included the following:

1. A review of the actions taken by APD members at all levels in response to the incident, including compliance with APD’s policies and procedures.

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1 On December 10, 2019, Denver’s CBS4 news reported that “[s]everal sources familiar with the Meier case told CBS4 Meier’s blood alcohol was more than five times the legal limit for DUI.” Aurora Cop Drives Drunk On Duty: Keeps Job, No Arrest, 4CBS DENVER, https://denver.cbslocal.com/2019/12/10/aurora-police-nate-meier/ (last visited March 3, 2020); see also Bodycam shows drunk officer slumped over in driver’s seat; city manager wants independent investigation, 9NEWS.COM, https://www.9news.com/article/news/local/body-camera-video-released-of-drunk-aurora-officer/73-7f9f3cc8-2b74-4ea2-8fda-a73b08da8fa9 (last visited February 26, 2020) (“Officer Nate Meier’s blood alcohol level was higher than 0.45 after the March 29 incident.”) These reports led to extensive public coverage locally and nationally.

2 The WilmerHale team also included attorneys Shelby Martin and Michelle Keast-Nachtrab, and paralegal Darla Pearsall.
2. A review of the sufficiency of existing APD policies and procedures to address the incident, and similar potential events.

3. In light of these reviews, and if appropriate, to make recommendations for different or additional policies and procedures.

Because both the District Attorney’s Office for Colorado’s 18th Judicial District and the APD IAB have continuing jurisdiction over the incident, the scope of our review did not include assessing or coming to conclusions as to potential criminal conduct and/or specific disciplinary recommendations regarding any APD member for their role in APD’s response to the incident.

To conduct our independent review, we began with a review of all APD materials directly related to the incident, including all materials collected and prepared by APD’s IAB in its investigation of the incident. The IAB plays a critical law enforcement role within APD and reviews complaints from any source about APD members’ conduct. The materials collected and prepared by IAB consisted of over 3.5 hours of audio- and video-recorded interviews of 14 officers; approximately 20 minutes of audio and video recorded by APD body-worn cameras (“BWC”) at the scene; 911 call recordings; and over 400 pages of incident reports, allegations, investigative summaries, interview transcripts, specification of charges and findings, disciplinary history, summaries of evidence, memoranda, medical records, dispatch logs, emails, and other documents and communications.

In addition to the IAB file and materials, we took additional investigative steps that we believed necessary to offer reliable and independent judgments concerning APD’s response to the incident and visited the scene of the incident. Our investigation included the following interviews:

- Six interviews of APD members regarding the incident (the responding traffic officer, the IAB lieutenant, Commander Marcus Dudley, Division (“Div.”) Chief Ernie Ortiz, former Chief of Police Nicholas Metz, and the former IAB commander);³
- Two interviews of APD members with specialized expertise (a DUI expert and members of the Professional Standards Section); and
- Visits and interviews of multiple witnesses at Officer Meier’s off-duty worksites.

We also reviewed and analyzed the following materials:

- APD Directive Manuals – its policies governing APD members’ conduct and the disciplinary process;
- Applicable APD Standard Operating Procedures (“SOPs”);
- The Aurora City Charter;
- Relevant law, including constitutional, statutory and case law materials;
- Officer Meier’s personnel file;

³ Our request for an interview of Dep. Chief O’Keefe was declined by Dep. Chief O’Keefe’s lawyer.
• Then Deputy Chief Paul O’Keefe’s personnel file;
• APD DUI training materials;
• Internal communications related to the incident and APD’s response and discipline;
• Relevant press and media reporting and interviews;
• Comparable APD IAB investigation and discipline summaries;
• The 18th Judicial District Attorney’s Investigative File; and
• A survey of best practices from other police departments and national law enforcement organizations such as the International Association of Chiefs of Police (“IACP”), Commission of Accreditation for Law Enforcement Agencies (“CALEA”), Police Executive Research Forum (“PERF”), Lexipol, Colorado State Patrol, Fort Collins Police Department, Denver Police Department, and Boulder Police Department.
III. FACTS

Our independent review focused on the events and actions taken during three distinct phases: 1) the March 29, 2019 incident and APD’s immediate response; 2) the IAB investigation; and 3) the disciplinary process.

A. The Incident and APD’s Response

1. The Incident – At the Scene

On Friday, March 29, 2019, around 3:37 p.m., two female civilians called 911 to report a male slumped over the steering wheel of an older Ford Taurus in the middle of East Mississippi Avenue just outside the Buckley Air Force Base gate in Aurora, Colorado. The second caller approached the vehicle and identified the driver as an APD officer in uniform. A call went out alerting all APD officers that an APD officer was in distress. Eight APD officers responded to the scene: Dep. Chief O’Keefe, five patrol officers, the duty lieutenant, and a lieutenant in Officer Meier’s chain of command. Buckley Fire Department (“BFD”) Engine 1, Aurora Fire Department (“AFD”) Engine 9, and Falck Ambulance Service also responded. The response to the scene lasted approximately 15 minutes, from 3:45 p.m. to 4:00 p.m. Approximately 15 minutes and 23 seconds of footage was captured of the scene by BWCs from four different APD patrol officers. This BWC footage does not cover every moment of the incident response, as the responding officers turned the cameras on and off intermittently while on scene.

a) Actions and Observations of APD Members on Scene

Dep. Chief O’Keefe was the first responder to arrive on scene, followed shortly thereafter by BFD. Because Chief of Police Metz was on medical leave, Dep. Chief O’Keefe was the acting Chief of Police in March, including at the time of the incident. The second APD member to arrive was a patrol officer whose BWC was not functioning. (He later explained that the battery was dead because the incident came near the end of his shift.) The male in the vehicle was identified as Agent Nathan Meier. Officer Meier was unresponsive, so BFD forced entry into the vehicle by breaking the passenger side window. Upon entry to the vehicle, BFD placed the vehicle in park, shut off the engine, and removed the keys. Dep. Chief O’Keefe entered the vehicle from the passenger’s side and removed Officer Meier’s holstered weapon. The patrol officer entered the vehicle from the driver’s side and removed Officer Meier’s taser and secured both the weapon and taser in Dep. Chief O’Keefe’s vehicle. Both Dep. Chief O’Keefe and the patrol officer smelled an odor of an alcoholic beverage on Officer Meier. Dep. Chief O’Keefe and the patrol officer did not speak to one another about smelling alcohol. The patrol officer later indicated, however, that there was non-verbal communication between himself and Dep. Chief O’Keefe when they entered the vehicle because Dep. Chief O’Keefe looked at him and shook his head. Both the patrol officer and Dep. Chief O’Keefe documented the smell of alcohol in their supplemental reports attached to the General Offense report. The patrol officer later indicated, however, that there was non-verbal communication between himself and Dep. Chief O’Keefe when they entered the vehicle because Dep. Chief O’Keefe looked at him and shook his head. Both the patrol officer and Dep. Chief O’Keefe documented the smell of alcohol in their supplemental reports attached to the General Offense report. The patrol officer later

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4 As a result of the subsequent IAB investigation into this incident, Officer Meier was demoted on October 22, 2019 from the rank of agent to officer.
5 In reporting on indicia of DUI, officers often use the phrase “an odor of an alcoholic beverage.” This report summarizes such findings as simply the smell or odor of “alcohol” throughout.
stated that Officer Meier tried to touch one of the firefighter’s face, “kind of like drunk people do.”

Four additional patrol officers with BWCs arrived on scene after Officer Meier was disarmed. Two of the officers arrived together in the same patrol car. As they approached Officer Meier’s vehicle the driver’s BWC captured the first patrol officer on scene saying something to the other officer (the passenger) that cannot be heard. The passenger officer then paused and turned to look at the driver. The passenger officer then reached down to his own BWC and turned it on. These officers were later instructed by the duty lieutenant to drive Officer Meier’s vehicle to the APD repair shop to have the broken passenger window repaired. The officers did not search or inventory the vehicle and its contents. The officers documented the incident in their supplemental reports that day. While neither officer stated they smelled alcohol in their reports, one of these officers initiated the General Offense report, which listed “alcohol” under the line item for “Suspected of Using.”

Another patrol officer’s BWC captured the arrival of the duty lieutenant. As the patrol officer approached the lieutenant, the duty lieutenant asked, “how is he?” The patrol officer responded, “He’s a, he’s a little intoxicated.” The patrol officer made an audible sound (“ugh”) and then reached down to his BWC and the video ends. This patrol officer never had direct access to Officer Meier at the scene; in a supplemental report submitted later that day, he explained that the first patrol officer on the scene had told him that Officer Meier was possibly intoxicated.

The fourth BWC was worn by another patrol officer who responded to the scene. His BWC captured him entering the passenger side of the vehicle to assist with the removal of Officer Meier’s duty belt. He also noted a smell of alcohol when he entered the vehicle. This patrol officer volunteered to follow the ambulance to the hospital and was the only patrol officer at both the scene and the hospital. A lieutenant in Officer Meier’s chain of command also arrived on scene. Dep. Chief O’Keefe mentioned to the lieutenant that he smelled alcohol during his initial contact with Officer Meier. After Officer Meier was removed from the vehicle, the lieutenant stuck his head in Officer Meier’s vehicle, but did not smell any alcohol.

The three APD members who entered the vehicle, including Dep. Chief O’Keefe, were the only APD officers on scene who had direct access to Officer Meier. All three documented the smell of alcohol on or around Officer Meier’s person in their supplemental reports. One other patrol officer, the duty lieutenant, and the lieutenant in Officer Meier’s chain of command all received information while at the scene that there was a smell of alcohol on Officer Meier but did not themselves note the smell of alcohol.

Dep. Chief O’Keefe instructed the duty lieutenant to have a traffic officer respond to the hospital for a possible driving under the influence (“DUI”) investigation. Dep. Chief O’Keefe also called the IAB commander from the scene and asked him to have an IAB investigator on standby because a preliminary breath test (“PBT”) may be required. Chief Metz had a policy

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7 See Directive Manual 14.5.9 Authorization to Conduct Reasonable Suspicion Drug/Alcohol Testing (Effective on Date of Incident).
that whenever an officer is hurt, the Chief would be notified, so Dep. Chief O’Keefe called Chief Metz from the scene. Dep. Chief O’Keefe told Chief Metz there was a possibility that Officer Meier was intoxicated, but that his medical condition was still uncertain.

There is no indication that any of the following preliminary investigative steps were performed at the scene: a search of the vehicle for evidence of alcohol; a sketch or photos taken of the scene; or attempts to gather relevant information from the officers and paramedics who responded to scene; interviews of other witnesses, including the civilian 911 caller who remained at the scene. All sworn APD members are required to conduct these preliminary investigation steps when assigned to an incident or upon discovering a possible crime. Dep. Chief O’Keefe admitted that he did not talk to the paramedics on scene and did not know if anyone did. He did not speak to the female civilian who called 911 and was on the scene when he arrived. Dep. Chief O’Keefe did not conduct a search of the car but stated that he did not see anything on the seats. One of the patrol officers on the scene did report seeing a clear plastic bottle on the passenger side seat. A glimpse of the bottle is also seen in the footage from one of the patrol officer’s BWC.

b) Actions and Observations of Paramedics and Firefighters on Scene

None of the responding BFD, AFD, or Falck personnel smelled alcohol on or around Officer Meier. Several explained that they did not suspect alcohol intoxication, and gave various reasons: Officer Meier was on-duty and in uniform; he was driving an APD vehicle; he did not present with other obvious signs of intoxication; they did not smell alcohol; they did not detect any open bottles of alcohol; the time of day, mid-afternoon; and finally, because no one on scene told them that alcohol might be involved. The paramedics were concerned that Officer Meier was suffering from either a stroke, a seizure, carbon monoxide poisoning, or exposure to an opioid such as fentanyl. Officer Meier’s vital signs were within normal ranges. Tests at the scene showed that Officer Meier’s blood sugar, while low, was not dangerously so, ruling out a diabetic incident. They were unable to perform the normal tests for a stroke because Officer Meier was unresponsive and unable to participate. One paramedic heard about the possibility of alcohol for the first time, when the Emergency Room (“ER”) physician noted the odor of alcohol on Officer Meier’s breath.

The ambulance ride to the hospital took approximately nine minutes. A paramedic from AFD and Falck rode in the back of the ambulance with Officer Meier. Neither paramedic smelled alcohol on Officer Meier’s person. Each stated that had they suspected intoxication, they would have followed a different procedure: the ambulance would not have used lights and sirens on route to the hospital and the AFD paramedic would not have ridden in the ambulance.

Several of the responding paramedics and firefighters later stated that because they could not smell the odor of alcohol on Officer Meier’s breath or person they were shocked to learn after the fact that Officer Meier had been intoxicated.

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9 The traffic officer who responded to the hospital on the day of the incident has extensive training in DUI enforcement. During our interview she explained that because the air in ambulances is highly circulated to prevent infection this can have the effect of dissipating odors such as alcohol.
2. *The Incident – At the Hospital*

The Falck ambulance arrived at The Medical Center of Aurora around 4:09 p.m. The arrival of the ambulance is captured on the BWC of an officer who happened to be standing in the ambulance bay at the hospital for another call. Immediately before the ambulance’s arrival, the patrol officer who reported from the scene to the hospital approached the officer at the hospital. The officer at the hospital asked, “what’s going on?” and the patrol officer from the scene replied something like, “following the bus.” The officer at the hospital responded, “that is what I heard, what’s going on?” The response was inaudible. The officer at the hospital gestured to his BWC and stated, “hold on . . . I’m on for something else.” The patrol officer from the scene responded, “I’ll tell you later.” The patrol sergeant on duty that day is also seen arriving to the hospital on the BWC.

a) Multiple APD Officers Respond to the Hospital

Thirteen APD officers were present at the ER at various times in response to Officer Meier’s situation on March 29, 2019. Div. Chief Ortiz and Commander Dudley responded because it was Chief Metz’s policy that when an officer is hurt, leadership is expected to respond to support the officer. Officer Meier’s direct supervisor also responded along with another co-worker of Officer Meier’s from the Economic Crimes Unit. Members from the APD Wellness Unit, which focuses on the health and well-being of APD members, were also present.

The patrol sergeant who responded to the hospital was the ranking officer until more senior officers arrived. The patrol officer from the scene told the patrol sergeant he smelled alcohol at the scene. The patrol sergeant told the patrol officer to write up a supplemental report on that point, which he did later that day. The patrol sergeant entered Officer Meier’s ER room with the patrol officer and the responding APD Wellness Unit officer. The patrol sergeant did not note the smell of alcohol while in Officer Meier’s ER room when standing approximately five feet from Officer Meier.

The patrol sergeant responded to the hospital because she was on duty at the time, but she is also a member of the Trauma Response Team (“TRT”), a branch of the Peer Support Team.\(^\text{10}\) As a member of the TRT, she received a separate electronic page saying there was a possible medical emergency involving an officer. The patrol sergeant noted she felt she was at the hospital in a “dual role” as both the responsible patrol sergeant and as a peer support member. She had what she initially described as a “personal” conversation with Dep. Chief O’Keefe while she was at the hospital, presumably out of concern over peer support confidentiality requirements, but later explained that she discussed with Dep. Chief O’Keefe whether Officer Meier’s condition was alcohol or drug induced.

Several officers described the scene at the hospital as “strange” because the medical staff refused to share any information with APD about Officer Meier’s health or condition. The hospital staff was also very careful to close the doors to Officer Meier’s room as they came and went. Multiple officers reported seeing Officer Meier return to his ER room on a gurney after a

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\(^{10}\) *See* Employee Support and Wellness Unit Standard Operating Procedure 6.1 Trauma Response Team.
CT scan. They described his head being up off the gurney, with his eyes closed, and not moving. They thought this was odd if Officer Meier was indeed suffering from some sort of head injury.

After 15-20 minutes at the hospital, Dep. Chief O’Keefe asked a nurse if she could rule out alcohol and she refused to answer the question. The ER doctor told Dep. Chief O’Keefe that Officer Meier was getting better and would go home after several hours but refused to provide any additional information. According to multiple officers, the hospital is typically forthcoming with information when there is a criminal investigation or an APD member is hurt, and that the hospital’s refusal to provide this information regarding Officer Meier was unique in their experience. Div. Chief Ortiz and Commander Dudley saw Dep. Chief O’Keefe make a phone call after his conversation with the ER doctor, but they do not know to whom he was talking.

Dep. Chief O’Keefe told Div. Chief Ortiz that the situation was unclear. He indicated that there were indicia that Officer Meier was under the influence of alcohol, but at the same time the situation might be a “freak medical condition.” Dep. Chief O’Keefe told Div. Chief Ortiz he was “on the fence about alcohol.” Div. Chief Ortiz said that he observed Dep. Chief O’Keefe “weighing all the options.” Dep. Chief O’Keefe was hoping to get more information from the doctors to help him decide whether the incident was alcohol related or not. Div. Chief Ortiz opined that once the ER doctor refused to provide information, Dep. Chief O’Keefe apparently decided to “err on the side of caution” and not pursue a criminal or internal investigation into the matter.

Neither Div. Chief Ortiz nor Commander Dudley observed Dep. Chief O’Keefe attempt to gather, comprehensively, the information or facts from other officers or first responders who had interacted with Officer Meier at the scene, nor did they observe Dep. Chief O’Keefe consult with the traffic officer at the ER for input on how a DUI investigation should be conducted. Dep. Chief O’Keefe did not ask for any input from Div. Chief Ortiz or Commander Dudley.

b) Dep. Chief O’Keefe Briefs Chief Metz Telephonically

Chief Metz talked to Dep. Chief O’Keefe twice on March 29, 2019, once when Dep. Chief O’Keefe was at the scene and once when he was at the hospital. Chief Metz was on medical leave at the time after a surgical procedure for a leg injury and took the calls at his residence. Chief Metz estimated that each call was under two minutes and amounted to Dep. Chief O’Keefe briefing Chief Metz about the situation. In the call from the scene, Chief Metz remembers Dep. Chief O’Keefe mentioning a “fruity smell” coming from Officer Meier, which Chief Metz thought might indicate a diabetic episode. When Dep. Chief O’Keefe called from the hospital, the situation was still unclear, and he advised that Officer Meier might have suffered from a medical condition. Dep. Chief O’Keefe told Chief Metz that Officer Meier was in an examination room and hospital staff had locked all APD personnel out. Dep. Chief O’Keefe said that a doctor advised that Officer Meier would be fine in a few hours. In both calls, Chief Metz did not offer any instructions or advice and Dep. Chief O’Keefe did not ask for any. Chief Metz indicated that in the second call, Dep. Chief O’Keefe had not yet come to a conclusion regarding the proper response to the situation.
c) The Traffic Officer

The traffic officer arrived at the hospital around 4:19 p.m. and spoke to the patrol sergeant on duty. The traffic officer asked the patrol sergeant why she had been called, and the patrol sergeant responded that she did not know. The patrol sergeant told the traffic officer that she had been in Officer Meier’s room and had not smelled alcohol. The patrol sergeant instructed the traffic officer to speak to the paramedics from the scene. The traffic officer spoke to one paramedic about Officer Meier’s blood sugar levels but did not ask whether the paramedic smelled alcohol on Officer Meier. She also spoke to the patrol officer from the scene who was also present at the hospital; she spoke by phone to the other patrol officer from the scene who had direct contact with Officer Meier in the vehicle. Both patrol officers told the traffic officer they smelled alcohol on Officer Meier’s person. The traffic officer noticed there were several members of command staff huddled in the corner at the hospital to include: the patrol lieutenant; the duty captain serving as watch commander; Officer Meier’s bureau commander, Commander Dudley; Div. Chief Ortiz; and Dep. Chief O’Keefe. The traffic officer never spoke to Dep. Chief O’Keefe at the hospital. She waited in the ER for approximately an hour until she was told by the duty captain that she was not needed and would be called back if anything changed. According to the duty captain, this decision came from Dep. Chief O’Keefe and Div. Chief Ortiz. She remained at the hospital for another hour responding to a different traffic call in the ER room across from Officer Meier’s.

The traffic officer never independently observed Officer Meier. According to the traffic officer, had she been instructed to conduct a DUI investigation she would have entered Officer Meier’s ER room and observed the monitors, checked his pulse, checked his blood pressure, leaned in close to smell his breath, and looked in his eyes to conduct a Horizontal Gaze Nystagmus (“HGN”) test. She would have also spoken to all the officers who responded to the scene. Assuming Officer Meier was still unconscious, and had the information she gathered established probable cause, she would have obtained a blood draw pursuant to Colorado Revised Statute (“C.R.S.”) Section 42-4-1301.1 (Colorado’s Expressed Consent Statute).11 Based on her

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11 In Mitchell v. Wisconsin, 139 S. Ct. 2525, 2539 (2019), the U.S. Supreme Court held “[w]hen police have probable cause to believe a person has committed a drunk-driving offense and the driver’s unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver’s BAC without offending the Fourth Amendment.” In People v. Hyde, 393 P.3d 962, 964 (Colo. 2017) the Colorado Supreme Court ruled that a warrantless blood draw conducted on an unconscious driver pursuant to Colorado’s Expressed Consent Statute C.R.S. Section 42-4-1301.1 did not violate the Fourth Amendment’s prohibition on unreasonable searches because the statutory implied consent satisfied the consent exception to the Fourth Amendment warrant requirement. Colorado courts have held that it requires more than just the odor of an alcoholic beverage to establish probable cause to believe a person is under the influence of intoxicating liquor. People v. Roybal, 655 P.2d 410, 413 n.8 (Colo. 1982); see also Grassi v. People, 320 P.3d 332, 339 (Colo. 2014). Additional evidence used to establish probable cause can include unsafe driving, failing a sobriety test, slurred speech, staggered walking, and other indicia of intoxication. In his letter regarding the incident, Brian Sugioka, Chief Deputy District Attorney, explained that the District Attorney’s Office was of the opinion that probable cause existed to seek a sample of blood from Officer Meier, citing the following facts: Officer Meier was found in control of the vehicle while it was stopped in a lane of travel, in drive, and with his foot on the brake; Officer Meier was unconscious and completely unresponsive; three officers smelled an odor of alcohol on Officer Meier’s person or emanating from the vehicle. See February 5, 2020 Letter RE: APD case 19-11789, concerning incident on March 29, 2019 involving Officer Nathan Meier, https://www.da18.org/2020/02/review-of-nate-meier-incident/ (last visited March 4, 2020).
understanding of the facts of Officer Meier’s actual intoxication, she believes that this additional investigation would have been highly likely to establish probable cause. The traffic officer also noted that she has never been prevented by hospital staff from entering a hospital room after she advised the medical staff that she was conducting a criminal investigation. In this instance, she was never instructed to proceed with an investigation by her supervisors, and as a result, did not request access to Officer Meier from medical staff.

The duty captain, patrol lieutenant, and Div. Chief Ortiz left prior to Officer Meier’s wife arriving at the hospital because they felt Dep. Chief O’Keefe, as the ranking officer, was in charge. Officer Meier’s wife, employed by the hospital in a non-medical capacity, arrived at the ER by 5:15 p.m. When she arrived, she requested that APD members stay out of Officer Meier’s ER room. Several officers left shortly thereafter because they were not allowed to visit Officer Meier and believed there was nothing left for them to do at the hospital. Dep. Chief O’Keefe, Officer Meier’s direct supervisor, and two officers from the Wellness Unit went into Officer Meier’s ER room and spoke to Officer Meier’s wife prior to leaving the hospital.

At 5:39 p.m., Dep. Chief O’Keefe called the IAB detective who was on standby at the IAB office and told him he was no longer needed and could go home.13

At 6:58 p.m., Dep. Chief O’Keefe sent an email to the entire APD stating that “it was determined that Agent Nathan Meier had suffered an undetermined medical episode.” And that “[h]is family is requesting no visitors for now.” Dep. Chief O’Keefe also wrote “[h]e is expected to be released at some point tonight. No more information about his condition is expected at this time.”

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12 An interview with an APD DUI expert revealed that DUI investigators are rarely denied access to a hospitalized DUI suspect. Typically, DUI investigators are only denied access when there is a medical emergency and the suspect is being stabilized or rushed to surgery. That was not the case on March 29, 2019. If it had been, the DUI investigator would have the option of seeking a search warrant for any retained blood samples at the hospital, typically within 48 to 72 hours of the incident.

13 According to the IAB commander, Dep. Chief O’Keefe called him after speaking to Chief Metz and advised that the matter would be treated as a medical issue and that the IAB investigator would not be needed.
d) Dep. Chief O’Keefe’s Description of Events

Dep. Chief O’Keefe believes he did not have reasonable suspicion to request a BAC test of Officer Meier. He noted that Officer Meier’s inability to perform a PBT created an obstacle for further inquiry, as did the fact that there had not been a driving or crash incident. Moreover, his observations of Officer Meier were not consistent with his past experience with intoxicated persons. He explained it was his decision not to pursue a DUI investigation. He was concerned about conducting blood draws on people who are in a medical crisis. He believed if it was a civilian, he would have made the same call. However, he admitted he may have done something different if he had known that two other officers also smelled alcohol on Officer Meier at the scene. He indicated that he had erred on the side of caution to protect Officer Meier and anybody else under the same circumstances from criminal investigation blood draws when they were suffering a medical emergency.

e) Later Events at the Hospital, and Officer Meier’s Discharge

Two officers remained at the hospital after all other APD members left: the original patrol officer from the scene who followed the ambulance to the hospital and an off-duty APD officer working as security at the hospital. Before she left, the patrol sergeant told the patrol officer to stay at the hospital until Officer Meier was released. The patrol officer left his post outside Officer Meier’s room for approximately 45 minutes to help interpret in Spanish in another ER room. About a half an hour before Officer Meier left the hospital, the patrol officer heard the doctor tell Officer Meier that he was not going to release him until Officer Meier could walk “from here to there and get his oxygen levels up.” The patrol officer saw Officer Meier walk from his room toward the sliding doors. The patrol officer never spoke with Officer Meier. After Officer Meier was discharged, the patrol officer asked the attending physician, “EtOH?” The doctor said he could not talk about it.

The patrol officer told the off-duty APD officer he smelled alcohol on Officer Meier at the scene. The off-duty APD officer told the patrol officer to make sure he put that in his supplemental report. The off-duty APD officer has worked at the hospital as off-duty security for over 13 years. He has never seen the hospital refuse to share information with APD like they

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14 See APD Directive Manual 14.5 Substance Abuse. This Directive Manual was revised on February 4, 2020 in response to the incident involving Officer Meier. Prior to being revised the Directive Manual stated that “[w]henever a supervisor has reasonable suspicion that a member is impaired by alcohol the supervisor . . . will direct that the member submit to a preliminary breath test (PBT).” Directive Manual 14.5.13(b) (Effective on Date of Incident) (emphasis added). The supervisor could direct the member to provide a blood sample “[i]f any measureable [sic] alcohol is detected by the PBT or if the supervisor determines through reasonable means that impairment is still present and with permission from the reviewing authority.” Id. at 14.5.13(c) (Effective on Date of Incident). APD Directive Manual 14.5 Substance Abuse defines reasonable suspicion as “[s]pecific and articulable facts known to a supervisor which, taken together with rational inferences from these facts, warrant a conclusion by the supervisor that the member may be in violation of the requirements of this Directive. Reasonable suspicion is less than probable cause, but can never be based on inarticulable hunches or feelings.” Id. at 14.5.1 Definitions (Effective on Date of Incident). According to section 14.5.4 Alcohol Impairment (Effective on Date of Incident) “[e]xamples of reasonable suspicion include, but are not limited to: the odor of an alcoholic beverage on the member’s breath or about their person, bloodshot watery eyes, slurred speech, admissions to drinking alcohol and clearly observable and describable physical imbalance.”

15 The term EtOH is an abbreviation for ethyl alcohol (ethanol) and is commonly used in medical circles to refer to alcohol.
did on the afternoon of the incident. The off-duty APD officer asked a nurse if Officer Meier was drunk. The nurse said she was not allowed to say but rolled her eyes. The off-duty APD officer opined it was “kind of obvious what was going on.”

According to the off-duty APD officer, whenever someone is highly intoxicated, they must wait several hours before release and leave with a family member. The doctors make sure they can walk up and down the hallway and are able to walk steadily.

Officer Meier left the hospital in the care of his wife at 10:47 p.m.

B. The IAB Investigation

1. Initiation of IAB Investigation and Its Scope

On Monday morning, April 1, 2019, Officer Meier’s status was discussed at a regularly scheduled APD Executive Staff Meeting. Dep. Chief O’Keefe, among other ranking officers, were present. The IAB lieutenant inquired whether there would be a follow-up urinalysis test of Officer Meier to determine what happened. Dep. Chief O’Keefe’s response was that they did not have reasonable suspicion to do so.

The IAB lieutenant reviewed the reports from the patrol officers who responded to the scene, as well as the BWC footage of the scene. He identified numerous indications that Officer Meier had been intoxicated. The IAB lieutenant discussed this with Commander Dudley, explaining he believed the evidence had been sufficient to establish reasonable suspicion to conduct a DUI test, at least through an administrative investigation, if not also a criminal investigation.

Similarly, the lieutenant in Officer Meier’s chain of command who had arrived on scene also reviewed the patrol officer’s reports and BWC footage on Monday, April 1, 2019. The lieutenant also told Commander Dudley that the officers on the scene observed signs of intoxication. Commander Dudley then went to Dep. Chief O’Keefe’s office and reported this information. After hearing that multiple officers reported smelling alcohol, Commander Dudley recalls that Dep. Chief O’Keefe sighed, said “ugh,” and pushed himself away from the desk. Dep. Chief O’Keefe said the information needed to go to IAB and that he needed to recuse himself from the IAB and the Chief’s Review Board (“CRB”) process because he was involved at the scene. Commander Dudley then went to Chief Metz and told him an IAB investigation should be initiated. Chief Metz seemed surprised when he heard several officers reported smelling alcohol.

On Tuesday, April 2, 2019, the IAB lieutenant called Chief Metz to get official approval to initiate an IAB investigation. The IAB lieutenant described the conversation with Chief Metz in detail. They discussed the scope of the investigation—in particular, whether any of the responding APD members, including Dep. Chief O’Keefe, should be the subject of an IAB investigation. The IAB lieutenant explained that numerous indications at the scene suggested a DUI investigation would have been appropriate. Chief Metz told the IAB lieutenant that when Dep. Chief O’Keefe called him from the hospital and told him that the medical staff were

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16 See IAB Standard Operating Procedure 2.1.1 Assignment of Cases to IAB.
denying access to Officer Meier and being evasive about the cause of his medical treatment, Chief Metz thought that Officer Meier must be drunk. The IAB lieutenant also explained that it was his impression that Chief Metz did not want Dep. Chief O’Keefe to force the issue at the hospital and falsely accuse an officer of a crime if it turned out to be a very serious medical condition instead. The IAB lieutenant said he explained to Chief Metz that if the incident were not investigated fully and appropriately it could result in negative perceptions of the Department. The IAB lieutenant stated that Chief Metz was reluctant to initiate a separate IAB investigation into APD’s response to the incident. Chief Metz advised that Officer Meier would be the only subject of the investigation. Everyone else involved, including Dep. Chief O’Keefe, would be interviewed as witnesses and the investigation would include the entire response to the incident. The IAB lieutenant interpreted this as a direction that unless some egregious acts by APD members were discovered during the investigation, the IAB should not independently investigate other members. The IAB investigation named only Officer Meier as the subject of the investigation.

Chief Metz does not recall this conversation and believed the scope of the investigation would include scrutiny of the actions of all officers who responded to the incident. He explained that he thought that if additional information about possible policy violations surfaced during the investigation, the IAB would investigate, if necessary, in an additional investigation. Chief Metz does recall that Commander Dudley raised the possibility of an IAB investigation of Dep. Chief O’Keefe’s response to the incident much later, after the media reports in December 2019.

2. Officer Meier’s Status During the IAB Investigation

After the incident on March 29, 2019, Officer Meier did not return to work until May 14, 2019. When he returned to work on May 14, 2019, he received a Notice of Investigation (“NOI”) from IAB. He was placed on Restricted Duty starting on May 14, 2019. He was not allowed to wear his uniform or engage in secondary employment. He was still able to carry his firearm, but it had to be concealed. He was also prohibited from driving any city-owned vehicle.

3. Steps Taken During the IAB Investigation

The IAB report states the case was initiated on Monday, April 1, 2019. Officer Meier was the only named subject. Violations of the following APD Directives were investigated:

- Directive Manual 8.2.3 Request for Leave
- Directive Manual 14.1.5 Conformance to Law
- Directive Manual 14.2.1 Conduct Unbecoming
- Directive Manual 14.5.2 Controlled Substances
- Directive Manual 14.5.4 Alcohol Impairment

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17 Our understanding is that the IAB investigation officially began on April 2, 2019, after the IAB lieutenant received the needed approval from Chief Metz.
The IAB investigation was extensive and lasted from April to mid-June 2019. IAB did not interview the two officers responding from the Wellness Unit due to confidentiality restrictions.\textsuperscript{18} Chief Metz, Div. Chief Ortiz and Commander Dudley were interviewed as part of this independent review but were not interviewed by IAB. IAB also did not interview personnel or obtain documents from BFD or AFD, though these investigative steps were later taken by the investigator for the District Attorney’s Office for the 18th Judicial District, in addition to interviews of two patrol officers who responded to the scene but were not interviewed by IAB.

All APD members interviewed by the IAB, except for Officer Meier, were provided notification as “WITNESS ONLY.” All APD members interviewed during the IAB, including Officer Meier, signed a \textit{Garrity}\textsuperscript{19} warning prior to the interviews.

None of the interviewees suspected Officer Meier as having a substance abuse problem prior to the March 29, 2019 incident. Co-workers described him as “aloof” and a “lone wolf.” They reported that Officer Meier would often disappear for several hours and no one knew where he went, but he always got his work done.

Officer Meier was on leave for six working days prior to the March 29, 2019 incident. On March 29, 2019, Officer Meier was scheduled to work from 8:00 a.m. to 6:00 p.m. A review of Officer Meier’s badge history and video surveillance show Officer Meier arrived to work in his personally owned vehicle at 10:15 a.m. dressed in civilian clothes. He left work at 2:02 p.m.

On the evening of March 29, 2019, Officer Meier was scheduled to work off-duty at a shopping center near Mississippi Ave. and Chambers Rd. from 6:00 p.m. to 10:00 p.m. He forgot to bring his uniform with him to work. He remembered going to his home in Parker to get his uniform and putting it on. He remembered going into his basement and drinking Smirnoff vodka. The next thing he recalled was being at the hospital and a male doctor telling him he was not going anywhere until he could stand on his own. Officer Meier could not recall why he was late to work on March 29, 2019. He did not recall drinking alcohol prior to coming to work in the morning, but said it was possible that he did.

IAB concluded its investigative activity on June 20, 2019. The IAB report was complete and ready for Officer Meier’s review on July 25, 2019.\textsuperscript{20}

4. \textit{IAB Commander’s Recommendations}

Pursuant to APD policy\textsuperscript{21}, after an IAB investigation is complete, the IAB commander recommends findings on each of the alleged violations under investigation, but does not recommend specific discipline for any violations found. On August 13, 2019, the IAB

\textsuperscript{18} C.R.S. Section 13-90-107(m) protects Peer Support Advisors from examination as witnesses concerning communications with members seeking assistance.

\textsuperscript{19} Established by the U.S. Supreme Court in \textit{Garrity v. New Jersey}, 385 U.S. 493 (1967), a \textit{Garrity} warning is an advisement of rights usually administered by federal, state, or local investigators to their employees who may be the subject of an internal investigation incident to their work. The effect of a \textit{Garrity} warning is to prevent the direct or indirect use of statements made in this compelled administrative context in a criminal prosecution of the officer making the statements.

\textsuperscript{20} See Directive Manual 10.2.5 Investigative Review Process (Effective on Date of Incident).

\textsuperscript{21} See Directive Manual 10.2.6 Formal Investigation Dispositions (Effective on Date of Incident).
commander made the following recommendations for findings for each of the alleged violations in Officer Meier’s case:

- Directive Manual 8.2.3 Request for Leave – “Not Sustained”
- Directive Manual 14.5.2 Controlled Substances – “Not Sustained”

C. The Disciplinary Process

Aurora City Charter Section 3-16(8) Disciplinary and Appeal Procedure and APD Directive Manual 10.02 Complaint and Discipline Procedures for Sworn Members set out the procedure for imposition of discipline. Officer Meier’s disciplinary process followed those requirements.

1. Chief’s Review Board

The CRB convened on September 16, 2019. Typically, the Deputy Chief is the chairperson of the CRB, but because Dep. Chief O’Keefe responded to the scene and was directly involved in the incident, he recused himself.22 Div. Chief Ortiz replaced Dep. Chief O’Keefe as the CRB chairperson. The CRB consisted of the Chairperson, Commander Dudley as Officer Meier’s Bureau Commander, the IAB commander, the IAB lieutenant, and two legal advisors. Everyone present, except for Div. Chief Ortiz and Commander Dudley, were attending in an advisory role. The CRB’s role is to review and approve or reject the IAB commander’s recommendations, and also to recommend proposed discipline, if appropriate, to the Chief of Police.

After describing the investigation and his recommendations, the IAB commander provided information on comparable IAB investigations and the discipline imposed. Div. Chief Ortiz and Commander Dudley did not believe the circumstances in the comparable investigations were analogous to the much more aggravated facts in Officer Meier’s case. Div. Chief Ortiz and Commander Dudley concluded the aggravating factors in Officer Meier’s investigation were insurmountable and the only appropriate discipline was termination.

Ultimately, the CRB agreed with the IAB commander’s recommended findings for the charged violations. For the sustained violations, the CRB’s recommendation of discipline to Chief Metz was “termination.”

The CRB also discussed whether Dep. Chief O’Keefe had violated any APD Directives when he decided not to initiate a criminal DUI investigation on March 29, 2019. Both Commander Dudley and Div. Chief Ortiz believed an IAB investigation into Dep. Chief

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22 See Directive Manual 10.2.7 Chief’s Review Board (Effective on Date of Incident).
O’Keefe’s response was appropriate. Later, Div. Chief Ortiz met with Chief Metz (a Police Legal Advisor was also present) and explained the CRB’s concerns related to Dep. Chief O’Keefe’s “decision making process” and whether he violated APD’s policy regarding investigation of alcohol use by an officer. Div. Chief Ortiz recalls that Chief Metz indicated that he did not believe that an investigation was appropriate. The decision was to be documented in a memorandum, but it appears that memorandum was never drafted.

Other avenues were available to review and address Dep. Chief O’Keefe’s response, short of an IAB investigation. Under Directive Manual 10.2.3, “[n]ormally, allegations that involve violations of policy or procedure but have little effect on operations, or, create a small degree of risk and/or liability to the member or the department may be handled at the Bureau/District level. Allegations of this nature may be handled with a Corrective Action Report, Performance Appraisal Entry, counseling, or possibly a recommendation for a Written Reprimand. Cases that involve a minor violation that is most likely a training or unprofessional demeanor issue will be assigned to the subject member’s Sergeant or direct supervisor for investigation.”23 Although these tools are not frequently used at the command staff level, they were available as corrective action. However, we identified no evidence that Chief Metz took any corrective action with respect to Dep. Chief O’Keefe’s response to the incident.

Officer Meier was provided a copy of the CRB’s recommended disposition on September 16, 2019. That same day he was taken off restricted duty status and placed on administrative leave with pay, which prevented him from working any scheduled shifts, taking police action, or working secondary employment. All employees facing termination in the disciplinary process are placed in this status.24

2. Pre-Disciplinary Hearing

Prior to the imposition of any discipline greater than a reprimand the Aurora City Charter requires that the member be provided a pre-disciplinary hearing before the Department Chief or designee.25

In advance of the pre-disciplinary hearing Chief Metz contacted Div. Chief Ortiz and asked why the CRB recommended termination of Officer Meier. Div. Chief Ortiz identified five reasons for the CRB’s determination:

1. Officer Meier’s excessive BAC;

2. Officer Meier knowingly went home on duty and consumed alcohol;

3. While consuming alcohol, Officer Meier knowingly put on his APD uniform and service weapon;

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23 See Directive Manual 10.2.3 Preliminary Administrative Investigation (Effective on Date of Incident).
24 See Directive Manual 8.2.3(f) Administrative Leave.
25 See Aurora City Charter Section 3-16(8)(b).
4. Officer Meier knowingly entered his APD vehicle in uniform, armed and intoxicated; and

5. Officer Meier knowingly operated his APD vehicle while intoxicated.

The pre-disciplinary hearing took place on September 26, 2019. In addition to Officer Meier, Chief Metz and Commander Dudley were present. Officer Meier gave a lengthy oral statement detailing the steps he had taken since the incident to deal with his alcohol abuse issues. Officer Meier also provided Chief Metz with additional information in mitigation and provided character references.

Chief Metz explained that, unlike the CRB, he was privy to “comments, thoughts, responses, and reactions of Officer Meier to the sustained violations.” Chief Metz said that after the pre-disciplinary hearing he ordered a “fitness for duty” evaluation to be conducted of Officer Meier. Chief Metz also spoke to Officer Meier’s substance abuse counselor. Based on the Fitness for Duty Evaluation and his conversation with the substance abuse counselor, Chief Metz decided not to take the termination action recommended by the CRB.

We have reviewed a copy of the Fitness for Duty Evaluation as part of the independent review and do not believe it provided information that significantly mitigated the aggravating factors identified by Div. Chief Ortiz and the CRB. Commander Dudley participated in the CRB and was present during the pre-disciplinary hearing. Commander Dudley indicated that Officer Meier’s statement did not offer information that, in Commander Dudley’s judgment, should alter the CRB’s recommendation to terminate Officer Meier.

APD’s discipline process provides for an IRB upon written request from the subject member within three days after the pre-disciplinary hearing. The Chief of Police may also request an IRB to assist the Chief in determining an appropriate level of discipline for sustained misconduct by subject members or for events that draw significant community interest. Neither Officer Meier nor Chief Metz requested an IRB in this instance.

3. Final Discipline & Approval by City Manager’s Office

Chief Metz prepared a Disciplinary Order outlining his findings and orders for disciplinary action for Officer Meier. In the Disciplinary Order Chief Metz adopted the IAB Summary of Evidence as his findings of fact. The Disciplinary Action was set as:

1. Demotion from the Rank of Agent to Officer. Officer Meier was to continue to be assigned to the Economic Crimes Unit. He was prohibited from testing for the rank of Agent until 2021.

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26 Notably, the Fitness for Duty Evaluation itself indicates that it was ordered by Dep. Chief O’Keefe in July 2019.
27 See Directive Manual 10.2.9 Predisciplinary Hearing (Effective on Date of Incident); Directive Manual 10.11 Independent Review Board.
2. Suspension for 360 hours, of which 260 hours would be served, and the remaining 100 hours will be held in abeyance for five years, for use at the Chief’s discretion in the event of a sustained complaint that results in suspension or demotion.

3. Random urinalysis or PBTs for five years. Any sustained finding of any alcoholic beverage during on-duty hours will result in termination.

4. Other forward-looking non-disciplinary conditions for his continued employment.

Pursuant to the Aurora City Charter Section 3-16(8)(c), all disciplinary orders involving a monetary impact on the member greater than one-third of the member’s monthly salary the disciplinary order must be approved by the City Manager. Chief Metz’s proposed disciplinary order met this standard. The entire disciplinary file, including the IAB investigation file, was provided to the City Manager’s office, along with the proposed Disciplinary Order. On October 17, 2019, the Deputy City Manager approved the Disciplinary Order. The Disciplinary Order was provided to Officer Meier on October 22, 2019 at his Final Disciplinary Hearing. Present at the Final Disciplinary Hearing was Officer Meier, Chief Metz, and Dep. Chief O’Keefe. That same day, Officer Meier was issued a Return to Duty Requirements memorandum outlining the requirements he must meet in order to return to full duty. APD advises that Officer Meier has successfully been meeting the conditions outlined in the Disciplinary Order and the Return to Duty Requirements, including passing regular random PBTs.

D. Media Coverage of the Incident

On December 10 and 11, 2019, several media outlets and the Denver Post reported the March 29, 2019 incident involving Officer Meier and the subsequent disciplinary actions. The media reports note that sources familiar with the Officer Meier case revealed that Officer Meier’s blood alcohol was more than five times the legal limit for DUI. The coverage also stated that Officer Meier was demoted but remained on the job despite sustained findings of violations by the IAB. The media further reported that Dep. Chief O’Keefe was the first APD member at the scene the day of the incident.

On December 13, 2019, Chief Metz sent an email to the entire APD in reaction to the media reports. In the email he wrote “I unequivocally stand by my decision regarding the involved officer because I care about the human being who stepped up and owned his incredibly poor decision . . . and continues to courageously own it.” He also stated, “finding the balance between discipline and support is critically important.” Throughout the email Chief Metz reinforced his philosophy of wellness and the importance of seeking help when needed.


30 Shelly Bradbury, Aurora Deputy Chief was First to Respond to Drunk Officer who Passed out in Car, DENVER POST (December 12, 2019), https://www.denverpost.com/2019/12/12/aurora-police-paul-okeefe-nathan-meier-dui-chief/.
24, 2019, Dep. Chief O'Keefe announced that he would not serve as the Department’s interim chief. In a letter addressed to the City Manager, Dep. Chief O’Keefe wrote that “under the current circumstances” it would be in the best interest of the Department for him to withdraw from the position. He also announced he planned to retire in March 2020.

E. District Attorney Investigation

In December 2019, the District Attorney’s Office for the 18th Judicial District initiated an investigation into the Officer Meier incident. As part of its investigation, the District Attorney’s Office executed a search warrant for the complete IAB file. Two different investigators reviewed the IAB file. In addition, an investigator contacted the Arapahoe County Sheriff’s office, Parker Police, Douglas County Sheriff’s office, and Colorado State Patrol to see if there were any Report Every Drunk Driver Immediately (“REDDI”) reports of erratic driving associated with the Ford Taurus Officer Meier was driving on March 29, 2019. There were no REDDI reports identified. An investigator obtained additional records from Falck Ambulance Service, BFD, and AFD. The investigator also conducted interviews of five non-APD first responders who were present at the scene, two APD officers who were not interviewed by IAB, and three citizen witnesses who were involved in the 911 calls reporting the incident.

As part of our independent review, we reviewed the District Attorney’s investigative file. We also reviewed the District Attorney’s decision letter dated February 5, 2020 stating that criminal charges could not be filed against Officer Meier or any other APD officer involved in the incident. On February 6, 2020, District Attorney (“DA”) George Brauchler held a press conference announcing his decision not to file criminal charges against Officer Meier. During the press conference DA Brauchler was critical of APD’s and, in particular, Dep. Chief O’Keefe’s handling of the incident. We reviewed this press conference and subsequent media interviews by DA Brauchler.

On February 6, 2020, Interim Chief of Police Vanessa Wilson ordered an IAB investigation into Dep. Chief O’Keefe’s conduct and decisions made during the incident. The alleged violations were Directive Manual 14.1.5 (Conformance to Law for a potential violation of C.R.S. Section 18-8-405 Second Degree Official Misconduct) and Directive Manual 14.3 (Professional Conduct and Responsibility) to include Directive Manual 14.3.1 (Unsatisfactory Performance). The same day the IAB investigation was announced, Dep. Chief O’Keefe declared he would be resigning from the Department, effective the next day. Initial indications were that the IAB investigation would continue despite his resignation.

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32 See APD Directive Manual 14.3.1: “Unsatisfactory performance may be demonstrated by lack of knowledge of the application of laws required to be enforced, an unwillingness or inability to perform assigned tasks, the failure to conform to work and/or training standards established for the member's rank, grade or position, the failure to take appropriate action on the occasion of a crime, disorder, or other condition deserving police attention, or absence without leave or habitual tardiness.”
IV. FINDINGS AND CONCLUSIONS

A. The Incident and APD’s Response

As the ranking officer present at the incident, Dep. Chief O’Keefe had responsibility for APD’s response. In that capacity, he made decisions that day that resulted in APD failing to take reasonable and expected investigative steps to pursue a criminal investigation and initiate an internal affairs investigation that day. The evidence we have obtained and reviewed is not sufficient to conclude that Dep. Chief O’Keefe was operating with improper motives, in bad faith, or with an intention to obstruct justice. In fact, substantial evidence came to light in our review that indicates that he was trying to assess unclear and somewhat contradictory information regarding a unique incident in an appropriate way. Nevertheless, reasonable additional investigative steps on March 29, 2019 would have led to evidence sufficient to pursue an internal affairs investigation, a criminal investigation, and criminal charges against Officer Meier.

1. APD’s Response at the Scene

APD’s response at the scene at the time of the incident was appropriate as a response to an officer in distress, but was materially incomplete as a response to a traffic incident and potential officer misconduct. Several APD members of various ranks reported and took steps necessary to secure the area and ensure Officer Meier’s safety. Dep. Chief O’Keefe, the first APD member to arrive on scene, did not direct APD responders to operate in the way they normally would to handle a traffic incident. As a result, APD failed to take certain steps that would be routine under normal circumstances. For example, APD did not take photos of the scene, including the location of Officer Meier’s vehicle in the middle of the road. They did not search and inventory Officer Meier’s vehicle before it was taken to APD headquarters. Besides collecting basic personal information, no one from APD conducted a substantive interview of the civilian witness who called 911 and who attempted to engage with Officer Meier while he was unresponsive in his vehicle.

Of the eight APD members who responded to the scene, each of the three officers, including Dep. Chief O’Keefe, who had direct contact with Officer Meier to safely remove his duty belt and extricate him from the vehicle stated that they smelled alcohol. This information was relayed to other responding APD members both at the scene and later at the hospital, and was recorded in incident reports. Some APD officers at the scene appear to have thought intoxication was possible or likely, as shown in the officers’ body language and audible responses captured on the BWC.

This information apparently was not conveyed to responding paramedics, none of whom smelled alcohol on or around Officer Meier. However, several paramedics noted that for multiple reasons, including the fact that Officer Meier was on-duty, in an APD vehicle, in the middle of the day, they did not suspect alcohol. Some said that if they had been told that APD officers smelled alcohol, they would have handled the situation differently.
APD members at the scene deferred to Dep. Chief O’Keefe as the highest-ranking officer present. This was appropriate under APD policy. However, Dep. Chief O’Keefe, as command staff, was not involved on a day-to-day basis investigating traffic incidents and did not instruct responding officers with that operational role to take all normal investigative steps. Instead, even though Dep. Chief O’Keefe directed that a traffic officer and IAB investigator respond to the hospital, the scene appears to have been handled solely as a response to an officer in distress, despite evidence that was sufficient to establish reasonable suspicion of a crime, specifically, DUI.

2. **APD’s Response at the Hospital**

The most consequential decisions and events took place at the hospital where Officer Meier was transported.

The traffic officer who responded to the hospital was relatively new to APD and to the APD’s Traffic Unit. As a result, upon arrival, she took the reasonable step of asking for guidance from her chain of command, rather than simply initiate the procedure she would normally use to evaluate a possible DUI. The patrol sergeant told her that she did not know why a traffic officer had been called. The traffic officer was never instructed to conduct an investigation, and she did not feel it was appropriate for her to enter Officer Meier’s room to conduct a DUI investigation without clear direction from the command staff. Had the traffic officer been directed to take ordinary investigative steps, she believes that in a case of this kind, she would likely have uncovered evidence sufficient to establish probable cause.

In addition, although an IAB investigator was put on notice of a possible DUI investigation of an APD officer soon after the initial response to the incident, he never actually arrived at the hospital. He was later informed that the administrative investigation was not proceeding. Had the IAB investigation gone forward at the time of the incident, we conclude that the IAB investigator would have identified enough information to move forward with an administrative DUI investigation.

3. **The Decision to Call off the Criminal Investigation and the IAB Investigation**

At the hospital, Dep. Chief O’Keefe was wrestling with a determination of whether Officer Meier was intoxicated or experiencing a medical issue—and whether there was sufficient evidence to establish “reasonable suspicion” of a crime. Multiple officers indicated that Dep. Chief O’Keefe genuinely seemed to believe the incident was or might be medical in nature—and that possibility is corroborated by the fact that paramedic first responders also had that impression.

Nevertheless, Dep. Chief O’Keefe ultimately made the decision to call off the criminal traffic investigation and the IAB investigation based largely on his own observations, without the

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34 See Directive Manual 14.1.1 Lawful Orders: “It is presumed that the highest-ranking officer on scene is in the best position to direct personnel and tactics during an emergency call.”
35 See Directive Manual 14.5.5 Applicability and Basis for Conducting Drug and/or Alcohol Tests (Effective on Date of Incident).
benefit of all the evidence actually available to him. Reasonable and expected investigative steps were available to Dep. Chief O’Keefe, as the ranking officer with responsibility for the incident, to gather the information necessary to make a fully-informed decision. He should have taken some or all of those steps. For example:

- Dep. Chief O’Keefe did not “huddle” all the responding officers to collect their observations, which would have revealed that two other officers had also smelled alcohol.

- Although medical staff was refusing to share medical test information, officers on the scene have indicated that access to Officer Meier for criminal investigative observation would have been granted. Access was not requested.

- Dep. Chief O’Keefe did not ask the responding traffic officer to observe Officer Meier, in light of the alcohol smell, to determine whether there were other indicia of intoxication, including an eventual HGN eye test when Officer Meier was sufficiently conscious. The responding traffic officer believes the results would have been conclusive. Probable cause for collecting a blood alcohol test for purposes of a criminal investigation likely would have been established had the traffic investigation been completed.

- Dep. Chief O’Keefe did not make a preservation request asking the hospital to hold Officer Meier’s blood samples in case future testing for alcohol impairment would be needed. Our understanding is that hospitals typically discard patients’ blood samples within 48-72 hours if a preservation request is not made. Thus, best practice in an uncertain situation would be to make the request, as is routinely done in cases of vehicular homicide or in cases in which a driver has been seriously injured and is not available for observation or questioning.

- Dep. Chief O’Keefe did not take into account the fact that medical staff’s refusal to provide additional information—unique in officers’ experience—itself raised at least yellow flags, particularly when coupled with the fact that medical staff nevertheless indicated that Officer Meier would be released later that evening.

- Notably, Dep. Chief O’Keefe apparently did not fully credit his own observations to assist in making this decision. Although he himself had smelled at least a fleeting odor of alcohol, he did not recognize that the odor of alcohol, along with the fact that Officer

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37 C.R.S. Section 42-4-1301.1(2)(b)(I): Any person who drives any motor vehicle upon the streets and highways and elsewhere throughout this state shall be required to submit to and to complete, and to cooperate in the completing of, a test or tests of such person’s blood, saliva, and urine for the purpose of determining the drug content within the person’s system when so requested and directed by a law enforcement officer having probable cause to believe that the person was driving a motor vehicle in violation of the prohibitions against DUI or DWAI and when it is reasonable to require such testing of blood, saliva, and urine to determine whether such person was under the influence of, or impaired by, one or more drugs, or one or more controlled substances, or a combination of both alcohol and one or more drugs, or a combination of both alcohol and one or more controlled substances.
Meier was found in his car with it running, in an active traffic lane, was evidence sufficient to establish reasonable suspicion to justify further investigative steps.\textsuperscript{38}

- Finally, although Dep. Chief O’Keefe clearly believed that the decision on the existence of reasonable suspicion was a difficult one, he did not call the DA’s office for legal counsel. Chief Deputy District Attorney Brian Sugioka stated that APD routinely calls the District Attorney’s Office to discuss whether reasonable suspicion or probable cause exists. No such call was made in this instance.\textsuperscript{39}

Dep. Chief O’Keefe has had a long and distinguished career with APD, marked by great service to the Department, the City of Aurora and the people of Aurora. Nevertheless, in this instance, he failed to take appropriate, reasonable investigative steps, and prematurely called off the criminal investigation and the IAB investigation. His actions and failures to act amounted to a failure of judgment and decision-making, both at the scene and more notably at the hospital, that APD members interviewed regarding the incident consider a failure of leadership.

The facts and evidence uncovered during the review, however, do not establish that Dep. Chief O’Keefe acted in bad faith or with improper motives in halting the investigations at the hospital. He candidly admitted that he struggled to assess the situation and that he was giving Officer Meier the benefit of the doubt to protect officers and others from blood draws and criminal investigation when suffering a medical incident. Although Dep. Chief O’Keefe appears to be sincere in this description, the same benefit of the doubt would likely not have been provided to a civilian driver in the same circumstances. The consequence of APD’s incomplete investigative response was that no DUI investigation of Officer Meier went forward and a likely valid prosecution did not proceed.

In addition, at least two officers at the scene—a patrol sergeant, and Dep. Chief O’Keefe himself—were operating both as investigating officers and as members/supervisors of the APD wellness “peer support” program. The patrol sergeant on scene explicitly recognized that dual role. We conclude this dual role created a conflict of interest that may have contributed to the outcome. During the IAB investigation, for example, the patrol sergeant in question initially described her conversation with Dep. Chief O’Keefe at the scene as “personal,” but later explained that she discussed with Dep. Chief O’Keefe whether Officer Meier’s condition was alcohol or drug induced. IAB did not interview the other two officers responding from the Wellness Unit because in the past they have refused to answer IAB’s questions due to confidentiality restrictions.\textsuperscript{40}

B. The IAB Investigation

On the Monday after the incident, April 1, 2019, multiple officers reviewed the BWC videos and incident reports and recognized that significant evidence of intoxication existed.

\textsuperscript{38} According to Directive Manual 14.5.4 Alcohol Impairment (Effective on Date of Incident), “[e]xamples of reasonable suspicion include, but are not limited to: the odor of an alcoholic beverage on the member’s breath or about their person, bloodshot watery eyes, slurred speech, admissions to drinking alcohol and clearly observable and describable physical imbalance.”


\textsuperscript{40} See C.R.S. Section 13-90-107(m).
Even Dep. Chief O’Keefe, when told that other officers smelled alcohol, immediately recognized the need for an IAB investigation. On April 2, 2019, the IAB lieutenant spoke with Chief Metz and an IAB investigation concerning the incident was officially opened.

At the time the IAB investigation began on Monday, April 1, 2019, APD still had some options to obtain critical evidence—retained blood samples—for a criminal investigation. Our review did not uncover any indication that APD addressed this possibility at the time.

1. **The IAB Investigation – Scope**

At least two ranking officers within the Department recommended to Chief Metz that Dep. Chief O’Keefe’s handling of the Officer Meier incident should be the subject of an IAB investigation. The IAB lieutenant stated this during his phone conversation with Chief Metz when discussing the scope of the IAB investigation at the time it was initiated. During the IAB investigation, multiple officers expressed concern with how Dep. Chief O’Keefe handled the situation. Finally, after the CRB reviewed the IAB file, Div. Chief Ortiz expressed the CRB’s concerns with Dep. Chief O’Keefe’s decision-making and suggested an IAB investigation of Dep. Chief O’Keefe’s response. Chief Metz did not take action to address these concerns, either through the IAB investigation process or through other performance review mechanisms. He should have done so.

In these circumstances, a complete review of the Officer Meier incident necessarily should have included a review to address the adequacy of APD’s response. Chief Metz’s decision not to do so has had the unintended effect of undermining the public’s confidence in APD and its ability to police itself.

2. **The IAB Investigation – Process and Procedure**

The IAB investigation processes and procedures were appropriate and well-conducted. We identified no information to suggest that the IAB investigators or commanders were “going easy” on Officer Meier. To the contrary, the IAB commander recommended that four of the six alleged violations be “sustained,” and the CRB recommended termination based on the IAB’s findings.

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41 See Directive Manual 10.10 Criminal Investigations Involving Members.
42 In theory, had the hospital not discarded blood samples from Officer Meier by the Monday after the Friday incident, APD could have attempted to obtain a search warrant based on probable cause to collect and test Officer Meier’s blood. We do not express an opinion on whether this would have been feasible because the hospital may have already discarded any blood samples by that time and a court may not have agreed that probable cause existed to support the warrant to retrieve the blood sample. We note that the District Attorney’s Office acknowledged that if APD had called for guidance on whether probable cause existed under the circumstances, they would have concluded that it did. In addition, the hospital could have been asked to preserve any blood samples at the time of the incident but was not asked to do so.
C. APD’s Disciplinary Process

The disciplinary process complied with City of Aurora and APD procedures. The CRB recommended termination of Officer Meier. Div. Chief Ortiz verbally gave Chief Metz five reasons for the CRB’s recommendation: Officer Meier’s extraordinarily high BAC; Officer Meier went home while on duty and consumed alcohol; while intoxicated, Officer Meier knowingly put on his APD uniform and service weapon; Officer Meier knowingly entered his APD vehicle in uniform, armed and intoxicated; and Officer Meier operated his APD vehicle while intoxicated.

Chief Metz’s decision to retain Officer Meier was within the discretion given to him as Chief by law and policy. Pursuant to the Aurora City Charter, the Chiefs of the civil service departments make disciplinary decisions. If discipline involves a monetary impact on the member greater than one-third of the member’s monthly salary, the disciplinary order must also be approved by the City Manager or a designated Deputy City Manager. Discipline decisions made by the Chief of Police can be appealed to the Civil Service Commission which reviews the disciplinary order under a standard akin to abuse of discretion.

Chief Metz’s decision to retain Officer Meier was not an abuse of discretion under applicable legal standards, which gave him great latitude. Chief Metz reviewed the entire IAB file as well as the memorandum from the CRB outlining its findings and recommendation of termination. At his pre-disciplinary hearing, Officer Meier provided Chief Metz with a long and detailed presentation of the steps he had taken since the incident to deal with his alcohol abuse issues. Chief Metz said that Officer Meier took full responsibility for his conduct and was very remorseful. After the pre-disciplinary hearing, Chief Metz reviewed Officer Meier’s Fitness for Duty Evaluation which included information from APD’s contract psychologist and Officer Meier’s treating psychologist. Chief Metz explained that he took all of this into account when he made his decision to deviate from the CRB’s recommendation of termination.

43 See Aurora City Charter 3-16(8); Directive Manual 10.2 Complaint and Discipline Procedures for Sworn Members (Effective on Date of Incident).
44 Aurora City Charter Section 3-16(8)(c).
45 See Aurora City Charter 3-16(8)(h): “In reviewing the disciplinary order, the Commission shall give due consideration to the necessity for maintaining administrative control of the Department by the Chief.”
46 See City of Colo. Springs v. Givan, 897 P.2d 753, 756 (Colo. 1995) (applying the abuse of discretion standard from Colorado Rule of Civil Procedure 106(a)(4)(1) applicable to judicial review of quasi-judicial activities to decision made by the City of Colorado Springs to terminate a supervisory employee who pled guilty to and was convicted of felony incest, the Supreme Court of Colorado held that reversal of the order is only permitted if there is “no competent evidence” to support the decision, which means that the administrative decision was “so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority”).
While Chief Metz’s decision was contrary to the CRB’s recommendation to terminate Officer Meier, it was within his legal discretion, and was approved by the City Manager. Nevertheless, his decision failed to take into account the totality of the circumstances surrounding the incident. In addition to the five factors the CRB identified, Officer Meier’s severe alcohol abuse issues established a high likelihood that he had previously been impaired by alcohol while on duty, armed and driving, and while at his off duty security job.47

As a result, although Chief Metz’s decision to give Officer Meier a second chance is understandable, and his motive laudable, his decision focused too narrowly on Officer Meier and did not adequately take into account the needs of the community and public safety more broadly. Chief Metz was aware that the facts of the incident might become public. Particularly, in view of that, he underestimated the legitimate public concerns given the severity of the incident.48 The decision not to terminate Officer Meier despite the highly aggravating facts of the incident, has had a negative impact on the Department internally and the public’s perception of whether APD is able to police itself. That conclusion leads to one of our recommended changes in APD practice.

47 “The occurrence of a BAL [blood alcohol level] higher than 0.20% is thought to be strong supportive evidence of alcoholism. A BAL of 0.40% is associated with coma and 0.50% with death.” Manual of Drug and Alcohol Abuse: Guidelines for Teaching in Medical and Health Institutions 136-37 (Awni Arif, M.D. and Joseph Westermeyer, M.D., Ph.D., eds. 1988). “Individuals who repeatedly drink large amounts of alcohol become tolerant to many of its effects. . . . Those tolerant to alcohol may on occasion have incredibly high blood alcohol concentrations; a few have survived concentrations of 700 mg/100 ml [0.70 BAC]. Even so, the tolerance is incomplete and individuals can always achieve some degree of intoxication and impairment.” Id. at 137-138. See also Marc Schuckit, Drug and Alcohol Abuse: A Clinical Guide to Diagnosis and Treatment 51 (2nd ed. 1985): “Doses of 400-700 mg % [0.40-0.70 BAC] can cause coma, respiratory failure, and death, although tolerant individuals may be awake and able to talk at blood levels exceeding 780 mg % [0.78 BAC].”

48 The Merit Systems Protection Board in its landmark decision, Douglas vs. Veterans Administration, 5 M.S.P.R. 280 (1981), established criteria that supervisors must consider in determining an appropriate penalty to impose for an act of federal employee misconduct. The Douglas factors are referenced widely as a resource to assist supervisors in determining a disciplinary penalty that is fair and reasonable and provide guidance in this case. One of the relevant factors that must be considered in determining the severity of discipline is “the notoriety of the offense or its impact upon the reputation of the agency.”
V. RECOMMENDATIONS

As identified in this review’s Findings and Conclusions, top-level APD command staff made decisions related to the incident that were based on poor judgment. Thus, we make the following recommendations with a focus on preventing similar errors of judgment by identifying policy changes and/or augmented best practices, as well as clarifying language in certain Directives.

A. Requiring Criminal Investigation of Possible DWAI or DUI and Prohibited Use of a Weapon

Required Criminal Investigations. In response to the incident, APD recently revised its Directive Manual 14.5 to require a criminal investigation in three scenarios, if there is reasonable suspicion that an APD member is under the influence of alcohol and/or drugs for driving under the influence in three scenarios: (1) when an APD member is found to be driving a motor vehicle on or off duty and there is a reasonable suspicion to believe that member is under the influence of alcohol and/or drugs; or (2) if a supervisor has reasonable suspicion that an APD member is impaired by alcohol and/or drugs and the supervisor has reasonable suspicion that the member the APD member recently operated a motor vehicle; and/or (3) if a supervisor has reasonable suspicion that an APD member is impaired by alcohol and/or drugs and the supervisor has a reasonable the APD member suspicion that the member has in his/her possession a firearm. This revised policy should be fully implemented and APD officers trained regarding it.

We agree with this revision to Directive Manual 14.5, and recommend training of APD members regarding it. The revision removes the opportunity for an APD member to make their own judgment call about whether to initiate a criminal investigation of another APD member in serious circumstances.

B. Consultation with District Attorney’s Office

Even with this recent revision, however, action under the Directive Manual on Substance Abuse turns on whether “reasonable suspicion” exists. As the facts of this incident show, Dep. Chief O’Keefe erred when he concluded at the hospital that reasonable suspicion did not exist to justify a further investigation and, potentially, a subsequent blood draw or search warrant to obtain retained blood samples. To prevent similar mistakes in making critical decisions “in real time” in future incidents, we recommend that if there is evidence that provides a reason to believe that an APD member is or has been under the influence of alcohol or drugs while operating a motor vehicle or while in possession of a firearm, the APD member responding to the incident must consult with the District Attorney’s Office for assistance in advising on investigative steps and making a determination as to whether reasonable suspicion and/or probable cause exists.

C. Referring Criminal Investigations of APD Members to Outside Agencies

Given the severity of the circumstances of the March 29, 2019 incident, and the fact that decision-making by high-ranking officials within the Department resulted in the lack of a criminal prosecution of Officer Meier, we recommend that:
In any case in which an APD member is suspected of serious criminal misconduct, for example, being or having been under the influence of alcohol or drugs while operating a motor vehicle or while in possession of a firearm, APD should consider as a best practice, and taking into account practicality and the totality of the circumstances, referring the criminal investigation to an outside agency with the required jurisdictional authority and subject matter expertise to conduct the investigation.

- The purpose of this recommendation is to facilitate an impartial investigation and avoid any appearance of a conflict of interest.
- Upon the agreement of supervisory personnel from APD and the outside agency, the outside agency may conduct the investigation jointly with APD investigative personnel or independently of APD.

D. Recusal of Officers with Roles in the Wellness Unit or Peer Support Program

Directive Manual 15.18 Peer Support Program explains the purpose of APD’s Peer Support Program (to provide members with confidential emotional support during and after times of personal or professional crisis) and outlines the responsibilities of the Peer Support Advisor. Peer Support Advisors provide short-term supportive assistance and/or referral to members seeking assistance. Discussions shared between a member seeking assistance and a Peer Support Advisor are confidential. Peer Support Advisors are protected from examination as witnesses concerning communications with members seeking assistance under C.R.S. Section 13-90-107(m), but this protection does not apply in cases of potential criminal conduct.

To prevent confusion related to confidentiality, we recommend a policy that officers with roles in the Wellness Unit or Peer Support Program act in only one capacity in connection with any case. In other words, they should either recuse themselves from any investigation or decision-making process when responding to an incident involving an APD member, or recuse themselves from their Wellness Unit/Peer Support role in the particular case. The responding member on behalf of the Wellness Unit or Peer Support Program should focus solely on the wellbeing of the APD member and allow other members not responding for the Wellness Unit or Peer Support Program to handle any investigation or operational response to the incident.

E. The Independent Review Board

Aurora City Charter Section 3-16(8) and the APD Directive Manual 10.2 Complaint and Discipline Procedures for Sworn Members provide substantial discretion to the Chief of Police to make determinations on discipline for the Department. Nevertheless, Chief Metz’s decision to retain Officer Meier was condemned by the public and was contrary to recommendations from within APD. For this reason, we recommend that in cases of serious misconduct, or cases that

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49 Although current policies recognize the issue (see, e.g., Directive Manual 15.18.7 Ethical Issues; Employee Support and Wellness Unit Standard Operating Procedure 5.1.3 Lethal Response Team Procedures) we recommend more direct language prohibiting acting in a dual capacity, which will assist officers when responding to future incidents involving APD members.
The IRB outlined in Directive Manual 10.11 and in City of Aurora Human Resources Policy Independent Review Board (revised 11/09/2018), is composed equally of members of the community and APD members. The IRB mechanism is designed to assist the Chief of Police in the deliberative process of determining an appropriate level of discipline for instances of sustained misconduct by subject members. The independent review revealed that in practice the IRB has largely been invoked by APD members who are the subject of IABs, rather than by the Chief of Police. However, the IRB can be more widely used as a tool for the Chief of Police to build community trust and enhance the credibility of the Department in appropriate cases. Thus, our recommendation is not to change the policy governing the IRB, but rather to recommend that the Department more frequently use the IRB in its disciplinary process, and that the Chief of Police always consider the IRB in cases of serious misconduct or with substantial community impact.

Civilian review boards can enhance the relationship between a law enforcement agency and the community it serves by fostering an environment of greater transparency, communication and understanding, and promoting collaboration to address high-profile and more routine issues that will invariably arise. Used effectively, the use of IRBs in serious misconduct cases can build public confidence and assist to strengthen APD’s policies and practices as it seeks to serve the community in the most responsive manner possible.

F. Clarifying Language Related to Consequences for a Member Driving Under the Influence in Directive Manual 14.1 Obedience to Orders, Directives and Laws

Directive Manual 14.1 provides members with rules to ensure obedience to orders, directives and laws. Section 14.1.5 Conformance to Law states that all APD members, at all times, must obey the law. It lists factors for members determined in an internal investigation to have driven under the influence of alcohol or prescribed and legally obtained drugs. We recommend that certain language in this section of the Directive Manual be edited for clarity:

- Under the heading “Expected Consequences for a Member Driving Under the Influence of Alcohol or Drugs:” the first bullet states the presumption is a 160-hour suspension for the “First Arrest for DUI.” The term “Arrest” should be modified to make it clear that an employee does not have to be arrested to sustain a finding that an employee was driving under the influence.
- The bulletized section then lays out “Aggravating Factors” that could lengthen the presumptive term of the suspension. The factors should be expanded to include a high BAC as well as an enhancement if the employee was carrying a firearm at the time he/she was driving under the influence.
- We recommend the Aggravating Factors list also include a catch-all category for “other factors indicating conduct impacting public safety.”
VI. CONCLUSION

This report sets forth the results of WilmerHale’s independent review. The recommendations included in this report are intended to prevent similar errors from occurring in the future, and to help restore the public’s confidence in APD.
## APPENDIX

Applicable Policies and Procedures

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<table>
<thead>
<tr>
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<tbody>
<tr>
<td>1.</td>
<td>Aurora City Charter Section 3-16(8)</td>
</tr>
<tr>
<td>2.</td>
<td>APD Directive Manual 06.11 PRELIMINARY AND CRIMINAL INVESTIGATIONS</td>
</tr>
<tr>
<td>3.</td>
<td>APD Directive Manual 06.18 ENFORCEMENT OF IMPAIRED DRIVING LAWS</td>
</tr>
<tr>
<td>4.</td>
<td>APD Directive Manual 08.02 LEAVE AND SCHEDULING PROCEDURES</td>
</tr>
<tr>
<td>5.</td>
<td>APD Directive Manual 10.02 COMPLAINT AND DISCIPLINE PROCEDURES FOR SWORN MEMBERS (Effective on Date of Incident)</td>
</tr>
<tr>
<td>7.</td>
<td>APD Directive Manual 10.10 CRIMINAL INVESTIGATIONS INVOLVING MEMBERS</td>
</tr>
<tr>
<td>8.</td>
<td>APD Directive Manual 10.11 INDEPENDENT REVIEW BOARD</td>
</tr>
<tr>
<td>9.</td>
<td>APD Directive Manual 14.01 OBEDIENCE TO ORDERS, DIRECTIVE AND LAWS</td>
</tr>
<tr>
<td>12.</td>
<td>APD Directive Manual 14.05 SUBSTANCE ABUSE (Effective on Date of Incident)</td>
</tr>
<tr>
<td>13.</td>
<td>APD Directive Manual 14.05 SUBSTANCE ABUSE (Revised: 02/04/2020)</td>
</tr>
<tr>
<td>14.</td>
<td>APD Directive Manual 15.18 PEER SUPPORT PROGRAM</td>
</tr>
<tr>
<td>15.</td>
<td>APD Standard Operating Procedures IAB 02.01 INTERNAL AFFAIRS BUREAU – AUTHORITY AND RESPONSIBILITY</td>
</tr>
<tr>
<td>16.</td>
<td>APD Standard Operating Procedures Employee Support and Wellness Unit 5.1 LETHAL RESPONSE TEAM</td>
</tr>
<tr>
<td>17.</td>
<td>APD Standard Operating Procedures Employee Support and Wellness Unit 6.1 TRAUMA RESPONSE TEAM</td>
</tr>
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</table>
John Paroske
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Virginia Zinth

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*City Manager*

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*City Attorney*

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George W. Zierk, III

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PREFACE

This Code constitutes a complete recodification of the general and permanent ordinances of the City of Aurora, Colorado.

Source materials used in the preparation of the Code were the 1979 Code, as supplemented through July 10, 1995, and ordinances subsequently adopted by the city. The source of each section is included in the history note appearing in parentheses at the end thereof. The absence of such a note indicates that the section is new and was adopted for the first time with the adoption of the Code. By use of the comparative tables appearing in the back of this Code, the reader can locate any section of the 1979 Code, as supplemented, and any subsequent ordinance included herein.

The chapters of the Code have been conveniently arranged in alphabetical order, and the various sections within each chapter have been catchlined to facilitate usage. Notes which tie related sections of the Code together and which refer to relevant state law have been included. A table listing the state law citations and setting forth their location within the Code is included at the back of this Code.

Chapter and Section Numbering System

The chapter and section numbering system used in this Code is the same system used in many state and local government codes. Each section number consists of two parts separated by a dash. The figure before the dash refers to the chapter number, and the figure after the dash refers to the position of the section within the chapter. Thus, the second section of chapter 1 is numbered 1-2, and the first section of chapter 6 is 6-1. Under this system, each section is identified with its chapter, and at the same time new sections can be inserted in their proper place by using the decimal system for amendments. For example, if new material consisting of one section that would logically come between sections 6-1 and 6-2 is desired to be added, such new section would be numbered 6-1.5. New articles and new divisions may be included in the same way or, in the case of articles, may be placed at the end of the chapter embracing the subject, and, in the case of divisions, may be placed at the end of the article embracing the subject. The next successive number shall be assigned to the new article or division. New chapters may be included by using one of the reserved chapter numbers. Care should be taken that the alphabetical arrangement of chapters is maintained when including new chapters.

Page Numbering System
The page numbering system used in this Code is a prefix system. The letters to the left of the colon are an abbreviation which represents a certain portion of the volume. The number to the right of the colon represents the number of the page in that portion. In the case of a chapter of the Code, the number to the left of the colon indicates the number of the chapter. In the case of an appendix to the Code, the letter immediately to the left of the colon indicates the letter of the appendix. The following are typical parts of codes of ordinances, which may or may not appear in this Code at this time, and their corresponding prefixes:

<table>
<thead>
<tr>
<th>CHARTER</th>
<th>CHT:1</th>
</tr>
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<tr>
<td>CHARTER COMPARATIVE TABLE</td>
<td>CHTCT:1</td>
</tr>
<tr>
<td>CODE</td>
<td>CD1:1</td>
</tr>
<tr>
<td>CODE COMPARATIVE TABLES</td>
<td>CCT:1</td>
</tr>
<tr>
<td>CHARTER INDEX</td>
<td>CHTi:1</td>
</tr>
<tr>
<td>CODE INDEX</td>
<td>CDi:1</td>
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Indexes

The indexes have been prepared with the greatest of care. Each particular item has been placed under several headings, some of which are couched in lay phraseology, others in legal terminology, and still others in language generally used by local government officials and employees. There are numerous cross references within the indexes themselves which stand as guideposts to direct the user to the particular item in which the user is interested.

Looseleaf Supplements

A special feature of this publication is the looseleaf system of binding and supplemental servicing of the publication. With this system, the publication will be kept up-to-date. Subsequent amendatory legislation will be properly edited, and the affected page or pages will be reprinted. These new pages will be distributed to holders of copies of the publication, with instructions for the manner of inserting the new pages and deleting the obsolete pages.
Keeping this publication up-to-date at all times will depend largely upon the holder of the publication. As revised pages are received, it will then become the responsibility of the holder to have the amendments inserted according to the attached instructions. It is strongly recommended by the publisher that all such amendments be inserted immediately upon receipt to avoid misplacing them and, in addition, that all deleted pages be saved and filed for historical reference purposes.

Acknowledgments

This publication was under the direct supervision of Roger D. Merriam, Supervising Editor, and Jody Wilson, Editor, of the Municipal Code Corporation, Tallahassee, Florida. Credit is gratefully given to the other members of the publisher's staff for their sincere interest and able assistance throughout the project.

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AN ORDINANCE ADOPTING AND ENACTING A NEW CITY CODE OF THE CITY OF AURORA, COLORADO; PROVIDING FOR THE REPEAL OF CERTAIN ORDINANCES NOT INCLUDED THEREIN; PROVIDING A PENALTY FOR THE VIOLATION THEREOF; PROVIDING FOR THE MANNER OF AMENDING SUCH CODE; AND PROVIDING WHEN SUCH CODE AND THIS ORDINANCE SHALL BECOME EFFECTIVE

Be It Ordained by the City Council of the City of Aurora, Colorado:

Section 1. The Code entitled "City Code of the City of Aurora, Colorado" published by Municipal Code Corporation consisting of Chapters 1 through 146, each inclusive, is adopted.

Section 2. All ordinances of a general and permanent nature approved on or before July 1, 1996, and not included in the Code or recognized and continued in force by reference therein, are repealed.
Section 3. The repeal provided for in section 2 hereof shall not be construed to revive any ordinance or part thereof that has been repealed by a subsequent ordinance that is repealed by this ordinance.

Section 4. Unless another penalty is expressly provided, every person convicted of a violation of any provision of the Code or any ordinance, rule, or regulation adopted or issued in pursuance thereof, shall be punished by a fine not exceeding $1,000.00, imprisonment for a term not exceeding one year, or both such fine and imprisonment. With respect to violations that are continuous with respect to time, each day upon which any such violation shall occur shall constitute a separate offense. The penalty provided by this section, unless another penalty is expressly provided, shall apply to the amendment of any Code section whether or not such penalty is reenacted in the amendatory ordinance. In addition to the penalty prescribed above, the city may pursue other remedies such as abatement of nuisances, injunctive relief, and revocation of licenses or permits.

Section 5. Additions or amendments to the Code when passed in the form as to indicate the intention of the city to make the same a part of the Code shall be deemed to be incorporated in the Code, so that reference to the Code includes the additions and amendments.

Section 6. Ordinances approved after July 1, 1996, that amend or refer to ordinances that have been codified in the Code, shall be construed as if they amend or refer to like provisions of the Code.

Section 7. This ordinance shall become effective February 4, 1997, as provided in Resolution No. 96-41.

3-16. - Police and fire department, service requirements, disciplinary procedures, salaries.

(1) The service requirements, disciplinary procedures, and methods of establishing salary scales for members of the Civil Service shall be the same for both Departments and as outlined hereafter.

(2) Probationary appointment, grades of firefighters and police officers. Every original appointment in the Civil Service shall have a period of probation of one year from the end of the Department's academy training. At the end of the period of probation following an original appointment, if the conduct and capacity of the person appointed has been satisfactory, the member shall be permanently appointed; otherwise, the member shall be involuntarily separated. Service during the period of probation following an original appointment shall be deemed active service in the civil service of the Departments and shall be included and credited in determining eligibility for advancement, promotion, retirement, pension, increased salary or compensation based on length of service, and other benefits of the Civil Service. A member of the Police or Fire Department is, during the period of probation following original appointment, a member of such Department in Civil Service for all purposes, except for tenure of the employment or position to which the member has been so appointed. During the period of probationary appointment the person appointed shall be classified as a police officer 4th grade or firefighter 4th grade. Members of the Departments, while serving during the probationary period, may be separated from the Service in the following manner:
During the probationary period after the date of appointment, the member shall be separated at any time by written notification (indicating the date of separation and stating the reason for separation) by the Chief of the Department with the approval of the City Manager or a designee within the City Manager's office. The chief's action shall be final.

3. **Advancement standards for Police Officers and Firefighters 1st Grade, 2nd Grade and 3rd Grade.** A Police Officer 3rd Grade, or a Firefighter 3rd Grade, shall be one who has served for more than one (1) year but less than two (2) years in the service of the Department; a Police Officer 2nd Grade, or a Firefighter 2nd Grade, shall be one who has served for more than two (2) years, but less than three (3) years in the service of the Department; and a Police Officer 1st Grade, or a Firefighter 1st Grade, shall be one who has served more than three (3) years in the service of the Department.

4. **Work force reduction.** When the force in either Department is reduced, the person last certified to such Department for employment shall be the first laid off; and when the force in such Department is increased, persons laid off shall be reinstated in the order of their original certification in accordance with the rules of the Civil Service Commission consistent with this provision; and, for the purposes of determining tenure and longevity, all time served, whether or not interrupted, shall be computed.

5. **Service in Armed Forces.** Involuntary service in the Armed Forces of the United States shall be deemed and considered active service in the Civil Service of the Police or Fire Department, if performed by a member of either such Department and while a member thereof; provided that, after discharge from the Armed Forces, the member has sought reentrance into the Civil Service in said Department within such time and under such conditions as provided for by the rules of the Civil Service Commission. If the probationary period following an original appointment is interrupted by service in the Armed Forces and the appointee is thereafter readmitted to active service, the appointee shall complete the remaining portion of such period of probation before being permanently appointed.

6. **Promotion.** All ranks in the Civil Service of the Police and Fire Departments above the grades of Police Officer 1st Grade and Firefighter 1st Grade shall be filled by promotion from within the respective Departments, under such service requirements and examination procedures as shall hereafter be outlined by the Civil Service Commission; provided that all such rules and regulations outlining qualifications and service requirements for both applicants for original appointment and for promotion be promulgated without any reference to political or religious opinions or affiliations, or race, creed, color, or gender. All promotions shall be made by appointing the first person on the eligibility list for the position as certified by the Civil Service Commission. The person so appointed shall complete a probationary period after appointment of twelve months' duration, at the end of which period he or she shall either be permanently appointed to said grade or rank or demoted to his or her former position, in accordance with the following procedure:

Between ten (10) and fifteen (15) days prior to the end of the probationary period, the Chief shall have the right to serve an order of demotion upon the officer, in the event an officer, having been duly certified and promoted, fails to satisfactorily perform the duties of the position to which he was promoted, in the opinion of the Chief of his Department. A copy shall be filed with the Civil Service Commission. The order of demotion shall state with specificity the reasons said officer did not satisfactorily perform his duties and shall be approved by the City Manager or a designee within the City Manager's office. The
order of demotion shall be served upon the member no later than ten (10) days prior to the end of the probationary period. If the member cannot be personally served with the order of demotion, a copy of the order shall be transmitted by certified mail to the member's official address as shown in the department records. If it is necessary to mail the order of demotion, the date of service shall be the date upon which the order is deposited in the United States mail. If no order of demotion is served within the specified time period, the promotion shall become permanent at the conclusion of the probationary period. Within ten (10) days after receipt of an order of demotion, the Civil Service Commission shall approve or disapprove said action, and the decision of the Commission in this matter shall be final, subject only to judicial review.

(7) Organization charts, creation of and filling vacant positions. The Chiefs of the respective Departments, with approval of the City Manager, shall, in conjunction with the proposed annual budget, supply City Council with an organization chart setting forth the number of positions in the Civil Service which will be necessary to perform the duties assigned to their Departments. The City Council shall, in accordance with authority vested in them, determine thereafter the number of positions to be allocated, based upon the budget available to said department. A vacant position, other than entry level, having been created or one which shall have become vacant by the promotion, death, retirement, resignation, or discharge of the holder thereof, shall be filled within sixty (60) days or said position shall be declared abolished for the remainder of the budget year. However, in the event the Civil Service Commission does not have a current certified list for a vacant or newly created position, the sixty (60) day period within which said position must be filled or abolished shall not begin until such list shall become available.

Nothing in this provision shall prevent City Council from creating new positions at any time, as the needs of the respective Departments may require; however, any new positions so created shall be filled in accordance with Civil Service Commission requirements and with the terms of this section.

A certified list for original appointment shall be prepared by using applicants taken from a pool of eligible candidates for which testing shall take place whenever the commission, in consultation with city management, determines that it is appropriate to conduct the testing in order to meet staffing requirements. The certified list for original appointment to positions in the civil service shall expire upon the effective date of a newly established list of eligible candidates. A certified list for promotional appointments shall contain the names of applicants who passed required testing, which testing shall take place no less than once per year; such list shall expire after one year, except that in the event a vacancy should exist in one of the Departments and the certified list for that position is scheduled to expire and a new list is not available, the Civil Service Commission may extend such list, one time only, for a period not to exceed ninety (90) days.

(8) Disciplinary and appeal procedure.

(a) The rules governing the conduct of the members of the civil service in the Police and Fire Departments shall be set forth as written rules and regulations by the Chiefs of each of the respective departments, with the approval of the City Manager or a designee; provided that such rules and regulations shall not contain any political, religious, race, creed, or gender qualifications or disqualifications. Any member of the civil service shall be subject to discipline for a violation of such rules and regulations.
Prior to the imposition of any discipline other than a reprimand, the member shall be provided with a predisciplinary hearing before the Chief or a designee. At this hearing, the member shall be given: (i) a copy of the specification of the charges; (ii) a copy of the written report of the evidence supporting the charges; (iii) a copy of the summary of the disciplinary record of the member, if any; and (iv) an opportunity to make a statement in response to the charges and written report. The statement, if made, shall be transcribed. The member shall have the right to submit a written statement to the Chief within three (3) days after the predisciplinary hearing. At the expiration of the three (3) day period, the Chief may proceed in accordance with the provisions of this section. If an appeal is filed by the member, all of the above-referenced documents shall be transmitted by the Chief to the Civil Service Commission. No other documentary materials shall be initially provided to the Civil Service Commission.

Discipline shall be by written command signed by the Chief of the Department. If discipline involves a monetary impact on the member greater than one-third (1/3) of the member's monthly salary, the disciplinary order must be approved by the City Manager or a designated Deputy City Manager. A disciplinary order submitted for City Manager approval shall be accompanied by all the materials described in (b). The City Manager or a designated Deputy City Manager shall, by endorsement or other written document, within five (5) business days approve, modify or disapprove the disciplinary order.

A copy of the written command with the endorsement by the City Manager or a designated Deputy City Manager shall be served on the member. If personal service of the order cannot be made within five (5) days because of the inability to locate the member within the City of Aurora, the copy of the order shall be mailed by certified mail, return receipt requested, to the last known address of the member as shown by the records of the department. If service is by certified mail, it shall be complete upon return of the mailing receipt regardless of whether the order has been accepted.

A member shall have ten (10) business days from the service of the order to file an appeal of the disciplinary order with the Civil Service Commission. The appeal shall be in writing and contain the name and address of the appealing member, a copy of the written command being appealed and a brief summary of the reasons for the appeal. A member may express a desire to have the hearing closed to the public. Upon receipt of an appeal, the Commission shall promptly provide a copy of it to the office of the City Attorney.

The Commission shall conduct a hearing on the appeal not less than fifteen (15) nor more than thirty (30) days after receipt of the appeal. After a hearing date has been set, it may be continued only upon agreement of all the parties or upon good cause shown to the Commission. The notice of the hearing shall indicate whether the hearing will be public.

At the hearing before the Commission, each side may offer evidence and cross examine witnesses. The member may be represented by a representative of their choosing and the City Manager-Department shall be represented by the City Attorney or a designee. The hearing shall be recorded by a reporter or an electronic recording device. The Commission may adopt rules for the conduct of the hearing. The City Manager and Chief of the Department, through the office of the City Attorney as counsel, shall offer evidence and justification of the departmental action. The rules of evidence shall conform, to the extent practicable, with those in civil nonjury cases in
the District Courts. However, when necessary to do so in order to ascertain facts affecting the substantial rights of the parties to the proceeding, the Commission may receive and consider evidence not admissible under such rules if such evidence possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs.

(h) Commission hearings may be conducted by less than all of its members, but in no event by less than a majority of the members. After the hearing, the Commission shall issue a written decision affirming, reversing or modifying the disciplinary order, provided that the commission may not increase the level of discipline imposed by the order. In reviewing the disciplinary order, the Commission shall give due consideration to the necessity for maintaining administrative control of the Department by the Chief. The decision by the Commission must be concurred in by a majority of the members of the Commission hearing the appeal.

(i) Appeals of Civil Service decisions reviewing disciplinary orders shall be made pursuant to the Colorado Rules of Civil Procedure applicable to judicial review of quasijudicial activities. Any appeal must be filed within thirty (30) days of the decision of the Commission. Judicial review of the decision shall not be further than to determine if the Commission has exceeded its jurisdiction or abused its discretion under the provisions of this Charter.

(j) Written and oral reprimands are not subject to the hearing and appeal procedure set out in this section. The Chiefs of the respective Departments shall have the power and authority to suspend with pay any member of the Civil Service pending an investigation and the initiation of disciplinary action, provided that the written specification of charges as heretofore set out is served upon the member, or such suspension must be terminated within thirty (30) days. If the investigation is still continuing at the expiration of the initial thirty (30) day period, the City Manager or his designee is authorized to extend the period of suspension with pay for up to an additional thirty (30) day period upon a finding that it is in the best interests of the affected Department to continue the suspension. Where a predisciplinary hearing is convened in accordance with the provisions heretofore set forth and before the expiration of the suspension, the disciplinary action emanating from such hearing shall supersede the suspension. Indictment of a member of the Civil Service, or the filing of an information or felony complaint against him by a prosecuting agency, charging any felony shall be cause for an immediate and indefinite suspension without pay upon order of the Chief, provided that such suspension shall be terminated by restoration to the service or by discharge as soon as the decision of the court becomes final. If the member of the Civil Service is restored to his position, he shall receive full pay for the entire period of such suspension and his eligibility for other benefits of the Service shall not be deemed to have been interrupted by such suspension. The conviction of a member of the Civil Service for a felony shall result in discharge from the Civil Service. A member of the Civil Service may be subject to discipline for the failure to answer questions concerning their own or any other member's conduct and activities as part of an internal departmental investigation only under the following circumstances:

(a) The subject matter of the statement or questions must be reasonably related to a member's work performance and/or fitness to hold his or her position and related to the specific charge or complaint being investigated;

(b) The member shall be afforded the appropriate legal assurances that said statement(s) will be used solely for the internal investigation pertaining to continuing employment;
(c) The statement or answers to questions shall not be used in any criminal proceeding against the member making the statement or answer.

(d) The statement shall be confidential and neither the statement, any information contained therein nor the answers to questions shall be disclosed to anyone except:

1. The statement or information may be disclosed to persons within the member's department on a need-to-know basis as determined by the Chief of the Department;

2. The statement or information learned from a member not being investigated for misconduct may be disclosed to representatives of the District Attorney or City Attorney on a need-to-know basis as determined by the Chief of the Department; and

3. The statement or answers may be offered as evidence to the Civil Service Commission in an appeal brought by a member challenging any discipline imposed; and

(e) The member is advised in writing of the conditions contained in this section prior to giving the statement or answering any questions.

(9) Salaries. The salaries for the members of the Civil Service shall be established by the City Council by ordinance subject to referral provision, as hereinafter set forth.

In the event City Council shall fail to provide an acceptable pay adjustment for the Civil Service for a period of two (2) consecutive years, the members of each department shall have the right to have their own pay increase proposal, which they submitted the second year, presented to the registered electors in the form of a Charter Amendment, at a regular or a special election called in accordance with the following provision:

(a) On the second consecutive year in which the City Manager's budget, as presented to City Council, does not include an acceptable pay adjustment for the members of the Civil Service and said members of the Civil Service, having not received an acceptable pay adjustment in the previous year by City Council action, shall be authorized, through a designated representative, to present to City Council a pay adjustment plan of their own. Said plan shall be presented along with the City Manager's annual budget proposal.

City Council shall consider the plan so submitted and may, at their election, meet with the designated representatives of the Departments. In the event that City Council refuses to pass the pay plan as proposed, or some compromise thereof which is acceptable to a majority of the respective Departments, then City Council shall, by ordinance, call a special election in the event no regular election is scheduled, within ninety (90) days of the adoption of the regular city budget. The ordinance calling said election shall refer to the city electorate, the pay plan as proposed by the Departments, or either of them, for acceptance or rejection by the voter. In the event the pay plan, as proposed, is adopted, it shall take effect at the beginning of the fiscal year in the same manner as if it had been included in the regular city budget. In the event the proposed plan is rejected, another plan may not again be submitted to the electorate by either ordinance referral or initiation until a period of two (2) years has elapsed and the City Council has again failed to make an acceptable pay adjustment for a two-year period and the same procedure as outlined herein has been followed.
An "acceptable pay adjustment" as used herein shall mean any pay adjustment which has been accepted by a majority vote of the members of the Civil Service of each of the Departments voting separately on the pay adjustments affecting their own Departments.

Any other matters which may by law be presented to the electorate for their consideration may be placed on the ballot at any election called under the provisions of this amendment; however, the pay plans presented must be contained in a separate amendment permitting the voters an opportunity to accept or reject the salary proposals as submitted.

(10) **Lateral entry.** Lateral entry into the Police and Fire Departments by individuals with prior public safety experience shall be permitted under those conditions and regulations promulgated by the Civil Service Commission and the provisions of this Charter. Such regulations shall include provisions requiring a minimum of three (3) years of previous related experience with good standing within the four (4) year period immediately preceding the application. Persons hired from the lateral entry appointment list shall not be eligible to take a promotional examination for ranks above Police Officer and Firefighter until a person hired from the certification list for original appointment at the same time is or would be eligible to take the same promotional examination. The seniority date for lateral entry hires shall be the date of hire. Applicants for the lateral entry program who meet the admission requirements shall be subject to appropriate testing, which may include, but not necessarily consist of, medical, background, polygraph, and psychological. Applicants who successfully pass these tests shall be placed in a pool of qualified individuals. The Chiefs of the respective Departments may, at their sole discretion, select qualified individuals from the unranked pool of individuals, unless the City Council, by ordinance, modifies the selection process described hereinabove. The respective Chiefs may hire from either the certification list for original appointment or the lateral entry appointment list provided that no more than half of the persons hired at any given time shall come from the lateral entry appointment list. A person hired from the lateral entry appointment list, during the training period established by the department for such persons and upon successful completion of that training program, shall be classified at such rank and grade as determined by the Chiefs of the respective Departments pursuant to departmental policy, but in no event at a rank higher than a Police Officer 1st Grade or Firefighter 1st Grade. Notwithstanding any other provision of this section, nothing in this section shall be deemed to prohibit the holding of a "lateral only" police academy.

If an individual meets the requirements for lateral entry of both the Aurora Civil Service Commission and the Department, this lateral entry privilege shall supersede the requirement found in section 3-16 of the Charter relating to entry into the Civil Service exclusively at the ranks of Police Officer 4th Grade and Firefighter 4th Grade.

Notwithstanding the reclassification to a higher grade provided herein, employment shall be subject to the a probationary period pursuant to section 3-16(2) of this Charter. No person can remain on the lateral entry appointment list for more than two (2) years without reapplication.

(Ord. No. 67-35, § 1, 7-25-67; Ord. No. CA75-4, 11-4-75; Ord. No. CA75-5, 11-4-75; Ord. No. CA75-6, 11-4-75; Ord. No. CA77-1, 11-8-77; Ord. No. CA77-2, 11-8-77; Ord. No. 87-199, § 1, 11-3-87; Ord. No. 89-88, § 1, 11-7-89; Ord. No. 89-92, § 1, 11-7-89; Ord. No. 91-47, § 1, 11-13-91; Ord. No. 38, § 1, 11-4-2003; Ord. No. 2006-47, § 1, 8-7-2006; Ord. No. 2018-24, § 1, 7-7-2018)
Editor's note—Ord. No. 2006-47, § 1, adopted by the City Council Aug. 7, 2006 and approved at a special municipal election held on Nov. 7, 2006 amended section 3-16(6). Formerly, former §§ 3-12-3 and 3-12-4 were amended by §§ 1 and 2 of Ord. No. 87-199, approved at a city election held Nov. 3, 1987. Such former sections were renumbered as §§ 3-16 and 3-17 to correspond to the index of art. III which was amended by § 7 of Ord. No. 87-202, also approved Nov. 3, 1987. See the editor's footnote to the title of art. III.
6.11 PRELIMINARY AND CRIMINAL INVESTIGATIONS

6.11.1 Preliminary Investigations

The preliminary investigation generally consists of those activities that begin when sworn members arrive at the scene of an incident and should continue until a postponement of the investigation or transfer of responsibility for the investigation will not jeopardize the successful completion of the investigation.

6.11.2 Responsibility for Preliminary Investigations

All sworn members are responsible for the preliminary investigation of assigned incidents.

Sworn members assigned an incident, or discovering a possible crime, will conduct an efficient and reasonable preliminary investigation with the objectives of determining if a crime has occurred and, whenever possible, bringing the case to a satisfactory conclusion without the necessity for a follow-up investigation.

Sworn members will, as appropriate, perform those following tasks relevant to the situation when conducting a preliminary investigation:

(a) Provide aid to the injured.

(b) Protect the scene to ensure that evidence is not lost or contaminated.

(c) Determine if an offense has actually been committed.

(d) Determine the identity of the suspect(s) and effect an arrest, if possible and appropriate.

(e) Provide assisting members with relevant information.
(f) Locate and identify all witnesses.

(g) Determine what information is known by victims and witnesses.

(h) Determine the exact circumstances of the offense.

(i) Collect or arrange for the collection of evidence.

(j) Obtain written statements from victims, witnesses, and suspects, if feasible.

(k) Accurately document all information on the proper report forms.

6.11.3 Coordination

Certain serious or complex crimes, e.g., homicides, child abuse resulting in serious bodily injury and fatal traffic accidents, require the involvement of specialists in the preliminary investigation. The circumstances requiring the early involvement of specialists are delineated in other directives and members will conduct their preliminary investigations accordingly.

6.11.4 Criminal Investigation Information Development

Information development and case solvability depend on investigative resources. Potential sources of information are unlimited and members should develop pertinent information through all available resources including, but not limited to, witnesses, victims, informants and records of this and other law enforcement agencies.

All elements of the criminal investigation including interviews and interrogations will be conducted according to departmental training, S.O.P.’s, and department directives with specific attention to Directive 14.2.9 - Constitutional Requirements. Members should also be aware that certain types of information, e.g., bank records, toll records, pen registers, etc., are available only through various forms of legal process, e.g., subpoenas, search warrants, etc. Members should keep abreast of the constitutional case law and statutory requirements governing the collection of such information.

During the investigation, all victims, witnesses, and suspects will be physically separated as early as possible so as not to contaminate their perceptions and accounts of the incident. Witnesses and victims will be interviewed at the earliest possible time following a crime or incident. Interviews and interrogations will be conducted to obtain information, particularly pertaining to the who, what, where, when, how and why elements of an incident. The assigned member or designee will be responsible for conducting interviews. All relevant information obtained will be accurately documented and included in the case reports, including exculpatory information, if any. Members should evaluate and utilize an appropriate means of documenting information giving consideration to the use of written statements, and audio/video recordings, if appropriate.
6.11.5 Suspect identification, use of field identification and photo lineups

First responding officers can utilize a field show up to help identify a person of interest or eliminate persons as a possible person of interest. Follow-up investigations can utilize a photo lineup.

In both field identifications and photo line ups, the actions of members can unduly influence the ability of the victim or witness to provide a correct and accurate identification of the person of interest. Members will be diligent in protecting the victim and witness during a field identification. Proper care will be taken to ensure the constitutional rights of the possible person of interest will be protected when utilizing either a field identification or photo lineup.

6.11.6 Field Identification (Show-ups)

Field identification (also known as a “show-up”) can be used whenever a person of interest is detained within reasonable proximity to the crime scene and within a reasonable time frame. To ensure that members do not unduly influence the process, the following guidelines are given:

The first responding officers should interview witnesses and victims to collect as complete a description of the person(s) of interest as possible. The person(s) of interest’s description should be aired to other units and added to the remarks in the call. If a possible person of interest is located, field identification can be conducted.

Officers will transport the victim/witness to the location where the suspect is being detained. Multiple victims/witnesses should be transported separately. Multiple victims/witnesses will be advised to avoid discussing details with other victims/witnesses.

The location should be well lit and with an unobstructed view of the suspect(s). Obstructions may include hoods, hats, bandanas, or clothing that is obstructing or altering the eyewitness’ view of the person of interest. Officers should be cautious about manipulating the person’s appearance so that the officer does not unduly influence the process. The reason for any manipulating of appearance should be documented in the report. The person of interest will not be detained in the back seat of a police vehicle or handcuffed during the field identification. If handcuffing is necessary for safety, all reasonable efforts should be made to obscure the handcuffs from the victim/witness.

For safety, the victim/witness will view the person of interest from the interior of the transport vehicle. The transporting officer will document where the victim/witness was seated within the vehicle and the approximate distance from the transport vehicle to the person of interest.
Investigating and/or transporting officers will not allow or make comments, writings, radio traffic, computer screen data or any other information concerning the possible person of interest in this case or previous arrests to be seen or overheard by the victim/witness that may influence his/her identification of the possible suspect.

The officer should read the advisement listed on the Field Identification/Show-up Form (APD Form 116) to the victim/witness.

Generally, the first reaction of the victim/witness is a good indicator of the accuracy of his/her memory. If there is any doubt, additional investigation may be required to ensure the actual suspect has been detained. The officer will document in detail the identification or non-identification of the suspect, using the victim/witness’ own words, as well as the victim/witness’ level of confidence.

The officer will thoroughly document the field identification including: the identification of all persons present, a description of the location, including lighting conditions, weather conditions and approximate distances, the suspect(s) clothing, demeanor and injuries, if any.

Video recording of the entire field identification procedure is recommended through the use of the body-worn camera. The recording should include the reading of the admonition, the responses by the eye-witnesses, and the confirmation statement.

The officer should complete the Field Identification/Show-up Form and submit it for inclusion with the case. If the Field Identification/Show-up is video and audio recorded, then the form is not necessary, but still can be filled out.

6.11.7 Photo Lineups/Arrays

It is extremely important that photo lineups be created that will not influence the victim/witness. Poorly conducted photo lineups can hinder law enforcement efforts to bring the right suspect to justice.

6.11.8 Constructing Photo Lineups/Arrays

It is recommended that members utilize the “Picture Link” mug shot system in the construction of photo lineups. Photo lineups made using this software ensures that there is a record of the lineup to include a key regarding the persons depicted within the photo lineup that has their respective identifying information attached, which safeguards posterity and audit, if necessary. Additionally, the member will ensure that an unmarked copy of the photo lineup and corresponding key regarding the persons depicted within the photo lineup that has their respective identifying information attached, be placed into police property.

If the “Picture Link” system does not have a photograph of the person of interest and a photograph of the person is available in “LUMEN,” the member may construct the
lineup using “LUMEN” or request to have the photograph of the person uploaded into the “Picture Link” system for utilization there. If “LUMEN” is utilized, the member will ensure that an unmarked copy of the photo lineup, to include a key regarding the persons depicted within the photo lineup that has their respective identifying information attached, be placed into police property in addition to being attached to the case report through Versadex RMS.

If neither “Picture Link” nor “LUMEN” have a photograph of the person of interest, a member may utilize either the Department of Motor Vehicles (DMV) or any other official photograph on record with any other outside governmental agency, in order to secure an associated photograph. The member may either upload the outside agency photograph of the person of interest into the “Picture Link” system for utilization there, or may construct a photo lineup utilizing any accepted electronic application, such as Microsoft Word, PowerPoint, etc., or may use any appropriate lineup created by such outside entity or agency. If an electronic application other than the “Picture Link” system or “LUMEN” is used, the member will ensure that an unmarked copy of the photo lineup, to include a key regarding the persons depicted within the photo lineup that has their respective identifying information attached, be placed into police property in addition to being attached to the case report through Versadex RMS.

Members constructing photo lineups should utilize the following guidelines:

1) Photo lineups should consist of no less than six photographs, one of the person of interest and five other similar filler photographs. Care should be taken when creating a photo lineup to ensure the backgrounds and photographs used as fillers are similar to the photograph of the person of interest. An officer creating a photo lineup needs to consider the photograph of the person of interest. The filler photographs must be similar in appearance to ensure an equitable photo lineup. Failure to provide similar filler photographs could create an overly suggestive lineup.

2) Filler photographs must be of persons of the same sex, race, age group and physical features as the person of interest. Hair color, hair style, facial hair and earrings or other body piercings should be considered. Use photographs of persons who generally fit the victim/witness’ description of the person of interest. Avoid photographs of persons who so closely resemble the person of interest that a person familiar with the person of interest might find it difficult to distinguish fillers from the person of interest. The filler photographs should depict similar clothing. For example, the person of interest should not be in a jail jumpsuit if all the fillers are in plain clothes.

3) All photographs in the lineup should have similar backgrounds and dimensional characteristics.

4) All photographs should depict persons in a similar pose. Filler photographs should match the person of interest photograph in so far as being a simple head shot or a
bust that includes the head and chest. No writing or other indications that the photo is a mug shot or jail photograph can be visible.

5) When using multiple photo lineups to identify multiple persons of interest from a single victim/witness, members should avoid placing the person of interest’s photo in the same position in each photo lineup. The same filler photographs cannot be used in multiple lineups.

6) Members will document the source of the photographs used in the lineup. The lineups used, whether an identification is made on not, will be retained as part of the case file.

Due to the complexity and uniqueness of investigations, members may choose to utilize photobooks in place of a photo lineup. A photobook can be constructed in two ways, the first being a book of photographs of all known and identified persons associated with a case or with the specific focus on a person of interest like that of a photo lineup. If a photobook is constructed containing all the known and identified persons associated with a case, the member will ensure that only a single photograph appears on each page, that the pages are numbered and that all identifying information is removed. The member will ensure that there are no visibly overt indications that the photograph is a mug shot or jail photograph, and that all photographs are head shots or a bust. The member will ensure that a corresponding key is generated that includes the respective identifying information of the persons depicted within the photobook.

If a member utilizes a photobook with a specific focus on a person of interest, like that of a photo lineup, the member will ensure that in addition to guidelines 1-3 outlined above for constructing photo lineups, that only a single photograph appears on each page, that the pages are numbered and that all identifying information is removed. The member will ensure that there are no visibly overt indications that the photograph is a mug shot or jail photograph, and that all photographs are head shots or a bust. The member will ensure that a corresponding key is generated that includes the respective identifying information of the persons depicted within the photobook.

The order of the photographs within a photobook should be reshuffled and numbered when shown to multiple victims/witnesses.

In either instance where a member utilizes a photobook, the member will ensure that an unmarked copy of the photobook, to include a key regarding the persons depicted within the photo lineup that has their respective identifying information attached, be placed into police property in addition to being attached to the case report through Versadex RMS.

Members are encouraged to utilize color photographs when constructing photo lineups or photobooks. However, it is understood that there are instances where the depicted person’s photograph, or those of suitable fillers, may dictate the necessity to present the photo lineup or photobook in black and white. Members will ensure that all
photographs are either color or converted to black and white. Aside from the issue of color versus black and white, the member will follow the direction outlined in the guidelines for constructing photo lineups and/or photobooks.

6.11.9 Procedural Guidelines for Using Photo Lineups/Arrays and Physical/Live Lineups

When conducting a photo lineup (photo array) or a physical/live lineup, it is recommended that it be presented by a member who does not know the identity of the person of interest when it is viewed by the victim/witness (“blind administrator”). If not by a blind administrator, then it is recommended that the lineup be presented by a member who may know who the person of interest is, but does not know in which position the person of interest is placed in to a photo lineup or live lineup (“blinded administrator”).

When presenting a photo lineup, members will provide the victim/witness, the Photo Lineup/Array Witness Instruction Form (APD Form 094). The member will advise the victim/witness of all elements of the instruction form to make sure he/she understand the investigation continues regardless of his/her ability to identify a person of interest or not. Members will avoid saying anything that will influence the victim/witness’ selection. Members will not report any information regarding the individual selected before obtaining a clear statement of certainty from the victim/witness.

Members will document the victim/witness’ level of confidence and the identification or non-identification of the person of interest, using the victim/witness’ own words. Members will document the location, date and time and all persons present at the time the victim/witness views the lineup. Viewing should be conducted in a quiet setting such as an interview room. If possible, the use of video/audio recording is encouraged to document the process and results. If multiple victims/witnesses will view the same lineup, the viewings should be done separately.

6.11.10 Additional Considerations for Physical/Live Lineups

Physical lineups have not historically been done in the Aurora Police Department. If a physical lineup is used, the following additional considerations should be followed:

- If a photo lineup was done prior to the physical lineup, the person of interest should be in a different position than the previous lineup.
- If there is more than one person of interest, different fillers should be used in each live lineup.
- All participants of the live lineup should be instructed not to speak, move, gesture to one another. They should also remain still and face forward during the procedure unless otherwise directed by an officer/investigator.
The person responsible for conducting the physical lineup must contact the District Attorney’s office responsible for prosecuting the offense prior to conducting the physical lineup in order to allow the District Attorney to (1) attend the physical lineup; and (2) determine whether defense counsel must also be allowed to attend the physical lineup. If the District Attorney determines that defense counsel must be allowed to attend the physical lineup, the person conducting the physical lineup must comply with the District Attorney’s determination.

When conducting a live lineup, the member conducting the lineup must utilize the Live Lineup Witness Instruction Form (APD Form 093). The form should be read to the witness, appropriately filled out and then included in the case documents.

6.11.11 Composite and Artists Renderings

A non-photographic depiction of a suspect can be developed for investigative purposes when a suspect photograph is not available. Officers will use care to not influence the description provided by the victim/witness. Drawings, identi-kit or computer generated composite images may be used.

6.11.12 Informants

All potential informants should be developed, contacted and debriefed by at least two sworn members, when possible. An informant’s credibility, motivation, information and potential utility should be carefully assessed. Informants will be documented, controlled and all pertinent information regarding informants will be maintained according to the member’s respective S.O.P. In the event a member’s District/Bureau/Section does not have an established procedure, it will be coordinated through and maintained by the Investigative Bureau’s or Narcotics Section’s S.O.P., as appropriate.

6.11.13 Collection, Preservation and Use of Physical Evidence

The collection and preservation of evidence is an important function for officers. The recruit officers will receive training in the academy to include the following:

- Properly collecting evidence in the field
- Properly packaging and preserving collected evidence
- Properly submitting evidence to the Property and Evidence Unit

During the recruits field training they will receive additional guidance on evidence handling, and be evaluated on this area of responsibility.
Officers who will be collecting latent prints at crime scenes will receive additional training provided by the Crime Scene Investigations Unit. This training is outlined in Directive 6.17 Latent Print Processing by Officers.

Members should use all measures necessary to preserve and maintain the integrity of any evidentiary items that will support the criminal investigation that may be used during any judicial proceedings.

The assigned member will ensure that relevant physical evidence is collected and stored according to Directive 08.10 - Reports for preservation and/or further testing and evaluation, as appropriate. The assigned investigator should obtain, collate and analyze all laboratory reports relating to the case to determine if additional testing and/or evaluation is required.

When a member realizes, or it is obvious, the requirements for the collection and preservation of evidence exceeds the technical expertise of the member, then that member should notify the Crime Investigations Unit and request assistance as delineated in Directive 03.02 - Duties And Responsibilities Of The Metro Division.

Members seizing physical evidence will document the chain of custody upon the appropriate form(s).

After seizure and proper documentation of the chain of custody, seized evidence will be handled according to Directive 08.09 - Processing, Storage and Disposition of Evidence and Other Property.

6.11.14 Preservation of Notes in Criminal Investigations

For officer notes related to Homicide Investigations / Vehicular Homicide / Officer Involved Shootings / Felony Assaults where death or serious bodily injury is likely, the member will insure that the original notes are scanned by the Records Unit into the appropriate case.

When the member has completed his/her report, he/she will make a copy of all notes connected to the referenced case/investigation, legibly print the case number, member’s name and ID number on each copied page in the upper right hand corner and then submit the copies to the Records Unit to be scanned into the Versadex Records Management System. After the copies are scanned, the copies will then be destroyed by Records Unit personnel. The member will place the original notes into Property.

Members taking notes in misdemeanor and felony cases not listed above should accurately transcribe their handwritten notes into their official report and state in the report that any hand written/typed notes were accurately transcribed into the final police report. The original notes should not be placed into Property except in extenuating circumstances. Nothing in this directive will preclude the preservation of
notes as deemed necessary by members, supervisors or command personnel based on the circumstances surrounding an event.

6.11.15 Major Incident Debriefing

Debriefing major incidents is an excellent method to facilitate communications between working groups. The purpose of a debriefing is to obtain knowledge and share ideas/concerns to improve the effectiveness and efficiency of Department practices and procedures. Supervisory or Command Level officers may facilitate debriefings after major incidents with involved personnel, including but not limited to members of:

- Detective Sections
- Crime Laboratory Section
- Investigations Bureau
- Internal Affairs Bureau
- Victim Services Unit
- Media Relations Unit
- District Patrol
- Public Safety Communications Division

6.11.16 Surveillance

Sworn members, when contemplating possible surveillance activities, should take into account the purpose of the surveillance, the necessity for the surveillance, the environment in which the surveillance will be conducted and legal and statutory constraints upon the proposed surveillance activity.

Prior to any surveillance related activity, members will de-conflict the operation through the RISSafe platform or by utilization of the Rocky Mountain HIDTA Watch Center at 1-800-965-6393.

6.11.17 Biological Substance Sample (DNA) Collection

State statute 16-23-103 requires that a biological substance sample (DNA) be collected from every adult arrested for felony charges. The statute also states that the “Arresting Law Enforcement Agency shall collect the sample from the arrested person as part of the booking process.”

The Colorado Bureau of Investigation (CBI) is in charge of this process. As such, CBI has developed a kit and procedures to fulfill the requirements of the law. Officers must use the kits supplied by CBI and follow their procedure. Everything needed to complete the collection, including written instructions, is included in the kit.

When an adult is arrested on felony charges (including felony warrants) and brought to the Aurora Detention Facility, the arresting officer will collect the DNA sample as part
of the booking process (the detention officers will NOT do the buccal swab collection). The officer will acquire a new (sealed) DNA kit from detention personnel and collect the sample following the included instructions. A sample will not have to be collected if the person has previously provided a biological sample for such testing pursuant to a statute of this state and CBI has the sample. Confirmation of the previously submitted sample must be confirmed by reviewing the Colorado criminal history report for “DNA profile in CODIS” and (Y) means that it is submitted and a (N) indicates that it has not been previously submitted.

If a prisoner is combative and cannot be fingerprinted then do not attempt to collect the buccal swab. When the prisoner has calmed down enough to be fingerprinted an officer will be called to collect the swabs at that time.

6.11.18 Familial DNA Search Protocol

A “Familial DNA Search” is defined as a deliberate search for biologically-related relatives of a contributor of an evidentiary profile conducted with specialized (non-CODIS) software designed for this purpose.

The Colorado Bureau of Investigation (CBI) has developed a DNA Familial Search Policy that deals with this possibility. In appropriate cases, the Chief of Police may request that CBI conduct a search of the Colorado DNA offender database for DNA profile(s) that are not exact but indicate a scientific connection or relative of the offender. The Department will follow all procedures in the current Colorado Bureau of Investigation’s DNA Familial Search Policy. The Crime Laboratory Section Lieutenant will maintain a current copy of the policy.

Requirements of CBI’s policy include but are not limited to:

- Requests for a Familial DNA search must come from the Chief of Police or the District Attorney.
- The request must justify the case having significant public safety concerns and the familial search result is critical to advancing the investigation.
- That the lead investigator assigned to the case has received CBI approved training in the use of DNA familial search evidence.
- That standard investigative leads have been exhausted.
- That the agency agrees to further investigate the case after CBI releases the identifying information to the requesting agency.

Investigators desiring a CBI Familial DNA Search will, in cooperation with their supervisor, command officer and the Crime Laboratory Lieutenant, make a proposal to the Chief of Police that the Chief initiate the request to CBI in accordance with their policy.
6.11.19  Use of Regional Information Sharing and Systems Intelligence Module

The purpose behind the de-confliction process is to increase officer safety, safeguard criminal investigations and promote information sharing within the law enforcement community.

The Rocky Mountain Information Network (RMIN) and the Rocky Mountain High Intensity Drug Trafficking Area (RMHIDTA) facilitate access to the two de-confliction systems, RISSafe and RISSIntel.

RISSafe is an operational de-confliction system. It provides members a way to safeguard that an on-going investigation is not in conflict with another active police operation in the same geographic area and same time frame. Investigators will enter information about police activities such as search warrants, surveillance, narcotics purchases or other police related activities conducted in the field.

RISSIntel is a de-confliction database in which personal identifying information of a subject linked to a specific criminal activity is maintained. It is a resource to determine if an individual is a subject of interest in other on-going independent investigations by other law enforcement agencies. RISSIntel will de-conflict information on a national scale. RISSIntel is an intelligence platform and all submissions must comply with specific requirements as outlined under 28 CFR Part 23.

Members will not direct enter information into RISSIntel. Members who believe information should be added to RISSIntel will forward that information to the Intelligence Unit supervisor for evaluation to include compliance with 28 CFR Part 23 and subsequent entry. The Intelligence Unit will retain the hardcopy of the initial information requesting the entry.

Direct entry into RISSIntel is limited to the following units and only after the approval of a supervisor;

- Members of the Investigative Support Section
- Members of the Narcotics Section
- Members of a Federal Task Force
- Members assigned to any Rocky Mountain HIDTA funded Task Force.

Additional information on these services can be obtained by contacting the Rocky Mountain HIDTA at 1-800-965-6393 (de-confliction/watch center) or 303-671-2180 (main line).

6.11.20  Undercover Operations Restricted
Plainclothes officers wear civilian attire and not a typical police uniform. Officers assigned to a plainclothes function represent themselves as police officers and generally display police identification and/or a badge.

Undercover police officers wear civilian attire but act in a covert position to disguise the fact they are police officers. Undercover operations involve a higher level of risk to the public and to participating officers. For this reason, the use of undercover operations is restricted to only those units that perform undercover operations as part of their normal course of duties and are properly trained in undercover work.

6.11.21 Investigations involving Aurora Mental Health Clients

Officers who are investigating a crime involving a client of Aurora Mental Health, either as a victim or suspect, may contact Aurora Mental Health for assistance. Officers may contact the Aurora Mental Health Emergency Services at 303-617-2300 for assistance. The assistance that can be provided by Aurora Mental Health personnel includes:

- Trying to locate a person who is part of an investigation.
- Identifying an individual who has admitted (outside of therapy) to participating in a violent crime.
- Aiding in an investigation when the victim is incapacitated.
- Responding to an off-site medical emergency.
- Aiding law enforcement in preventing or lessening a serious and imminent threat.
- Identifying or apprehending an individual who appears to have escaped lawful custody.

Aurora Mental Health must verify information from requesting officers. If requested, members of the police department will provide the following:

- City of Aurora Personnel Identification Number (7-digit EID number) and name.
- Business card.
- Business phone number.
- Written request on agency letterhead (preferred but not required).
6.18 ENFORCEMENT OF IMPAIRED DRIVING LAWS

This Directive will guide members in the enforcement of impaired driving laws.

6.18.1 Field Sobriety Tests

When an officer is in contact with a suspected impaired driver and circumstances permit, voluntary field sobriety tests should be offered. Field sobriety tests should be administered in a manner consistent with the most current NHTSA (National Highway Traffic Safety Administration) Standardized Field Sobriety Tests (SFST) manual.

SFSTs will not always be administered under ideal conditions in the field, because such conditions will not always exist. Even when administered under less than ideal conditions, they will generally serve as valid and useful indicators of impairment.

After arresting a subject for DUI, DUI Per Se, DWAI, Vehicular Homicide (alcohol or drugs) or Vehicular Assault (alcohol or drugs) or a combination thereof, Officers shall take necessary steps to check the suspect’s criminal/driver history for prior DUI related convictions. Officers shall contact the Records Section and request a “DUI history”. The Records Section will then make the criminal/driver history available to officers. When the Records Section locates an out of state driver’s license number or arrest, the records clerk will begin searching that states database and attach that states drivers history as part of the criminal/drivers history. Officers will then view the history and determine if the arrested subject meets the criteria for felony DUI (see section 6.18.11).

A person is deemed to have a prior conviction for DUI, DUI Per Se, DWAI, Vehicular Homicide (alcohol or drugs), or Vehicular Assault (alcohol or drugs), if the person has been convicted under the laws of this state or under the laws of any other state of the United States, or Territory subject to the jurisdiction of the United States.

6.18.2 Chemical Testing For Alcohol

After establishing probable cause that impairment due to alcohol exists, officers will offer either a blood test or a breath test to the subject. While not a requirement, it is
6.18.3 Breath Test

After the Colorado Express Consent Advisement, should the subject choose to provide a breath sample, the following procedures will apply:

Only officers certified as Instructors or Operators will administer evidential breath alcohol tests (EBAT) utilizing the Intoxilyzer 9000 Instrument, and they will do so in compliance with the Colorado Department of Public Health and Environment’s (CDPHE) Rules and Regulations.

The Intoxilyzer 9000 instrument will provide a 4-page printout, which includes a completed EBAT (1), Intoxilyzer annual certification (1), and instrument performance report (IPR)(2) for each completed evidential breath alcohol test (EBAT) administered. Any Exception Messages encountered will also result in a 4-page printout.

The entire 4-page report will be attached with the officer’s offense report, including any printouts from any exception messages encountered. No copies are given to the subject at the completion of the test.

The Colorado Department of Public Health and Environment (CDPHE) maintains all backup records pertaining to the maintenance of the Intoxilyzers. CDPHE also maintains the backup records of certifications for all Intoxilyzer 9000 Instructors and Operators, including but limited to, all recertification records required by CDPHE’s rules and regulations. Each Intoxilyzer 9000 instrument stores the above data internally.

Intoxilyzer 9000 Instructors and Operators are solely responsible to maintain his/her certification as required by CDPHE’s rules and regulations.

Intoxilyzer 9000 instructors are required to maintain certification by the following:
1) Complete an annual online refresher course (within the calendar year) presented by CDPHE;
2) Participate in teaching one 8-hour operator certification course (once every 2 years).
3) Complete a recertification EBAT within 180 days, using the recertification menu option on the Intoxilyzer 9000.

Intoxilyzer 9000 operators are required to maintain certification by the following:
1) Complete an annual online refresher course (within the calendar year) presented by CDPHE;
2) Complete a Recertification EBAT within 180 days, using the recertification menu option on the Intoxilyzer 9000.
Each Intoxilyzer 9000 Instructor and Operator is issued a swipe card by CDPHE in order to operate an Intoxilyzer 9000 instrument. Each member is responsible for his/her own swipe card, and the member must notify CDPHE as soon as possible if the card becomes lost or stolen in order for a new card to be issued.

6.18.4 Blood Test

After advisement, should the subject choose to provide a blood sample, the following procedures will apply.

The officer will request, via the Public Safety Communications Department (PSCD), that a DUI nurse respond to either the Detoxification Center or the Aurora Detention Center (see exceptions below). The nurse will respond and take the blood sample as directed by CDPHE’s most current Rules and Regulations. An officer will remain with the subject at all times while the subject is in the presence of the DUI Nurse. The blood draw will be witnessed by an officer, and that officer will document such in his or her report. The DUI nurse will maintain custody of the blood sample.

When blood samples have been collected, either on a felony or misdemeanor case, the blood kit will be placed into the evidence refrigerator located at the jail. The sample will be placed through the slot provided. The DUI nurse will then complete the DUI blood log next to the secured refrigerator.

Aurora Police Department Laboratory personnel will be responsible for collecting the blood kits and maintaining the evidence log. After performing the necessary test as outlined by the CDPHE, the results will be forwarded to the Traffic Section along with the form provided in the kit. The DUI Nurse will record all necessary information for the blood test(s) in the log book.

The Traffic Section Commander or designee will ensure that a current on-call list of nurses is on file with the PSCD.

6.18.5 Injured Subjects

Responding emergency medical personnel will determine if the subject is to be transported to a hospital for evaluation and/or treatment. Should the investigating officer have probable cause to believe that the subject was under the influence of alcohol, drugs, or both, the officer will advise the subject, as described in section 6.18.2, excluding the option for a breath test. Should the subject choose to provide a blood test, the officer will request, via PSCD, that a DUI Nurse respond to the hospital.

If the hospital is outside the city limits of Aurora, it is the responsibility of the Police Department to transport the DUI Nurse from an agreed upon location within Aurora (typically headquarters) to the hospital. After the blood is drawn, the officer will ensure that the DUI Nurse is transported back to the place of origin.
Should the injured subject be receiving immediate treatment for injuries at a medical facility, the DUI Nurse must not interfere with medical personnel. The DUI Nurse should not attempt to obtain a blood sample if such a blood sample would interfere with the treatment of or endanger the subject. If necessary, the DUI Nurse should obtain permission from the attending medical personnel to administer a blood draw.

6.18.6 Chemical Testing For Drugs

If an officer has probable cause to believe that a subject has been in physical control of a vehicle and the subject is impaired by one or more drugs, then the officer may request from the subject any combination of chemical test(s) of the subject’s blood, breath, urine or saliva. Should the officer have indications of impairment, and the officer can reasonably articulate based on training and experience that the impairment is due to drugs and not alcohol, then the officer should request both a breath test (to rule out alcohol as the cause of the impairment), and a blood sample to test for the presence of drugs. The subject is required to cooperate in the completion of both tests or be treated as a refusal (see section 6.18.8).

In some circumstances, a urine sample should be obtained in order to test for the presence of drugs. These circumstances are rare. The collection of urine samples must be observed by an officer of the same sex as the subject. The DUI Nurse may be used to assist in this effort. Urine will be collected in a urine specimen container and sealed. The urine sample will be placed into the evidence refrigerator and locked and the key will then be placed into the same box as the sample through the slot provided.

6.18.7 Laboratory Requests

On cases where a blood or urine sample is taken and the officer suspects impairment due to drugs, the officer must complete an APD laboratory request. The officer will send the request either directly to the lab electronically or filled out on hard copy and turned into the Crime Laboratory. If there is a specific drug suspected, the requesting officer should indicate the specific drug on the request form.

The Crime Laboratory (or other certified laboratory) will analyze the sample and notify the officer, the Records Section, and the Traffic Section of the results.

6.18.8 Notice of Revocation

The arresting officer will ensure that an Express Consent Affidavit and Notice of Revocation form is completed if one (1) or more of the following occur:
- The subject provides a valid breath sample within two (2) hours of actual physical control of a vehicle and the results of the test are 0.08 or greater.
- The subject provides a blood sample within two (2) hours of actual physical control of a vehicle and the subsequent results are 0.08 or greater.
The subject refuses to take a blood or breath test, when alcohol is suspected.

- The subject refuses to take a blood, breath or urine or combination of these tests – when drugs are suspected.
- Commercial/HAZMAT Operators - testing disclosed an alcohol concentration of 0.04 or more.
- Under 21 years of age and testing disclosed and alcohol concentration between .02 and .05 at the time of driving or within two hours of driving.

6.18.9 Processing or Releasing the Arrestee

When a driver has been arrested for a possible impaired driving violation, the suspect may be transported for testing to either the Aurora Detention Center or to the Detoxification Center. In the event the suspect is going to be held for bond, the officer will take the suspect to the Aurora Detention Center for processing and booking.

The Detoxification Center may be utilized for those arrested for DUI and no other charges that require jailing.

Directive 6.12.4 provides guidelines for officers on placing a subject into the Aurora Detention Center, the Detoxification Center or releasing to a responsible party.

6.18.10 Mandatory Chemical Testing

If an officer has probable cause to believe that a subject has committed either Vehicular Homicide, Vehicular Assault, Criminally Negligent Homicide or third degree assault, then the officer can require the subject to submit to chemical testing. The subject cannot refuse nor choose the type of test. The officer will request for a DUI Nurse to respond and the blood will be drawn in accordance with this section 6.18.4, however two (2) additional blood draws will be done each an hour after the previous draw.

6.18.11 Felony DUI offenders

After 3 or more prior convictions arising out of separate and distinct criminal episodes for DUI, DUI Per Se, DWAI, Vehicular Homicide (alcohol or drugs) or Vehicular Assault (alcohol or drugs) or a combination thereof makes the fourth or subsequent arrest for DUI, DUI Per Se, DWAI, Vehicular Homicide (alcohol or drugs) or Vehicular Assault (alcohol or drugs) or a combination thereof a felony.

A person is deemed to have a prior conviction for DUI, DUI Per Se, DWAI, Vehicular Homicide (alcohol or drugs), or Vehicular Assault (alcohol or drugs), if the person has been convicted under the laws of this state or under the laws of any other state of the United States, or Territory subject to the jurisdiction of the United States.

Once an officer determines that a suspect meets the criteria for a felony DUI charge, the officer should process the suspect as any other felony arrest while also following the procedures set forth in this directive for processing impaired drivers as it relates to express consent, chemical testing and notice of revocation.
8.2 LEAVE PROCEDURES

8.2.1 Scheduled Leave

Effective scheduling and attendance reporting ensures that the desired number of employees with the required skills are available to deliver services expected, and that payroll-related activities are accurately recorded. Tasks include assigning responsibilities, preparing and revising schedules, and documenting and reporting actual attendance status.

Attendance reporting must be highly accurate. It is the Police Department’s policy that attendance is documented on a daily/shift basis. Therefore, all first-level supervisors must perform scheduling and attendance functions in a timely and accurate manner. While duty environments and scheduling considerations vary among programs, these procedures are designed to provide all supervisors a common means to effectively schedule, monitor, and reconcile attendance.

Employees, supervisors, staff, and managers participate in scheduling and attendance reporting. Timely attention to detail and compliance with these procedures will provide reasonable checks and balances to achieve accurate attendance reporting.

Employees. Each employee must inform his/her supervisor of all deviations in the scheduled workday. An example is leaving work prior to the end of the day or shift due to illness. The employee must contact his/her supervisor (or another supervisor, if necessary) as soon as possible and explain the circumstances.

First-Level Supervisors. First-level supervisors will prepare rosters and document attendance using the current scheduling system. For purposes of this directive, first-level supervisors may include, but are not limited to: Sergeants, Shift Supervisors, Patrol Lieutenants, Section Lieutenants and Program Managers.

Program Managers. Program managers will ensure that all known scheduling information is made available to supervisors responsible for preparing
schedules. This includes minimum staffing criteria, shift assignments, approved annual vacation schedules, published training schedules such as Range, SWAT and ERT, and other information that impacts the scheduling process.

Administrative Services Section. The Business Services Bureau Administrator is responsible for developing and disseminating procedures prescribed in this directive. Additionally, Payroll staff will assist supervisors with attendance-related assistance when requested. They will also assist with attendance-related reviews within the Department’s staff inspection process.

This directive pertains to the following categories of leave: Annual, Family Medical Leave Act (FMLA), Special, Personal, and Administrative.

8.2.2 Leave Schedule Form

Scheduled leaves should be entered into the current scheduling system. Leaves scheduled as part of the annual bid process will be entered into the system prior to the bid taking effect.

Coordinating last minute changes of leave plans is not the responsibility of the Court Liaison Office. Members who make last minute leave requests and have court obligations are not automatically excused from the court obligation. The member may attempt to secure a release from an existing subpoena with the appropriate prosecuting attorney or court of jurisdiction. Requests for leave will not be approved while the member has an outstanding subpoena.

Sending the request to the appropriate court does not relieve the member from attending court. The Court Liaison Office or the appropriate court may notify the member if an appearance is still required. The member remains responsible for all served subpoenas until released by the appropriate authority.

8.2.3 Request for Leave

All requests for leave will be approved through the appropriate chain of command before any member goes on leave.

Members will enter the request into the scheduling system in accordance with the following guidelines. Supervisor/command officers reviewing requests for time off (compensatory time, personal or annual leave) will check leave balance accruals indicated in the Aurora Police Personnel System (APPS) and ensure at the time the leave is taken the available leave balance is appropriate. Supervisors/command officers cannot approve leave time that exceeds the amount indicated in APPS. This includes compensatory time approved in the scheduling system but not accounted for in APPS except when it is earned and used in the same work week (Saturday –
Friday). Supervisors/command officers will ensure appropriate staffing levels are met before authorizing the request.

a. Annual Leave – Members will complete the scheduling system leave request at least two weeks before going on leave, if possible. The scheduling system leave request will be acknowledged and approved by the member's supervisor before a member goes on leave. The supervisor will advise the member if the leave is not granted.

b. Personal Leave – Will be handled the same as annual leave. Personal Leave days will be granted if there is not a personnel shortage. Personal Leave compensation for sworn members will be handled in accordance with the collective bargaining agreement.

c. Sick Leave

- All Bureaus/Sections/Units/Details are responsible for developing a procedure for members attempting to call in on Sick Leave. At a minimum the procedure will include:

  1. The requirement for members to provide a telephone number where they can be reached during the absence. When possible, the member will enter the request in the scheduling system.

  2. Directions for the supervisor/command officer receiving the information regarding the absence to ensure the absence is noted in the scheduling system.

- In all cases, members must describe to their supervisor or command officer his/her condition to include the following: specific injury or sickness, medical care received or intended to be received and anticipated return to work date. If the sick leave is being used for an injured or ill family member, only the anticipated return to work date and contact number need be provided unless the employee is requesting FMLA leave. Failure to follow the above procedures may result in the absence being considered unauthorized leave.

- On the fourth-consecutive day that an employee calls in sick, the supervisor will document the medical information pertaining to the absence in a securable file separate from the member’s working personnel file. The supervisor or command officer will notify the Administrative Services Section of the employee’s absence to determine if paperwork for FMLA should be completed.
8.2 LEAVE PROCEDURES

- Members are required to call in each day that they are absent unless excused by their supervisor or manager. Supervisors will approve the sick leave in the scheduling system for each day of the absence to ensure an accurate roster is generated.

- Members using sick leave when scheduled for a court appearance must call the appropriate court to report their absence.

- If a chronic illness of a member or a member’s immediate family causes a member to be absent frequently or extensively, the supervisor will notify the Section / Bureau / District Command Officer. The member may be required to submit a doctor's written medical verification of the illness. The member may request FMLA status or the City may opt to place the member on FMLA, if the condition meets the requirements for FMLA. Medical verification for FMLA may only be requested once every 30 days. If the leave is for any non-FMLA medical reason, medical verification may be required for each subsequent request for sick time. The supervisor may require medical verification confirming that the member may return to duty before the member’s scheduled return to work.

- With Section / Bureau / District Command Officer approval, supervisors may require the member to provide medical verification for the absence. If medical verification is required, the member will be notified either verbally or in writing to submit the verification upon return to work. The member has the responsibility to obtain the medical verification during the member’s absence and provide the medical verification to his/her supervisor or designee, upon the member’s return to work.

- When the member returns to work, he/she will ensure the appropriate information is entered into the scheduling system. The supervisor will ensure that the scheduling system entry is accurate. Once the member calls in sick, the sick leave will not be converted to vacation, compensatory time, or personal days.

- Leave will be considered unauthorized whenever a member fails to provide appropriate medical verification required by a supervisor.

- The Chief of Police may require the member to undergo an examination to determine his/her fitness for duty.

- Supervisors will not document medical information in the scheduling system or maintain any medical information in the employee’s working file. All medical information obtained from a member must be maintained in a separate and secure file.
8.2 LEAVE PROCEDURES

d. Special Leave

1) Military leave – Members going on military leave will notify their supervisor as soon as they are aware of their duty dates. Members will submit a copy of their military orders to their supervisor and enter the request in the scheduling system. The supervisor will forward the request and the orders to the Administrative Services Section. The supervisor will ensure the member entered the request into the scheduling system and that the request was properly approved.

2) Jury Duty leave – Jury duty leave will be handled similarly to military leave. Members will notify their supervisor as soon as they know that they have jury duty. The member will enter the jury duty (leave) into the scheduling system and present the supervisor with a copy of the jury notice. When the member returns, any money received for appearances while on jury duty will be forwarded to the Administrative Services Section.

3) Scheduled Leave without pay – Leave without pay is not an entitlement. A member must obtain permission from the Chief of Police through the chain of command before any scheduled leave without pay will be granted.

4) Unscheduled Leave without pay – All unscheduled leave without pay will be reviewed through the Chief’s office. Unless the leave is FMLA or military, the member may be subject to disciplinary action.

5) Family Medical Leave Act (FMLA) – In compliance with the 1993 Family and Medical Leave Act, the City provides employees up to twelve weeks leave in a calendar year for eligible family and medical conditions. Members should refer to Administrative Policy Memorandum (APM) 3-14 and City Personnel Policies and Procedures Manual Chapter 3-7 for eligibility requirements, application procedures and leave guidelines. The supervisor or member shall enter “Leave FMLA” into the scheduling system. A note may be added to specify the type of leave being requested.

6) Compensatory Time Taken – Eligible, FLSA non-exempt members may accrue and take compensatory time in accordance with Aurora Police Directive 8.14: Overtime Compensation. Requests for compensatory time off will be handled in the same manner as Annual Leave requests.

e. Emergency Leave – Paid leave available to members in the event of a death, serious illness or emergency involving the member’s immediate family. Emergency leave also applies to natural disasters or a major fire that damages the member’s personal residence. Additionally, emergency leave includes those
situations as delineated in the City contract with the recognized collective bargaining unit applicable to sworn members.

As soon as practical, the member will report to his/her immediate supervisor or any command officer the request for use of emergency leave and the estimated duration of the absence. A command officer receiving notification of an emergency leave status will immediately report the situation to the member’s chain of command. The supervisor or member shall enter “Leave Emergency” into the scheduling system. A note may be added to specify the reason for the leave. The Emergency Leave Request Form (APD 201) must also be completed. Either the supervisor or member should complete this form as soon as possible and e-mail the form through their chain of command to include the appropriate division chief. The division chief will forward the form to the appropriate police payroll representative.

Members are reminded that emergency leave is granted upon special circumstances consistent with the current bargaining agreement and city policy and only with the approval of the Chief of Police. The approval of a request for Emergency Leave is not automatic and must first be reviewed by the Chief of Police.

d. Administrative Leave – Paid leave that may be administered in cases where a member is involved in an event that may require prosecutorial review (e.g. Officer Involved Shooting) or the member is alleged to have been involved in criminal activities, violations of City Personnel Policies and Procedures or violations of Department Directives. Only the Chief of Police or designee may authorize members be placed on administrative leave. Upon receipt of the appropriate personnel orders or notification, only Administrative Services Section personnel will enter administrative leave status into the scheduling system.

Members placed on administrative leave will remain available for contact during regular business hours (Monday through Friday, 0800-1700 hours). Members placed on Administrative Leave will:

- Provide valid contact information.
- Be available to respond to the Office of the Chief of Police on short notice.
- Honor all court subpoenas.
- Be temporarily ineligible to participate in secondary employment.
The Chief of Police or designee will remind members placed on administrative leave of their obligations to and restrictions by the Department on an Administrative Leave Memorandum.

g. Pre-Discipline Suspension without Pay – Upon the indictment of a member or the filing of charges against a member for any felony charge is cause for immediate suspension without pay pending the outcome of the legal proceedings. Only the Chief of Police or designee may authorize the suspension without pay of a member.

h. Training Leave – Available to members to attend job-related or professional development opportunities. These opportunities include, but are not limited to seminars, courses and conferences. Training leave does not apply to accredited college or university courses. The recorded training leave time only pertains to the actual course hours and is not inclusive of travel time.

Members will submit the appropriate forms as outlined in Directive 7.6 Requests for Travel and Training.

i. Other Leave – Applies to those situations as deemed appropriate by the Chief of Police. Command officers may request authorization to grant leave time to individuals or groups of members affected by special circumstances such as the annual redeployment.

8.2.4 Reporting Leave Taken Outside the Period

Members will report all leave hours taken in an expeditious manner and before the reporting period closure. Once a reporting period is closed or has been finalized for payroll reporting, new reports for the closed period require a memorandum from the member’s command officer explaining why the report was not submitted in a timely manner. The memorandum should be submitted electronically to the Administrative Services Section in order to reduce any further delays in reporting or accounting.

The Administrative Services Section will monitor the reporting system to identify training and/or corrective actions necessary to maximize efficiencies.

An exception exists for situations involving emergency leave. When possible, members are encouraged to notify their supervisor or any command officer of the absence in advance.

8.2.5 Records Management & Reconciliation

On a daily basis, supervisors and command officers will ensure the scheduling system reflects attendance accurately.
The Aurora Police Personnel System (APPS) automatically produces a weekly report indicating unapproved requests for overtime or leave within the scheduling system. Supervisors and Command officers are notified by e-mail of these pending requests and should take immediate action to determine if the requests are accurate and approve or deny the requests as necessary.

In the event that a supervisor denies a request for leave, the supervisor will personally notify the member and change the requested scheduling system code to the “Deny” work code. Members should check the scheduling system to ensure requests are processed and approved before taking leave time. Members noting that a request was not approved/denied in the scheduling system should make inquiries with their immediate supervisor as to the status of the leave request. Members will advise their supervisor when cancelling approved leave. If necessary, the supervisor will e-mail payroll requesting the cancellation of the leave. Members are ultimately responsible for the correct posting of all absences from duty.

8.2.6 Program Day

The City allows Department Directors to grant compensatory time off to FLSA exempt employees who actually work in excess of 45 hours in a normal work week. The following guidelines apply to Police Department FLSA exempt employees:

Additional hours worked over the normal 40-hour week will not be recorded in the scheduling system or other department tracking documentation. The additional hours do not accrue as a compensatory time balance and will not be deferred for time off in a future month.

The FLSA exempt employee must ensure that the supervisor is aware of additional hours worked so that the supervisor has sufficient information to approve requests for a program day.

The FLSA exempt employee will request the program day in the department scheduling system. Each request must be approved or disapproved by the supervisor. Approval is dependent on the supervisor’s assessment of additional hours worked, leave taken during the period, staffing availability and workload.

A program day is equal to the normally scheduled hours worked in a day. The program day will be taken as a single event and will not be divided into lesser durations taken on multiple days.
10.02  COMPLAINT AND DISCIPLINE PROCEDURES FOR SWORN MEMBERS

The following procedures apply to all allegations of misconduct except that complaints determined to be related to discrimination or harassment will be handled in accordance with Directive 10.9 - Discrimination and Harassment Complaint Procedure.

Pursuant to city charter, the Chief of Police determines discipline within the Police Department. The Internal Affairs Bureau (IAB) is supervised directly by the Chief. Nothing in this order precludes the Chief from monitoring or directly supervising an Internal Affairs investigation, from delegating this responsibility to the Deputy Chief or another senior command officer, or from consulting with the Division Chiefs or Deputy Chief about an investigation or proposed discipline at any stage in the process.

10.2.1  Complaint Procedures

The Aurora Police Department utilizes an automated complaint process. This process requires members to access the complaint management system or the internet in order to fill out the appropriate complaint forms.

Complainants may use the computer version of the complaint form found on the internet, but are not restricted to this format. Complainants may utilize the paper version of the complaint form or any other written format. Complainants desiring to lodge a complaint verbally will be encouraged to complete a written complaint, but not required to do so. Supervisors in the Department will accept all complaints in any reporting format the citizen chooses. Complainants may also contact the Internal Affairs Bureau directly to lodge their complaint.

Supervisors accepting a complaint, either verbally or in writing, will enter the complaint into the complaint management system. Any written documentation of the complaint provided by the citizen to a member will be scanned into an electronic format and attached to the electronic complaint. The electronic complaint will be forwarded to the Internal Affairs Bureau Commanding Officer. The chain of command for the involved member will be tracked on the online complaint, but their tracking will immediately be closed by the supervisor entering the complaint. This ensures the chain
of command is notified, but does not delay processing the complaint. The original items will be forwarded to the IAB with the electronic system case number included.

a. Allegations from outside the department

Department supervisors will accept any complaint made against any member of the department in a professional manner. Supervisors may attempt to resolve the complaint, but will not attempt to dissuade any person from lodging a complaint against any member of the department. If the complaint is based on a misunderstanding or question of policy or procedure, and the supervisor is able to resolve the complaint, the complaint will still be added to the complaint management system as a Citizen’s Inquiry and forwarded as any other complaint, but in the narrative, the supervisor will note that the complaint was resolved with the complainant. The Citizen’s Inquiry is to document that a citizen called, should the complainant later imply that his/her concern was not taken seriously, but carries no points in the PEIS system and is not a complaint. A call from a person, to ask a question is not making a complaint, and need not be documented unless the supervisor believes it should be.

Any non-supervisory member contacted by a citizen wishing to lodge an allegation against any member will immediately put the citizen in contact with a supervisor. If for any reason a supervisor is not immediately available, the member will obtain the citizen's name and phone number, the nature of the allegation, and forward this information to a supervisor as soon as possible, but prior to the end of shift. The non-supervisory member will also give the citizen the information on how to file a formal complaint utilizing the paper complaint forms and the on-line complaint system found on the internet.

If the complainant does not wish to speak to a supervisor at the time of making the complaint, the member in contact with the citizen will provide the citizen the access information to file a complaint on-line.

Complaints received in the Chief's Office by mail, fax, email, or other means will be forwarded to the IAB Administrative Technician for entry into the complaint management system.

All information contained in a complaint report is considered confidential. Any member of the department who initiates or otherwise handles a complaint will keep the information confidential.

Anonymous allegations will be accepted and investigated in the same manner as all other allegations.

On a quarterly basis, the Internal Affairs Bureau Commanding Officer will provide a report to the Chief of Police detailing the status of all complaints received.
b. Allegations by Members

Members who wish to make an allegation against a sworn member are authorized to report directly to the Internal Affairs Bureau (IAB), his/her supervisor, or the supervisor of the member. Members who initiate an allegation against another member may enter their complaint into the on-line complaint system, or the complaint management system listing themselves as the complainant, or if the member chooses not to, the receiving supervisor or IAB Investigator will enter the information into the complaint management system.

The complaining member will not indicate the existence of or divulge the contents of his or her allegation to any other agency, officer, or individual, without proper authorization. The receiving supervisor will not indicate the existence of or divulge the contents of the allegation to any other agency, officer, or individual, without proper authorization. Nothing in this paragraph will interfere with the complaining member’s privileged conversations with his or her attorney, licensed counselor, labor representative, peer support member, chaplain, religious counselor, or reporting his or her information to an appropriate legal authority.

In cases where the allegation is against a peer or superior of the receiving supervisor or command officer and that supervisor believes the allegation is of such a nature that the complaint demands immediate investigation, the receiving supervisor or command officer will contact the IAB Commanding Officer during duty hours, or the on call Internal Affairs Investigator outside of duty hours. The IAB Commanding Officer/Investigator will determine if the complaint needs immediate attention or can be processed through the normal channels.

c. Allegations by Supervisors

When a supervisor alleges misconduct because he or she witness or otherwise become aware of misconduct, outside of receiving a complaint from another, and he or she are the first or second line supervisor of the subject member(s) allegedly involved, he or she will initiate an Initial Inquiry. If not the subject member(s)’ first or second line supervisor, he or she will gather enough information so that an Initial Inquiry can be started by the appropriate supervisor. The supervisor will enter or cause to be entered a complaint covering his or her allegation of wrongdoing into the complaint management system. Allegations made against more than one member, by a first or second line supervisor of one of the subject members, shall be considered initiated by a first or second line supervisor of all of the subject members, and an Initial Inquiry should commence.

Minor violations, not received as a complaint that can be corrected through training, counseling, or the issuance of a Performance Appraisal Entry (PAE) are not considered misconduct needing an Initial Inquiry and complaint entry.
10.2 Initial Inquiry

Complaints will generally start with the named member's immediate supervisor; however, any supervisor may receive a complaint.

An initial inquiry is designed to gather necessary facts and information concerning the allegation, to determine if any law, ordinance, directive, standard operating procedure, or other city policy may have been violated or a potential for a policy failure exists without interviewing the subject member(s). This does not prohibit the supervisor from asking the alleged subject members general questions to determine if they are the proper subject of the complaint, except where the allegation against the subject of the initial inquiry implies potential criminal conduct. The supervisor should advise the subject member that he or she is conducting an administrative investigation prior to asking these general questions. These questions are often related to, but not limited to, issues such as if the member was on a specific call, in an area at a specific time, operating a specific vehicle, or if he or she had contact with a specific person.

a. The investigating supervisor will make reasonable attempts to contact and discuss the incident with the complainant(s). The investigating supervisor should speak with witnesses, including other involved members to determine the scope and
nature of the allegation. Whenever possible, a written statement will be obtained from the complainant and other available witnesses. All written statements will be scanned and attached to the electronic report in the complaint management system. During this inquiry, the investigating supervisor will determine if the allegation is merely a lack of understanding on the part of the complainant, as opposed to misconduct by the involved member. If the investigating supervisor believes a lack of communication or miscommunication between the parties is a substantial factor in the complaint, or where such communication resulted in an escalation of the conflict between an officer and a member of the community, except where a Use of Force as defined in Department Directive 5.4 is involved, the supervisor may attempt to resolve the case with the complainant. Should this information satisfy the complainant, the complaint can be identified as resolved in the narrative of the report in the complaint management system. Should the complainant not be satisfied, or the allegation is related to a Use of Force, the complaint will be forwarded as normal, and if a Use of Force, will be linked to the Use of Force report.

b. If a procedural or statutory explanation exists, the investigating supervisor will provide this information to the complainant. Should this information satisfy the complainant, the complaint can be identified as resolved in the narrative of the report in the complaint management system.

c. A complaint based solely upon a dispute over the guilt or innocence of the complainant in the matter of a traffic violation or other summons will be referred to the appropriate court. The member or investigating supervisor may provide information related to the court process, but should not discuss the details of the case. This is not a complaint and should not be entered into the complaint system.

d. If the Initial Inquiry reveals the possibility of criminal conduct on the part of the member, the investigation will be handled in accordance with Department Directive 10.10: Criminal Investigations Involving Members. The investigating supervisor will contact the Duty Captain who will confer with the Duty Chief on assigning the criminal investigation to the appropriate investigative unit/team. The original complaint, if already added to the complaint management system, will be forwarded to the IAB Commanding Officer.

e. If the Initial Inquiry reveals a policy failure exists, the investigating supervisor will note that in the complaint report.

f. The assigned investigating supervisor will complete the Initial Inquiry in an expeditious manner.

10.2.3 Preliminary Administrative Investigation

Once the Internal Affairs Bureau Commanding Officer or designee has reviewed the case, if he or she determines the case is an allegation that can be investigated at the
Bureau/District level, he or she will send the case to the appropriate Commanding Officer. The Commanding Officer will assign the case to an appropriate supervisor in the Bureau/District. Normally, allegations that involve violations of policy or procedure but have little effect on operations, or, create a small degree of risk and/or liability to the member or the department may be handled at the Bureau/District level. Allegations of this nature may be handled with a Corrective Action Report, Performance Appraisal Entry, counseling, or possibly a recommendation for a Written Reprimand.

Cases that involve a minor violation that is most likely a training or unprofessional demeanor issue will be assigned to the subject member’s Sergeant or direct supervisor for investigation. Cases that require a more thorough investigation, and may end up with a recommendation for discipline will normally be assigned to a Command Officer for investigation. Cases where the subject member is a Sergeant, acting Sergeant, or above, will be assigned to a Command Officer for investigation.

The subject member of a Preliminary Administrative Investigation will be issued a Notice of Investigation (NOI) prior to being interviewed and be allowed an Observer within the time constraints for Observer Conditions.

a. The investigating supervisor of a Preliminary Administrative Investigation will electronically record all relevant interviews with equipment provided by the Department. Subject members who are interviewed during a Preliminary Administrative Investigation may also electronically record or take notes of the interview.

Until the conclusion of the Preliminary Administrative Investigation, the investigating supervisor will retain all tapes, notes, and reports. Subject members will not be allowed access to the investigative materials until the case has been concluded. In the event the case is sent back for a formal investigation to IAB, all tapes, notes, digital records and reports will be forwarded to IAB. Once the supervisor is sure that IAB has the tapes, notes, digital records and reports, he or she will delete any copies that remain in his or her possession or control. At the conclusion of any discipline, counseling, or retraining subsequent to the preliminary investigation, the subject member’s notes and/or electronic recording of the NOI interview may be returned to the member. The supervisor’s notes and recordings will be uploaded to the complaint management system.

b. Supervisors conducting a Preliminary Administrative Investigation into an allegation of misconduct will complete the investigation in an expeditious manner. The investigating supervisor’s immediate Command Officer may grant appropriate extensions as necessary.

c. If during the Preliminary Administrative Investigation, the investigator believes the allegation cannot be handled at the Bureau/District level, a request for investigation by the IAB will be completed and forwarded, through the complaint
management system to the subject member’s Division Chief. All reports, forms, associated documentation or materials collected during the Preliminary Administrative Investigation will accompany the request for formal investigation.

d. Supervisors conducting Preliminary Administrative Investigations will notify the complaining citizen, government official, or member either verbally or in writing of the status of the complaint. The investigating supervisor will indicate in the administrative management system how the complainant notification was accomplished, i.e. by phone, e-mail, mail.

If the complainant is not satisfied with the resolution of the case, he or she may contact the next command officer in the chain of command. The supervisor will provide contact information to the complainant.

10.2.4 Formal Investigations

Preface for Department Directives 10.2.5 and 10.2.6: Before serving as an observer in a formal investigation, or representative, the member must meet with the IAB Commanding Officer or his/her designee to be briefed on Department policy regarding the responsibilities of the observer and representative roles.

In order to avoid a conflict of interest or the appearance of a conflict of interest, observers, and representatives cannot be the subject member’s supervisor or anyone in the subject member’s current chain of command or at the time of the alleged misconduct. In addition, the observer or representative cannot be anyone who has had any role in the incident or matter under investigation, even as a potential witness or peripheral party.

The Internal Affairs Bureau Commanding Officer or designee will receive allegations of misconduct as outlined in this directive. The IAB Commanding Officer will determine whether the allegation of misconduct necessitates an IAB investigation, if it can be investigated at the Bureau/District level, if it can be referred for mediation, or if some other process is needed. The IAB has the authority of the Chief of Police to conduct investigations without interference or obstruction by any member. The Chief, or designee, may assign the investigation to any member should he or she decide not to have IAB investigate an allegation. Formal investigations will be conducted according to IAB Standard Operating Procedures.

Members who are the subject of a formal investigation will be provided a Notice Of Investigation (NOI) prior to being interviewed.

Members who are the subject of a formal investigation are allowed to have an observer present during interviews as described in Section 10.2.1 of this directive.

If the subject member chooses to have an observer present for the IAB interview, the observer must be present at the scheduled time and place. Should the observer arrive
after the scheduled interview time and the interview has begun, the observer will not be permitted to attend the in-progress interview. Prior to the interview, the IAB investigator and the observer will acknowledge the “Acceptance of Observer Conditions” into the formal record.

The observer shall not turn the interview into an adversarial proceeding. The observer may not interfere with the questioning or investigation, will not give any advice that would be contrary to complete honesty and truthfulness, and will not discuss the case with any member of the department or any other person the observer knows or reasonably should know will be interviewed as a witness during the formal investigative process while the case is open (as defined in Department Directives 10.2 and 10.3). The materials present in the room during the course of the interview are not available for review, perusal, or access without the consent of the Internal Affairs Investigator. The observer’s presence is a privilege extended by the Chief of Police, and any violation of these conditions may result in forfeiture of this privilege for the current investigation and for that observer’s presence in future investigations.

At the end of the Internal Affairs Investigator’s questioning, the Investigator will allow the subject member to add information related to the case, to the record, should he or she feel that important information was not obtained in the interview. The Investigator will allow the observer to suggest questions to the Investigator that are narrow in scope and relevant to the case, that the observer feels were not covered during the interview. The Investigator will determine if these questions will be asked of the subject member. At no time will the observer directly question the interviewer or the subject member. The Investigator may ask additional questions of the member to complete the interview. The subject member is under the same standards of truthfulness regardless if the statements are made on his or her own volition, or in response to questions posed by the Investigator.

If the subject member has not arranged to have an observer present, the interview will commence.

The IAB will notify the complainant in writing that the complaint was received in the IAB and provide the status of the investigation.

If a complaint concerns misconduct by the Chief of Police, the IAB will forward a copy directly to the City Manager. 

If a formal IAB investigation is authorized and includes the charge of 14.1.5 (Conformance to Law) and the matter was also the subject of a criminal investigation, and the criminal investigation has been closed, the entire criminal investigation will be attached as an addendum to the IAB case. Identifying information about witnesses, victims and confidential sources and methods may be redacted from the copy of the criminal investigation that is appended to the IAB case at the direction of the Chief or Deputy Chief.
If a formal IAB investigation does not include the charge of 14.1.5 (Conformance to Law), but, the matter was also the subject of a criminal investigation, the criminal investigation may be attached as an addendum to the IAB case at the request of the member or the IAB Investigator. The member will be informed that a criminal investigation was conducted. Identifying information about witnesses, victims and confidential sources and methods may be redacted from the copy of the criminal investigation at the direction of the Chief or Deputy Chief.

10.2.5 Investigative Review Process

The Investigative Review Process (IRP) occurs at the conclusion of the IAB investigation, and prior to the IAB report being sent to the IAB Commanding Officer for recommendations. At that time, the IAB Investigator will notify the subject member that the case is available for the IRP. The subject member will have fourteen (14) calendar days to review the report and make note of any issues in dispute.

a. The subject member may opt to have a representative appear with him/her or on his/her behalf at the review;

b. If agreed to by both IAB and the subject member, the fourteen-day review period may be reduced or extended;

c. If in the determination of the Chief, there is an important organizational need to expedite the IRP process, validated by the Chief in writing and made part of the file, the Chief may at his/her discretion shorten the IRP process. If the process is shortened, the member will be notified in writing. The member will be afforded duty time, compensatory time and/or overtime to properly review the file;

d. Subject members will not remove the report from the IAB offices at any time during their review. Subject members will not be allowed to copy any portion of the report. Subject members may bring a representative with them to review the report;

e. Subject members and their representative are permitted to take notes during their review of the investigation. These notes will remain in IAB and can be referred to during the IRP.

f. The IAB investigator will also notify the subject member of the date and time of his/her final IRP meeting. The final IRP meeting will be considered a duty assignment under Department Directive 14.3.5. The review of the investigation must be completed prior to the IRP meeting. Disputed issues, including the need for further or clarifying investigation, will be discussed at this time in an attempt to reach an agreement or understanding as to the content of the report. If no agreement on the issues can be reached, the subject member may attach a Letter of Dispute to the file prior to submission to the Chief’s Staff for review. The subject member will have seven (7) calendar days to prepare and submit a signed, Letter of Dispute. A Letter of Dispute is intended to address perceived inadequacies in the internal
investigation such as a failure to interview a witness, a failure to inquire into certain areas during a witness interview or a failure to collect evidence. A Letter of Dispute is not an appropriate forum in which to raise defenses to the alleged policy violations or present mitigating information, issues which are more appropriately included in a Letter of Defense;

g. In complex investigations, where the member desires to use his/her IRP notes to prepare a Letter of Dispute, he/she must appeal to the Chief of Police or designee. The Chief or designee will decide if the use of notes is appropriate. If appropriate, the Chief or designee will inform the IAB Investigator. The IAB Investigator in the presence of the member will number and copy the page(s) of notes. The originals will remain in IAB and the copies provided to the member. The IAB Investigator will advise the member of the guidelines for having a copy of the IRP notes using form APD 192. The guidelines are:

- the member will not make copies of the notes in any form;
- the member will not provide information from the investigation or notes to any other member of the Department, except his/her APA or FOP observer listed on the form;
- the member will not provide information from the investigation or the notes to the public;
- the member will not provide information from the investigation or the notes to the media;
- the member will not use the notes to conduct a parallel investigation;
- the member will return the copy of the notes to IAB along with the Letter of Dispute. Upon return of the notes to IAB, the IAB Investigator will verify all pages of the notes were returned;
- members are reminded that Department Directive 10.2.16(f) specifically forbids the conducting of a parallel investigation. Members are reminded that the initial notification of investigation from the IAB Investigator and the Notice of Investigation form, are direct orders not to discuss the case;
- at the discretion of the Chief of Police, an IRP may begin prior to an IA case being completed.

h. Duty time is authorized for a subject member to review the investigation report and to meet with the IAB investigator over disputed issues;

i. If the case proceeds to an Independent Review Board (IRB) hearing, the subject member will be permitted to retrieve his/her notes and remove them from IAB for use in preparation for his/her IRB hearing.

10.2.6 Formal Investigation Dispositions
The IAB Commanding Officer will review each completed IAB case after the IRP process has concluded. The IAB Commanding Officer will ensure the case is complete and make a recommendation of finding for each alleged violation in the case. The IAB Commanding Officer can make one of the following finding recommendations for each alleged violation:

a. Unfounded – A finding which indicates the act(s), complained of did not occur or failed to involve police personnel.

b. Exonerated – A final finding of a complaint of misconduct, which indicates the alleged action did occur but that it was justified, lawful, and/or proper.

c. Not Sustained – A final finding of a complaint of misconduct that indicates an investigation failed to discover substantial evidence to prove or disprove the allegations made in the complaint.

d. Policy Failure – The allegation is true, however, the action of the agency or member were in conformance with existing agency policy which led to an undesirable result; or the member’s or agency’s action violated existing policy even though such actions were reasonable given the totality of circumstances.

e. Sustained – A policy violation will be sustained if, after considering all of the supporting and contradicting evidence, violation of the policy has been established by a preponderance of the evidence. The term "preponderance of the evidence" means that the proposition is more probably true than not.

For compliance reviews, the following recommendations can be forwarded:

a. Compliance – A finding that indicates the member acted in accordance with policy.

b. Noncompliance – A finding that indicates the member did not act in accordance with policy.

10.2.7 Chief’s Review Board

The IAB Commanding Officer will provide the completed case to the Deputy Chief of Police, and will notify the subject member/members’ Division Chief(s), and Bureau/District Commanding Officer(s) that the case is available for review. The IAB case will not leave the Chief’s Office for the review.

The subject member of the investigation may send a Letter of Defense to the Chief’s Review Board for their use. A Letter of Defense is a letter sent to the chair of the Chief’s Review Board to provide a defense or mitigation for the member’s misconduct or alleged misconduct contained in the IA file. The Letter of Defense does not become part of the IA file.
a. Once the involved Chiefs and Commanding Officers have read the case, the Deputy Chief, on behalf of the Chief of Police, and as part of the deliberative process, will convene a Chief’s Review Board (CRB). The CRB will be chaired by the Deputy Chief and consist of:

- the subject member’s Division Chief;
- the subject member’s Bureau/District Commanding Officer;
- the IAB Commanding Officer.

Should the case involve a conflict of interest with the Deputy Chief, or involve a member who reports to the Deputy Chief without a Division Chief in his or her chain of command, the Deputy Chief will appoint a Division Chief to be the Chair.

Should the case involve subject members with different chains of command, one board will be convened for all involved subject members.

b. The CRB will review the case, discuss the recommendation of finding from the IAB Commander and decide one or more of the following:

- send the case back to IAB for more investigation;
- accept, reject, or modify some, all, or none of the recommended findings of the IAB Commander.

If the CRB determines a finding of sustained for any allegation of misconduct, or noncompliance for any compliance review, the CRB will make a recommendation of discipline to the Chief of Police. The IAB Commander will not participate in the discipline discussion or recommendation, other than to provide comparable discipline examples. The CRB may convene more than once to determine findings and then discipline.

If the CRB determines a finding other than sustained for any allegations of misconduct, the board may still recommend additional training, counseling, or other intervention for the involved subject member(s).

c. The affected subject member(s) will be informed of the findings and, if applicable, discipline recommendation(s) of the CRB in a letter from the Chair of the CRB. A copy of the letter will be forwarded to the IAB for inclusion in the case file.

All formal investigations will be maintained in a complaint file in the IAB.

Any formal investigation with a disposition code of policy failure will require a memorandum explaining in detail the actual failure. The memo will be sent to the Professional Standards Section for further review.
a. **Purpose:**

The purpose of this portion of the policy is to define the use of a Negotiated Disciplinary Settlement Agreement (NDSA) process in order to provide efficient resolution of Departmental Directives violations requiring limited formal discipline without the necessity of a formal Internal Affairs investigation.

Misconduct allegations do not require extensive investigation when clear and verifiable evidence demonstrates that a violation of Departmental Directives and/or City of Aurora policies and procedures has occurred, and/or the accused member does not contest the allegations. In such cases, an NDSA can provide a more efficient, timely resolution using minimal Departmental resources. It is beneficial to all parties involved to resolve complaints fairly and efficiently in order to maintain public trust in the Department and to provide an improved sense of procedural justice for its employees.

NDSAs are offered at the discretion of the Chief of Police or designee and are not a “right” or “entitlement.” At any point during the process, subject to the final approval by the Chief of Police or designee, the matter may be referred to the IAB for a formal IAB investigation.

b. **NDSA eligibility determination by IAB:**

When an internal or external complaint is entered in the AIM system, it is immediately routed to IAB for review per Department Directive 10.2.1. The IAB Commander or designee will review the complaint to determine if it should be assigned to IAB for a full IAB investigation or reassigned to the subject member’s Commander for either a Preliminary Investigation or an NDSA. For purposes of this Directive 10.2.8, “Commander” refers to the highest ranking command officer or civilian manager below the rank of Division Chief in the member’s chain of command. Such members shall be eligible and designated to conduct the NDSA process.

The IAB Commander or designee will add notes to the AIM tracking indicating that the matter is eligible for the NDSA process. The tracking note will include a range of discipline based on the comparable discipline for prior similar policy violations resulting in a 40-hour suspension or less. The tracking will be set as due in 5 days to ensure that the process continues in an expedient manner.

c. **Eligible and Ineligible Matters:**

The NDSA is primarily designed for situations where the facts of what occurred are not in dispute and there is no need for additional investigation, including, but not limited to, the following:
1. The incident is witnessed by other Department members or clearly documented on Body Worn Camera or other surveillance video, which establishes little dispute as to the underlying facts of the incident.

2. The member failed to appear for a duty assignment or court.

3. Unintentional Discharge of a Weapon (either lethal or less-lethal not involving injuries, significant property damage, or other aggravating factors).

4. Police Vehicle Collisions where the Collision Review Process has determined enough points exist for formal discipline consisting of a written reprimand or suspension of 40 hours or less.

5. The subject member self-reports or admits to a Directives violation eligible for the NDSA process.

The NDSA will NOT be used in the following circumstances:

1. When a member is arrested or charged with a violation of municipal, state, or federal law.

2. Where the anticipated or comparable discipline, generally, is greater than a 40-hour suspension.

3. Any allegation of misconduct that is the subject of pending or anticipated civil litigation, unless authorized by the Chief of Police.

4. Any allegation requiring additional investigation, numerous witness interviews, or evidence collection that would be more efficiently and effectively handled by a formal IAB investigation.

5. When additional information is discovered during the NDSA process that would make the incident ineligible for the NDSA process for any reason.

6. When a formal IAB investigation is ordered by the Chief of Police or IAB Commander.

7. Upon request of the Commander or accused member when the member cannot reach a NDSA with his/her Commander.

d. NDSA Process and Presentation Meeting

Upon receipt of the complaint from IAB indicating that the complaint qualifies for a NDSA, the member’s Commander will schedule a Presentation Meeting with the accused member to discuss the complaint and the NDSA process. Ideally, this meeting should be scheduled as soon as practical within 10 working days from the date the
Commander receives the complaint from IAB, however, allowances may be made for previously scheduled leave, training, emergencies, etc.

The member’s Commander will conduct the Presentation Meeting in accordance with existing Department Directive 10.2.3 Preliminary Administrative Investigations and will electronically record the meeting. Most complaints that qualify for the NDSA process should not require additional investigation when assigned to the Commander; however, nothing in this Directive prohibits the Commander from delegating any additional investigative responsibilities required to an appropriate supervisor in his/her chain of command.

At the Presentation Meeting, the Commander will present the accused member with a Notice of Investigation (APD Form 112) detailing the incident and Directives violation, as well as the proposed discipline based on the comparable discipline for similar violations.

The Commander will discuss the incident with the accused member and will provide the accused member with access to any supporting evidentiary documentation, body worn camera video, etc. that was used in the investigation.

The Commander should allow the accused member the opportunity to present any facts in mitigation at this time. Based on the information received during the Presentation Meeting, the Commander may elect to adjust the proposed discipline up or down within the guidelines of the NDSA process listed below.

e. Options Following Presentation Meeting

At the conclusion of the Presentation Meeting, the accused member has three options:

1. **Immediate Resolution**: The member may elect to immediately accept the sustained allegation and the Commander’s recommended discipline/outcome. If the member selects Immediate Resolution, the NDSA Resolution Form 233 will be completed by the member and his/her Commander, who will forward it to the Chief of Police for approval and signature. The Chief’s office will return the signed original form to the IAB Commander who will ensure that it is placed in the member’s Internal Affairs file. The matter is considered resolved at this point.

2. **Reflection Period**: The member may elect to have a time period of up to 5 calendar days to consider the findings and the recommended discipline/outcome prior to making a decision. No later than the end of that 5-day period, the member must either select option #1 above or option #3 below. If the member fails to respond, option #3 will be deemed the default option selected.
If the member does not select Immediate Resolution of the issue at the Presentation Meeting and opts for a Reflection Period, the Commander will immediately schedule a Settlement Meeting as soon as practical and as close to the expiration date of the Reflection Period as practical, but no more than 10 calendar days out. Again, allowances may be made for previously scheduled leave, training, emergencies, etc.

The date of the scheduled Settlement Meeting and expiration date of the Reflection Period, if selected, will be documented in this manner as well. If a reflection period is selected, the Commander will track the IAB Commander and the accused member in AIM, with the due date set for 10 days and the Role set as: “FYI only”.

The Settlement Meeting may be rescheduled for emergencies or court attendance that would prevent the member from attending the Settlement Meeting and/or prevent him/her from communicating with his/her Commander on the date of the Settlement Meeting.

3. Request a Formal Internal Affairs Investigation: The member may request, in writing, to have the case formally investigated by the IAB subject to the approval of the Chief of Police or designee (IAB Commander).

The Commander shall document the member’s selection of one of the above options in the tracking notes in AIM. The member shall be tracked at this time, and shall electronically sign and close his/her tracking in the AIM entry.

f. Settlement Meeting

Should the member select option #2, the Commander will schedule the Settlement Meeting, which is the final meeting in the NDSA process. The accused member will NOT be allowed a third opportunity to consider the sustained allegations and recommended outcome in the NDSA process.

During the time prior to the scheduled Settlement Meeting, the member shall consider the settlement proposal and be prepared to discuss the recommended outcome. The member shall be prepared to present any facts in mitigation and make a decision at the Settlement Meeting. The member may also secure the advice or attendance of any APA/FOP observer at the Settlement Meeting; however, the availability of an observer shall not be cause to unreasonably delay any scheduled meeting. The participation of member observers in the NDSA process is governed by Department Directive 10.2.1 concerning observers. The Acceptance of Observer Conditions Form (APD 111) will also be used during the NDSA process if an observer is present and will be uploaded into AIM.
At any point prior to or during the Settlement Meeting, the member may opt for a NDSA if the accused member communicates this to his/her Commander in writing. The NDSA Resolution Form 233 will be completed by the member and the Commander, and forwarded to the Chief of Police for approval and signature. The Chief’s office will return the signed original form to the IAB Commander who will ensure that it is placed in the member’s Internal Affairs file. The matter is considered resolved at this point.

At the Settlement Meeting, the accused member may negotiate the recommended discipline, which must be within the range established by IAB based on comparable discipline for similar violations. The member’s APA/FOP Observer may be present at the Settlement Meeting, but is only there in an advisory role and may not directly negotiate for the member. The observer is still bound by the conditions of Department Directive 10.2.1.

The member and the Commander should make every effort to negotiate a settlement. Cooperation and communication by both the member and the member’s Commander is essential for the effectiveness of the NDSA process.

At the conclusion of the Settlement Meeting, the available results are:

1. The member accepts responsibility and the negotiated settlement. The member and his/her Commander sign the NDSA Resolution Form (APD 233) indicating resolution of the matter, or:

2. The accused member does not communicate a selection during or before the designated Settlement Meeting date/time and/or the member fails to appear at the Settlement Meeting, the member will be deemed to have selected to have the matter sent to the IAB for a formal IAB investigation (Option #3 above). The Commander will document this in his/her tracking notes and track the case back to the IAB Commander in AIM.

3. The member does not accept responsibility, does not agree to sign the NDSA Resolution Form, and/or does not agree with the discipline recommended. If the accused member is unable or unwilling to accept responsibility for the sustained allegation(s) after the Presentation Meeting, Reflection Period, and Settlement Meeting, and/or refuses to sign the NDSA Resolution Form, and/or does not agree with the discipline proposed by the Commander, then the Commander will track the complaint back to the IAB Commander in AIM.

The IAB Commander, upon approval of the Chief of Police, will then assign the investigation to an IAB investigator for a formal IAB investigation consistent with Department Directives. The member shall be given the opportunity to review the NOI and any audio recordings from the NDSA process prior to any interviews conducted by IAB.
If the accused member has agreed to accept responsibility for his or her behavior but disagrees only with the extent of discipline proposed, every effort should be undertaken to resolve the disagreement during the Settlement Meeting to avoid a formal IAB investigation.

The member’s Commander and/or the accused member may request, at any point in the process, the assistance of the IAB Lieutenant or IAB Commander to assist with the negotiations to resolve the matter. However, if an acceptable resolution cannot be agreed upon, the case shall be returned to the IAB for a formal IAB investigation upon approval of the Chief of Police.

If the matter is resolved at either the Presentation or Settlement Meeting, then that shall constitute a Pre-disciplinary Hearing as defined by Department Directive 10.2.9. As such, that meeting shall be conducted in accordance with the provisions of that Directive and shall be digitally recorded. The member’s Commander is responsible for ensuring that the digital recording of the meeting is uploaded into the AIM system.

g. Extraordinary Circumstances Extension

If the accused member’s Commander determines during the Presentation or Settlement process that extraordinary circumstances exist and that additional time for review or consideration of new information would be in the best interest of the Department or accused member, the member’s Commander may request an extension of up to 10 additional calendar days with the approval of the IAB Commander.

h. Confidentiality:

To assure the integrity of an ongoing investigation prior to closure of the complaint, the member and any department members involved in the NDSA process are required to maintain the confidentiality of the complaint and investigation as required by Department Directive 10.2. Failure to maintain confidentiality may result in separate disciplinary action.

i. Additional Information:

Commanders, with the approval of the Chief of Police, and in accordance with APD Directive 10.2.11, are authorized to hold in abeyance all or part of any suspension time imposed. For comparable discipline purposes, the full discipline, including any deferred or suspended portions will be the discipline used for comparison. Nothing in this Directive shall limit or preclude exoneration of the accused member, or the resolution of the matter by alternatives to formal discipline if compelling mitigating facts are presented during the NDSA process which support exoneration or the use of an alternative to formal discipline as being in the best interest of the Aurora Police Department and/or the accused member.
Members who elect to negotiate discipline through the NDSA process will waive their right to an IRB and right to appeal the imposed discipline to the Civil Service Commission. The NDSA Form will notify the member of this stipulation and the member’s signature on the form will serve as his/her acknowledgment that he/she is voluntarily relinquishing his/her right to appeal the discipline. In addition, the member also acknowledges that he/she relinquish his/her right to the Investigative Review Process (Department Directive 10.2.5) and Independent Review Board (Department Directive 10.11).

j. Post-NDSA formal IAB investigation

Should the Department receive any new information regarding the original matter that, if the information had been known prior to or during the NDSA process would have required the case to be sent to IAB for a formal IAB investigation or would have resulted in discipline greater than the original comparable discipline, a formal IAB investigation may be initiated. Any discipline served as a result of the original NDSA case, if already closed, will be taken into consideration if the member is sustained on any subsequent Internal Affairs investigation that arises from the same complaint or incident.

10.2.9 Predisciplinary Hearing

In accordance with Aurora City Charter §3-16(8)(b), prior to the imposition of any discipline other than a reprimand, the member shall be provided with a predisciplinary hearing before the Chief or a designee. At this hearing, the member shall be given:

- a copy of the specification of the charges;
- a copy of the written report of the evidence supporting the charges;
- a copy of the summary of the disciplinary record of the member, if any;
- an opportunity to make a statement in response to the charges and written report. The statement, if made, shall be transcribed.
- the right to submit a written statement to the Chief within three (3) days after the predisciplinary hearing.

At the expiration of the three (3) business day period, the Chief may proceed in accordance with the provisions of charter. The Chief or designee conducting the hearing may extend the three-day period at his or her discretion.

The member will be informed of the date of the predisciplinary hearing in writing by the Chief of Police. The letter will include any recommendations for discipline received by the Chief, or other intervention determined by the CRB. The letter will also include the next steps in the process for the member to include if an Independent Review Board (IRB) is automatically required for the sustained charges, and that the member can request an IRB, in writing, at the predisciplinary hearing or within three
10.02 COMPLAINT AND DISCIPLINE PROCEDURES FOR SWORN MEMBERS

10.02.10 Notice of Investigation

A member will be issued a Notice of Investigation (NOI) if he or she is the subject member of a Preliminary Administrative Investigation, or a Formal Investigation, or:

- the member is required to submit financial disclosure statements;
- the member is required to submit to any test, e.g. breath test, blood test, urine sample, hair follicle test, fitness for duty, etc., as deemed necessary for any internal investigation. Random breath test, blood test, urine sample, or hair follicle test because of a member’s rank or assignment will not constitute the need for an NOI.

The NOI will include a synopsis of the incident under investigation outlining the specific nature of, and the member's status, in the investigation. The allegations of misconduct for which the member will be interviewed will be documented, not necessarily in policy specific language, in the space provided.

Prior to an NOI interview, the member will review the NOI form, sign it and will be provided a copy of the signed and dated form. If during an interview additional allegations are identified, the supervisor will stop the interview, prepare an additional NOI, and serve it to the subject member.

- Supervisors conducting Preliminary Administrative Investigations will not rely on a "blanket statement" to put the member on notice that other issues of misconduct will be investigated.

Members involved in Critical Incidents may be issued a Notice of Investigation – Critical Incident. This NOI is only issued under the authority of the Internal Affairs Bureau Commanding Officer. Anytime a Critical Incident is suspected to have occurred, the IAB Commanding Officer will be contacted prior to any Preliminary Investigation or issuance of an NOI.

Subject members told of an investigation will not discuss any knowledge they have of the case with any other member or outside source. Nothing in this paragraph will interfere with the subject member’s privileged conversations with his or her attorney, licensed counselor, labor representative, peer support member, chaplain, or religious counselor.

Any other member who learns of an investigation will not discuss any knowledge he or she has of the case with any other member or outside source other than the IAB, supervisors conducting an investigation related to the case, criminal investigators conducting an investigation related to the case, and/or among the executive staff.
A case is considered active when the case is received by any department member. The case remains active until the conclusion of all appeals to the Civil Service Commission on all sustained violations for all members involved in the case or there are no findings of sustained violations for any member.

10.2.11 Observer/Representative Compensation

a. Observer

If a sworn member is asked to participate as an observer during an accused subject member's interview (including initial inquiries, preliminary, formal and IAB interviews), the following procedures will be adhered to:

- If authorized and on-duty, the member will be allowed use of duty time to serve as an observer;
- Should the requested member be off-duty, he/she will receive straight-time compensation for time spent in an observer role.

b. Representative

Representatives participating in the IRP will be allowed up to four (4) straight-time compensation hours to assist with the review of a completed Internal Affairs Bureau case. If more than four hours is reasonably required to perform this task, the representative may request approval of the Deputy Chief for additional time compensation. The Internal Affairs Bureau Commanding Officer will make an entry into the current scheduling system for the representative.

Representatives participating in the IRB process will be allowed straight-time compensation for that time spent in hearing. The Internal Affairs Bureau investigator present at the IRB hearing will enter the appropriate time into the current scheduling system for the representative.

10.2.12 Scope of Authority for Corrective Actions and Discipline

a. All Supervisors may impose the following performance oriented actions:

- Counseling;
- Training;
- Oral Reprimand;
- Performance Appraisal Entry;
- Corrective Action Report.
b. Sergeants may recommend disciplinary action be imposed, but will not formally participate in the disciplinary process.

c. Command Officers may recommend disciplinary action. If a written reprimand is approved by the Chief of Police or designee, a command officer will deliver the reprimand to the subject member. The issuance of discipline, to include a written reprimand, will not be delegated to a sergeant.

When a command officer requests the issuance of a written reprimand, the command officer will complete and submit the written reprimand with an investigative summary through the chain of command to the Chief of Police or designee for approval prior to issuance.

d. The Chief of Police may relieve a member from duty as an administrative action pending further investigation. Additionally, the Chief of Police may impose the following discipline, subject to provisions in City Charter:

- Written Reprimand;
- Reimbursement;
- Fine;
- Suspension;
- The Chief may, at his or her discretion, authorize that the obligation to fulfill suspension time be met by substituting a commensurate reduction in annual leave time;
- Demotion in Rank or Grade;
- Dismissal from the Department.

The Chief of Police may defer or suspend all or part of any discipline he or she imposes. For comparable discipline purposes, the full discipline, including any deferred or suspended portions will be the discipline used for comparison.

When officer misconduct results in dismissal from the Department, the following information will be made available, in written communication, to the member:

- Reason for dismissal;
- Effective date of the dismissal;
- Status of accumulated fringe and retirement benefits after the dismissal;
- Content of the officer's employment record in or with relation to the dismissal.

10.2.13 Records of Corrective Action Reports and Disciplinary Action Reports

a. Corrective Action Reports: Corrective Action Reports are not disciplinary actions. They will be maintained in the member's working file for one (1) year or until the member's next scheduled evaluation, whichever is longer. Corrective Action
Reports will not be forwarded to the IAB, nor forwarded to the member's permanent 201 file.

b. Disciplinary Action Reports: All disciplinary action reports will be forwarded to the IAB following conclusion of the investigation and issuance of the applicable orders. All supervisor documentation concerning Disciplinary Action Reports (including Written Reprimands) will be forwarded to the IAB along with the report. A Written Reprimand, Fine, Suspension, Reimbursement, Demotion or Dismissal order will be maintained according to the retention rules of the IAB, and a copy forwarded by IAB to the member's permanent 201 file kept by the City’s Human Resources Department.

Members may request Written Reprimands be removed from their 201 file after two (2) years from date of issuance. Requests must be submitted in writing to the Chief of Police. Only upon written approval of the Chief of Police or designee, will a Written Reprimand be removed from a member’s personnel file.

10.2.14 Appeal of Disciplinary Action

Fines, Suspensions, Reimbursements, Demotions or Dismissals of sworn members arising from disciplinary action are subject to appeal as stated in Department Directive 10.5 - Rights of Members under Administrative Investigation.

10.2.15 Supervisor Responsibility

a. Supervisory members will initiate an Initial Inquiry when the misconduct observed or alleged is within the scope of their authority.

b. Supervisory members who receive or observe an allegation of misconduct will complete the Initial Inquiry in an expeditious manner and forward to the Internal Affairs Bureau.

c. Supervisory members conducting a Preliminary Administrative Investigation will complete the investigation in an expeditious manner.

d. Supervisory members investigating a complaint will complete the Initial Inquiry as expeditiously as possible. The completed Initial Inquiry and all supporting documentation will be forwarded through the complaint management system, to the Internal Affairs Bureau. The subject member’s/members’ chain of command will be tracked and their tracking closed for notification purposes in the complaint management system.

e. Supervisory members discovering potential policy failures because of an investigation will complete a summary memorandum and forward the information to the Professional Standards Section in an expeditious manner.
f. Command personnel who receive a completed Initial Inquiry, or Preliminary Administrative Investigation through the chain of command will review, make recommendation(s), if any, and forward to the next level in the chain of command within five (5) working days.

g. Command officers may impose emergency relief from duty.

10.2.16 Individual Member Responsibility

a. All members of the Department will perform the duties and assume the obligations of their rank in the reporting of complaints or allegations of misconduct.

b. Members are required to cooperate in a department investigation and to answer questions by, or render material and relevant statements to, a supervisor or an Internal Affairs Investigator. Members will answer all questions fully and truthfully and will not omit any material facts.

c. Any member may be required to submit to a medical or laboratory examination at the agency's expense when the examination is specifically directed and narrowly related to a particular internal investigation.

d. Any member may be required to be photographed, to participate in a line-up, to submit to a fingerprint comparison and/or to submit a financial disclosure statement when such actions are material to a particular internal investigation.

e. Members may be required to be photographed or fingerprinted for records kept by the Chief of Police and/or the IAB.

f. Members who are the subject of a departmental administrative investigation (including preliminary and formal) are not permitted to conduct a parallel investigation or inquiry into the matter. All members are prohibited from participating in a parallel investigation or inquiry by or on behalf of a member subject to a departmental investigation.

10.2.17 Wearing of Weapons

Involved members and their observer/representative will not be armed during interviews with Internal Affairs Investigators, the IRP process, or during pre-disciplinary/disciplinary hearings with the Chief of Police or designee.

10.2.18 Records Maintenance and Retention

The Internal Affairs Bureau maintains records of all complaints received against the Department and its members. These records are stored electronically, or if not stored electronically, in a secure file cabinet separate from other Department records.
Maintenance and purging of records will be accomplished in accordance with relevant Department Directives, Procedures, City Policy, and the State of Colorado Municipal Records Retention Schedule governing police administrative actions.

Any formal investigation with a disposition code of sustained will require a statement of action taken.

All member and observer notes created in the IRP processes will be destroyed after the case is concluded and no longer active as defined in 10.2.1 above.

All notes and records created in the IRB processes will be destroyed after the IRB is concluded save the final recommendation memo to the Chief of Police, which will remain as part of the case file.
10.02 COMPLAINT AND DISCIPLINE PROCEDURES FOR SWORN MEMBERS

The following procedures apply to all allegations of misconduct except that complaints determined to be related to internal discrimination or harassment will be handled in accordance with Directive 10.9 - Discrimination and Harassment Complaint Procedure.

Pursuant to city charter, the Chief of Police determines discipline within the Police Department. The Internal Affairs Bureau (IAB) is supervised directly by the Chief. Nothing in this order precludes the Chief from monitoring or directly supervising an Internal Affairs investigation, from delegating this responsibility to the Deputy Chief or another senior command officer, or from consulting with the Division Chiefs or Deputy Chief about an investigation or proposed discipline at any stage in the process.

At any time during the processes addressed in this directive when there is a conversation between a supervisor and member involving a complaint, a supervisor may decide, or the member may request, that the following advisement be read into the record:

i. You are being ordered to answer questions and/or provide a written statement in connection with an internal administrative investigation.

ii. Your answers to those questions and/or your written statement must be truthful and complete. You must answer truthfully and completely all questions asked of you. Failure to do so will result in discipline, which could include termination.

iii. The scope of the investigation is limited to activities, circumstances, events, conduct, or acts, which pertain to the incident that is the subject of the investigation.

iv. The Aurora Police Department is requiring this information solely and exclusively for internal administrative purposes.
v. No truthful information will be used in any criminal proceeding against you.

vi. If the information you are ordered to provide is used for any purpose other than an internal administrative investigation, you may invoke your constitutional right to silence under the fifth and fourteenth amendments to the United States Constitution and rely specifically upon protections afforded you under the holdings in Garrity v. New Jersey

10.2.1 Definitions

Active Case

A case is considered active when the case is received by any department member. The case remains active until the conclusion of all appeals to the Civil Service Commission on all sustained violations for all members involved in the case or there are no findings of sustained violations for any member.

Initial inquiry

The initial actions taken by any supervisor who receives a complaint or becomes aware of a possible violation of policy, to determine the fundamental elements of such a violation. See further detail in Section 10.2.5 of this directive.

Preliminary Administrative investigation

Steps taken by a supervisor to advance the investigation of a complaint beyond an initial inquiry or as the primary process to determine, among other possible factors: the degree of violation, where in the organization to best resolve the complaint and the potential level of resulting corrective action or discipline. See further detail in Section 10.2.6 in this directive.

Finding

The resolution or outcome of an internal investigation based on a complaint and supported facts and circumstances developed within that internal investigation. An investigated complaint will result in one of the following findings:

a. Unfounded—A finding which indicates the act(s), complained of did not occur or did not involve police personnel.

b. Exonerated—A final finding of a complaint of misconduct, which indicates the alleged action did occur but that it was justified, lawful, and/or proper.
c. Not Sustained—A final finding of a complaint of misconduct that indicates an investigation failed to discover substantial evidence to prove or disprove the allegations made in the complaint.

d. Policy Failure—The allegation is true, however, the action of the agency or member were in conformance with existing agency policy which led to an undesirable result; or the member’s or agency’s action violated existing policy even though such actions were reasonable given the totality of circumstances.

Any formal investigation with a disposition code of policy failure will require a memorandum explaining in detail the actual failure. The memo will be sent to the Professional Standards Section for further review.

e. Sustained—A policy violation will be sustained if, after considering all of the supporting and contradicting evidence, violation of the policy has been established by a preponderance of the evidence. The term “preponderance of the evidence” means that the proposition is more probably true than not.

f. Expired—A finding utilized only by the Chief of Police regarding a complaint received three or more years after the alleged event. All criminal complaints will be investigated to the extent possible regardless of the statute of limitations. Nothing precludes the Chief of Police from investigating serious allegations no matter how old they are determined to be.

For compliance reviews such as but not limited to a Force Review Board outcomes, the following recommendations can be forwarded:

a. Compliance—A finding that indicates the member acted in accordance with policy.

b. Noncompliance—finding that indicates the member did not act in accordance with policy.

10.2.2 Scope of Authority for Corrective Actions and Formal Discipline

a. All Supervisors may impose the following performance oriented actions:

- Counseling;
- Training;
- Oral Reprimand;
- Performance Appraisal Entry;
- Corrective Action Report.
b. Sergeants may recommend disciplinary action be imposed, but will not formally participate in the disciplinary process.

c. Command officers may recommend disciplinary action. If a written reprimand is approved by the Chief of Police or designee, a command officer or equivalent rank will deliver the reprimand to the subject member.

When a command officer requests the issuance of a written reprimand, the command officer will complete and submit the written reprimand with an investigative summary through the chain of command to the Chief of Police or designee for approval prior to issuance.

d. The Chief of Police may relieve a member from duty as an administrative action pending further investigation. Additionally, the Chief of Police may impose the following discipline, subject to provisions in City Charter:

- Written Reprimand;
- Reimbursement;
- Suspension (The Chief may, at his or her discretion, authorize that the obligation to fulfill suspension time be met by substituting a commensurate reduction in annual leave time);
- Demotion in Rank or Grade;
- Dismissal from the Department.

The Chief of Police may defer or suspend all or part of any discipline he or she imposes. For comparable discipline purposes, the full discipline, including any deferred or suspended portions will be the discipline used for comparison.

When officer misconduct results in dismissal from the Department, the following information will be made available, in written communication, to the member:

- Reason for dismissal;
- Effective date of the dismissal;
- Status of accumulated fringe and retirement benefits after the dismissal;
- Content of the officer's employment record in or with relation to the dismissal.

10.2.3 Advisement

It shall be presumed by members that the following advisement and rules will apply to conversations between a supervisor and employee when the conversation is narrowly focused on the resolution of a complaint.

a. You are being ordered to answer questions and/or provide a written statement in connection with an internal administrative investigation.
b. Your answers to those questions and/or your written statement must be truthful and complete. You must answer truthfully and completely all questions asked of you. Failure to do so will result in discipline, which could include termination.

c. The scope of the investigation is limited to activities, circumstances, events, conduct, or acts, which pertain to the incident that is the subject of the investigation.

d. The Aurora Police Department is requiring this information solely and exclusively for internal administrative purposes.

e. No truthful information will be used in any criminal proceeding against you.

f. If the information you are ordered to provide is used for any purpose other than an internal administrative investigation, you may invoke your constitutional right to silence under the fifth and fourteenth amendments to the United States Constitution and rely specifically upon protections afforded you under the holdings in Garrity v. New Jersey.

10.2.4 Complaint Procedures

The Aurora Police Department utilizes an automated complaint process. This process requires members to access the complaint management system or the internet in order to fill out the appropriate complaint forms.

All information contained in a complaint report is considered confidential. Any member of the department who initiates or otherwise handles a complaint will keep the information confidential.

a. Allegations from outside the department

Citizen/non-member complainants may use the computer version of the complaint form found on the internet, but are not restricted to this format. Complainants may utilize the paper version of the complaint form or any other written format. Complainants desiring to lodge a complaint verbally will be encouraged to complete a written complaint, but not required to do so. Supervisors in the department will accept all complaints in any reporting format the citizen chooses. Complainants may also contact the Internal Affairs Bureau directly.

Supervisors accepting a complaint, either verbally or in writing, will enter the complaint into the complaint management system. Any written documentation
of the complaint provided by the citizen to a member will be scanned into an electronic format and attached to the electronic complaint as an exhibit.

Department supervisors will accept any complaint made against any member of the department in a professional manner. Supervisors may attempt to resolve the complaint, but will not attempt to dissuade any person from lodging a complaint against any member of the department. If the complaint is based on a misunderstanding or question of policy or procedure, and the supervisor is able to resolve the complaint, the complaint will still be added to the complaint management system as a citizen’s inquiry and forwarded as any other complaint. The supervisor will note that the complaint was resolved with the complainant in the narrative portion of their entry.

b. The “citizen’s inquiry” is to document that a citizen called, should the complainant later imply that his/her concern was not taken seriously, but carries no points in the Personnel Early Intervention System (PEIS) and is not deemed a complaint. A call from a person, to ask a question is not making a complaint, and need not be documented unless documentation in the complaint system is determined to be appropriate by a supervisor or command officer. Likewise, a complaint based solely upon a dispute over the guilt or innocence of the complainant in the matter of a traffic violation or criminal summons need not be documented unless documentation in the complaint system is determined to be appropriate by a supervisor or command officer. The complainant will be referred to the appropriate court. The member or investigating supervisor may provide information related to the court process but should not discuss the details of the case. This is not a complaint and should not be entered into the complaint system as such.

Responses to surveys or questionnaires will not be treated as complaints.

Any non-supervisory member contacted by a citizen wishing to lodge an allegation against any member will immediately put the citizen in contact with a supervisor. If for any reason a supervisor is not immediately available, the member will obtain the citizen's name and phone number, the nature of the allegation, and forward this information to a supervisor as soon as possible, but prior to the end of shift. The non-supervisory member will also give the citizen the information on how to file a formal complaint utilizing the on-line complaint system found on the internet.

If the complainant does not wish to speak to a supervisor at the time of making the complaint, the member in contact with the citizen will provide the citizen the access information to file a complaint on-line.

Complaints received in the Chief’s Office by mail, fax, email, or other means will be forwarded to the subject member’s immediate supervisor for entry into the
complaint management system and the supervisor will treat the complaint as if it was received directly by the supervisor.

Anonymous complaints from outside the Department will be accepted and investigated in the same manner as all other allegations.

c. Allegations by Members (to include all APD employees)

Members who wish to make an allegation against a sworn member are authorized to report directly to the Internal Affairs Bureau (IAB), his/her supervisor, or the supervisor of the member. Members who initiate an allegation against another member may enter their complaint into the on-line complaint system, or the complaint management system listing themselves as the complainant, or if the member chooses not to, the receiving supervisor or IAB Investigator will enter the information into the complaint management system.

The complaining member will not indicate the existence of or divulge the contents of his or her allegation to any other agency, officer, or individual, without proper authorization. The receiving supervisor will not indicate the existence of or divulge the contents of the allegation to any other agency, officer, or individual, without proper authorization. Nothing in this paragraph will interfere with the complaining member’s privileged conversations with his or her attorney, licensed counselor, labor representative, peer support member, chaplain, religious counselor, or reporting his or her information to an appropriate legal authority.

d. Allegations by Supervisors

When a supervisor wishes to make a complaint regarding a subordinate because he or she witnesses or otherwise becomes aware of potential misconduct, and he or she is the first or second line supervisor of the subject member(s) allegedly involved, he or she will initiate an initial inquiry. If not the subject member’s first or second line supervisor, he or she will gather enough information so that an initial inquiry can be started by the member’s supervisor. The supervisor will enter or cause to be entered a complaint covering his or her allegation of wrongdoing into the complaint management system. Allegations made against more than one member, by a first or second line supervisor of one of the subject members, shall be considered initiated by a first or second line supervisor of all of the subject members, and an initial inquiry should commence.

Minor workplace performance issues, not received as a complaint from outside the department or from another member that can be corrected through training, counseling, or the issuance of a Performance Appraisal Entry (PAE) are not considered misconduct needing an initial inquiry and complaint entry.
e. Allegations Contained in Legal Documents

If allegations of misconduct are contained in legal documents, e.g., Notices of Intent, Complaints, etc., and there are no formal complaints against the member(s) involved other than those contained in such documents, no investigation will be conducted, unless ordered by a chief after consultation with the City Attorney’s Office/Police Legal Advisor.

f. Routine and Customary Communication

Nothing in this directive will prohibit supervisors from performing or engaging in routine, normal, and/or customary supervisory and leadership communications for the purposes of counseling, training, and resolving minor discrepancies.

If answers to routine and customary questions somehow indicate to a supervisor or above that an initial inquiry or more formal investigation is appropriate, the processes outlined in, 10.2.5, and subsequent relevant sections, shall be followed. Routine and customary communication will not be used as a pretext to avoid the initial inquiry or investigation conditions in this directive.

g. Delayed Complaints

Complaints received three years or more after the alleged event will be assessed by the Chief of Police or designee to determine the degree of investigative resources to be invested. All criminal complaints will be investigated to the extent possible regardless of the statute of limitations. Nothing precludes the Chief of Police from investigating serious allegations no matter how old they are determined to be.

h. Reporting

On a quarterly basis, the Internal Affairs Bureau Commanding Officer will provide a report to the Chief of Police detailing the status of all complaints entered into the complaint management system.

10.2.5 Initial Inquiry

All complaints will generally start with the named member's immediate supervisor; however, any supervisor may receive and conduct an initial inquiry into a complaint. Additionally, if the supervisor believes the alleged conduct is such that it may result in discipline beyond a 40-hour suspension, or bring the agency into disrepute, the supervisor may forward the complaint directly to IAB for review and determination.
An initial inquiry is designed to gather necessary facts and information concerning the allegation, to determine if any law, ordinance, directive, standard operating procedure, or other city policy may have been violated or a potential for a policy failure exists. The supervisor will ask the alleged subject member(s) questions narrowly focused to the specific complaint to determine clarifying facts, except where the allegation against the subject of the initial inquiry implies potential criminal conduct, in which case Department Directive 10.10: Criminal Investigations Involving Members will be adhered to. The supervisor will advise the subject member that he or she is conducting an administrative investigation prior to asking these questions. These questions, narrow in scope to the complaint, will be focused on establishing the facts of the case to determine: if a violation of policy has occurred, who the violator(s) is/are and the degree of violation.

If, through this process, or on its face, it appears there is a violation which if sustained, would result in discipline greater than a written reprimand, the supervisor will serve a Notice of Investigation and comply with associated protocols as defined in the following sections.

10.2.6 Preliminary Administrative Investigation.

a. Members are reminded that they are required to cooperate in a department investigation and to answer questions by, or render material and relevant statements to, a supervisor or an internal affairs investigator. Members will answer all questions fully and truthfully and will not omit any material facts. The requirement to answer questions as stated in this directive is compelled and is not voluntary. Failure or refusal to fully and truthfully cooperate, may subject the member to discipline up to and including termination.

b. Should the supervisor decide, or the member request, the following advisement shall be read into the record:

   i. You are being ordered to answer questions and/or provide a written statement in connection with an internal administrative investigation.

   ii. Your answers to those questions and/or your written statement must be truthful and complete. You must answer truthfully and completely all questions asked of you. Failure to do so will result in discipline, which could include termination.

   iii. The scope of the investigation is limited to activities, circumstances, events, conduct, or acts, which pertain to the incident that is the subject of the investigation.

   iv. The Aurora Police Department is requiring this information solely and exclusively for internal administrative purposes.
v. No truthful information will be used in any criminal proceeding against you.

vi. If the information you are ordered to provide is used for any purpose other than an internal administrative investigation, you may invoke your constitutional right to silence under the fifth and fourteenth amendments to the United States Constitution and rely specifically upon protections afforded you under the holdings in Garrity v. New Jersey.

c. As part of a complete and thorough investigation, the investigating supervisor will make reasonable attempts to contact and discuss the incident with the complainant(s). The investigating supervisor should speak with witnesses, including other involved members to determine the scope and nature of the allegation. Whenever possible, a written statement will be obtained from the complainant and other available witnesses. All written statements will be scanned and attached to the electronic report as an exhibit in the complaint management system. During this inquiry, the investigating supervisor will determine if the allegation is merely a lack of understanding on the part of the complainant, or misconduct by the involved member.

If a procedural or statutory explanation exist, or if the complaint emanates solely from a lack of communication, or miscommunication, the supervisor should attempt to resolve the case with the complainant by explaining appropriate statutory or procedural requirements or by addressing the miscommunication. The complaint can be categorized as resolved in the tracking narrative of the report in the complaint management system and tracked through the chain of command to the commander or equivalent within the respective chain of command for review and conclusion.

The supervisor may also recommend mediation based on the criteria above, described further in Directive 10.12: occurrence.

d. If the initial inquiry reveals a violation committed by a member, which, if sustained, would result in the issuance of a suspension of 40 hours or less, the investigation may be completed by the initiating supervisory officer’s chain of command. To make this determination, the case will be tracked in the complaint management system to the commander or equivalent rank through the chain of command for review.

The commander or equivalent position in that chain of command will determine, based on the investigation, whether the case will be concluded at the district/bureau/section level, or whether it should be forwarded to the Internal Affairs Bureau for further action.

e. If the initial inquiry reveals the possibility of criminal conduct on the part of the member, the investigation will be handled in accordance with Department Directive 10.10: Criminal Investigations Involving Members. The investigating supervisor
will contact the duty executive who will determine the appropriate investigative unit/team(s) to be assigned to conduct the criminal investigation. The original complaint, if already added to the complaint management system, will be forwarded to the IAB commanding officer.

f. If the initial inquiry reveals a policy failure exists, the investigating supervisor will note that in the complaint report.

g. The assigned investigating supervisor will complete the initial inquiry in an expeditious manner.

10.2.7 Notice of Investigation

A member will be issued a Notice of Investigation (NOI) if he or she is the subject member of a Preliminary Administrative Investigation where the possible discipline is greater than a written reprimand, or a formal investigation, or:

- the member is required to submit financial disclosure statements;
- the member is required to submit to any test, e.g. breath test, blood test, urine sample, hair follicle test, fitness for duty, etc., as deemed necessary for any internal investigation. Random breath test, blood test, urine sample, or hair follicle test because of a member’s rank or assignment will not constitute the need for an NOI.

The NOI will include a synopsis of the incident under investigation outlining the specific nature of, and the member's status, in the investigation. The allegations of misconduct for which the member will be interviewed will be documented, not necessarily in policy specific language.

Prior to an NOI interview, the member will review the NOI form, sign it and will be provided a copy of the signed and dated form. If during an interview, additional allegations are identified, the supervisor will stop the interview, prepare an additional NOI, and serve it to the subject member.

- Supervisors conducting Preliminary Administrative Investigations will not rely on a "blanket statement" to put the member on notice that other issues of misconduct will be investigated.

Members involved in Critical Incidents may be issued a Notice of Investigation – Critical Incident. This NOI is only issued under the authority of the Internal Affairs Bureau Commanding Officer. Anytime a Critical Incident is suspected to have occurred, the IAB Commanding Officer will be contacted prior to any Preliminary Investigation or issuance of an NOI.

Subject members told of an investigation will not discuss any knowledge they have of the case with any other member or outside source. Nothing in this paragraph will interfere with the subject member’s privileged conversations with his or her attorney,
licensed counselor, labor representative, peer support member, chaplain, or religious counselor.

Any other member who learns of an investigation will not discuss any knowledge he or she has of the case with any other member or outside source other than the IAB, supervisors conducting an investigation related to the case, criminal investigators conducting an investigation related to the case, and/or among the executive staff.

10.2.8 Preliminary Administrative Investigation

Note: An initial inquiry may serve as a preliminary administrative investigation if the information gathered is sufficiently thorough and complete.

Once a supervisor’s initial inquiry indicates that a directive or standard operating procedure may have been violated, the complaint will be tracked through the chain of command to the commander or equivalent rank within the respective chain of command for review. Cases where the discipline would be greater than a forty (40) hour suspension will be tracked to the appropriate division chief with a recommendation to be assigned to the Internal Affairs Bureau.

Cases that involve a minor violation that is most likely a training or unprofessional demeanor issue will be assigned to the subject member’s direct supervisor for resolution. Normally, allegations that involve violations of policy or procedure but have little effect on operations, or, create a small degree of risk and/or liability to the member or the department may be handled with a Corrective Action Report, Performance Appraisal Entry, counseling, or possibly a Written Reprimand.

Cases that require a more thorough investigation and may result in a recommendation for discipline higher than a written reprimand and no more than a forty (40) hour suspension, will normally be assigned to a command officer for investigation. Cases where the subject member is a sergeant, acting sergeant, or above, will be assigned to a command officer for investigation.

Cases where the resulting discipline would range from greater than a written reprimand to a forty (40) hour suspension may be eligible for resolution through the Negotiated Discipline Settlement Agreement as defined in Section 10.2.14 of this directive. It may also be determined by the commander or equivalent rank that the case be concluded at the district/bureau/section level.

The subject member of a preliminary administrative investigation will be issued a NOI under the following circumstances:

a. The member will be interviewed by a supervisor for an allegation of misconduct which the member is the subject of the investigation; and, a supervisor has
advised the member that the investigation may result in formal discipline greater than a written reprimand.

b. The member is required to produce any documentation, including memoranda, related to an allegation of misconduct investigation, which may result in formal discipline greater than a written reprimand.

The NOI will include a synopsis of the incident under investigation outlining the specific nature of, and the member's status in, the investigation. Further, it will outline the allegation of misconduct for which the member will be interviewed and will be documented on APD Form 112.

Prior to a preliminary administrative investigation, the member will review the NOI form, and sign it. They will be provided a copy prior to departure from the interview. If during an interview, additional allegations are identified, the supervisor will stop the interview, prepare an additional NOI addressing the added elements to be investigated and serve it to the subject member who will review it, sign it and receive a copy.

Further, the subject member will be allowed an observer (see 10.2.9 Observer/Representative) pursuant to observer conditions as defined in Form 111.

Preliminary Process

a. The investigating supervisor conducting a preliminary administrative investigation will electronically record all relevant interviews with equipment provided by the department. Subject members who are interviewed during a preliminary administrative investigation may also electronically record or take notes of the interview.

Until the conclusion of the preliminary administrative investigation, the investigating supervisor will retain all tapes, notes, and reports. Except for the notes and recordings of the member or observer, the tapes, notes and reports should be uploaded into the complaint management system as exhibits. Subject members will not be allowed access to the investigative materials until the case has been concluded or set for a negotiated settlement. In the event the case is sent to IAB for a formal investigation, all original tapes, notes, records and reports will be forwarded to IAB, copies of all will be uploaded to the complaint management system. Once the supervisor is sure that IAB has the tapes, notes, digital records and reports, he or she will delete any copies that remain in his or her possession or control. At the conclusion of any discipline, counseling, or retraining subsequent to the preliminary administrative investigation, the subject member’s notes and/or electronic recording of the NOI interview may be returned to the member. The supervisor’s notes and recordings will be uploaded to the complaint management system as exhibits.
b. Supervisors conducting a preliminary administrative investigation into an allegation of misconduct will complete the investigation in an expeditious manner. The investigating supervisor’s immediate command officer may grant extensions as necessary.

c. If, at the conclusion of the preliminary administrative investigation, the investigator believes the allegation cannot be handled at the district/bureau/section level, or believes the final discipline could be greater than a forty (40) hour suspension, the case shall be forwarded or tracked, with an entry requesting that the case be investigated by the IAB, through the chain of command to the subjects’ commander or equivalent rank in the complaint management system. All reports, forms, associated documentation or materials collected during the preliminary administrative investigation will accompany the request for formal investigation.

The commander or equivalent position in the chain-of-command will make the determination on whether an investigation should be concluded by the Internal Affairs Bureau or at the district/bureau/section level.

d. Supervisors conducting preliminary administrative investigations will notify the complaining citizen, government official, or member either verbally or in writing of the status of the complaint. The investigating supervisor will indicate in the administrative management system how the complainant notification was accomplished, i.e. by phone, e-mail, mail.

If the complainant is not satisfied with the resolution of the case, he or she may contact the next command officer in the chain of command. The supervisor will provide contact information to the complainant.

10.2.9 Observers/Representatives

- In order to avoid a conflict of interest or the appearance of a conflict of interest, observers and representatives cannot be the subject member’s subordinate, supervisor or within the subject member’s chain of command either currently or at the time of the alleged misconduct. In addition, the observer or representative cannot be anyone who has had any role in the incident or matter under investigation, even as a potential witness or peripheral party.

- If the subject member chooses to have an observer present for the IAB interview, the observer must be present at the scheduled time and place. Should the observer arrive after the scheduled interview time and the interview has begun, the observer will not be permitted to attend the in-progress interview. Prior to the interview, the IAB investigator and the
observer will acknowledge the “Acceptance of Observer Conditions” into the formal record.

- Before serving as an observer in a formal investigation, or representative, the member must meet with the IAB commanding officer or his/her designee to be briefed on department policy regarding the responsibilities of the observer and representative roles.

- The observer shall not turn the interview into an adversarial proceeding. The observer may not interfere with the questioning or investigation, will not give any advice that would be contrary to complete honesty and truthfulness, and will not discuss the case with any member of the department or any other person the observer knows or reasonably should know will be interviewed as a witness during the formal investigative process while the case is open (as defined in Department Directives 10.2 and 10.3). The materials present in the room during the course of the interview are not available for review, perusal, or access without the consent of the Internal Affairs Investigator. The observer’s presence is a privilege extended by the Chief of Police, and any violation of these conditions may result in forfeiture of this privilege for the current investigation and for that observer’s presence in future investigations.

**Observer/Representative Compensation**

a. **Observer**

   If a sworn member is asked to participate as an observer during an accused subject member’s interview (including initial inquiries, preliminary, formal and IAB interviews), the following procedures will be adhered to:

   - If authorized and on-duty, the member will be allowed use of duty time to serve as an observer;
   
   - Should the requested member be off-duty, he/she will receive straight-time compensation for time spent in an observer role.

b. **Representative**

   Representatives participating in the IRP will be allowed up to four (4) straight-time compensation hours to assist with the review of a completed Internal Affairs Bureau case. If more than four hours is reasonably required to perform this task, the representative may request approval of the Deputy Chief for additional time compensation. The Internal Affairs Bureau Commanding Officer will make an entry into the current scheduling system for the representative.
Representatives participating in the IRB process will be allowed straight-time compensation for that time spent in hearing. The Internal Affairs Bureau investigator present at the IRB hearing will enter the appropriate time into the current scheduling system for the representative.

10.2.10 Formal Investigations (IAB)

The Internal Affairs Bureau commanding officer or designee will receive allegations of misconduct as outlined in this directive. The IAB has the authority of the Chief of Police to conduct investigations without interference or obstruction by any member. The Chief, or designee, may assign the investigation to any member or appropriate outside entity should the Chief or designee decide not to have IAB investigate an allegation. Formal investigations will be conducted according to IAB Standard Operating Procedures.

If a complaint concerns misconduct by the Chief of Police, the IAB will forward a copy directly to the City Manager.

Members who are the subject of a formal investigation will be provided a Notice Of Investigation (NOI) prior to being interviewed.

Members who are the subject of a formal investigation are allowed to have an observer present during interviews (refer to the section on Observers). If the subject member has not arranged to have an observer present, the interview will commence.

At the end of the Internal Affairs investigator’s questioning, the investigator will allow the subject member to add information related to the case, to the record, should he or she feel that important information was not obtained in the interview. The investigator will allow the observer to suggest questions to the investigator that are narrow in scope and relevant to the case, that the observer feels were not covered during the interview. The investigator will determine if these questions will be asked of the subject member. At no time will the observer directly question the interviewer or the subject member. The investigator may ask additional questions of the member to complete the interview. The subject member is under the same standards of truthfulness regardless if the statements are made on his or her own volition, or in response to questions posed by the investigator.

If a formal IAB investigation is authorized and includes the charge of 14.1.5 (Conformance to Law) and the matter was also the subject of a criminal investigation, and the criminal investigation has been closed, the entire criminal investigation will be attached as an addendum to the IAB case. Identifying information about witnesses, victims and confidential sources and methods may be redacted from the copy of the criminal investigation that is appended to the IAB case at the direction of the Chief or Deputy Chief and pursuant to applicable records disclosure law.
If a formal IAB investigation does not include the charge of 14.1.5 (Conformance to Law), but, the matter was also the subject of a criminal investigation, the criminal investigation may be attached as an addendum to the IAB case at the request of the member or the IAB Investigator. The member will be informed that a criminal investigation was conducted. Identifying information about witnesses, victims and confidential sources and methods may be redacted from the copy of the criminal investigation at the direction of the Chief or Deputy Chief and pursuant to applicable records disclosure law.

10.2.11 Investigative Review Process

The Investigative Review Process (IRP) occurs at the conclusion of the IAB investigation, and prior to the IAB report being sent to the IAB Commanding Officer for recommendations. At that time, the IAB Investigator will notify the subject member that the case is available for the IRP. The subject member will have fourteen (14) calendar days to review the report and make note of any issues in dispute.

a. The subject member may opt to have a representative appear with him/her or on his/her behalf at the review;

b. If agreed to by both IAB and the subject member, the fourteen-day review period may be reduced or extended;

c. If in the determination of the Chief, there is an important organizational need to expedite the IRP process, validated by the Chief in writing and made part of the file, the Chief may at his/her discretion shorten the IRP process. If the process is shortened, the member will be notified in writing. The member will be afforded duty time, compensatory time and/or overtime to properly review the file;

d. Subject members will not remove the report from the IAB offices at any time during their review. Subject members will not be allowed to copy any portion of the report. Subject members may bring a representative with them to review the report;

e. Subject members and their representative are permitted to take notes during their review of the investigation. These notes will remain in IAB and can be referred to during the IRP.

f. The IAB investigator will also notify the subject member of the date and time of his/her final IRP meeting. The final IRP meeting will be considered a duty assignment under Department Directive 14.2.13 Neglect of Duty. The review of the investigation must be completed prior to the IRP meeting. Disputed issues, including the need for further or clarifying investigation, will be discussed at this time in an attempt to reach an agreement or understanding as to the content of the report. If no agreement on the issues can be reached, the subject member may attach a Letter of Dispute to the file prior to submission to the Chief’s Staff for review. The subject member will have seven (7) calendar days to prepare and
submit a signed, Letter of Dispute. A Letter of Dispute is intended to address perceived inadequacies in the internal investigation such as a failure to interview a witness, a failure to inquire into certain areas during a witness interview or a failure to collect evidence. A Letter of Dispute is not an appropriate forum in which to raise defenses to the alleged policy violations or present mitigating information, issues which are more appropriately included in a Letter of Defense.

g. In complex investigations, where the member desires to use his/her IRP notes to prepare a Letter of Dispute, he/she must appeal to the Chief of Police or designee. The Chief or designee will decide if the use of notes is appropriate. If appropriate, the Chief or designee will inform the IAB Investigator. The IAB Investigator in the presence of the member will number and copy the page(s) of notes. The originals will remain in IAB and the copies provided to the member. The IAB Investigator will advise the member of the guidelines for having a copy of the IRP notes using form APD 192. The guidelines are:

- the member will not make copies of the notes in any form;
- the member will not provide information from the investigation or notes to any other member of the Department, except his/her APA or FOP observer listed on the form;
- the member will not provide information from the investigation or the notes to the public;
- the member will not provide information from the investigation or the notes to the media;
- the member will not use the notes to conduct a parallel investigation;
- the member will return the copy of the notes to IAB along with the Letter of Dispute. Upon return of the notes to IAB, the IAB Investigator will verify all pages of the notes were returned;
- members are reminded that Department Directive 10.2.19(h) specifically forbids conducting parallel investigations. Members are reminded that the initial notification of investigation from the IAB Investigator and the Notice of Investigation form, are direct orders not to discuss the case;
- at the discretion of the Chief of Police, an IRP may begin prior to an IA case being completed.

h. Duty time is authorized for a subject member to review the investigation report and to meet with the IAB investigator over disputed issues;

i. If the case proceeds to an Independent Review Board (IRB) hearing, the subject member will be permitted to retrieve his/her notes and remove them from IAB for use in preparation for his/her IRB hearing.
10.2.12 **Formal Investigation Dispositions**

The IAB Commanding Officer will review each completed IAB case after the IRP process has concluded. The IAB Commanding Officer will ensure the case is complete and make a recommendation of finding for each alleged violation in the case. The IAB commanding officer can make one of the finding recommendations as defined in the definition section (10.2.1) of this directive for each alleged violation.

10.2.13 **Chief’s Review Board**

Note: nothing in this section prevents the Chief of Police from exercising his or her prerogative of reversing or modifying a finding or determining levels of discipline.

The IAB Command Officer will provide the completed case to the Deputy Chief of Police and will notify the subject member/members’ Division Chief(s), and Bureau/District Commanding Officer(s) that the case is available for review. The IAB case will not leave the Chief’s Office for the review.

The subject member of the investigation may send a Letter of Defense to be added to the file for the Chief’s Review Board's use. A Letter of Defense is sent to the Internal Affairs commanding officer prior to a recommendation of findings to provide a defense or mitigation for the member’s misconduct or alleged misconduct contained in the IA file. The Letter of Defense accompanies the case to the CRB for consideration and is ultimately scanned and entered into the electronic file as an exhibit but not included as part of the IAB investigative file. Once the involved Chiefs and Commanding Officers have read the case, the Deputy Chief, on behalf of the Chief of Police, and as part of the deliberative process, will convene a Chief’s Review Board (CRB). The CRB will be chaired by the Deputy Chief and consist of:

- the subject member’s Division Chief;
- the subject member’s Bureau/District Commanding Officer; and
- the IAB Commanding Officer.

The CRB may see the advice of the police legal advisor during the review process. Should the case involve a conflict of interest with the Deputy Chief or involve a member who reports to the Deputy Chief without a Division Chief in his or her chain of command, the Deputy Chief will appoint a Division Chief to be the Chair. Should the case involve a conflict of interest with the subject member’s Bureau/District Commanding Officer, the Deputy Chief may appoint another supervisor in the member’s chain of command or may appoint a Division Chief to take the Bureau/District Commanding Officer’s position in the C.R.B.

Should the case involve subject members with different chains of command, one CRB will be convened for all involved subject members.
10.02 COMPLAINT AND DISCIPLINE PROCEDURES FOR SWORN MEMBERS

a. The CRB will review the case, discuss the recommendation of finding from the IAB Commander and decide one or more of the following:

- Send the case back to IAB for more investigation;
- Accept, reject, or modify some, all, or none of the recommended findings of the IAB Commander.
- Recommend post-CRB accelerated disciplinary process (see Section 10.2.13 (b) below) based on:
  - A finding of a sustained violation
  - A recommended discipline of no more than a 40-hour suspension

If the CRB determines a finding of sustained for any allegation of misconduct, or noncompliance for any compliance review, the CRB will make a recommendation of discipline to the Chief of Police. The CRB may also recommend additional training, counseling, or other intervention for the involved subject member. The IAB Commander will not participate in the discipline discussion or recommendation, other than to provide comparable discipline examples. The CRB may convene more than once to determine findings and then discipline.

If the CRB determines a finding other than sustained for any allegations of misconduct, the board may still recommend additional training, counseling, or other intervention for the involved subject member(s).

The affected subject member(s) will be informed of the findings and, if applicable, discipline recommendation(s) of the CRB in a letter from the Chair of the CRB. A copy of the letter will be forwarded to the IAB for inclusion in the case file.

a. Post-CRB accelerated disciplinary process

The purpose of this variation is to:

- Streamline the disposition of appropriate cases formally investigated by IAB
- Allow commanders to have more involvement in cases
- Reduce anxiety for members by not having to meet with the Chief; and
- Provide opportunity for members to have more input in the final outcome of their case

In the event a complaint is addressed through a formal investigation and there is a sustained violation, the case may be re-directed through the post-CRB accelerated disciplinary process for final disposition under the following conditions:

- Member is fully and credibly cooperative
• Member acknowledges mistakes and accepts responsibility
• Chiefs review board sustains the violation; and
• A recommended discipline of no more than a forty (40) hour suspension

Should the post-CRB accelerated disciplinary process be deemed appropriate, it will be inserted into the process flow as follows:

a. The case will be sent to the member’s commander or equivalent rank to begin the post-CRB accelerated disciplinary process. The member and commander or equivalent rank, will attempt to reach a mutually agreeable outcome for discipline. The sustained finding will not be subject to negotiation. If an agreement for discipline is reached, the case is considered settled and it is forwarded to the chief’s office for final approval.

b. If there is no agreement between the parties, the case will be scheduled for pre-and final-disciplinary hearings with the chief. If, after the pre-and final-disciplinary hearings, the member is not in agreement with the chief’s final decision, appeal rights apply.

10.2.14 Negotiated Disciplinary Settlement Agreement Process

a. Purpose:

The purpose of this portion of the policy is to define the use of a Negotiated Disciplinary Settlement Agreement (NDSA) process in order to provide efficient resolution of Departmental Directives violations requiring limited formal discipline without the necessity of a formal Internal Affairs investigation.

Misconduct allegations do not require extensive investigation when clear and verifiable evidence demonstrates that a violation of Departmental Directives and/or City of Aurora policies and procedures has occurred, and/or the accused member does not contest the allegations. In such cases, an NDSA can provide a more efficient, timely resolution using minimal Departmental resources. It is beneficial to all parties involved to resolve complaints fairly and efficiently in order to maintain public trust in the Department and to provide an improved sense of procedural justice for its employees.

NDSAs are offered at the discretion of the Chief of Police or designee and are not a “right” or “entitlement.” At any point during the process, subject to the final approval by the Chief of Police or designee, the matter may be referred to the IAB for a formal IAB investigation.

b. NDSA eligibility determination:

When an internal or external complaint is entered in the complaint management system, and the initial inquiry has been completed, it will be routed through the chain of command to the commander. Cases where the resulting discipline would range from
greater than a written reprimand to a forty (40) hour suspension may be eligible for resolution through the Negotiated Discipline Settlement Agreement. It may also be determined by the commander or equivalent rank that the case be concluded at the district/bureau/section level.

Cases may also be deemed appropriate for resolution through the NDSA by the IAB commander if, after a formal investigation, the proposed discipline range would reflect between a written reprimand and 40-hour suspension.

For purposes of this Directive, “commander” refers to the highest ranking command officer or civilian manager below the rank of division chief in the member's chain of command. Such members shall be eligible and designated to conduct the NDSA process.

The IAB commander or designee will add notes to the AIM tracking indicating that the matter is eligible for the NDSA process. The tracking notes will include a range of discipline based on the comparable discipline for prior similar policy violations resulting in a 40-hour suspension or less. The tracking will be set as due in 5 days to ensure that the process continues in an expedient manner.

c. Eligible and Ineligible Matters:

The NDSA is primarily designed for situations where the facts of what occurred are not in dispute and there is no need for additional investigation, including, but not limited to, the following:

1. The incident is witnessed by other Department members or clearly documented on Body Worn Camera or other surveillance video, which establishes little dispute as to the underlying facts of the incident.

2. The member failed to appear for a duty assignment or court.

3. Unintentional Discharge of a Weapon (either lethal or less-lethal not involving injuries, significant property damage, or other aggravating factors).

4. Police Vehicle Collisions where the Collision Review Process has determined enough points exist for formal discipline consisting of a written reprimand or suspension of 40 hours or less.

5. The subject member self-reports or admits to a Directives violation eligible for the NDSA process.

The NDSA will NOT be used in the following circumstances:

1. When a member is arrested or charged with of a violation of municipal, state, or federal law.
2. Where the anticipated or comparable discipline, generally, is greater than a 40-hour suspension.

3. Any allegation of misconduct that is the subject of pending or anticipated civil litigation, unless authorized by the Chief of Police.

4. Any allegation requiring additional investigation, numerous witness interviews, or evidence collection that would be more efficiently and effectively handled by a formal IAB investigation.

5. When additional information is discovered during the NDSA process that would make the incident ineligible for the NDSA process for any reason.

6. When a formal IAB investigation is ordered by the Chief of Police or IAB Commander.

7. Upon request of the Commander or accused member when the member cannot reach a NDSA with his/her Commander.

d. NDSA Process and Presentation Meeting

Upon receipt of the complaint from IAB indicating that the complaint qualifies for a NDSA, the member’s Commander will schedule a Presentation Meeting with the accused member to discuss the complaint and the NDSA process. Ideally, this meeting should be scheduled as soon as practical within 10 working days from the date the Commander receives the complaint from IAB, however, allowances may be made for previously scheduled leave, training, emergencies, etc.

The member’s Commander will conduct the Presentation Meeting in accordance with existing Department Directive 10.2.6 Preliminary Administrative Investigations and will electronically record the meeting. Most complaints that qualify for the NDSA process should not require additional investigation when assigned to the Commander; however, nothing in this Directive prohibits the Commander from delegating any additional investigative responsibilities required to an appropriate supervisor in his/her chain of command.

At the presentation meeting, the Commander will present the accused member with a Notice of Investigation (APD Form 112) detailing the incident and Directives violation, an Acceptance of Observer Conditions Form (APD 111), as well as the proposed discipline based on the comparable discipline for similar violations.

The Commander will discuss the incident with the accused member and will provide the accused member with access to any supporting evidentiary documentation, body worn camera video, etc. that was used in the investigation.
The Commander should allow the accused member the opportunity to present any facts in mitigation at this time. Based on the information received during the Presentation Meeting, the Commander may elect to adjust the proposed discipline up or down within the guidelines of the NDSA process listed below.

e. Options Following Presentation Meeting

At the conclusion of the Presentation Meeting, the accused member has three options:

1. **Immediate Resolution:** The member may elect to immediately accept the sustained allegation and the Commander’s recommended discipline/outcome. If the member selects Immediate Resolution, the NDSA Resolution Form 233 will be completed by the member and his/her Commander, who will forward it to the Chief of Police for approval and signature. The Chief’s office will return the signed original form to the IAB Commander who will ensure that it is placed in the member’s Internal Affairs file. The matter is considered resolved at this point.

2. **Reflection Period:** The member may elect to have a time period of up to 5 calendar days to consider the findings and the recommended discipline/outcome prior to making a decision. No later than the end of that 5-day period, the member must either select option #1 above or option #3 below. If the member fails to respond, option #3 will be deemed the default option selected.

   If the member does not select Immediate Resolution of the issue at the Presentation Meeting and opts for a Reflection Period, the Commander will immediately schedule a Settlement Meeting as soon as practical and as close to the expiration date of the Reflection Period as practical, but no more than 10 calendar days out. Again, allowances may be made for previously scheduled leave, training, emergencies, etc.

   The date of the scheduled Settlement Meeting and expiration date of the Reflection Period, if selected, will be documented in this manner as well. If a reflection period is selected, the Commander will track the IAB Commander and the accused member in AIM, with the due date set for 10 days and the Role set as: “FYI only”.

   The Settlement Meeting may be rescheduled for emergencies or court attendance that would prevent the member from attending the Settlement Meeting and/or prevent him/her from communicating with his/her Commander on the date of the Settlement Meeting.
3. Request a Formal Internal Affairs Investigation: The member may request, in writing, to have the case formally investigated by the IAB subject to the approval of the Chief of Police or designee (IAB Commander).

The Commander shall document the member’s selection of one of the above options in the tracking notes in AIM. The member shall be tracked at this time and shall electronically sign and close his/her tracking in the AIM entry.

f. Settlement Meeting

Should the member select option #2, the Commander will schedule the Settlement Meeting, which is the final meeting in the NDSA process. The accused member will NOT be allowed a third opportunity to consider the sustained allegations and recommended outcome in the NDSA process.

During the time prior to the scheduled Settlement Meeting, the member shall consider the settlement proposal and be prepared to discuss the recommended outcome. The member shall be prepared to present any facts in mitigation and make a decision at the Settlement Meeting. The member may also secure the advice or attendance of an APA/FOP observer at the Settlement Meeting; however, the availability of an observer shall not be cause to unreasonably delay any scheduled meeting. The participation of member observers in the NDSA process is governed by this directive in section 10.2.9 concerning observers. The Acceptance of Observer Conditions Form (APD 111) will also be used during the NDSA process if an observer is present and will be uploaded into AIM.

At any point prior to or during the Settlement Meeting, the member may opt for a NDSA if the accused member communicates this to his/her Commander in writing. The NDSA Resolution Form (APD 233) will be completed by the member and the Commander and forwarded to the Chief of Police for approval and signature. The Chief’s office will return the signed original form to the IAB Commander who will ensure that it is placed in the member’s Internal Affairs file. The matter is considered resolved at this point.

At the Settlement Meeting, the accused member may negotiate the recommended discipline, which must be within the range established by IAB based on comparable discipline for similar violations. The member’s APA/FOP Observer may be present at the Settlement Meeting but is only there in an advisory role and may not directly negotiate for the member. The observer is still bound by the conditions of directive section 10.2.9.

The member and the Commander should make every effort to negotiate a settlement. Cooperation and communication by both the member and the member’s Commander is essential for the effectiveness of the NDSA process.
At the conclusion of the Settlement Meeting, the available results are:

1. The member accepts responsibility and the negotiated settlement. The member and his/her Commander sign the NDSA Resolution Form (APD 233) indicating resolution of the matter, or:

2. The accused member does not communicate a selection during or before the designated Settlement Meeting date/time and/or the member fails to appear at the Settlement Meeting, the member will be deemed to have selected to have the matter sent to the IAB for a formal IAB investigation (Option #3 above). The Commander will document this in his/her tracking notes and track the case back to the IAB Commander in the AIM system.

3. The member does not accept responsibility, does not agree to sign the NDSA Resolution Form, and/or does not agree with the discipline recommended. If the accused member is unable or unwilling to accept responsibility for the sustained allegation(s) after the Presentation Meeting, Reflection Period, and Settlement Meeting, and/or refuses to sign the NDSA Resolution Form, and/or does not agree with the discipline proposed by the Commander, then the Commander will track the complaint back to the IAB Commander in AIM.

The IAB Commander, upon approval of the Chief of Police, will then assign the investigation to an IAB investigator for a formal IAB investigation consistent with Department Directives. The member shall be given the opportunity to review the NOI and any audio recordings from the NDSA process prior to any interviews conducted by IAB.

If the accused member has agreed to accept responsibility for his or her behavior but disagrees only with the extent of discipline proposed, every effort should be undertaken to resolve the disagreement during the Settlement Meeting to avoid a formal IAB investigation.

The member’s Commander and/or the accused member may request, at any point in the process, the assistance of the IAB Lieutenant or IAB Commander to assist with the negotiations to resolve the matter. However, if an acceptable resolution cannot be agreed upon, the case shall be returned to the IAB for a formal IAB investigation upon approval of the Chief of Police.

If the matter is resolved at either the Presentation or Settlement Meeting, then that shall constitute a Pre-disciplinary Hearing as defined by directive section 10.2.15. As such, that meeting shall be conducted in accordance with the provisions of that Directive and shall be digitally recorded. The member’s Commander is responsible for ensuring that the digital recording of the meeting is uploaded into the AIM system.
g. Extraordinary Circumstances Extension

If the accused member’s Commander determines during the Presentation or Settlement process that extraordinary circumstances exist and that additional time for review or consideration of new information would be in the best interest of the Department or accused member, the member’s Commander may request an extension of up to 10 additional calendar days with the approval of the IAB Commander.

h. Confidentiality:

To assure the integrity of an ongoing investigation prior to closure of the complaint, the member and any department members involved in the NDSA process are required to maintain the confidentiality of the complaint and investigation as required by Department Directive 10.2. and/or 10.3 Failure to maintain confidentiality may result in separate disciplinary action.

i. Additional Information:

Commanders, with the approval of the Chief of Police, are authorized to hold in abeyance all or part of any suspension time imposed. For comparable discipline purposes, the full discipline, including any deferred or suspended portions will be the discipline used for comparison. Nothing in this Directive shall limit or preclude exoneration of the accused member, or the resolution of the matter by alternatives to formal discipline if compelling mitigating facts are presented during the NDSA process which support exoneration or the use of an alternative to formal discipline as being in the best interest of the Aurora Police Department and/or the accused member.

Members who elect to negotiate discipline through the NDSA process will waive their right to an IRB and right to appeal the imposed discipline to the Civil Service Commission. The NDSA Form will notify the member of this stipulation and the member’s signature on the form will serve as his/her acknowledgment that he/she is voluntarily relinquishing his/her right to appeal the discipline. In addition, the member also acknowledges that he/she relinquish his/her right to the Investigative Review Process and Independent Review Board.

j. Post-NDSA formal IAB investigation

Should the Department receive any new information regarding the original matter that, if the information had been known prior to or during the NDSA process would have required the case to be sent to IAB for a formal IAB investigation or would have resulted in discipline greater than the original comparable discipline, a formal IAB investigation may be initiated. Any discipline served as a result of the original NDSA case, if already closed, will be taken into consideration if the member is sustained on any subsequent Internal Affairs investigation that arises from the same complaint or incident.
10.2.15 Predisciplinary Hearing and Imposition of Discipline

In accordance with Aurora City Charter §3-16(8)(b), prior to the imposition of any discipline other than a reprimand, the member shall be provided with a predisciplinary hearing before the Chief or a designee. At this hearing, the member shall be given:

- a copy of the specification of the charges;
- a copy of the written report of the evidence supporting the charges;
- a copy of the summary of the disciplinary record of the member, if any;
- an opportunity to make a statement in response to the charges and written report. The statement, if made, shall be transcribed.
- the right to submit a written statement to the Chief within three (3) days after the predisciplinary hearing.

The member will be informed of the date of the predisciplinary hearing in writing, to include email, by the Chief of Police or designee. The letter will include any recommendations for discipline received by the Chief, or other intervention determined by the CRB. The letter will also include the next steps in the process for the member to include if an Independent Review Board (IRB) is automatically required for the sustained charges, and that the member can request an IRB, in writing, at the predisciplinary hearing or within three days after the predisciplinary hearing. All IRB requests must be made in writing should the member choose to have one.

At the expiration of the three (3) business day period for the member to submit a written statement, the Chief may proceed in accordance with the provisions of charter. The Chief or designee conducting the hearing may extend the three-day period at his or her discretion.

Per Charter, discipline will be by written command signed by the Chief. If discipline involves a monetary impact on the member greater than one-third (1/3) of the member’s monthly salary, the disciplinary order must be approved by the City Manager or a designated Deputy City Manager. A copy of the written disciplinary order shall be served on the member. In the event this Directive is inconsistent with the language of the Charter regarding discipline, the Charter controls.

10.2.16 Records of Corrective Action Reports and Disciplinary Action Reports

a. Corrective Action Reports: Corrective Action Reports are not disciplinary actions. They will be maintained in the current personnel file software program for one (1) year or until the member's next scheduled evaluation, whichever is longer. Corrective Action Reports will not be forwarded to the IAB, nor forwarded to the member's permanent 201 file.
b. Disciplinary Action Reports: All disciplinary action reports will be forwarded to the IAB following conclusion of the investigation and issuance of the applicable orders. All supervisor documentation concerning Disciplinary Action Reports (including Written Reprimands) will be forwarded to the IAB along with the report. A Written Reprimand, Suspension, Reimbursement, Demotion or Dismissal order will be maintained according to the retention rules of the IAB, and a copy forwarded by IAB to the member's permanent 201 file kept by the City’s Human Resources Department.

Members may request Written Reprimands be removed from their 201 file, and the current personnel file software program after two (2) years from date of issuance. Requests must be submitted in writing to the Chief of Police. Only upon written approval of the Chief of Police or designee, will a Written Reprimand be removed from a member’s 201 file and the current personnel file software program.

10.2.17 Appeal of Disciplinary Action

Fines, Suspensions, Reimbursements, Demotions or Dismissals of sworn members arising from disciplinary action are subject to appeal as stated in Department Directive 10.5 - Rights of Members under Administrative Investigation.

10.2.18 Supervisor Responsibility

a. Supervisory members will initiate an Initial Inquiry when the misconduct observed or alleged is within the scope of their authority.

b. Supervisory members who receive or observe an allegation of misconduct will complete the initial inquiry in an expeditious manner and forward through the chain of command.

c. Supervisory members conducting a preliminary administrative investigation will complete the investigation in an expeditious manner.

d. Supervisory members investigating a complaint will complete the initial inquiry or preliminary investigation as expeditiously as possible. The completed initial inquiry and all supporting documentation will be forwarded through the complaint management system, to the subject member’s/members’ chain of command.

e. Supervisory members discovering potential policy failures because of an investigation will complete a summary memorandum and forward the information to the Professional Standards Section in an expeditious manner.

f. Command personnel who receive a completed Initial Inquiry, or Preliminary Administrative Investigation through the chain of command will review, make recommendation(s), if any, and forward to the next level in the chain of command within five (5) working days.
10.02 COMPLAINT AND DISCIPLINE PROCEDURES FOR SWORN MEMBERS

10.2.19 Individual Member Responsibility

a. All members of the Department will perform the duties and assume the obligations of their rank in the reporting of complaints or allegations of misconduct.

b. Members are ordered, and required, to cooperate in a department investigation and to answer questions, and/or provide a written statement, render material and relevant statements to, a supervisor or an Internal Affairs Investigator.

c. Members answers to those questions and/or written statement must be truthful and complete and must not omit any material facts. Failure to do so may result in discipline, which could include termination.

d. Any member may be required to submit to a medical or laboratory examination at the agency's expense when the examination is specifically directed and narrowly related to a particular internal investigation.

e. Any member may be required to be photographed, to participate in a line-up, to submit to a fingerprint comparison and/or to submit a financial disclosure statement when such actions are material to a particular internal investigation.

f. Members may be required to be photographed or fingerprinted for records kept by the Chief of Police and/or the IAB.

g. Members who are the subject of a departmental administrative investigation (including preliminary and formal) are not permitted to conduct a parallel investigation or inquiry into the matter.

h. All members are prohibited from participating in a parallel investigation or inquiry by or on behalf of a member subject to a departmental investigation.

10.2.20 Wearing of Weapons

Involved members and their observer/representative will not be armed during interviews with Internal Affairs Investigators, the IRP process, or during pre-disciplinary/disciplinary hearings with the Chief of Police or designee.

10.2.21 Records Maintenance and Retention

The Internal Affairs Bureau maintains records of all complaints received against the Department and its members. These records are stored electronically, or if not stored electronically, in a secure file cabinet separate from other Department records.
Maintenance and purging of records will be accomplished in accordance with relevant Department Directives, Procedures, City Policy, and the State of Colorado Municipal Records Retention Schedule governing police administrative actions.

Any formal investigation with a disposition code of sustained will require a statement of action taken.

All member and observer notes created in the IRP processes will be destroyed after the case is concluded and no longer active as defined in 10.2.11 above.

All notes and records created in the IRB processes will be destroyed after the IRB is concluded save the final recommendation memo to the Chief of Police, which will remain as part of the case file.

10.2.22 Mandated Disclosure Requirements

Certain notifications regarding sustained disciplinary findings are required by law. In addition to Brady/Rule 16 notifications given to the District Attorney’s office regarding information that could be used to impeach an officer (credibility, truthfulness, bias), there are certain laws that mandate notifications.

a. C.R.S. § 24-31-305(2.5) requires the Department notify the Colorado Department of Law – P.O.S.T. board regarding a sustained finding, based on a clear and convincing standard of the evidence, of any untruthful statements made knowingly by a sworn member after August 2, 2019, in one of these four categories:

1. On a criminal justice record
2. While testifying under oath
3. During an Internal Affairs investigation; or
4. During an administrative/disciplinary process

IAB will be responsible for the preparation, review and submission to P.O.S.T. Notifications are required after all internal disciplinary rights have been exhausted or expired. P.O.S.T. then is obligated by law to start revocation proceedings.

b. C.R.S. § 24-33.5-114 requires the Department notify the District Attorney’s office for the 17th and 18th Judicial Districts whenever there is a sustained finding that any sworn member of the agency has made a knowing misrepresentation:

1. In any testimony or affidavit relating to the arrest or prosecution of a person or to a civil case pertaining to the peace officer or to the peace officer's employment history; or

2. During the course of any internal investigation by a law enforcement agency, which investigation is related to the peace officer's alleged criminal conduct; official misconduct or use of excessive force.
The Chief’s Office will be responsible for the preparation, review and submission to the District Attorneys’ office.
10.10  CRIMINAL INVESTIGATIONS INVOLVING MEMBERS

An internal investigation is one in which the subject(s) of the investigation is a member(s) of the police department. These investigations are divided into two types, which are distinctive in both purpose and in the methods used during the investigation. The two types are:

(a) Internal Criminal Investigations - used to investigate alleged, suspected or possible criminal violation(s) by member(s) of the Aurora Police Department.

(b) Internal Administrative Investigations - used to investigate alleged, suspected or possible violations of Departmental Directives, Bureau or Section Standard Operating Procedures, Special Orders by member(s) of the Aurora Police Department, or any other city wide administrative or personnel related procedures.

At the conclusion of all criminal investigations involving members, the Internal Affairs Bureau will review the investigation to determine what, if any violations of policy or directive may exist. Should the review reveal the need for further administrative investigation, the Internal Affairs Bureau Commander or designee will conduct the internal administrative investigation.

10.10.1 Internal Criminal Investigations

When an accused/suspected member is investigated for a criminal violation that member is entitled to all constitutional rights.

The accused/suspected member may be interviewed by the criminal investigator(s).

The accused/suspected member may be requested to participate in a polygraph exam.
All accused/suspected members are reminded when they are involved in a criminal investigation and are advised of their rights pursuant to the Miranda warnings, they are not compelled to answer any questions. The rank of the interviewer has no bearing in a criminal investigation because no member may receive any discipline or punishment for exercising their constitutional rights, e.g., refusing to give a statement or refusing to submit to a polygraph exam, etc.

10.10.2 Procedure for Criminal Interview of an On-Duty Member

When the need arises for a criminal interview of an accused/suspected on-duty member, the criminal investigator will use the following procedure:

(a) The criminal investigator may notify the accused/suspected member's command officer or designee of the need for an interview.

(b) That command officer or designee will notify the accused/suspected member to report to the command officer or designee at a specified location.

(c) The criminal investigator will stand by with the command officer or designee at the specified location.

(d) When the accused/suspected member reports, the command officer or designee will give the following advisement and only the following advisement: "(name of investigator) would like to talk to you and has requested an interview be allowed on your duty time."

(e) If the accused/suspected member agrees to be interviewed, prior to the commencement of the interview the criminal investigator will present and read a Criminal Investigation Advisement for Members Form.

(f) If a polygraph is to be given, the criminal investigator will ensure that a Criminal Investigation Advisement for Members Form and an Advisement of Rights Form (per Miranda) are completed before the polygraph starts.

Participation in a criminal interview is voluntary. An accused/suspected member may decline at any point after being notified of the criminal investigation. When the accused/suspected member declines participation or the interview is completed, the accused/suspected member will again report to their command officer. The command officer will either return the member to duty or may impose relief from duty.

10.10.3 Association Responsibility

When the investigation of a member-involved incident is potentially a criminal investigation, any on-duty Association board member who is present at or responds to
the scene of the incident, or to the Investigations Bureau, will act only in the capacity of an on-duty police officer and not as a representative of his/or respective organization.

10.10.4 Polygraph Examination for Internal Criminal Investigations

When the need arises during an internal criminal investigation for a polygraph examination, participation by any member is voluntary. No discipline or punishment will result from an accused/suspected member refusing to submit to a criminal polygraph examination.

If an accused/suspected member agrees to take a polygraph exam the polygrapher will begin the process by completing a Criminal Investigation Advisement for Members Form and an Advisement of Rights Form.

10.10.5 Internal Administrative Investigations

An internal administrative investigation is the investigation of a formal complaint that may lead to disciplinary action.

The initial inquiry and/or the preliminary investigation into an allegation of misconduct conducted by the supervisor receiving the allegation, is fact finding and is not considered a formal administrative investigation. Initial fact-finding in a complaint may lead either to a criminal, an internal administrative or both a criminal and an internal administrative investigation. Administrative investigations will be conducted in accordance with Directive 10.2.

The Chief of Police may authorized the Internal Affairs Bureau to conduct an internal administrative investigation at the same time a criminal investigation is being conducted, on the same subject member, for the same incident(s)/allegations(s).

In a formal internal administrative investigation, the member can be required to participate in an interview and answer questions. The member will be alerted that they are required to cooperate. Before the interview begins, the member will be given a Notice of Investigation (NOI) and an Internal Administrative Investigation Form to read and acknowledge.

The member can also be requested to participate in a polygraph examination when the request is made within the guidelines outlined in Directive 10.5 - Rights Of Members Under Administrative Investigation (Bill of Rights).
10.11 Duties and Responsibilities of the Independent Review Board

The Independent Review Board (IRB) is designed to assist the Chief of Police in the deliberative process of determining an appropriate level of discipline for instances of sustained misconduct by subject members. The IRB may also review events that draw significant community interest as described below.

The IRB is not designed to determine or question findings, or evaluate the Department, the Chief’s Office, and/or the Internal Affairs Bureau, unless specifically empaneled by the Chief of Police to do so. The IRB is designed to recommend discipline for violations of policy under the circumstances of the violation.

The IRB process, although supported by the Police Department, is a function of the Human Resources Department under the control of the City’s Director of Human Resources or his or her designee ("Director of Human Resources").

10.11.1 Disciplinary Matters Subject to IRB Review

With the intent of recommending a course of discipline to the Chief of Police, the Chief of Police or a subject member officer involved in a potential disciplinary action by the Department, may request an IRB. Should a subject member request an IRB review, the fact that he or she requested an IRB review will have no bearing on the discipline recommendation from the IRB.

Note: In matters involving allegations of criminal conduct by a member of the Department, the Police Chief may, in his/her discretion, move to discipline or terminate the member without input from an IRB.

When the need for an IRB review arises under this Directive, the Chief or his or her designee will send a written request, which can be by e-mail, for an IRB to the Director of Human Resources, or his/her designee.

When a review by the IRB is enacted in the case of Disciplinary matters, the IRB review will take place after the Pre-Disciplinary (Loudermill) hearing with the Chief.
The specific procedures for the IRB review process will be established by the City’s Director of Human Resources. The IRB conference will be managed by the facilitator, upon the general direction of the Director of Human Resources.

Following the IRB conference, a recommendation of discipline will be forwarded to the Chief of Police. The Chief of Police will have the option of accepting, increasing, or decreasing the recommended discipline of the IRB.

10.11.2 Non-Disciplinary matters subject to IRB review

An IRB may also be called, for the sake of public transparency, for any incident that has created a significant community concern, and when the Chief of Police or City Manager, in consultation with the City Attorney, determines that it is in the best interest of the city to call for an IRB review.

An IRB may also be called when the original complainant involved in the case requests a review of the case, regardless of the original recommendations and findings in the case and when the Chief of Police or City Manager, in consultation with the City Attorney’s office, determines that it is in the best interest of the city to call for an IRB review.

The specific process for reviewing an incident or non-disciplinary matter will be determined by the Director of Human Resources, with approval by the Chief of Police. The IRB conference will be managed by the facilitator, upon the general direction of the Director of Human Resources.
AURORA POLICE DEPARTMENT
DIRECTIVES MANUAL

14.1 Title: OBEDIENCE TO ORDERS, DIRECTIVES AND LAWS

Approved By: Nick Metz, Chief of Police

Effective: 09/01/1998

Revised: 01/31/2019


References:

Review: Internal Affairs Bureau Commander

14.1 OBEDIENCE TO ORDERS, DIRECTIVES AND LAWS

14.1.1 Lawful Orders

Any lawful order given by a command or supervisory officer must be obeyed. It is immaterial whether the order is in written or verbal form or if the order is relayed from the supervisor by an officer of the same or lesser rank. Members will not deliberately disobey or refuse any lawful order.

It is presumed that the highest-ranking officer on scene is in the best position to direct personnel and tactics during an emergency call. Command and supervisory officers should avoid giving orders to resolve in-progress emergency calls when they are not on scene, unless they perceive it to be absolutely necessary.

14.1.2 Unlawful Orders

Command and supervisory officers will be responsible for knowing whether their orders are in compliance with all applicable department and legal requirements.

Command and supervisory officers will not knowingly issue an order that is in violation of a Department Directive or Standard Operating Procedure unless special circumstances exist.

Any command or supervisory officer who issues an order that appears to violate any Department Directive or Standard Operating Procedure must have specific articulable facts that prove the order to be reasonable and necessary under the special circumstances.

Members who receive an order that violates a law, ordinance, statute, Department Directive or Standard Operating Procedure will explain to the superior officer issuing the order that they believe the order to be unlawful. If the superior officer issuing the order does not rescind the order, the member may:
(a) Accept the order as issued - this indicates the member concurs with the order and the superior officer's reason for issuing the apparently unlawful order.

(b) Obey the order under protest - this indicates the member will obey the order but does not agree with the order or the superior officer's reason for issuing the order. When an order is obeyed under protest, it should be noted in a memorandum following the incident. The written account will be forwarded to the appropriate Bureau or Section Command Officer via the chain of command.

(c) Refuse to obey the order - A member who refuses to obey an order will specifically articulate in writing why the order was unlawful and that the special circumstances did not make the order reasonable or necessary. The written account will be forwarded to the appropriate Bureau or Section Command Officer via the chain of command. If it is later determined by competent authority that the order was indeed a lawful order, the member may be held accountable under Directive 14.1.1 - Lawful Orders.

14.1.3 Conflicting Orders

Members who are given a lawful order that is in conflict with a previous lawful order will respectfully inform the superior officer issuing the order of the conflict. If the superior officer issuing the latter order does not alter or rescind the conflicting order, the latter order will stand. The superior officer issuing the conflicting order is responsible for that order.

Members will obey the conflicting order and will not be held responsible for disobedience of the order previously issued.

14.1.4 Tactical and In-Progress Calls

Members on-scene at a tactical and/or in-progress emergency call may, if reasonably necessary to prevent loss of life or serious bodily injury, and if the evolving tactical situation requires, deviate from the orders given by a command or supervisory officer if that command or supervisory officer is not on scene. Any divergence from orders must be explained by the member, and will be subject to scrutiny after the call.

14.1.5 Conformance to Law

Members will, whether on or off duty, whether acting in an official capacity or not, obey all laws of the United States and of any State and local jurisdiction in which the members are present.

A finding of guilty by a judge or jury, or a plea of guilty or nolo contendere, whether judgment and sentencing is deferred or not, to a violation of any law will constitute
prima facie evidence of a violation of this section and the Department need not re-establish the facts and findings of the charge.

Regardless of the status of any criminal proceeding, the Department reserves the right to conduct an internal investigation into the underlying allegation. The Department may take disciplinary action based upon the internal investigation independent of the determination or conclusion of the criminal case.

Any member charged with or arrested for a violation of a traffic law which involves the use of alcohol or drugs, or for a traffic violation which may result in a loss of driver’s license, or for a violation of a criminal law or ordinance will report such fact. The violation will be reported in writing to the Chief of Police via the chain of command on or before the member's next scheduled working day.

Upon conclusion of judicial action in the matter, the member will report the disposition and pertinent facts in writing to the Chief of Police via the chain of command. This will be done by the member's next scheduled working day.

**Expected Consequences for a Member Driving Under the Influence of Alcohol or Drugs:**

Nothing in this directive should be construed to apply to incidents in which a member is sustained for the use and/or possession of an illegal substance. Those situations will be handled under the guidelines of Directives 14.5, Substance Abuse, and/or other applicable directives.

The following protocols will be applied to a member, sustained in an internal investigation, involving driving under the influence of alcohol or prescribed and legally obtained drugs (DUI):

- **First Arrest for DUI:** Presumption is 160 hour suspension for Conformance to Law
  - **Aggravating Factors**
    - First Line Supervisor = + 40 hours
    - Command Officer = + 80 hours
    - Involved in a non-injury accident = + 40 hours
    - Involved in an injury accident = Up to termination
    - On-Duty at time of arrest = Up to termination
    - In a city-owned vehicle = Up to termination
    - Off-Duty, but in uniform = Up to termination
    - Fleeing from the scene – traffic stop or accident = Up to termination

- **Second or subsequent Arrest for DUI:** Presumption is termination for Conformance to Law
  - **Mitigating Factors**
- BAC less than .08%

Any legal action, whether or not related to alcohol or drugs, that results in a member receiving restrictions against or the loss of driving privileges for more than one year: the presumption is termination.

Recognizing that federal law may prohibit anyone under a domestic violence restraining order from possessing a firearm, the Department has a need to know when any member is served with such an order. Any member who is served with a domestic violence restraining order will notify the Chief of Police, via the chain of command, and provide a copy of the order before the member's next scheduled duty day. The member will then report to the Internal Affairs Section at 0800 on the next business day for a review of the order. The member will be prohibited from performing any armed police duties until the order is reviewed by the Internal Affairs Section and Legal Advisor to assess the member's legal authority to carry a firearm.

14.1.6 Conformance to Directives

Members will observe and obey all Department Directives, Special Orders and Standard Operating Procedures. All members have the responsibility to become thoroughly familiar with the provisions and regulations of this Department Directives Manual and are expected to know and assume their duties and obligations. In the event of breach of discipline or violation of some law, rule, directive, procedure or other duty, it will be presumed that the member was familiar with the law, rule, directive, policy or other duty in question.
14.2 CONDUCT UNBECOMING

14.2.1 Conduct Unbecoming

Members will conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably on the Department. Unprofessional conduct and irresponsibility will include that which brings the Department into direct disrepute, publicly or amongst its members, reflects direct discredit upon the member, or impairs the operation or efficiency of the Department or member.

Anything else in this Directives Manual to the contrary notwithstanding, members will not, whether on duty or off duty, whether acting in an official capacity or not, engage in conduct involving dishonesty, fraud, deceit, misrepresentation, misappropriation, theft or which is prejudicial to the administration of justice.

Misrepresentation by an officer of his/her identity, occupation, status or involvement in illegal activity when such misrepresentation is authorized by a superior officer and done in furtherance of and pursuant to an authorized law enforcement operation, will not be deemed a violation of this directive.

14.2.2 Making a False or Untruthful Declaration

Members will not, in the course of their official duties, willfully or knowingly make a false or untruthful declaration, either orally or in writing. This rule is applicable regardless of the materiality of the declaration.

Actions held to be in violation of this directive include, but are not limited to:
- Intentional incomplete or untruthful statements (written or oral) made or submitted to a supervisor.
- Intentional incomplete or untruthful statements made in a judicial or other legal proceeding.
• Intentional incomplete or untruthful statements made during the course of an IAS or other investigation.
• Intentional incomplete or untruthful statements made for personal gain to the declarant.

14.2.3 Abuse of Position

Members will not use their official position, official identification cards or badges for personal or financial gain or benefit, or for any other purpose which would tend to create the appearance of impropriety.

Members will not lend to or knowingly allow another person to utilize their identification cards, badges or other departmentally owned equipment, or permit them to be photographed or reproduced without the approval of the Chief of Police.

Members will not authorize the use of their names, photographs, or official titles which identify them as members in connection with testimonials or advertisements of any commodity or commercial enterprise without the approval of the Chief of Police.

14.2.4 Solicitation and Acceptance of Gratuities

The Department and members must exercise discretion concerning the receipt of goods or services to establish and maintain the highest possible levels of credibility and ethical standards which are incumbent upon the law enforcement profession.

Members will not solicit or accept from any person, business or organization, any gift, gratuity, money or other benefit or other thing of value (including food, beverage or entertainment) either for services rendered pursuant to their duties as members or expected preferential treatment because of their capacity as employees of the Aurora Police Department, except:

(a) Lawful salary.

(b) Goods or services offered to other occupations or the general public besides law enforcement personnel as part of a marketing technique, e.g., entertainment passes or discounts offered through Credit Unions or other businesses.

(c) Acceptance of food or beverage during the performance of duty, with no expectation by the member of preferential treatment, is permitted when offered as refreshment during the investigation of a reported offense or during or in conjunction with meetings, etc.

Acceptance of free food at fast food establishments, restaurants, coffee shops or convenience stores is prohibited under any circumstance. Solicitation is prohibited at all times.
Food, beverages or floral arrangements offered to members of the Department at large may be accepted with the permission of the Chief of Police.

(d) Complimentary gifts provided to other organizations besides the Police Department will not be prohibited, e.g., appointment books, calendars, etc.

14.2.5 Associations

Members will avoid regular or continuous associations or dealings with persons whom they know or reasonably should know are under criminal investigation or charges, or who have had a reputation in the community or the Department for present involvement in felonious or criminal behavior, except as necessary to the performance of official duties or where unavoidable because of geographic or other personal family relationships of the members.

Members are prohibited from buying or selling anything of value from or to any complainant, suspect, witness, defendant, prisoner, or other person involved in any pending case which has come to their attention or which arose out of their departmental employment except as may be specifically authorized by the Chief of Police.

14.2.6 Intervention

Members will not knowingly interfere with cases being handled by other members of the Department or by any other governmental agency unless ordered to intervene by a superior officer; or the intervening member believes beyond a reasonable doubt that a manifest injustice would result from failure to take immediate action. Members will not undertake any investigation or other official action not part of their regular duties without obtaining permission from their superior officer unless the exigencies of the situation require immediate police action.

14.2.7 Possession of Keys

No member, unless authorized by his/her commanding officer, will possess keys to any business premise not his/her own. No member may possess any departmental keys not expressly issued to him/her and when there is no need to possess those departmental keys to perform his/her duties.

14.2.8 Endorsements and Referrals

Members will not recommend or suggest in any manner, except in the transaction of personal business, the employment or procurement of a particular product, professional service, or commercial service, e.g., an attorney, ambulance service, towing service, bondsman, mortician, alarm products. In the case of an ambulance or towing service, when such service is necessary and the person needing the service is unable or
unwilling to procure it or requests assistance, members will proceed according to established departmental procedures.

14.2.9 Payment of Debts

Members will not undertake any financial obligations which they know or reasonably should know they will be unable to meet, and will pay all just debts when due. Filing for a voluntary bankruptcy petition will not, by itself, be cause for discipline. Financial difficulties stemming from unforeseen medical expenses or personal disaster will not be cause for discipline, provided a good faith effort to settle all accounts is being undertaken. Members will not co-sign a note for any superior officer.

14.2.10 Visiting Prohibited Establishments

Except in the performance of duty and while acting under proper and specific orders from a superior officer, members will not knowingly visit, enter or frequent an establishment wherein the laws of the United States, the State or the local jurisdiction are being violated.

14.2.11 Constitutional Requirements

When conducting criminal investigations, members should be conscious of the fact that their procedures will be scrutinized by the courts. It is incumbent upon each member to stay abreast of court decisions that relate to police investigative conduct.

Members will not make any arrest, search or seizure which they know or reasonably should know is not according to established legal precedent or statutory law.

Members will follow all established constitutional guidelines and requirements pertaining to interrogations of individuals suspected of criminal activity. The obtaining of a confession or admission by means of coercion, duress, threats or promises by any member will not be tolerated by this department.

No member will refuse a suspect the right of counsel, when requested, during any investigation or interrogation.

No member will, in any manner, delay for any reasons the appearance of any individual accused of a criminal offense before an appropriate magistrate.

When an accused person waives his/her rights, it is the responsibility of the investigating member to ensure that the accused person's waiver was made "voluntarily, knowingly, and intelligently.”

14.2.12 Tobacco Policy
Tobacco use in any form is prohibited in all city buildings and vehicles. Tobacco use outside of a city building is allowed only at designated, marked areas.

14.2.13 Neglect of Duty

All members are required to take appropriate police action toward aiding a fellow peace officer exposed to danger or in a situation where danger might be impending.

Members will not read, play games, watch television or movies, or otherwise engage in entertainment while on duty, except as may be required in the performance of their duties specifically or as authorized by the Chief of Police. They will not engage in any activities or personal business, which could cause them to neglect or be inattentive to duty.

Members will report for duty at the time and place required by assignment or orders and will be physically and mentally fit to perform his or her duties for the entirety of the assigned shift. Only command level officers (lieutenants or above) possess the authority to grant a member permission to report late to or leave early from a duty assignment without the submission of an entry in the attendance software. Sergeants serving in an acting lieutenant position are not granted this authority. Command officers exercising this authority are expected to be able to explain his or her action to the next level of the chain of command.

Members will be properly equipped and cognizant of information required for the proper performance of duty so that they may immediately assume their duties. Training courses, seminars and conferences approved for individual members to attend are considered duty assignments. Judicial or administrative subpoenas will constitute an order to report for duty under this section.

Members will remain awake while on duty. Should a member experience difficulty remaining awake, he or she will report to a supervisor, who will determine the proper course of action.

Members will not leave their assigned duty posts until relieved or authorized by proper authority.

Members may be permitted to suspend patrol or other assigned non-emergency activity, with proper authorization, for the purpose of having meals. If a member’s meal break is counted as time worked, that member is subject to immediate recall at any time and will be alert to all radio calls on his/her primary channel. Members whose meal breaks are not counted as time-worked are not normally subject to recall.
14.2.14 Conduct Towards Superior and Subordinate Officers and Associates

Members will treat superior officers, subordinates, and associates with respect. They will be courteous and civil in their relationships with one another. When on duty and particularly in the presence of other members or the public, officers should refer to each other by rank.

14.2.15 Unsatisfactory Performance

Members will maintain sufficient competency to properly perform their duties and assume the responsibilities of their positions.

Unsatisfactory performance may be demonstrated by lack of knowledge of the application of laws required to be enforced, an unwillingness or inability to perform assigned tasks, the failure to conform to work and/or training standards established for the member's rank, grade or position, the failure to take appropriate action on the occasion of a crime, disorder, or other condition deserving police attention, or absence without leave or habitual tardiness.

In addition to other indications of unsatisfactory performance, the following will be considered prima facie evidence of unsatisfactory performance: repeated poor evaluations or an official written report of repeated infractions of directives, and/or corrective action reports of the Department.

Members are required to maintain proficiency in the proper deployment of authorized weapons. Members will only deploy those weapons for which they are certified to carry. The discharge of any weapon in a negligent or inappropriate manner could be considered an unsatisfactory performance.

14.2.16 Conduct Prejudicial

Members shall not engage in conduct prejudicial to the good order and police discipline of the Department or conduct unbecoming which:

(a) May or may not specifically be set forth in department rules, regulations or directives; or

(b) Causes harm greater than would reasonably be expected to result, regardless of whether the misconduct is specifically set forth in department rules, regulations or directives.

14.2.17 Sexual Misconduct

While on duty, members shall not engage in any conduct or solicit another to engage in any conduct for the purpose of sexual gratification, sexual humiliation or sexual
abuse. The same conduct is also prohibited while off duty, either in uniform in a public
place or in any vehicle or facility to which a member has access by virtue of the
member’s authority. The consent of another to engage in such sexual conduct or sexual
acts is immaterial.

14.2.18 Identification as Police Officer

Except when impractical, unfeasible or when their identity is obvious, officers will
identify themselves both verbally and by displaying the official badge or identification
card before taking police action. Officers will verbally identify themselves as a police
officer when conducting official business by telephone. Exceptions to this include
working in an undercover capacity or when divulging official identity would
compromise personnel and/or an investigation.

14.2.19 Social Networking

Employees (sworn and civilian) are advised that some social networking behaviors
and practices are not allowed by policy. Refer to Directive 17.09 for further details
on social media.

14.2.20 Dissemination of Information

Members will treat the official business of the Department as confidential. Information
regarding official business will be disseminated only to those for whom it is intended.

No member will divulge, directly or indirectly, the nature or location of any covert
surveillance equipment installed and/or maintained by the Aurora Police Department
to any citizen or organization unless the release of such information is specifically
authorized, in writing, by the member’s bureau or section command officer. No
member will divulge, directly or indirectly, the nature or location of any such covert
surveillance equipment to another member of the Department unless such member has
a right to know and a need to know, and the release of such information is approved
by the member’s immediate supervisor or a member of the command staff.

When writing reports, most of which are or will become available to the public,
members should refrain from mentioning any covert surveillance equipment and its
location, if possible. If a reference to covert electronic surveillance must be included
in the report, then it should be referred to in the most generic terms possible, e.g.,
“surveillance was conducted . . .” or “the suspect was observed . . .”

Members will not disclose one another’s address, telephone number or information
from personnel files to the public or to news media except with the consent of the
concerned individual or by due process of law.

Members will not divulge the identity of persons giving confidential information
except as directed or authorized by officers of the court or the Chief of Police. Any
member receiving a written communication for transmission to a higher command will, in every case, forward such communication.

A member receiving a communication from a subordinate directed to a higher command will endorse it indicating approval, disapproval or acknowledgment and will, in every case, forward such communication to the next level within the chain of command.

14.2.21 Police - Community Relations

The Aurora Police Department is committed to Community Policing, which involves a commitment to improving community relations. A member who is aware of any actions, practices or attitudes on the part of any member that may be contributing to community or racial tensions, should bring that matter to the attention of his/her immediate supervisor. The supervisor should make every effort to correct these actions, practices or attitudes at an early stage to ward off greater problems in the future. If the actions taken by the supervisor are not successful, the supervisor should forward the information to his/her supervisor for solution.

Members will be courteous to the public. Members will be tactful in the performance of their duties, will control their tempers and exercise the utmost patience and discretion and will strive to avoid engaging in argumentative discussions. Members will verbally provide their names, badge or employee number(s) when requested by a member of the public. Members will provide a business card when requested by a member of the public.

When any person requests assistance or advice, makes complaints, or reports either by telephone or in person, all pertinent information will be obtained in an official and courteous manner and will be properly and judiciously acted upon, consistent with established departmental procedures.
14.3 PROFESSIONAL CONDUCT AND RESPONSIBILITY

Members will conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably on the Department. Unprofessional conduct and irresponsibility will include that which brings the Department into direct disrepute, publicly or amongst its members, reflects direct discredit upon the member, or impairs the operation or efficiency of the Department or member.

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Members will maintain sufficient competency to properly perform their duties and assume the responsibilities of their positions.

Unsatisfactory performance may be demonstrated by lack of knowledge of the application of laws required to be enforced, an unwillingness or inability to perform assigned tasks, the failure to conform to work and/or training standards established for the member's rank, grade or position, the failure to take appropriate action on the occasion of a crime, disorder, or other condition deserving police attention, or absence without leave or habitual tardiness.

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Members will treat superior officers, subordinates, and associates with respect. They will be courteous and civil in their relationships with one another. When on duty and
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Members will not, in the course of their official duties, willfully or knowingly make a false or untruthful declaration, either orally or in writing. This rule is applicable regardless of the materiality of the declaration. Actions held to be in violation of this directive include, but are not limited to:

- Intentional incomplete or untruthful statements (written or oral) made or submitted to a supervisor.
- Intentional incomplete or untruthful statements made in a judicial or other legal proceeding.
- Intentional incomplete or untruthful statements made during the course of an IAS or other investigation.
- Intentional incomplete or untruthful statements made for personal gain to the declarant.

14.3.4 Dissemination of Information

Members will treat the official business of the Department as confidential. Information regarding official business will be disseminated only to those for whom it is intended.

No member will divulge, directly or indirectly, the nature or location of any covert surveillance equipment installed and/or maintained by the Aurora Police Department to any citizen or organization unless the release of such information is specifically authorized, in writing, by the member’s bureau or section Command Officer. No member will divulge, directly or indirectly, the nature or location of any such covert surveillance equipment to another member of the Department unless such member has a right to know and a need to know, and the release of such information is approved by the member’s immediate supervisor or a member of the Command Staff.

When writing reports, most of which are or will become available to the public, members should refrain from mentioning any covert surveillance equipment and its location, if possible. If a reference to covert electronic surveillance must be included in the report, then it should be referred to in the most generic terms possible, e.g., “surveillance was conducted . . .” or “the suspect was observed . . .”

Members will not disclose one another's address, telephone number or information from personnel files to the public or to news media except with the consent of the concerned individual or by due process of law.

Members will not divulge the identity of persons giving confidential information except as directed or authorized by officers of the Court or the Chief of Police.
Any member receiving a written communication for transmission to a higher command will, in every case, forward such communication.

A member receiving a communication from a subordinate directed to a higher command will endorse it indicating approval, disapproval or acknowledgment.

14.3.5 Neglect of Duty

All members are required to take appropriate police action toward aiding a fellow peace officer exposed to danger or in a situation where danger might be impending.

Members will not read, play games, watch television or movies, or otherwise engage in entertainment while on duty, except as may be required in the performance of their duties specifically or as authorized by the Chief of Police. They will not engage in any activities or personal business, which could cause them to neglect or be inattentive to duty.

Members will report for duty at the time and place required by assignment or orders and will be physically and mentally fit to perform his or her duties for the entirety of the assigned shift. Only command level officers (lieutenants or above) possess the authority to grant a member permission to report late to or leave early from a duty assignment without the submission of an entry in the attendance software. Sergeants serving in an acting lieutenant position are not granted this authority. Command officers exercising this authority are expected to be able to explain his or her action to the next level of the chain of command.

Members will be properly equipped and cognizant of information required for the proper performance of duty so that they may immediately assume their duties. Training courses, seminars and conferences approved for individual members to attend are considered duty assignments. Judicial or administrative subpoenas will constitute an order to report for duty under this section.

Members will remain awake while on duty. Should a member experience difficulty remaining awake, he or she will report to a supervisor, who will determine the proper course of action.

Members will not leave their assigned duty posts until relieved or authorized by proper authority.

Members may be permitted to suspend patrol or other assigned non-emergency activity, with proper authorization, for the purpose of having meals. If a member’s meal break is counted as time worked, that member is subject to immediate recall at any time and will be alert to all radio calls on their primary channel. Members whose meal breaks are not counted as time-worked are not normally subject to recall.
14.3.6 Notification of Name, Address and/or Telephone Change

Members will notify the Administrative Services Section in writing of any legal name change, change of address or telephone number or any changes to emergency contact information no later than the effective date of the change. Members will provide the exact name as it appears in the legal documentation for the change. The actual street address of the member’s residence is required.

All changes will be reported on the Personal Data Change form (APD 059). The Administrative Services Section will ensure all information is accurately entered into the Aurora Police Personnel System (APPS) in a timely fashion. Designated District/Bureau/Section Unit personnel have access to the APPS program, to include the “Address/Name Change” report. The Administrative Services Section maintains all current member information in APPS.

The member is responsible for ensuring his/her chain of command is aware of any legal name change, change of address or residential telephone number or any changes to emergency contact information.

When a member reports a legal name change, a Personnel Order will be issued to notify all department personnel of the change and to ensure that appropriate updates are completed in the various records systems throughout the department.

All members are required to have an operational telephone (either land line or cell).

14.3.7 Leave, Illness and Injury

Members will report for duty at the time and place specified unless absence is authorized by their commanding officer prior to the member’s regularly scheduled duty time.

Members will not fail, while off duty due to illness or injury, except while hospitalized, to contact their commanding officer each day to report their condition and progress of recovery, unless the reporting is excused by their commanding officer.

Members will not feign illness, injury, or falsely report themselves ill or injured. When a member is absent without permission for more than five (5) consecutive work days and there has been no contact made by the employee with their immediate supervisor:

- The member’s position will be declared vacant
- The member’s absence will be considered a non-disciplinary, voluntary resignation.
14.3.8 Police - Community Relations

The Aurora Police Department is committed to Community Policing, which involves a commitment to improving Community Relations. A member that is aware of any actions, practices or attitudes on the part of any member that may be contributing to community or racial tensions should bring that matter to the attention of their immediate supervisor. The supervisor should make every effort to correct these actions, practices or attitudes at an early stage to ward off greater problems in the future. If the actions taken by the supervisor are not successful, the supervisor should forward the information to their supervisor for solution.

Members will be courteous to the public. Members will be tactful in the performance of their duties, will control their tempers and exercise the utmost patience and discretion and will strive to avoid engaging in argumentative discussions. Members will verbally provide their names, badge or employee number(s) when requested by a member of the public. Members will provide a business card when requested by a member of the public.

When any person applies for assistance or advice, makes complaints, or reports either by telephone or in person, all pertinent information will be obtained in an official and courteous manner and will be properly and judiciously acted upon, consistent with established departmental procedures.

14.3.9 Use of Tobacco

Members will not use tobacco products while in formation, when it would be offensive or inappropriate on an assignment or post, when in violation of the City of Aurora Smoking Policy, or when engaged in traffic direction or control.

Members should be considerate of others when using tobacco products.

14.3.10 Reporting Responsibility

Reports submitted by members either written or oral will be accurate and complete to the best of their knowledge and no member will enter or cause to be entered or provide otherwise any inaccurate, false, or improper information, nor will they withhold information favorable to a defendant.

Accidents involving departmental personnel, property, and/or equipment must be reported according to departmental procedures.

When city property is found bearing evidence of damage which has not been reported, it will be prima facie evidence that the last person using the property or vehicle was responsible.
14.3.11 **Identification as Police Officer**

Except when impractical, unfeasible or when their identity is obvious, officers will identify themselves both verbally and by displaying the official badge or identification card before taking police action. Officers will verbally identify themselves as a police officer when conducting official business by telephone. Exceptions to this include working in an undercover capacity or when divulging official identity would compromise personnel and/or an investigation.

14.3.12 **Testifying as an Expert or Character Witness**

No member of the Department is permitted to offer or volunteer to testify as a character or expert witness for a criminal defendant or a party engaged in litigation with the City of Aurora without the prior approval of the Chief of Police. Any member who is subpoenaed as a character or expert witness by the defense in a criminal trial or by any party in a civil action must promptly notify the Chief of Police and seek guidance from the Chief as to an appropriate response to the subpoena. Members who arrive in court and find out they are called to testify in the types of situations described above, without their prior knowledge, and who are compelled by the court to testify, must notify the Chief of Police or designee as soon as practical at the completion of their testimony.

14.3.13 **Use of Letterhead**

Stationery, to include envelopes that contain the Seal or Logo of the City of Aurora, the Seal or Logo of the Aurora Police Department, any of the badges of the Aurora Police Department, any approved unit Logo of a unit of the Aurora Police Department or the City of Aurora or letterhead of the City of Aurora or the Aurora Police Department, whether preprinted or electronically generated, shall only be used for official business and will not be used for letters of endorsement, support or in a critical manner without the permission of the Chief of Police or designee.

Members may not generate letterhead or similar looking communication, or communication that a reasonable person would believe came from the Aurora Police Department in an official capacity without the permission of their Division Chief or above.

14.3.14 **Social Networking**

Employees (Sworn and Non-sworn) may not use any drawings, pictures, artwork or other depictions of the Aurora Police badge, patch, logo, vehicles or uniforms, or City of Aurora Seal or Logo on any social networking sites such as My Space, Face Book, Twitter, etc., or any other publically accessible web site. Any employee who identifies himself/herself as an employee of the City or Police Department on a social networking site or other publically accessible web site shall be responsible for all postings on that
site and will be subject to discipline for violations of directives, special orders and standard operating procedures. The employee must advise his/her supervisor if he/she has made such posting in the past and if he/she makes any posting after the effective date of this portion of the directive.

Any posting in violation of this section at the time this directive becomes effective must be removed immediately.
# AURORA POLICE DEPARTMENT
## DIRECTIVES MANUAL

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<thead>
<tr>
<th>14.05</th>
<th>Title: SUBSTANCE ABUSE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Approved By: Nick Metz, Chief of Police</td>
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<td>Associated Policy:</td>
</tr>
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<td>References:</td>
</tr>
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</table>

Review: Internal Affairs Bureau Commanding Officer

## 14.5 SUBSTANCE ABUSE

The Aurora Police Department has a legal responsibility and obligation to ensure a safe work environment. The Department is required to protect the public by ensuring the ability of its members to fulfill the Department's enforcement, investigatory and service responsibilities through quality performance of their assigned duties.

The illegal use of controlled substances, alcohol or controlled substance dependence, and alcohol or controlled substance abuse can seriously impair an individual's performance and their general physical and mental health.

The Aurora Police Department does not permit a member to use or possess marijuana even if the member has a medical marijuana card that conveys on him/her “caregiver” or “patient” status in Colorado.

A member who abuses alcohol or controlled substances poses a potential threat to the safety of the community and fellow members of the Department and diminishes the morale and integrity of the Department. The illegal possession and use of controlled substances are crimes, which are in most cases felonies, and will not be tolerated.

Therefore, the purpose of this Directive is to ensure a member's fitness for duty as a condition of employment; to ensure that such tests as may be required are based on reasonable, objective bases; to provide written guidance for test procedures; to ensure an appropriate degree of confidentiality; and to ensure that each member knows that testing is a requirement of employment and a condition of certain specialized assignments.

The procedures outlined in this Directive are to be utilized for the collection of biological samples for administrative testing purposes and does not address collection of biological samples in matters that are, or may be, criminal in nature.
14.5.1 **Definitions**

**Alcoholic Beverage**  Any malt beverage, malt, vinous or spirituous liquor.

**Biological Sample**  A physical sample of a member’s blood, breath, urine or hair.

**Blood Alcohol Content (BAC)**  The amount of ethyl alcohol in a person’s blood expressed in grams of alcohol per 100 milliliters of blood.

**Breath Alcohol Content (BrAC)**  The amount of ethyl alcohol in a person’s breath expressed in grams of alcohol per 210 liters of breath.

**Common Drugs of Abuse**  Common drugs of abuse include, but are not limited to: Amphetamines, Barbiturates, Benzodiazepines, Cannabinoids and its metabolites, Cocaine and its metabolites, Methadone, Methaqualone, Opiates, Phencyclidine Propoxyphene, Ethyl Alcohol

**Confirmatory Procedure**  A second test by an alternate chemical method to positively identify a drug or metabolite except for anabolic steroids that utilize the same methodology with separate aliquots utilized for each test. Confirmations are carried out on presumptive positives from screening procedures.

**Controlled Substance**  Any drug or other substance or an immediate precursor that is declared to be a controlled substance under any Law of the State of Colorado or any Federal Law, rule or regulation.

**Cut-Off Level**  The concentration limit for drugs or their metabolites that will be used to declare a given sample positive or negative. It is frequently higher than the detection limit. Any sample, which tests below this level, is considered a negative.

**Detection Limit**  Lowest concentration of a drug or metabolite that can reliably be detected by a given test methodology.

**Drug**

**Drug Concentration**  As defined by C.R.S. 18-18-102(13)(a).

Amount of a drug or metabolite in a unit volume of biological fluid, expressed as weight/volume. Drug
concentrations are usually expressed either as nanograms per milliliter (ng/ml), as micrograms per milliliter (ug/ml), or milligrams per liter (mg/l). There are 28,000 micrograms in an ounce, and 1,000 nanograms in a microgram.

Drug Test
A toxicological test administered under approved conditions and procedures as set out in this Directive to detect drugs and/or alcohol.

Impaired
Affected to the slightest degree for drugs other than alcohol. For alcohol refer to 14.5.4.

Member
An individual employed by the Aurora Police Department in either a full-time, part-time or temporary capacity and includes both sworn and non-sworn personnel, as well as any individual who performs work for the Department on a voluntary basis.

Metabolite
A compound produced from chemical changes of a drug in the body.

Negative Test Result
Regardless of the preliminary test results, the results of a confirmatory test conducted and reported (in writing) by a laboratory indicating that drug metabolites are not present in a concentration above the established cut-off level. This may be reported quantitatively or may be reported merely as "negative".

Positive Test Result
The results of a confirmatory test conducted and reported (in writing) by a laboratory indicating that drugs or their metabolites are present in a concentration above the established cut-off level. This may be reported quantitatively or may be reported merely as "positive".

Presumptive Positive
A sample flagged as positive by screening but which has not been confirmed.

Probable Cause
Facts and circumstances within an officer’s knowledge, and of which he/she has reasonably trustworthy information, are sufficient in themselves
to warrant a person of reasonable caution in the belief that an offense has been or is being committed.

Probationary Member Any new Career Service/Civil Service employee, during their introductory period as defined in the City Personnel Policy and Procedure Manual, and hired after the effective date of this directive.

Quality Assurance Practices that assure accurate laboratory results.

Reasonable Suspicion Specific and articulable facts known to a supervisor which, taken together with rational inferences from these facts, warrant a conclusion by the supervisor that the member may be in violation of the requirements of this Directive. Reasonable suspicion is less than probable cause, but can never be based on inarticulable hunches or feelings.

Screening Procedure An initial procedure designed to separate samples with drugs at or above the particular minimum concentration from those below that minimum concentration (positive versus negative).

Substance Abuse A knowing violation of controlled substance law or prescription dosage levels.

Supervisor Any member of the Department assigned to a position requiring the exercise of direct supervision over the activities of other members.

Test Either a screening procedure or a combination of a screening procedure and a confirmatory procedure conducted on a biological sample.

14.5.2 Controlled Substances

Members will not possess, dispense or ingest any controlled substances unless prescribed by a licensed physician or other authorized health practitioner and then only in accordance with the prescribed dosage and frequency.

The Aurora Police Department does not permit a member to use or possess marijuana for medical or personal use under the current laws of the State of Colorado, regardless of the member’s duty status.
Members, while in the performance of their duties and while acting under proper and specific orders from a supervisor, may possess or dispense certain authorized controlled substances in connection with and in furtherance of an investigation, e.g., Narcotics Section personnel.

A member who is required to take prescription medication will inquire of the prescribing or treating practitioner whether any of the ingredients of such medication constitute a controlled substance as defined by State or Federal Law. If a member has received a prescription for a controlled substance, he/she will complete a Prescribed Controlled Substance Notification Checklist (APD 081) and forward the completed document to his/her immediate supervisor. If the prescription is for a chronic ongoing medical condition, the member will resubmit a new form annually, to ensure proper documentation is on file. If a member has received medications in the course of the treatment that contains a controlled substance, he/she will follow all procedures as outlined in this section as well. This form constitutes a medical record and is not to be retained in the supervisor’s file. This form is retained in a separate confidential medical file within Internal Affairs.

The member will inform the prescribing or treating practitioner of his/her job duties and will ask if, in the practitioner’s opinion, the medication will affect his/her ability to perform their assigned job duties. The member will ask the practitioner to document this opinion in writing and will provide that written documentation to his/her supervisor prior to going on duty. The member will inform his/her supervisor in writing if he/she is experiencing any adverse effects from the medication that may affect his/her ability to perform any assigned job function. If it is determined that the member is not fit to perform his/her duties and there is no appropriate alternative duty available, the member will be placed on sick leave or injury leave, whichever is appropriate.

Whether or not the member is deemed to be fit to perform his/her duties, the supervisor will record all appropriate information including the action taken and forward the record through the chain of command to the member's Division Chief. If the member was not fit to perform his/her normal duties, the Division Chief will make further inquiries and will make the necessary arrangements to restore the member to duty or place the member on the appropriate form of leave. The Division Chief will then forward the record to the Internal Affairs Section where it will be maintained in accordance with the records retention schedule detailed in the Internal Affairs Section SOP. In no case will the record be maintained any longer than two years. All members will maintain the confidentiality of the information pertaining to the member's medical condition and/or any medications prescribed.

14.5.3 Anabolic Steroids

Under the Anabolic Steroids Control Act of 1990, anabolic steroids are classified as a Schedule III Controlled Substance. Testing procedures for anabolic steroids are outlined in Section 14.5.11 of this directive.
14.5.4 Alcohol Impairment

Members will not report for duty while impaired by alcohol or with a BAC or BrAC of 0.02 or more.

Members will not possess or consume any alcoholic beverage while on duty, during secondary employment, or on departmental premises, except in the performance of duty and while acting under proper and specific orders from a supervisor.

Off-duty members will not consume any alcoholic beverage while wearing any uniform item which is readily distinguishable as part of an official uniform.

If a supervisor has reasonable suspicion that a member is impaired by alcohol, the supervisor will follow Directive 14.5.13. Examples of reasonable suspicion include, but are not limited to: the odor of an alcoholic beverage on the member’s breath or about their person, bloodshot watery eyes, slurred speech, admissions to drinking alcohol and clearly observable and describable physical imbalance.

14.5.5 Applicability and Basis for Conducting Drug and/or Alcohol Tests

There are four conditions for which the department may conduct administrative biological testing of a member: random testing, mandatory testing as a condition of assignment or position, reasonable suspicion testing and critical incident testing. In each situation, the collection of the biological sample will be governed by this directive.

14.5.6 Random Drug/Alcohol Testing

All sworn probationary members may be subject to periodic, unannounced drug tests. These tests will be administered not more than twice during their probationary period.

All sworn members will be subject to periodic, unannounced drug tests at the direction of the Internal Affairs Section. Each year, at least five percent of the sworn membership not subject to testing as a condition of assignment to specialized positions will be randomly selected for drug testing. The Internal Affairs Section will utilize a computer program to produce random numbers assigned to sworn members as a basis for participation. The Internal Affairs Section will then notify the sworn member when and where he/she is to report for testing.

The test administrator will first test for the presence of alcohol with a preliminary breath test device (PBT). If any measureable alcohol is detected by the PBT, the DUI Nurse shall be summoned and draw blood as outlined in 14.5.14. When there is a measureable amount of BrAC detected by the PBT, the test administrator will request that the blood be tested for alcohol and common drugs of abuse.
In the event that a PBT registers 0.000 BrAC, the test administrator will request a urine sample from the member and request that the sample is tested for common drugs of abuse, other than alcohol. The urine sample will be collected according to this directive 14.5.11

If, during a periodic, unannounced drug test, a member tests positive for alcohol or drugs, the Chief of Police, or designee has the discretion to assign the member to

- Administrative leave with pay; or
- A modified duty work detail of a non-safety sensitive, non-driving nature.

14.5.7 Mandatory Drug/Alcohol Testing as a Condition of Assignment or Position

Members will be required to submit to periodic, unannounced drug tests at the direction of the Internal Affairs Section. The testing process will be done similar to the random drug and alcohol testing process in 14.5.6. In the event of a positive test, the actions taken against the member’s duty status will also follow 14.5.6.

With prior approval of the Deputy Chief, the individual Command Officers will select the date and time when each member assigned to a specialized assignment or position will be tested. The Deputy Chief of Police will select the date and time for testing of sworn members of the Internal Affairs Section. The drug/alcohol test will be administered to each assigned member at least once, but not more than twice a year without advance notice.

The requirement for testing is applicable to every member who is assigned to one of the specialized assignments or positions listed below, regardless of whether the member is assigned on a temporary or permanent basis. The specialized assignments and/or positions affected are:

- All sworn members of the Narcotics Section, DART Units, and Operations Support Section.
- Crime Laboratory Section - all members.
- Property and Evidence Unit - all members.
- Investigative Support Section – all sworn members.
- Internal Affairs Section - all sworn personnel.
- Technical Services Bureau Lieutenant or designees involved in the destruction of contraband.
• Sworn members assigned to outside task forces who are actively working narcotics related cases.

All members submitting applications for assignment to any of the aforementioned specialized assignments are advised that mandatory drug/alcohol screening is a part of the selection process and is a condition of continued assignment to that specialized position.

Additionally, all command officers are subject to periodic, unannounced drug/alcohol testing upon demand of the Internal Affairs Section Lieutenant with approval of the Chief of Police, the Deputy Chief, or designee. This drug/alcohol test may be administered to such designated command officers at least once, but not more than twice a year, without advance notice.

The Chief of Police, Deputy Chief, and all Division Chiefs will be required to submit to periodic, unannounced drug/alcohol tests, upon demand of the Internal Affairs Section Lieutenant, at least once, but not more than twice a year without advance notice. The Internal Affairs Section Lieutenant will select the date and time when each of them will be tested.

The initial screening may occur at any time during the selection process and subsequent testing will occur periodically.

14.5.8 Critical Incident Drug/Alcohol Testing

Any member who has employed deadly force or potentially deadly force as defined in Directive 5.1: Use of Deadly and Potentially Deadly Force; or any sworn member involved in a duty-related automobile accident involving serious bodily injury or death, will be subject to toxicological testing as soon as practicable after the incident. Mandatory drug/alcohol testing following incidents as described above will be required of the member for internal administrative investigative purposes only. Members asked to submit to drug/alcohol testing for criminal investigations following the above described use of force or accident scenarios are reminded they are entitled to all constitutional rights. Authorization for testing a member following a use of force incident or accident will be approved by the Duty Captain or designee.

The member will be transported to headquarters. In the event that the member was injured and transported to the hospital, drug/alcohol testing will be conducted there. Generally, the criminal investigation is conducted first. However, due to the dissipation of potential evidence, drug/alcohol testing will be done without delay.

The test administrator will first test for the presence of alcohol with a preliminary breath test device (PBT). If any measureable alcohol is detected by the PBT, the DUI Nurse shall be summoned and draw blood, as outlined below. When there is a
measureable amount of BrAC detected by the PBT, the test administrator will request that the blood be tested for alcohol and common drugs of abuse.

In the event that a PBT registers 0.000 BrAC, the test administrator will request a urine sample from the member and request that the sample is tested for common drugs of abuse, other than alcohol. The urine sample will be collected according to this directive 14.5.11

While articulable exceptions may exist, the blood draw will not be done prior to the member consulting with his/her attorney. The DUI Nurse will be summoned to the member’s location. The test administrator will fill out APD Form 023. Using the blood kits designed for critical incidents/reasonable suspicion testing, the DUI Nurse will draw two grey top tubes of blood and the test administrator will observe the blood draw. After sealing the vials, the test administrator will escort the DUI Nurse to the Crime Laboratory and place the vials into the Crime Laboratory refrigerator used for storage of toxicological tests. The test administrator will secure the blood vials in the refrigerator. In the absence of a member of the Crime Lab, the test administrator will retain temporary custody of the samples until a member of the Crime Lab becomes available to provide access to the Crime Lab refrigerator. The test administrator will submit a laboratory request for the presence of drugs and alcohol under the APD case number. The laboratory will follow laboratory Standard Operating Procedures for testing a blood sample for drugs and alcohol.

The criminal investigator(s) must remind the member that after the compelled blood draw, the criminal investigation recommences and that all constitutional rights of the member in a criminal investigation are applicable.

14.5.9 Authorization to Conduct Reasonable Suspicion Drug/Alcohol Testing

Any supervisor who has reasonable suspicion to believe that a member has violated any provision of this Substance Abuse Directive will review the reasonable suspicion with the suspected member's Command Officer if it occurs during normal business hours. If the member's Command Officer is unavailable or if it occurs after normal business hours, the supervisor will review the reasonable suspicion with the designated Duty Executive Officer. The Duty Executive Officer will notify the affected member's Command Officer. If the initiating supervisor is the member's Command Officer, the reasonable suspicion will be reviewed with the next higher level in the normal chain of command. Only when the reviewing authority concurs that there is reasonable suspicion may they authorize the supervisor to initiate an alcohol or drug test in accordance with the procedures outlined in this directive.

The reviewing authority should consult with the Department Legal Advisor when possible.
If the Duty Executive Officer, Deputy Chief, or a Division Chief, is the initiating supervisor, the Chief of Police or the Acting Chief of Police will be the final level of review or authorization required.

When a member is tested for drugs/alcohol due to reasonable suspicion, the member will be placed on administrative leave pending the results of the drug test.

If the result of the test based on reasonable suspicion is negative, the member may be returned to duty provided they are mentally and physically capable of resuming such duty. If the test result is positive, the Chief of Police may proceed in any manner permitted by this directive and the administrative leave will be retroactively charged against the appropriate leave accrual.

14.5.10 Reporting and Documentation Required

Members having a belief or knowledge that a violation of any provision(s) of this directive has occurred, will immediately report the same to their supervisor, or if unavailable, any supervisor.

The supervisor having reasonable suspicion that a member has violated the provisions of this Directive will document in writing:

a. The facts giving rise to the supervisor's reasonable suspicion, and

b. Date, time and name of reviewing authority notified, and

c. Reviewing authority's authorization or refusal of authorization to conduct testing.

If authorized to conduct alcohol or drug testing, the supervisor will also document in writing:

a. The date, time, names and activity performed by all individuals involved in any authorized testing implemented by the supervisor, and

b. The date, time and location where the sample was obtained, and

c. The control number provided by Internal Affairs Section and utilized on the sample to maintain confidentiality, and

d. The chain of custody of any sample collected, and

e. Any other pertinent information to include the action taken, if any, regarding the suspected member after the testing process.
The written documentation will be forwarded immediately under confidential cover to the Internal Affairs Section Lieutenant through the reviewing authority, the suspected member's Division Chief and the Chief of Police.

The written documentation will be considered medical records and accorded the highest level of confidentiality and will not be duplicated or copied except by the Internal Affairs Section Lieutenant or Internal Affairs Section personnel acting under the express authorization of the Deputy Chief of Police. Any copies so made will be given out only by the aforementioned personnel who will document any such distribution.

A copy of the written documentation will be made available to the affected member by the Chief of Police.

14.5.11 Urine Sample Collection Procedure for Drugs other than Alcohol

The intent of these procedures is to utilize those methods which simultaneously provide for adequate control and ensure sample integrity, and which are the least intrusive according to the sensibilities of the member involved. To this end, the member being tested will have their choice of three methods of collection.

Those three methods will be:

a. Direct observation:

The suspected member will remove any coat or outer garment and leave it outside the collection area, in the custody of the supervisor, along with any other personal items such as purses, handbags, briefcases, etc. The supervisor will then visually observe the member provide the sample.

b. Strip:

The member will remove all clothing down to but not including their underwear. A member choosing this option will be provided a paper gown to wear, if they so desire. The member may then enter the collection area alone, out of the direct observation of the supervisor, to provide the sample. All clothing and other personal items will be left outside the collection area in the custody of the supervisor.

c. Pat down:

The member will remove any coat or outer garment and empty their pockets, leaving these and any other personal items outside the collection area in the custody of the supervisor. The supervisor will then thoroughly pat down the member's clothing, including entering the pockets. The member may then enter
the collection area alone, out of the direct observation of the supervisor, to provide the sample.

The supervisor collecting the sample will be of the same sex as the member providing the sample. If the supervisor is not of the same sex, the supervisor will attempt to find another supervisor of the same sex as the member providing the sample. If a supervisor of the same sex is not available, the supervisor may order any member of the same sex to collect the sample.

Whenever a supervisor is collecting a urine sample for drug testing, based upon reasonable suspicion with reviewing authority authorization, for random sampling or based upon the member's specialized assignment or probationary status, the supervisor will:

a. Obtain one Specimen Collection Kit (consisting of one collection cup with attached temperature strip, two 3 oz snap closure containers and one biohazard bag) and necessary testing laboratory paperwork from either the Crime Laboratory Section or Internal Affairs Section. Dye may be obtained from the Crime Laboratory if necessary. (Also, obtain a paper gown if the member has chosen to strip.)

b. Obtain a control number from the Internal Affairs Section Lieutenant or if not available from the on-duty or on-call Internal Affairs Section Sergeant.

c. Select an appropriate facility, such as a bathroom stall, as the collection area.

d. Conduct a search of the facility and ensure that it is free of any foreign substance, which might be utilized to contaminate or adulterate the sample, if the sample is not to be collected under direct observation.

e. Utilize the colored dye provided by the Department to color the water in the toilet to prevent it from being utilized to dilute or adulterate the sample, if the sample is not to be collected under direct observation.

f. Instruct the member to wash their hands prior to providing the sample. After washing their hands, the member will remain in the presence of the collecting supervisor and not be allowed access to water fountains, faucets, soap dispensers, cleaning agents or any other materials that could be used to adulterate the specimen.

g. Direct the member to provide a urine sample in the collection cup with the attached temperature strip provided. The specimen will be divided between the two 3 oz snap closure containers after the temperature has been verified by the collecting supervisor. Each container must have at least thirty (30) mls of urine.
h. If the member has chosen direct observation as the method of collection, the supervisor will enter the collection area with the member, observe the giving of the sample and take immediate custody of the sample. Otherwise, the member will be permitted the privacy of the designated collection area to provide the samples. The collecting supervisor will remain immediately outside the collection area and will listen while the member provides the samples. The member will hand the samples to the supervisor immediately after collection and will not flush the toilet.

i. The supervisor will then inspect the toilet to verify that the colored dye is still present, if the sample was not collected under direct observation, and may then flush the toilet.

j. The supervisor will then check the temperature strip within four minutes of collection and verify that the temperature range is between 90.5 and 99.8 degrees Fahrenheit. If the proper temperature range is not indicated, or if the samples are discolored or otherwise appear to have been contaminated, that will be reason to believe that the member may have altered or substituted the specimens.

A second set of specimens will then be collected under direct observation. The specimens that are believed to have been altered will also be retained and submitted for testing.

k. The supervisor, in the presence of the tested member, will seal the specimens using the two specimen seals provided on the testing laboratory’s paperwork. One each will be placed over the cover and down both sides of the container. The supervisor will affix the date where noted on the label and the Internal Affairs control number in “Donor’s Initial’s” area, using a permanent evidence-marking pen. The necessary information will be completed on the testing laboratory’s paperwork to include the IAU control number in Step 1 and the information in Steps 2 and 4.

l. The supervisor will place the urine specimens in the locking compartments of the refrigerator in the Crime Laboratory Section. After locking the specimen in the compartment, the supervisor will place the key inside the locked compartment through the slot in the door.

The Crime Laboratory Section will be responsible for ensuring that one sample is sent to the laboratory for testing and that the second sample is frozen and retained within the Department.

14.5.12 Urine Sample Testing for Drugs other than Alcohol

Members of the Aurora Police Department will not be utilized to perform any screening or confirmatory tests on any urine samples collected from members and submitted for
analysis in accordance with this directive. All such samples will be transmitted to a designated, independent laboratory for analysis.

If a confirmatory procedure indicates a positive test result, the member will be allowed to have an independent analysis of their urine sample conducted. The member will complete a memorandum requesting the Chief of Police to authorize a portion of the original sample be released for independent analysis.

Any laboratory selected to conduct analysis of urine samples for drugs and/or their metabolites will be required to adhere to the following standards:

a. Ensure that quality assurance procedures are implemented and documented.

b. Ensure that the manufacturer's protocols are followed.

c. Will maintain and document strict chain of custody of samples.

d. Will utilize only trained and certified laboratory technicians to conduct a drug test.

e. Will utilize one of the following analytical methods as a screening procedure for the detection of drugs in a urine sample:

   - Enzyme Multiplied Immunoassay Technique (EMIT)
   - Radio Immunoassay (RIA)
   - Gas Chromatography / Mass Spectroscopy (GC/MS) to be used as a screening procedure for anabolic steroids only.

f. Will utilize only Gas Chromatography combined with Mass Spectroscopy (GC/MS) as a confirmatory procedure, except in the case of benzodiazepines, which will be confirmed with High Pressure Liquid Chromatography (HPLC).

g. Will utilize a portion of the same sample for both the screening procedure and confirmatory procedure, whenever possible.

h. Will ensure that any unused portion of a urine sample is preserved until the Internal Affairs Section Lieutenant notifies the independent laboratory of the Chief of Police's authorization for destruction or release.

i. Will provide this Department with written facts pertaining to:

   - The detection limit of each test authorized by this Directive and actually utilized by the laboratory to detect drug metabolites.
• The cut-off level(s) recommended or established by the manufacturer for any test utilized.

• The cut-off level actually utilized to test samples for each drug metabolite and each screening procedure utilized.

• The chain of custody procedures and documentation thereof, which will be utilized by the laboratory.

• The quality assurance procedures and documentation thereof, which will be utilized by the laboratory.

14.5.13 Breath Sample Collection Procedure

Whenever a supervisor has reasonable suspicion that a member is impaired by alcohol, the supervisor will follow the steps below:

a. The supervisor will notify the member’s commanding officer of the reasonable suspicion, as per directive 14.5.9.

b. After the reviewing authority clearly permits, the supervisor will direct that the member submit to a preliminary breath test (PBT). If the PBT measures 0.000 then the preliminary investigation of alcohol as the cause of impairment will end.

c. If any measurable alcohol is detected by the PBT or if the supervisor determines through reasonable means that impairment is still present and with permission from the reviewing authority, then the supervisor will direct that the member provide a blood sample to test for the presence of drugs and will follow directive 14.5.14.

d. If the member provides a PBT result within the range of 0.020 – 0.049, with the permission of the reviewing authority, the supervisor will immediately place the member on administrative leave and provide the member a ride home.

e. If the member provides a PBT result at or above 0.050, the member is presumptively impaired as defined by C.R.S. With the permission of the reviewing authority, the supervisor will immediately take possession of all firearms possessed by the member and place the member on administrative leave. The member will not be allowed to drive and will be provided a ride home. The supervisor will follow the direction given by the reviewing authority as to any potential criminal investigation.

f. Testing should be done within two (2) hours of making a reasonable suspicion determination. The initiating supervisor will make timely notification to the on-call Internal Affairs supervisor so that the Internal Affairs supervisor will be on
hand to observe the blood draw within the two-hour time frame. Should the Internal Affairs supervisor be unavailable to respond within the two hours, an Internal Affairs control number can be given over the phone. If a supervisor from Internal Affairs is unavailable, any command officer can observe the blood draw and document the Internal Affairs control number on the appropriate paperwork. If the two (2) hour time frame is exceeded, the supervisor must document the reasons the test was not done in a timely manner. Supervisors who fail to test an employee within the established time frame may be subject to discipline.

14.5.14 Blood Sample Collection Procedure

Reasonable Suspicion Blood Draw: In the event that a supervisor has reasonable suspicion that a member is under the influence of a drug or drugs or a combination of drugs and alcohol or if the member had provided a breath sample into a PBT and was tested at any measureable amount and can clearly describe the specific, contemporaneous, articulable, observations of the member’s appearance, behavior, speech, and body odor, the supervisor will immediately notify the affected member’s command officer per directive 14.5.9.

After receiving permission from the reviewing authority, the supervisor will request a control number from the Internal Affairs Lieutenant (or designee). The supervisor shall escort the member to IAS at headquarters. During non-business hours, the on-call IAS investigator will also respond. The supervisor shall then request that a DUI Nurse respond to the member’s location. Using the blood kits designed for critical incidents/reasonable suspicion testing, the DUI Nurse will draw two grey top tubes of blood and the IAS investigator will observe the blood draw. The DUI Nurse will seal the blood vials in both the IAS investigator’s and member’s presence. The IAS investigator will escort the DUI Nurse to the Crime Laboratory and store them in the Crime Laboratory refrigerator used for the storage of toxicological samples. The IAS investigator will secure the vials in the refrigerator. In the absence of a member of the Crime Laboratory, the IAS investigator will retain temporary custody of the samples until a member of the Crime Laboratory becomes available to provide access to the Crime Lab refrigerator.

The IAS investigator will submit a laboratory request for the presence of drugs and/or alcohol. The case number will be the control number obtained from Internal Affairs. When a member is tested due to reasonable suspicion, the member will be placed on administrative leave pending the results of the drug/alcohol test. The supervisor will then provide a ride home for the member.

However, if a supervisor has probable cause (rather than reasonable suspicion) that the member is impaired by drugs, and with the permission of the reviewing authority, the supervisor shall immediately take possession of the member’s firearm(s) and then place the member on administrative leave. The supervisor will then provide a ride home for
substance abuse

14.5 SUBSTANCE ABUSE

the member. The supervisor will follow the direction given by the reviewing authority as to any potential criminal investigation.

Testing should be done within two (2) hours of making a reasonable suspicion determination. If the two (2) hour time frame is exceeded, the supervisor must document the reasons the test was not done in a timely manner. Supervisors who fail to test an employee within the established timeframe may be subject to discipline.

As stated previously in this directive, the written documentation will be forwarded immediately under confidential cover to the Internal Affairs Section Lieutenant through the reviewing authority, the suspected member's Division Chief and the Chief of Police.

The written documentation will be considered medical records and accorded the highest level of confidentiality and will not be duplicated or copied except by the Internal Affairs Section Lieutenant or Internal Affairs Section personnel acting under the express authorization of the Deputy Chief of Police. Any copies so made will be given out only by the aforementioned personnel who will document any such distribution.

A copy of the written documentation will be made available to the affected member by the Chief of Police.

14.5.15 Hair Sample Collection Procedure

Only the Chief of Police or Deputy Chief will have the authority to order a member to submit to hair testing for substance abuse. Hair testing for substance abuse may be ordered by the Chief of Police or Deputy Chief to supplement a current internal administrative investigation.

Any member ordered to submit to hair testing for substance abuse will be placed on administrative leave, or administrative leave will be extended if the order for hair testing supplements a current order for leave based on reasonable suspicion testing. The member will remain on administrative leave until the results of the testing are reported by the contracted laboratory.

Hair samples will not be used for random testing or as a result of a critical incident.

An order to submit a hair sample for testing will require the following conditions:

- A supervisor has reasonable suspicion that a member has used illegal drugs in a time frame that would make insufficient the use of blood or urine samples due to the extended time frame between the alleged use and testing.

- For historical analysis, following a positive result from a blood or urine test that indicates the use of an illegal substance and the hair sample can be used to determine the extent or time period and duration of use.
Upon the orders of the Chief of Police or Deputy Chief, Crime Lab personnel will:

a. Retrieve hair samples from a member according to established Crime Lab standard operating procedures.

b. Package and submit the hair samples to a contracted laboratory for testing. Members of the Aurora Police Department will not be utilized to perform any screening or confirmatory tests on hair samples collected from members and submitted for analysis according to this directive. All hair samples will be transmitted to a designated, independent laboratory for analysis.

c. Report return of analysis immediately under confidential cover to the Chief of Police. All documentation associated with the request, retrieval and analysis will be considered medical records and will be accorded the highest level of confidentiality, and will not be duplicated or copied except by personnel acting under the express authorization of the Chief of Police.

Hair sampling may only be used for detection of the following controlled substances or classes:

a. AMPHETAMINES
b. COCAINE
c. CANNABINOIDS
d. OPIATES
e. PCP

14.5.16 Confidentiality

All members will maintain strict confidentiality pertaining to the allegations, testing and/or results, except where necessary to communicate information to comply with this Directive.

All written information pertaining to an incident will be considered medical records and accorded the highest level of confidentiality. This information will be forwarded to the Internal Affairs Section in a manner that will ensure that confidentiality.

The Internal Affairs Section will maintain a log of all requests for drug tests, whether testing is authorized or not, all drug tests conducted and the results thereof, both positive and negative.

14.5.17 Discipline and Treatment Alternatives
Members are encouraged to seek voluntary treatment for alcohol and/or drug abuse problems.

In some cases, successful completion of a treatment program may be authorized by the Chief of Police as an alternative to formal discipline, in the Chief of Police's sole discretion. If formal discipline is imposed for incidents arising as a result of a violation of this Directive, then such discipline will be handled in accordance with Directive 10.2 - Complaint And Discipline Procedures For Sworn Members and Directive 10.3 - Complaint And Discipline Procedures For Non-Sworn Members. Nothing herein will be construed as preventing the Chief of Police to require successful completion of a treatment program as a condition of any discipline imposed. If a member enrolls in a treatment program, either as an alternative to or a condition of discipline, then that member must sign a waiver permitting the release of all relevant treatment information to the Chief of Police or designee.

Treatment programs will be at the member's expense and may be covered by the member's Health Insurance.

14.5.18 Cut-Off Levels

Cut-off levels for controlled substances and their metabolites for urine samples will be according to current Substance Abuse Mental Health Service Administration (SAMPSHA) standards. The Crime Lab will be responsible for maintaining current documentation relating to the cut-off levels, and will make the documentation available upon request for all members during normal business hours.

Cut-off levels for controlled substances and their metabolites for hair samples will be according to the current established picogram detection levels for the contracted laboratory. The Crime Lab will be responsible for maintaining current documentation relating to the cut-off levels for hair testing, and will make the documentation available upon request for all members during normal business hours.

14.5.19 Retention of Biological Samples

Any biological sample of a member obtained for administrative purposes shall not be used in any criminal investigation. The Crime Laboratory Section is responsible for maintenance and storage of the sample according to the laboratory’s Standard Operating Procedures.

Generally, one sample is sent to a certified laboratory for testing and the second sample stored at the lab. In the event that the first sample tests negative, the Internal Affairs Lieutenant will direct the lab to destroy the second sample. In the event that the sample tests positive, the second sample shall be retained. The member has the ability to
request the second sample be tested at another certified laboratory by authoring a memorandum to the Chief of Police, or designee, allowing the release of the sample to another laboratory. At the conclusion of the case, the Internal Affairs Lieutenant will direct the Crime Laboratory to destroy the second sample if the sample was retained by the laboratory.
14.05 SUBSTANCE ABUSE

The Aurora Police Department has a legal responsibility and obligation to ensure a safe work environment. The Department is required to protect the public by ensuring the ability of its members to fulfill the Department's enforcement, investigatory and service responsibilities through quality performance of their assigned duties.

The illegal use of controlled substances, alcohol or controlled substance dependence, and alcohol or controlled substance abuse can seriously impair an individual's performance and their general physical and mental health.

The Aurora Police Department does not permit a member to use or possess marijuana even if the member has a medical marijuana card that conveys on him/her “caregiver” or “patient” status in Colorado.

A member who abuses alcohol or controlled substances poses a potential threat to the safety of the community and fellow members of the Department and diminishes the morale and integrity of the Department. The illegal possession and use of controlled substances are crimes and will not be tolerated.

Therefore, the purpose of this Directive is to ensure a member's fitness for duty as a condition of employment; to ensure that such tests as may be required are based on reasonable, objective bases; to provide written guidance for test procedures; to ensure an appropriate degree of confidentiality; and to ensure that each member knows that testing is a requirement of employment and a condition of certain specialized assignments.

The procedures outlined in this Directive are to be utilized for the collection of biological samples for criminal and administrative testing purposes. Collection of biological samples for a criminal investigation will follow the procedure outlined in this Directive, APD Directive 10.10 and applicable law.
## Definitions

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<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<tbody>
<tr>
<td><strong>Alcoholic Beverage</strong></td>
<td>Any malt beverage, malt, vinous or spirituous liquor.</td>
</tr>
<tr>
<td><strong>Biological Sample</strong></td>
<td>A physical sample of a member’s blood, breath, urine or hair.</td>
</tr>
<tr>
<td><strong>Blood Alcohol Content (BAC)</strong></td>
<td>The amount of ethyl alcohol in a person’s blood expressed in grams of alcohol per 100 milliliters of blood.</td>
</tr>
<tr>
<td><strong>Breath Alcohol Content (BrAC)</strong></td>
<td>The amount of ethyl alcohol in a person’s breath expressed in grams of alcohol per 210 liters of breath.</td>
</tr>
<tr>
<td><strong>Common Drugs of Abuse</strong></td>
<td>Common drugs of abuse include, but are not limited to: Amphetamines, Barbiturates, Benzodiazepines, Cannabinoids and its metabolites, Cocaine and its metabolites, Methadone, Methaqualone, Opiates, Phencyclidine Propoxyphene, Ethyl Alcohol</td>
</tr>
<tr>
<td><strong>Confirmatory Procedure</strong></td>
<td>A second test by an alternate chemical method to positively identify a drug or metabolite except for anabolic steroids that utilize the same methodology with separate aliquots utilized for each test. Confirmations are carried out on presumptive positives from screening procedures.</td>
</tr>
<tr>
<td><strong>Controlled Substance</strong></td>
<td>Any drug or other substance or an immediate precursor that is declared to be a controlled substance under any Law of the State of Colorado or any Federal Law, rule or regulation.</td>
</tr>
<tr>
<td><strong>Cut-Off Level</strong></td>
<td>The concentration limit for drugs or their metabolites that will be used to declare a given sample positive or negative. It is frequently higher than the detection limit. Any sample, which tests below this level, is considered a negative.</td>
</tr>
<tr>
<td><strong>Detection Limit</strong></td>
<td>Lowest concentration of a drug or metabolite that can reliably be detected by a given test methodology.</td>
</tr>
<tr>
<td><strong>Drug</strong></td>
<td>As defined by C.R.S. 18-18-102(13)(a).</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Drug Concentration</td>
<td>Amount of a drug or metabolite in a unit volume of biological fluid, expressed as weight/volume. Drug concentrations are usually expressed either as nanograms per milliliter (ng/ml), as micrograms per milliliter (ug/ml), or milligrams per liter (mg/l). There are 28,000 micrograms in an ounce, and 1,000 nanograms in a microgram.</td>
</tr>
<tr>
<td>Drug Test</td>
<td>A toxicological test administered under approved conditions and procedures as set out in this Directive to detect drugs and/or alcohol.</td>
</tr>
<tr>
<td>Impaired</td>
<td>Affected to the slightest degree for drugs other than alcohol. For alcohol refer to 14.5.4.</td>
</tr>
<tr>
<td>Member</td>
<td>An individual employed by the Aurora Police Department in either a full-time, part-time or temporary capacity and includes both sworn and non-sworn personnel, as well as any individual who performs work for the Department on a voluntary basis.</td>
</tr>
<tr>
<td>Metabolite</td>
<td>A compound produced from chemical changes of a drug in the body.</td>
</tr>
<tr>
<td>Negative Test Result</td>
<td>Regardless of the preliminary test results, the results of a confirmatory test conducted and reported (in writing) by a laboratory indicating that drug metabolites are not present in a concentration above the established cut-off level. This may be reported quantitatively or may be reported merely as &quot;negative&quot;.</td>
</tr>
<tr>
<td>Positive Test Result</td>
<td>The results of a confirmatory test conducted and reported (in writing) by a laboratory indicating that drugs or their metabolites are present in a concentration above the established cut-off level. This may be reported quantitatively or may be reported merely as &quot;positive&quot;.</td>
</tr>
<tr>
<td>Presumptive Positive</td>
<td>A sample flagged as positive by screening but which has not been confirmed.</td>
</tr>
<tr>
<td>Probable Cause</td>
<td>Facts and circumstances within an officer’s knowledge, and of which he/she has reasonably</td>
</tr>
</tbody>
</table>
trustworthy information, are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed.

Probationary Member

Any new Career Service/Civil Service employee, during their introductory period as defined in the City Personnel Policy and Procedure Manual, and hired after the effective date of this directive.

Quality Assurance

Practices that assure accurate laboratory results.

Reasonable Suspicion

Specific and articulable facts known to a supervisor which, taken together with rational inferences from these facts, warrant a conclusion by the supervisor that the member may be in violation of the requirements of this Directive. Reasonable suspicion is less than probable cause, but can never be based on inarticulable hunches or feelings.

Screening Procedure

An initial procedure designed to separate samples with drugs at or above the particular minimum concentration from those below that minimum concentration (positive versus negative).

Substance Abuse

A knowing violation of controlled substance law or prescription dosage levels.

Supervisor

Any member of the Department assigned to a position requiring the exercise of direct supervision over the activities of other members.

Test

Either a screening procedure or a combination of a screening procedure and a confirmatory procedure conducted on a biological sample.

14.5.2 Controlled Substances

Members will not possess, dispense or ingest any controlled substances unless prescribed by a licensed physician or other authorized health practitioner and then only in accordance with the prescribed dosage and frequency.

The Aurora Police Department does not permit a member to use or possess marijuana for medical or personal use under the current laws of the State of Colorado, regardless of the member’s duty status.
Members, while in the performance of their duties and while acting under proper and specific orders from a supervisor, may possess or dispense certain authorized controlled substances in connection with and in furtherance of an investigation, e.g., Narcotics Section personnel.

A member who is required to take prescription medication will inquire of the prescribing or treating practitioner whether any of the ingredients of such medication constitute a controlled substance as defined by state or federal law. If a member has received a prescription for a controlled substance, he/she will complete a Prescribed Controlled Substance Notification Checklist (APD 081) and forward the completed document to his/her immediate supervisor. If the prescription is for a chronic ongoing medical condition, the member will resubmit a new form annually, to ensure proper documentation is on file. If a member has received medications in the course of the treatment that contains a controlled substance, he/she will follow all procedures as outlined in this section as well. This form constitutes a medical record and is not to be retained in the supervisor’s file. This form is retained in a separate confidential medical file within the Internal Affairs Bureau.

The member will inform the prescribing or treating practitioner of his/her job duties and will ask if, in the practitioner’s opinion, the medication will affect his/her ability to perform their assigned job duties. The member will ask the practitioner to document this opinion in writing and will provide that written documentation to his/her supervisor prior to going on duty. The member will inform his/her supervisor in writing if he/she is experiencing any adverse effects from the medication that may affect his/her ability to perform any assigned job function. If it is determined that the member is not fit to perform his/her duties and there is no appropriate alternative duty available, the member will be placed on sick leave or injury leave, whichever is appropriate.

Whether or not the member is deemed fit to perform his/her duties, the supervisor will record all appropriate information including the action taken and forward the record through the chain of command to the member’s Division Chief.

14.5.3 Anabolic Steroids

Under the Anabolic Steroids Control Act of 1990, anabolic steroids are classified as a Schedule III Controlled Substance. Testing procedures for anabolic steroids are outlined in Section 14.5.11 of this directive.

14.5.4 Alcohol and/or Drug Impairment; Criminal Investigation into Possible DWAI or DUI; Criminal Investigation into Prohibited Use of a Weapon

Members will not report for duty while impaired by drugs and/or alcohol or with a BAC or BrAC of 0.02 or more.
Members will not possess or consume any alcoholic beverage or controlled substance (except those approved pursuant to directive 14.5.2) while on duty, during secondary employment, or on departmental premises, except in the performance of duty and while acting under proper and specific orders from a supervisor.

Off-duty members will not consume any alcoholic beverage or controlled substances (except those approved pursuant to directive 14.5.2) while wearing any uniform item which is readily distinguishable as part of an official uniform.

**DWAI/DUI Criminal Investigation:**

Any member found to be driving a motor vehicle either on or off duty and for which there is reasonable suspicion to believe that officer is under the influence of alcohol or drugs or both shall be investigated for driving under the influence of alcohol and/or drugs (C.R.S. 42-4-1301) in accordance with state law and Directive 10.10.

If a supervisor has reasonable suspicion that a member is impaired by alcohol and/or drugs, and the supervisor has reasonable suspicion that the member recently operated a motor vehicle, then the member shall be investigated for driving under the influence of alcohol and/or drugs (C.R.S. 42-4-1301). The Chief of Police will be immediately notified by the supervisor. The supervisor shall notify the Lieutenant of the Traffic Unit, and a traffic investigator shall be assigned to investigate the possible violation of operating a motor vehicle while under the influence of alcohol, drugs or both, and shall work with the appropriate District Attorney’s Office to determine if charges shall be filed. The Chief of Police, or designee, may request the investigation be handled by an outside law enforcement entity as deemed appropriate by the Chief. If there is a criminal investigation of the member, the supervisor will stop any administrative investigation efforts; however Internal Affairs will still need to be notified.

As this would require a criminal investigation, such investigation shall adhere strictly to APD Directive 10.10 Criminal Investigation of Members, in addition to any other rights established under the law. At a minimum, a General Offense (GO) Report shall be authored by the investigating officer. The GO shall include all steps taken to determine the appropriateness of charges, or the lack thereof.

**Prohibited Use of a Weapon – Criminal Investigation:** If a supervisor has reasonable suspicion that a member is impaired by alcohol and/or drugs, and the supervisor has reasonable suspicion that the member has in his/her possession a firearm, the member shall be investigated for possession a firearm while under the influence (C.R.S. 18-12-106(d)). The Chief of Police will be immediately notified by the supervisor. If there is a corresponding investigation into DWAI/DUI, the same investigating officer will handle the possession of a firearm investigation. If there is not a corresponding investigation into DWAI/DUI, the supervisor shall notify the Traffic Lieutenant and a Traffic Investigator regarding possible violation of possession of a firearm while intoxicated, and shall work with the appropriate district attorney’s office to determine if charges shall be filed. The supervisor or investigating officer will immediately take
possession of all firearms possessed by the member. The Chief of Police, or designee, may request the investigation be handled by an outside law enforcement entity as deemed appropriate by the Chief. If there is a criminal investigation of the member, the supervisor will stop any administrative investigation efforts.

Examples of reasonable suspicion include but are not limited to: the odor of an alcoholic beverage on the member’s breath or about their person, bloodshot watery eyes, slurred speech, admissions to drinking alcohol and clearly observable and describable physical imbalance.

Administrative Investigation: If there is no reasonable suspicinon for DWAI, DUI, or possession of a firearm when under the influence, the supervisor will continue with an administrative investigation and follow Section 14.5.13 of this directive.

At the conclusion of the criminal investigation(s), if any, involving the member, the Internal Affairs Bureau will review the investigation to determine what, if any violations of policy or directive may exist. Should the review reveal the need for further administrative investigation, the Internal Affairs Bureau Commander or designee will conduct the internal administrative investigation. The Chief of Police may authorize the Internal Affairs Bureau to conduct an internal administrative investigation at the same time a criminal investigation is being conducted, on the same subject member, for the same incident(s)/allegations(s).

14.5.5 Applicability and Basis for Conducting Drug and/or Alcohol Tests

There are four conditions for which the department may conduct administrative biological testing of a member: random testing, mandatory testing as a condition of assignment or position, reasonable suspicion testing and critical incident testing. In each situation, the collection of the biological sample will be governed by this directive.

14.5.6 Random Drug/Alcohol Testing

All sworn probationary members may be subject to periodic, unannounced drug tests. These tests will be administered not more than twice during their probationary period. All sworn members will be subject to periodic, unannounced drug tests at the direction of the Internal Affairs Bureau. Each year, at least five percent of the sworn membership not subject to testing as a condition of assignment to specialized positions will be randomly selected for drug testing. The Internal Affairs Bureau will utilize a computer program to produce random numbers assigned to sworn members as a basis for participation. The Internal Affairs Bureau will then notify the sworn member when and where he/she is to report for testing.

The test administrator will first test for the presence of alcohol with a preliminary breath test device (PBT). If any measurable alcohol is detected by the PBT, the DUI nurse shall be summoned and draw blood as outlined in 14.5.14. When there is a
measurable amount of BrAC detected by the PBT, the test administrator will request that the blood be tested for alcohol and common drugs of abuse.

In the event that a PBT registers 0.000 BrAC, the test administrator will request a urine sample from the member and request that the sample is tested for common drugs of abuse, other than alcohol. The urine sample will be collected according to this directive 14.5.11

If, during a periodic, unannounced drug test, a member tests positive for alcohol or drugs, the Chief of Police, or designee has the discretion to assign the member to

- Administrative leave with pay; or
- A modified duty work detail of a non-safety sensitive, non-driving nature.

14.5.7 Mandatory Drug/Alcohol Testing as a Condition of Assignment or Position

Members will be required to submit to periodic, unannounced drug tests at the direction of the Internal Affairs Bureau. The testing process will be done similar to the random drug and alcohol testing process in Section 14.5.6 of this directive. In the event of a positive test, the actions taken against the member’s duty status will also follow Section 14.5.6 of this directive.

Individual command officers will select the date and time when each member assigned to a specialized assignment or position will be tested. The Deputy Chief of Police will select the date and time for testing of sworn members of the Internal Affairs Bureau. The drug/alcohol test will be administered to each assigned member at least once, but not more than twice a year without advance notice.

The requirement for testing is applicable to every member who is assigned to one of the specialized assignments or positions listed below, regardless of whether the member is assigned on a temporary or permanent basis. The specialized assignments and/or positions affected are:

- All sworn members of the Narcotics Section, and Operations Support Section.
- Crime Scene Unit - all members.
- Property and Evidence Unit - all members and any designees involved in the destruction of contraband.
- Investigative Support Section – all sworn members.
- Internal Affairs Bureau - all sworn personnel.
• Sworn members assigned to outside task forces who are actively working narcotics related cases.

All members submitting applications for assignment to any of the aforementioned specialized assignments are advised that mandatory drug/alcohol screening is condition of continued assignment to that specialized position.

Additionally, all command officers are subject to periodic, unannounced drug/alcohol testing upon demand of the Internal Affairs Bureau Commander, or designee, with approval of the Chief of Police, the Deputy Chief, or designee. This drug/alcohol test may be administered to such designated command officers at least once, but not more than twice a year, without advance notice.

The Chief of Police, Deputy Chief, and all Division Chiefs will be required to submit to periodic, unannounced drug/alcohol tests, upon demand of the Internal Affairs Bureau Commander, or designee, at least once, but not more than twice a year without advance notice. The Internal Affairs Bureau Commander, or designee, will select the date and time when each of them will be tested.

14.5.8 Critical Incident Drug/Alcohol and Drug Testing

Any member who has employed deadly force or potentially deadly force or any sworn member involved in a duty-related automobile accident involving serious bodily injury or death or an in-custody incident involving death, will be subject to toxicological testing as soon as practicable after the incident. “Involvement” means that the member had an active role in the force used. Mandatory drug/alcohol testing following incidents as described above will be required of the member for internal administrative investigative purposes only. Members asked to submit to drug/alcohol testing for criminal investigations following the above described use of force or accident scenarios are reminded they are entitled to all constitutional rights. Authorization for testing a member following a use of force incident or accident will be approved by the Duty Captain or designee.

The member will be transported to headquarters. In the event that the member was injured and transported to the hospital, drug/alcohol testing will be conducted there. Generally, the criminal investigation is conducted first. However, due to the dissipation of potential evidence, drug/alcohol testing will be done without delay.

The test administrator will first test for the presence of alcohol with a preliminary breath test device (PBT). If any measurable alcohol is detected by the PBT, the DUI nurse shall be summoned and draw blood, as outlined below. When there is a measurable amount of BrAC detected by the PBT, the test administrator will request that the blood be tested for alcohol and common drugs of abuse.
In the event that a PBT registers 0.000 BrAC, the test administrator will request a urine sample from the member and request that the sample is tested for common drugs of abuse, other than alcohol. The urine sample will be collected according to this Directive under Section 14.5.11 of this directive.

While articulable exceptions may exist, the blood draw will not be done prior to the member consulting with his/her attorney. The DUI nurse will be summoned to the member’s location. The test administrator will fill out APD Form 023. Using the blood kits designed for critical incidents/reasonable suspicion testing, the DUI nurse will draw two grey top tubes of blood and the test administrator will observe the blood draw. After sealing the vials, the test administrator will escort the DUI Nurse to the Internal Affairs Bureau where an IAB member and the test administrator will place the vials into the Internal Affairs Bureau refrigerator used for storage of toxicological tests. The IAB member will secure the blood vials in the refrigerator. In the absence of a member of the Internal Affairs Bureau, the test administrator will retain temporary custody of the samples until a member of the Internal Affairs Bureau becomes available to provide access to the refrigerator. The Internal Affairs Bureau is responsible for submitting the sample to an independent laboratory for testing.

The criminal investigator(s) must remind the member that after the compelled blood draw, the criminal investigation recommences and that all constitutional rights of the member in a criminal investigation are applicable.

14.5.9 Administrative Leave When a Member is Tested Based Upon Reasonable Suspicion

When a member is tested for drugs/alcohol due to reasonable suspicion either for a criminal investigation under Section 14.5.4 of this directive or an administrative investigation under Section 14.5.13 of this directive, the member will be placed on administrative leave pending the results of the drug test.

If the result of the test based on reasonable suspicion is negative, the member may be returned to duty provided they are mentally and physically capable of resuming such duty. If the test result is positive, the Chief of Police may proceed in any manner permitted by this directive and the administrative leave will be retroactively charged against the appropriate leave accrual.

14.5.10 Reporting and Documentation Required

Members having a belief or knowledge that a violation of any provision(s) of this directive has occurred, will immediately report the same to their supervisor, or if unavailable, any supervisor.

The supervisor having reasonable suspicion that a member has violated the provisions of this Directive will document in writing:
a. The facts giving rise to the supervisor's reasonable suspicion, and

b. Date, time and name of reviewing authority notified, and

c. Reviewing authority's authorization or refusal of authorization to conduct testing.

If authorized to conduct alcohol or drug testing, the supervisor will also document in writing:

a. The date, time, names and activity performed by all individuals involved in any authorized testing implemented by the supervisor, and

b. The date, time and location where the sample was obtained, and

c. The control number provided by Internal Affairs Bureau and utilized on the sample to maintain confidentiality, and

d. The chain of custody of any sample collected, and

e. Any other pertinent information to include the action taken, if any, regarding the suspected member after the testing process.

The written documentation will be forwarded immediately under confidential cover to the Internal Affairs Bureau Commander, or designee, through the reviewing authority, the suspected member's Division Chief and the Chief of Police.

A copy of the written documentation will be made available to the affected member by the Chief of Police or designee.

14.5.11 Urine Sample Collection Procedure for Drugs other than Alcohol

The intent of these procedures is to utilize those methods which simultaneously provide for adequate control and ensure sample integrity, and which are the least intrusive according to the sensibilities of the member involved. To this end, the member being tested will have their choice of three methods of collection.

Those three methods will be:

a. Direct observation:

The suspected member will remove any coat or outer garment and leave it outside the collection area, in the custody of the supervisor, along with any other personal items such as purses, handbags, briefcases, etc. The supervisor will then visually observe the member provide the sample.
b. Strip:

The member will remove all clothing down to but not including their underwear. A member choosing this option will be provided a paper gown to wear, if they so desire. The member may then enter the collection area alone, out of the direct observation of the supervisor, to provide the sample. All clothing and other personal items will be left outside the collection area in the custody of the supervisor.

c. Pat down:

The member will remove any coat or outer garment and empty their pockets, leaving these and any other personal items outside the collection area in the custody of the supervisor. The supervisor will then thoroughly pat down the member's clothing, including entering the pockets. The member may then enter the collection area alone, out of the direct observation of the supervisor, to provide the sample.

The supervisor collecting the sample will be of the same sex as the member providing the sample. If the supervisor is not of the same sex, the supervisor will attempt to find another supervisor of the same sex as the member providing the sample. If a supervisor of the same sex is not available, the supervisor may order any member of the same sex to collect the sample.

Whenever a supervisor is collecting a urine sample for drug testing, based upon reasonable suspicion with reviewing authority authorization, for random sampling or based upon the member's specialized assignment or probationary status, the supervisor will:

a. Obtain one Specimen Collection Kit (consisting of one collection cup with attached temperature strip, two 3 oz snap closure containers and one biohazard bag) and necessary testing laboratory paperwork from Internal Affairs Bureau. Dye may be obtained from the Crime Scene Unit if necessary. (Also, obtain a paper gown if the member has chosen to strip.)

b. Obtain a control number from the Internal Affairs Bureau Commander or if not available from the on-duty or on-call Internal Affairs Bureau Lieutenant.

c. Select an appropriate facility, such as a bathroom stall, as the collection area.

d. Conduct a search of the facility and ensure that it is free of any foreign substance, which might be utilized to contaminate or adulterate the sample, if the sample is not to be collected under direct observation.
e. Utilize the colored dye provided by the Department to color the water in the toilet to prevent it from being utilized to dilute or adulterate the sample, if the sample is not to be collected under direct observation.

f. Instruct the member to wash their hands prior to providing the sample. After washing their hands, the member will remain in the presence of the collecting supervisor and not be allowed access to water fountains, faucets, soap dispensers, cleaning agents or any other materials that could be used to adulterate the specimen.

g. Direct the member to provide a urine sample in the collection cup with the attached temperature strip provided. The specimen will be divided between the two 3 oz snap closure containers after the temperature has been verified by the collecting supervisor. Each container must have at least thirty (30) mls of urine.

h. If the member has chosen direct observation as the method of collection, the supervisor will enter the collection area with the member, observe the giving of the sample and take immediate custody of the sample. Otherwise, the member will be permitted the privacy of the designated collection area to provide the samples. The collecting supervisor will remain immediately outside the collection area and will listen while the member provides the samples. The member will hand the samples to the supervisor immediately after collection and will not flush the toilet.

i. The supervisor will then inspect the toilet to verify that the colored dye is still present, if the sample was not collected under direct observation, and may then flush the toilet.

j. The supervisor will then check the temperature strip within four minutes of collection and verify that the temperature range is between 90.5 and 99.8 degrees Fahrenheit. If the proper temperature range is not indicated, or if the samples are discolored or otherwise appear to have been contaminated, that will be reason to believe that the member may have altered or substituted the specimens.

A second set of specimens will then be collected under direct observation. The specimens that are believed to have been altered will also be retained and submitted for testing.

k. The supervisor, in the presence of the tested member, will seal the specimens using the two specimen seals provided on the testing laboratory’s paperwork. One each will be placed over the cover and down both sides of the container. The supervisor will affix the date where noted on the label and the Internal Affairs control number in “Donor’s Initial’s” area, using a permanent evidence-marking pen. The necessary information will be completed on the testing laboratory’s
paperwork to include the IAB control number in Step 1 and the information in Steps 2 and 4.

1. The supervisor will be responsible for transporting the specimen to the IAB for testing purposes. IAB personnel will be responsible for securing the specimen until it is transported for testing.

The Internal Affairs Bureau will be responsible for ensuring that one sample is sent to the independent laboratory for testing and that the second sample is retained by IAB. The second sample may be destroyed if the test result is negative.

14.5.12 Urine Sample Testing for Drugs other than Alcohol

Members of the Aurora Police Department will not be utilized to perform any screening or confirmatory tests on any urine samples collected from members and submitted for analysis in accordance with this directive. All such samples will be transmitted to a designated, independent laboratory for analysis.

If a confirmatory procedure indicates a positive test result, the member will be allowed to have an independent analysis of their urine sample conducted. The member will complete a memorandum requesting the Chief of Police to authorize a portion of the original sample be released for independent analysis.

Any laboratory selected to conduct analysis of urine samples for drugs and/or their metabolites will be required to adhere to the following standards:

a. Ensure that quality assurance procedures are implemented and documented.

b. Ensure that the manufacturer's protocols are followed.

c. Will maintain and document strict chain of custody of samples.

d. Will utilize only trained and certified laboratory technicians to conduct a drug test.

e. Will utilize one of the following analytical methods as a screening procedure for the detection of drugs in a urine sample:

- Enzyme Multiplied Immunoassay Technique (EMIT)
- Radio Immunoassay (RIA)
- Gas Chromatography / Mass Spectroscopy (GC/MS) to be used as a screening procedure for anabolic steroids only.
f. Will utilize only Gas Chromatography combined with Mass Spectroscopy (GC/MS) as a confirmatory procedure, except in the case of benzodiazepines, which will be confirmed with High Pressure Liquid Chromatography (HPLC).

g. Will utilize a portion of the same sample for both the screening procedure and confirmatory procedure, whenever possible.

h. Will ensure that any unused portion of a urine sample is preserved until the Internal Affairs Bureau Commander or designee notifies the independent laboratory of the Chief of Police's authorization for destruction or release.

i. Will provide this Department with written facts pertaining to:
   - The detection limit of each test authorized by this Directive and actually utilized by the laboratory to detect drug metabolites.
   - The cut-off level(s) recommended or established by the manufacturer for any test utilized.
   - The cut-off level actually utilized to test samples for each drug metabolite and each screening procedure utilized.
   - The chain of custody procedures and documentation thereof, which will be utilized by the laboratory.
   - The quality assurance procedures and documentation thereof, which will be utilized by the laboratory.

14.5.13 Breath Sample Collection Procedure

If there is no reasonable suspicion for DWAI, DUI, or possession of a firearm when under the influence so that a criminal investigation is warranted as per this directive, and a supervisor has reasonable suspicion that a member is impaired by alcohol, the supervisor will follow the steps below:

a. The supervisor will notify the member’s commanding officer, along with the Chief of Police, of the reasonable suspicion.

b. After the reviewing authority clearly permits, the supervisor will direct that the member submit to a preliminary breath test (PBT). If the PBT measures 0.000 then the preliminary investigation of alcohol as the cause of impairment will end.

c. If any measurable alcohol is detected by the PBT or if the supervisor determines through reasonable means that impairment is still present and with permission from the reviewing authority, then the supervisor will direct that the member provide a
blood sample to test for the presence of alcohol and/or drugs and will follow directive 14.5.14.

d. If the member provides a PBT result at or above 0.020, with the permission of the reviewing authority, the supervisor will immediately place the member on administrative leave and provide the member a ride home or arrange for a ride home.

e. Testing should be done within two (2) hours of making a reasonable suspicion determination. The initiating supervisor will make timely notification to the on-call Internal Affairs supervisor, or designee so that the Internal Affairs supervisor, or designee will be on hand to observe the blood draw within the two-hour time frame. Should the Internal Affairs supervisor, or designee be unavailable to respond within the two hours, an Internal Affairs control number can be given over the phone. If a supervisor from Internal Affairs is unavailable, any command officer can observe the blood draw and document the Internal Affairs control number on the appropriate paperwork. If the two (2) hour time frame is exceeded, the supervisor must document the reasons the test was not done in a timely manner. Supervisors who fail to test an employee within the established time frame may be subject to discipline.

14.5.14 Blood Sample Collection Procedure

Reasonable Suspicion Blood Draw: If there is no reasonable suspicion for DWAI, DUI, or possession of a firearm when under the influence so that a criminal investigation is warranted as per this directive, and a supervisor has reasonable suspicion that a member is under the influence of a drug or drugs or a combination of drugs and alcohol or if the member had provided a breath sample into a PBT and was tested at any measurable amount and can clearly describe the specific, contemporaneous, articulable, observations of the member’s appearance, behavior, speech, and body odor, the supervisor will immediately notify the affected member’s command officer as outlined in this policy.

After receiving permission from the reviewing authority, the supervisor will request a control number from the Internal Affairs Bureau Commander (or designee). The supervisor shall escort the member to IAB at District 2. During non-business hours, the on-call IAB investigator will also respond. The supervisor shall then request that a DUI Nurse respond to the member’s location. Using the blood kits designed for critical incidents/reasonable suspicion testing, the DUI Nurse will draw two grey top tubes of blood and the IAB investigator will observe the blood draw. The DUI nurse will seal the blood vials in both the IAB investigator’s and member’s presence. The IAB investigator will escort the DUI nurse to the Internal Affairs Bureau and store them in the Internal Affairs Bureau refrigerator used for the storage of toxicological samples. The IAB investigator will secure the vials in the refrigerator. In the absence of a member of the Internal Affairs Bureau, the supervisor will retain temporary custody of
the samples until a member of the Internal Affairs Bureau becomes available to take
custody of the sample.

The IAB investigator will submit a laboratory request for the presence of drugs and/or
alcohol. The case number will be the control number obtained from Internal Affairs.
When a member is tested due to reasonable suspicion, the member will be placed on
administrative leave pending the results of the drug/alcohol test. The supervisor will
then provide a ride home for the member.

Testing should be done within two (2) hours of making a reasonable suspicion
determination. If the two (2) hour time frame is exceeded, the supervisor must
document the reasons the test was not done in a timely manner. Supervisors who fail
to test an employee within the established timeframe may be subject to discipline.

A copy of the written documentation will be made available to the affected member by
the Chief of Police.

14.5.15 Hair Sample Collection Procedure

Only the Chief of Police or Deputy Chief will have the authority to order a member to
submit to hair testing for substance abuse. Hair testing for substance abuse may be
ordered by the Chief of Police or Deputy Chief to supplement a current internal
administrative investigation.

Any member ordered to submit to hair testing for substance abuse will be placed on
administrative leave, or administrative leave will be extended if the order for hair
testing supplements a current order for leave based on reasonable suspicion testing.
The member will remain on administrative leave until the results of the testing are
reported by the contracted laboratory.

Hair samples will not be used for random testing.

An order to submit a hair sample for testing will require the following conditions:

- A supervisor has reasonable suspicion that a member has used illegal drugs
  in a time frame that would make insufficient the use of blood or urine samples
due to the extended time frame between the alleged use and testing.

- For historical analysis, following a positive result from a blood or urine test
  that indicates the use of an illegal substance and the hair sample can be used
to determine the extent or time period and duration of use.
Upon the orders of the Chief of Police or designee, Internal Affairs Bureau personnel will:

a. Ensure that the retrieval of hair samples from a member are conducted according to established independent laboratory procedures.

b. Package and submit the hair samples to a contracted laboratory for testing. Members of the Aurora Police Department will not be utilized to perform any screening or confirmatory tests on hair samples collected from members and submitted for analysis according to this directive. All hair samples will be transmitted to a designated, independent laboratory for analysis.

c. Report return of analysis immediately under confidential cover to the Chief of Police, or designee. All documentation associated with the request, retrieval and analysis will be considered medical records and will be accorded the highest level of confidentiality and will not be duplicated or copied except by personnel acting under the express authorization of the Chief of Police or designee.

Hair sampling may only be used for detection of the following controlled substances or classes:

a. AMPHETAMINES
b. COCAINE
c. CANNABINOIDS
d. OPIATES
e. PCP

14.5.16 Confidentiality

All members will maintain strict confidentiality pertaining to the allegations, testing and/or results, except where necessary to communicate information to comply with this Directive.

The Internal Affairs Bureau will maintain a log of all requests for drug tests, whether testing is authorized or not, all drug tests conducted and the results thereof, both positive and negative.

14.5.17 Discipline and Treatment Alternatives

Members are encouraged to seek voluntary treatment for alcohol and/or drug abuse problems.
In some cases, successful completion of a treatment program may be authorized by the Chief of Police as an alternative to formal discipline, in the Chief of Police's sole discretion. If formal discipline is imposed for incidents arising as a result of a violation of this Directive, then such discipline will be handled in accordance with Directive 10.2 - Complaint And Discipline Procedures For Sworn Members and Directive 10.3 - Complaint And Discipline Procedures For Non-Sworn Members. Nothing herein will be construed as preventing the Chief of Police to require successful completion of a treatment program as a condition of any discipline imposed. If a member enrolls in a treatment program, either as an alternative to or a condition of discipline, then that member must sign a waiver permitting the release of all relevant treatment information to the Chief of Police or designee.

Treatment programs may be at the member's expense and may be covered by the member's health insurance.

14.5.18 Cut-Off Levels

Cut-off levels for controlled substances and their metabolites for urine samples will be according to current Substance Abuse Mental Health Service Administration (SAMPSHA) standards. The independent laboratory be responsible for maintaining current documentation relating to the cut-off levels and will make the documentation available upon request for all members during normal business hours.

Cut-off levels for controlled substances and their metabolites for hair samples will be according to the current established picogram detection levels for the contracted laboratory. The independent laboratory will be responsible for maintaining current documentation relating to the cut-off levels for hair testing and will make the documentation available upon request for all members during normal business hours.

14.5.19 Retention of Biological Samples

Any biological sample of a member obtained for administrative purposes shall not be used in any criminal investigation. The Internal Affairs Bureau is responsible for maintenance and storage of the sample according to IAB SOPs.

Generally, one sample is sent to a certified laboratory for testing and the second sample stored at the Internal Affairs Bureau. In the event that the first sample tests negative, the Internal Affairs Bureau Commander or designee will destroy the second sample. In the event that the sample tests positive, the second sample shall be retained. The member has the ability to request the second sample be tested at another certified laboratory by authoring a memorandum to the Chief of Police, or designee, allowing the release of the sample to another laboratory. At the conclusion of the case, the Internal Affairs Bureau Commander or designee will ensure the second sample is destroyed.
15.18 PEER SUPPORT PROGRAM

The Aurora Police Department’s Peer Support Program (Program) is designed to provide confidential emotional support during and after times of personal or professional crisis to members who express a need for assistance, or for whom supervisory staff feel could benefit from program involvement. The Program shall promote trust, allow anonymity and preserve confidentiality for all members utilizing the Program. The Program will not be used as any form of corrective action or discipline.

Peer Support Advisors (Advisors) are protected under CRS 13-90-107(m)(l): There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person shall not be examined as a witness in the following cases:

A law enforcement peer support team member shall not be examined without the consent of the person to whom peer support services have been provided as to any communication made by the person to the peer support team member; nor shall a recipient of individual peer support services be examined as to any such communication without the recipient’s consent.

“Communication” means an oral statement, written statement, note, record, report, or document, made during, or arising out of, a meeting with a peer support team member.

“Law enforcement peer support team member” means a peace officer, civilian employee, or volunteer member of a law enforcement agency or other person who has been trained in peer support skills and who is officially designated by a police chief, as a member of a law enforcement agency’s peer support team.

This shall apply only to communications made during interactions conducted by a peer support team member: Acting in the person’s official capacity as a law enforcement or firefighter peer support team member; and functioning within the
written peer support guidelines that are in effect for the person’s respective law enforcement agency.

15.18.1 Definitions

**Personal or Professional Crisis** – This could be any incident which causes severe physical or mental injury, usually due to an external agent. One of these events may include, but are not limited to:

- Member involved in the use of deadly force.
- Assault on a member involving a deadly weapon.
- Hostage situation where a member is victim.
- Injury, illness or death of a member or family member.
- Assisting family with a member’s death.
- Catastrophic incidents such as an airplane crash, flood or fatal accident.
- Investigations involving death, such as S.I.D.S.
- Substance abuse.
- Marital, relationship, health, family, financial, employment, or other personal problems.

**Psychological Services** – Psychological Services will supervise the Program of the Aurora Police Department and provide voluntary and confidential services to all members and their families. The Police Psychologist will assist in the selection, training, and retention of Advisors and provide consultation regarding client and other Program matters as needed.

**Peer Support Program Coordinator** – The Employee Support and Wellness Coordinator will act as the coordinator for the Program. They will be responsible for administering the program to include assigning and supervising Advisors in the performance of their duties associated with the support and referral program. The Coordinator will be designated by the Chief of Police or designee in consultation with the Psychological Services.

**Peer Support Advisor (Advisor)** – An employee who, by virtue of prior experience, training or interest, has expressed a desire and has been selected to provide support for peers. Advisors will be appointed by the Chief of Police in consultation with the Coordinator and Psychological Services.

**Client** – Any Aurora Police Department employee may initiate the Program’s benefits by either making a self-initiated contact, being referred by another employee, or is contacted by an Advisor. Any client may maintain a mutually consensual Peer Support relationship with any Advisor.
**Monthly Peer Support Advisor Contact Summary** – The statistical form submitted by Peer Supporters to the Coordinator listing the number of contacts made and time spent each month.

15.18.2 Responsibilities of the Peer Support Program Coordinator

The Coordinator shall function as the primary liaison between Advisors, Psychological Services, and the Chief of Police. The Coordinator will keep record of current contacts of all Advisors and continuously seek out those members who would qualify as an Advisor. The records are to be kept secured at all times. A supervisor may call on the Coordinator to ask advice for situations or to get contact information for one of his/her subordinates to contact an Advisor.

15.18.3 Responsibilities of the Peer Support Advisor

The Advisors will advise clients seeking assistance that the Advisors are not exempt from laws, rules, regulations, directives, or orders; but, that any exchange of information not in violation of the above shall remain confidential. The client is to be advised that any acts of self-injury or injury to others cannot go unreported.

Any other party seeking information about discussions shared between a client and an Advisor shall be informed that the information is confidential.

Advisors provide short-term supportive assistance and or referral within the scope of their ability, knowledge and training, and may make additional referral for assistance when deemed appropriate.

Advisors shall maintain contact with the Coordinator regarding program activities and statistical data on contacts for purposes of program evaluation, including the submission of a monthly contact summary.

15.18.4 Peer Support Advisor Selection Process

Through a competitive process, a sufficient number of interested members shall be selected to perform the duties as Advisors. They shall have three or more continuous years of service and submit a letter of interest to the Coordinator detailing their qualifications, training, and experience which they feel would be beneficial to the program.

An interview will take place before a panel made up of a representative of Psychological Services, Administration, the Coordinator and two current Advisors. They may consider characteristics and traits such as the applicant’s reputation within the department, social skills, ability to empathize, previous education and training, job experience, motivation, sincerity, ability to complete training, and adherence to program policy.
The newly selected Advisor will sign a Memo of Understanding and Confidentiality Statement and be required to successfully complete all the training requirements of the Program.

Due to the sensitive nature of peer support work, an Advisor or the Coordinator can be de-selected at any time at the discretion of the Chief of Police and/or in violation of the Memo of Understanding and Confidentiality Statement. De-selection or a hiatus may also be justified in order to relieve additional stress and/or secondary trauma which are inherent in an advisory role.

15.18.5 Training

Initial training for the newly selected Advisors currently consists of a 40-hour curriculum that includes instruction concerning mental health, suicide, grief, chemical dependency (and other compulsive behavior), counseling skills, listening skills, issues with families and children, critical incidents, trauma, vicarious trauma, anger management, stress management, and referral techniques. Continuing education is required for all Advisors.

15.18.6 Meetings and Documentation

The Coordinator will facilitate regular meetings with his/her Advisor at a frequency approved by the Chief of Police who may provide special assignment time or administrative leave. A Psychological Services clinician (or his/her designee) will attend a portion of the meeting to provide assistance and consultation reference past and ongoing contacts with clients. These meetings will also provide opportunities for continuing education.

The Coordinator will insure client contact sheets (or other methods of capturing data) are completed and submitted on a timely basis. The sheets may indicate the number and type of client contacts, but no information that could identify individual clients will be recorded. The data will be forwarded to the Coordinator on a regular basis.

15.18.7 Ethical Issues

The behaviors and actions of an Advisor reflect on the credibility of this Program. Inappropriate behavior can damage the trust all members place in this Program. Therefore, Advisors are expected to be role models in their professional lives, appearance, and off-duty activities.

Paramount is the personal integrity of each Advisor and his or her respect for each client’s dignity, self-development, and personal welfare.

Advisors will not exercise power over clients or derive personal gain from helping them. It is unethical for an Advisor to accept any gift or remuneration from a client, engage in activities to meet his/her personal needs at the expense of the client, or to ask
for favors or help from clients. An Advisor’s sole reward is the satisfaction of helping a troubled employee.

In developing trust with a client, it is beneficial to explain the Advisor’s role and describe what services can and cannot be offered. Advisors are primarily caring and attentive listeners, serving as a bridge to helping troubled employees find the professional help they require, and are not tasked to solve the clients’ problems for them.

Advisors must be knowledgeable with state statutes and department policy involving confidentiality. They must advise clients when confidentiality can and must be breached (such as indications of illegal behavior or indication that a clear and imminent danger exists to the client or others), preferably at the outset of any contact.

Advisors must not enter into a “dual relationship” with clients. These can include: situations where the client is a subordinate, supervisor, subject officer or panel member of a Disciplinary Review Board, or other process involving the Advisor. Advisors shall avoid situations where the client’s need for peer support stems from an incident involving the Advisor or any other situations diminishing the Advisor’s ability to remain objective.

Should any of the above situations arise, the Advisor shall contact the Coordinator and/or supervisory officer to be removed from that situation.

The Program relies on the trust and endorsement of both management and employees. Advisors must strive to be neutral, non-partisan or aligned with management or employee organizations.

15.18.8 Contacting Peer Support

To take advantage of the Peer Support Program, a member can call any of the Advisors listed on the Peer Support Program brochure or call and leave a message on the Peer Support Hot Line at 303-739-7550.
AURORA POLICE DEPARTMENT
STANDARD OPERATING PROCEDURES
INTERNAL AFFAIRS BUREAU

IAB 02.01 Title: Internal Affairs Bureau – Authority and Responsibility

| Approved By: Harry Glidden, IAB Commander |
| Effective: 11/01/1997 | Revised: 09/15/2016 |
| Associated Policy: |
| References: |

2.1 Internal Affairs Bureau – Authority and Responsibility

The Internal Affairs Bureau Commander and assigned investigators act directly under the authority of the Chief of Police and have the authority to require any member of the department, regardless of rank, to make a full, complete and truthful disclosure pertaining to the commission of, or omission of, any act which might be in conflict with the duties and obligations of a member of the department.

The Internal Affairs Bureau has the authority of the Chief of Police to conduct investigations without interference from any member.

The primary duty of IAB is to ensure the integrity of the Aurora Police Department by:

- Recording, registering, controlling, and supervising the investigation of complaints against department members.
- Maintaining the confidentiality of Internal Affairs investigations and records.

The emphasis of the unit will be prompt, efficient and unbiased investigations of complaints and the security and confidentiality of records and files.

2.1.1 Assignment of Cases to IAB

The Chief of Police, or designee, and the Internal Affairs Bureau will receive complaints. The Chief of Police, or designee, will determine whether the complaint necessitates an IAB investigation. IAB will not conduct an investigation until authorized by the Chief of Police, or designee. If the complaint concerns alleged misconduct by the Chief of Police, the City Manager may authorize investigation by IAB.
5.1.1 Lethal Response Team

The Lethal Response Team (LRT) is a voluntary team comprised of agency members who serve on the Peer Support Team. LRT is under the direct supervision of the Employee Support and Wellness Unit (ESWU).

LRT is responsible for responding to and assisting department members who have been involved in a critical incident and/or deadly force encounter while acting in the scope of their duties, whether on or off-duty. The incident may be intentional or accidental in nature and does not require the death of a subject to initiate a response.

5.1.2 Selection and Retention

Members of LRT will be selected by the ESWU, and will have been directly involved with prior qualifying personal or professional experiences that allow them to effectively support members involved in similar circumstances. Such experiences may include but not be limited to, those critical incidents, as defined in the Reintegration Program under APD DIRECTIVE 2.8.

LRT members will be held to retention standards equivalent to the peer support team and must maintain their peer support certification to preserve confidentiality.

5.1.3 LRT Procedures

When a critical incident occurs, the on-call ESWU member will receive a call from a supervisor, as directed in the “Patrol Commander Notification Matrix”. The on-call member will then determine what type of response will be needed and will make the appropriate notifications to team members.

Team members who are available and asked to respond will report to the requested location with their issued “LRT” or “Peer Support” lanyard, or other attire identifying themselves as a Peer Support Member. At minimum, the ratio of responding LRT members to officers directly involved with the critical incident should be 1:1.
Upon responding to the requested location, each LRT person will be assigned to a member involved with the critical incident. Unless otherwise requested or aside from any conflicts, this LRT person will remain as the liaison and primary support for their assigned member.

LRT personnel will clearly communicate with transporting officers, MCHU detectives, and other personnel present that they are acting ONLY in a peer support capacity, and will not provide any information or services outside of that scope.

Each LRT person is responsible for ensuring their member has all necessary forms, documents, and resources, as directed in the “LRT Operations Checklist”. They will also provide emotional support for the affected member and normalize any emotions/feelings the member may be experiencing. When able and appropriate they will also act as an advocate for the member’s welfare and requested needs, while operating within the scope of their duties and taking into account the requirements and needs of the investigation.

LRT, along with ESWU, will additionally ensure that each affected member’s family is notified and cared for, based on the member’s wishes. Should the family request in-person contact, another member of LRT or Peer Support will be dispatched to support the family.

5.1.4 On-going Support

LRT personnel are expected to continue providing on-going support to their assigned member. Support will include, but not be limited to, frequent check-ins with the member and their family, providing stress management techniques, facilitating communication between the department and the member, providing necessary updates reference their incident, support during any internal and/or criminal or civil processes.

5.1.5 Reintegration Program

LRT personnel assigned to assist a member in returning to duty will do so under the direction of ESWU, in accordance with the Reintegration Program, as specified in APD DIRECTIVE 2.8.
6.1.1 Objectives

The Trauma Response Team (TRT) is a voluntary team comprised primarily of agency members who serve on the Peer Support Team. TRT is under the direct supervision of the Employee Support and Wellness Unit (ESWU).

TRT is responsible for coordinating hospital response for department members and their families, whether immediate or long-term, depending on the needs of the member. These needs may include, but are not limited to, providing tangible and emotional support to members and families, agency notifications, coordinating resources, funeral arrangements, and facilitating survivor benefits.

Similar incidents involving members of other agencies within the City of Aurora and/or who are transported to a hospital in the city for emergent medical care may also require a TRT response.

6.1.2 Definitions

- **Line-of-Duty Death** – Any action, felonious, accidental, or sudden and unexpected, which claims the life of an Aurora Police Officer who is performing work related functions either on or off-duty.

- **Line-of-Duty Injury** – Injury sustained by an officer, who is performing work-related functions either on or off duty, from either felonious or accidental means, requiring immediate hospitalization.

- **Immediate Family** – For the purposes of this procedure, the immediate family consists of the member’s parent, spouse, children (regardless of age), and other relatives who reside in the member’s household. Other family members may be deemed immediate family on a case-by-case basis with approval of the Chief of Police.

- **Survivor** – Immediate family member of an agency member killed in the line-of-duty.
• **Critical Incident Stress Management (CISM)** – A crisis intervention system with multiple components that may be applied to small or large groups dealing with a critical incident.

• **Beneficiary**: Those designated by the officer as recipients of specific death benefits.

• **Benefits**: Financial payments made to the family to assist with financial stability following the loss of a loved one.

### 6.1.3 TRT Rank, Structure, and Key Positions

**TRT Commanding Officer**: The TRT Commanding Officer will be a member of the Trauma Response Team holding the rank of Lieutenant or above, and will be assigned by the Chief of Police or designee. The TRT Commanding Officer will also coordinate with any outside agencies that may be affected in order to maintain order, ensure the process works to benefit the member or his/her family, and to prevent the duplication of efforts.

The TRT Commanding Officer will be responsible for appointing key positions. It will be at the TRT Commanding Officer’s discretion as to whether these positions are best filled from within or outside the TRT.

Should the TRT Commanding Officer be unavailable or otherwise engaged with other duties, the TRT Commanding Officer will have the ability to appoint someone to act in his/her place.

**Hospital Liaison Coordinator**: This TRT member will be responsible for responding to and making immediate contact with pre-designated hospital representatives, per pre-arranged protocols. The first TRT member at the hospital will likely take this lead role in identifying needs and locations within the hospital including:

• Immediate needs of downed member
• Gathering all accurate and up-to-date information to pass to Notification Team
• Family Room and securing its access
• Room for officers to gather for information
• Room for Command Staff
• Refreshments/Water
• Assist hospital staff/personnel with keeping ingress and egress clear of traffic

**Family Liaison**: This TRT member will be the single point of contact that leads the group of individuals responsible for immediately supporting and meeting the needs of the family of the affected member. Although the liaison should know the deceased officer and be aware of the family relationships, the liaison should not be so emotionally involved with the loss or injury that he or she would become ineffective. The Family Liaison is a key position during a line-of-duty death or other significant injury with a department member
that will help identify the needs, both tangible and emotional, that the family requires. The Family Liaison has the duty to ensure that the needs of the family receive the highest level of consideration.

It’s important that Family Liaison learn the dynamics of the family, including extended family, to anticipate needs, both short and long term. Depending on the family dynamics of the member, more than one Family Liaison may be assigned.

Depending on the event, the Family Liaison may be required to maintain contact with the family and continue to provide support through any memorial, funeral service, or court proceedings.

**Public Information Officer:** Department PIOs will act as the public information officers for any event involving the significant injury or death of a Department member. On a large-scale event, PIOs may need to utilize mutual aid assistance from other metro area agency PIOs. PIOs will be responsible for any designated media areas and press releases at the hospital or other locations reference the event.

**Notification Team:** Agency members designated to notify immediate family members/survivors of an active agency member’s death or serious injury.

**APD Internal Communication Coordinator:** This TRT member will be responsible for ensuring that timely and accurate information be made internally to Department members. This includes personal or telephone contact with the member’s closest friends and colleagues. The Internal Communication Coordinator will stay in direct contact with members of the chief’s office and the department’s media relations unit. They also may have to maintain contact with those close friends and colleagues for multiple days during an on-going event.

**Benefits Coordinator:** This TRT member will work closely with members of the APD Orphan’s Fund in identifying and coordinating all local, state, and federal benefits for the family of a fallen officer. They will also assist with coordinating incoming funds or donations from private parties or organizations.

### 6.1.4 TRT Procedures

When an event occurs requiring the response of TRT, the on-call member of Employee Support and Wellness will be contacted via phone by a supervisor. The on-call member will then determine what type of response will be needed and make the appropriate notifications to team members.

Team members who are available and asked to respond will report to the requested location with their issued “TRT” lanyard or other attire identifying themselves as a Peer Support member. Personnel assigned tasks related to a TRT call-out will be placed on a detail
assignment, and all efforts will be made by supervisors to allow them leave from their normal assignments.

TRT members may be required to respond to a hospital, police building, and/or be asked to make a family notification to the affected member(s).

6.1.5 Death or Injury Notification

- In all cases where death or a severe / debilitating injury has occurred to an active agency member, immediate family notification shall be made by the Emergency Notification Team, as directed in DM 15.12. Preferably, a member of the Peer Support Team that has familiarity with the member’s family will be utilized. Other members to consider being involved in notifications include:
  - A member pre-designated on the injured member’s emergency contact form
  - Victim Advocate
  - Command-level department member
  - Chaplain
  - Psychological Services Clinician

- If an active agency member suffers injuries which are grave in nature and an opportunity exists to get the immediate family to the hospital prior to his or her death, than all efforts should be made to do so. If TRT members are on-duty and can transport family expeditiously, this is preferred. If other on-duty officers complete the transport, the TRT members shall meet the family at the hospital.

- Notification of immediate family members / survivors living in the area shall be made in person, in pairs, and in a private place (not in public) whenever possible. At least one member of the notification team shall be in uniform, preferably a command officer. If family members live outside of the Denver metro area, an in-person death notification will be requested from the family’s local law enforcement agency, or as indicated on member’s Emergency Notification Form.

- Death notifications are difficult for all involved parties, including those doing the notification. Realize that if a member of the notification team is too close to the involved member, it may be detrimental to the process. Having a close friend to comfort family members is beneficial, but may not want to be utilized to provide information to the family. As soon as the member’s family sees law enforcement, they will know something is wrong.
  - Ask to be admitted to the house. Never make a death notification on the doorstep.
  - Gather everyone into the home, and have them sit down. Special consideration should be made for children. Once the notification is made to the adults, allow them to decide how they wish to notify the children, and have the adults involved in that notification.
  - Inform the family slowly and clearly of the information that you know regarding the incident.
It is important to refer to the member by name during the notification.
- If the member has already died, quickly and clearly relay that information. Do not provide a false sense of hope.
- The name of the deceased/injured active duty agency member shall not be released to the department or to the media until all notifications have been made to immediate family members. The family liaison and TRT Commander should be in constant contact with the media relations unit.
- The TRT members shall keep in constant contact with the member’s chain of command as well as the Chief’s Office to ensure that proper notifications can be made to the agency member’s supervisors, peers, and co-workers. Peer Support members trained in Critical Incident Stress Management (CISM) in conjunction with department psychologists, will assist with holding debriefings/diffusing sessions for agency members. If the member’s death occurred on-duty, the employees involved in the incident will have separate Critical Incident Stress Debriefings with Peer Support and psychological service prior to the end of their shift. Additional debriefings will be held in the days following the incident.

6.1.6 Assisting the Family at the Hospital

- If the member is transported from the scene and the pronouncement of death is made at a hospital, TRT will respond to that hospital in a timely manner.
- The TRT will use the pre-arranged protocol with the hospitals and make immediate contact with the pre-designated hospital representatives. The first TRT member to the hospital will likely be designated as the Hospital Liaison and immediately start identifying the needs of the family, officers, and responding personnel.
- TRT members identified as part of the Family Liaison team, along with Emergency Notification Team will, if at all possible, bring the family to the hospital and prepare them for what they may see upon arrival. The family will be taken to a pre-designated Family Room identified by the Hospital Liaison.
- The Hospital Liaison will establish communication with the hospital staff to ensure that all medical bills relating to the care and treatment of the member will be sent to the department, and not the home of the member.
  - The family should not sign as a guarantor of payment for treatment.
  - Omit requests for insurance information.
- If the injuries to the member are likely to be fatal, and it is possible for the family to visit the member prior to the death, they should be afforded the opportunity.
- The Family Liaison and Notification Team should remain at the hospital the entire time the family is present and will arrange whatever assistance the family may need, including transportation home.
- Before the Family Liaison leaves the family, the liaison will leave his or her contact information with the family and ensure that they will be available 24/7.
• The Family Liaison will gather information about family residing out-of-town and pass on to TRT members assigned to logistics that will coordinate to arrange transportation for those family members.

6.1.7 Support for the Family during a Wake or Funeral

In the event of a line of duty death or funeral, TRT members may be called upon to assist with the planning, coordinating, and execution of a member’s funeral or memorial services. Funeral planning may take over a week to complete. Personnel available to assist must clear the absence from their normal duty assignment through their chain of command. Funeral planning tasks related to a line of duty death will be placed on a detail assignment, and all efforts will be made by supervisors to allow them leave from their normal assignments.
Additional Materials Cited


Douglas vs. Veterans Administration, 5 M.S.P.R. 280 (1981)


Grassi v. People, 320 P.3d 332, 339 (Colo. 2014)

People v. Hyde, 393 P.3d 962, 964 (Colo. 2017)

People v. Roybal, 655 P.2d 410, 413 n.8 (Colo. 1982)


C.R.S. Section 13-90-107

C.R.S. Section 18-8-405

C.R.S. Section 42-4-1301.1
§ 13-90-107. Who may not testify without consent--definitions, CO ST § 13-90-107

C.R.S.A. § 13-90-107

§ 13-90-107. Who may not testify without consent--definitions

Effective: October 1, 2019

Currentness

(1) There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person shall not be examined as a witness in the following cases:

(a)(I) Except as otherwise provided in section 14-13-310(4), C.R.S., a husband shall not be examined for or against his wife without her consent nor a wife for or against her husband without his consent; nor during the marriage or afterward shall either be examined without the consent of the other as to any communications made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, a criminal action or proceeding for a crime committed by one against the other, or a criminal action or proceeding against one or both spouses when the alleged offense occurred prior to the date of the parties' marriage. However, this exception shall not attach if the otherwise privileged information is communicated after the marriage.

(II) The privilege described in this paragraph (a) does not apply to class 1, 2, or 3 felonies as described in section 18-1.3-401(1)(a)(IV) and (1)(a)(V), C.R.S., or to level 1 or 2 drug felonies as described in section 18-1.3-401.5(2)(a), C.R.S. In this instance, during the marriage or afterward, a husband shall not be examined for or against his wife as to any communications intended to be made in confidence and made by one to the other during the marriage without his consent, and a wife shall not be examined for or against her husband as to any communications intended to be made in confidence and made by one to the other without her consent.

(III) Communications between a husband and wife are not privileged pursuant to this paragraph (a) if such communications are made for the purpose of aiding the commission of a future crime or of a present continuing crime.

(IV) The burden of proving the existence of a marriage for the purposes of this paragraph (a) shall be on the party asserting the claim.

(V) Notice of the assertion of the marital privilege shall be given as soon as practicable but not less than ten days prior to assertion at any hearing.
(a.5)(I) Except as otherwise provided in section 14-13-310(5), C.R.S., a partner in a civil union shall not be examined for or against the other partner in the civil union without the other partner's consent, nor during the civil union or afterward shall either be examined without the consent of the other as to any communications made by one to the other during the civil union; except that this exception does not apply to a civil action or proceeding by one against the other, a criminal action or proceeding for a crime committed by one against the other, or a criminal action or proceeding against one or both partners when the alleged offense occurred prior to the date of the parties' certification of the civil union. However, this exception shall not attach if the otherwise privileged information is communicated after the certification of the civil union.

(II) The privilege described in this paragraph (a.5) does not apply to class 1, 2, or 3 felonies as described in section 18-1.3-401(1)(a)(IV) and (1)(a)(V), C.R.S., or to level 1 or 2 drug felonies as described in section 18-1.3-401.5(2)(a), C.R.S. In this instance, during the civil union or afterward, a partner in a civil union shall not be examined for or against the other partner in the civil union as to any communications intended to be made in confidence and made by one to the other during the civil union without the other partner's consent.

(III) Communications between partners in a civil union are not privileged pursuant to this paragraph (a.5) if such communications are made for the purpose of aiding the commission of a future crime or of a present continuing crime.

(IV) The burden of proving the existence of a civil union for the purposes of this paragraph (a.5) shall be on the party asserting the claim.

(V) Notice of the assertion of the privilege described in this paragraph (a.5) shall be given as soon as practicable but not less than ten days prior to assertion at any hearing.

(VI) For the purposes of this paragraph (a.5), “partner in a civil union” means a person who has entered into a civil union established in accordance with the requirements of article 15 of title 14, C.R.S.

(b) An attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor shall an attorney's secretary, paralegal, legal assistant, stenographer, or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity.

(c) A clergy member, minister, priest, or rabbi shall not be examined without both his or her consent and also the consent of the person making the confidential communication as to any confidential communication made to him or her in his or her professional capacity in the course of discipline expected by the religious body to which he or she belongs.

(d) A physician, surgeon, or registered professional nurse duly authorized to practice his or her profession pursuant to the laws of this state or any other state shall not be examined without the consent of his or her patient as to any information acquired in attending the patient that was necessary to enable him or her to prescribe or act for the patient, but this paragraph (d) shall not apply to:
§ 13-90-107. Who may not testify without consent--definitions, CO ST § 13-90-107

(I) A physician, surgeon, or registered professional nurse who is sued by or on behalf of a patient or by or on behalf of the heirs, executors, or administrators of a patient on any cause of action arising out of or connected with the physician's or nurse's care or treatment of such patient;

(II) A physician, surgeon, or registered professional nurse who was in consultation with a physician, surgeon, or registered professional nurse being sued as provided in subparagraph (I) of this paragraph (d) on the case out of which said suit arises;

(III) A review of a physician's or registered professional nurse's services by any of the following:

(A) The governing board of a hospital licensed pursuant to part 1 of article 3 of title 25, C.R.S., where said physician or registered professional nurse practices or the medical staff of such hospital if the medical staff operates pursuant to written bylaws approved by the governing board of such hospital;

(B) An organization authorized by federal or state law or contract to review physicians' or registered professional nurses' services or an organization which reviews the cost or quality of physicians' or registered professional nurses' services under a contract with the sponsor of a nongovernment group health care program;

(C) The Colorado medical board, the state board of nursing, or a person or group authorized by such board to make an investigation in its behalf;

(D) A peer review committee of a society or association of physicians or registered professional nurses whose membership includes not less than one-third of the medical doctors or doctors of osteopathy or registered professional nurses licensed to practice in this state and only if the physician or registered professional nurse whose services are the subject of review is a member of such society or association and said physician or registered professional nurse has signed a release authorizing such review;

(E) A committee, board, agency, government official, or court to which appeal may be taken from any of the organizations or groups listed in this subparagraph (III);

(IV) A physician or any health care provider who was in consultation with the physician who may have acquired any information or records relating to the services performed by the physician specified in subparagraph (III) of this paragraph (d);

(V) A registered professional nurse who is subject to any claim or the nurse's employer subject to any claim therein based on a nurse's actions, which claims are required to be defended and indemnified by any insurance company or trust obligated by contract;

(VI) A physician, surgeon, or registered professional nurse who is being examined as a witness as a result of his consultation for medical care or genetic counseling or screening pursuant to section 13-64-502 in connection with a civil action to which section 13-64-502 applies.
(e) A public officer shall not be examined as to communications made to him in official confidence, when the public interests, in the judgment of the court, would suffer by the disclosure.

(f)(I) A certified public accountant shall not be examined without the consent of his or her client as to any communication made by the client to him or her in person or through the media of books of account and financial records or his or her advice, reports, or working papers given or made thereon in the course of professional employment; nor shall a secretary, stenographer, clerk, or assistant of a certified public accountant be examined without the consent of the client concerned concerning any fact, the knowledge of which he or she has acquired in such capacity.

(II) No certified public accountant in the employ of the state auditor's office shall be examined as to any communication made in the course of professional service to the legislative audit committee either in person or through the media of books of account and financial records or advice, reports, or working papers given or made thereon; nor shall a secretary, clerk, or assistant of a certified public accountant who is in the employ of the state auditor's office be examined concerning any fact, the knowledge of which such secretary, clerk, or assistant acquired in such capacity, unless such information has been made open to public inspection by a majority vote of the members of the legislative audit committee.

(III)(A) Subpoena powers for public entity audit and reviews. Subparagraph (I) of this paragraph (f) shall not apply to the Colorado state board of accountancy, nor to a person or group authorized by the board to make an investigation on the board's behalf, concerning an accountant's reports, working papers, or advice to a public entity that relate to audit or review accounting activities of the certified public accountant or certified public accounting firm being investigated.

(B) For the purposes of this subparagraph (III), a “public entity” shall include a governmental agency or entity; quasi-governmental entity; nonprofit entity; or public company that is considered an “issuer”, as defined in section 2 of the federal “Sarbanes-Oxley Act of 2002”, 15 U.S.C. sec. 7201.

(IV)(A) Subpoena powers for private entity audit and reviews. Subparagraph (I) of this paragraph (f) shall not apply to the Colorado state board of accountancy, nor to a person or group authorized by the board to make an investigation on the board's behalf, concerning an accountant's reports or working papers of a private entity that is not publicly traded and relate to audit or review attest activities of the certified public accountant or certified public accounting firm being investigated. This subparagraph (IV) shall not be construed to authorize the Colorado state board of accountancy or its agent to subpoena or examine income tax returns.

(B) At the request of either the client of the certified public accountant or certified public accounting firm or the certified public accountant or certified public accounting firm subject to the subpoena pursuant to this subsection (1)(f)(IV), a second certified public accounting firm or certified public accountant with no interest in the matter may review the report or working papers for compliance with the provisions of article 100 of title 12. The second certified public accounting firm or certified public accountant conducting the review must be approved by the board prior to beginning its review. The approval of the second certified public accounting firm or certified public accountant shall be in good faith. The written report issued by a second certified public accounting firm or certified public accountant shall be in lieu of a review by the board. Such report shall be limited to matters directly related to the work performed by the certified public accountant or certified public accounting firm being investigated and should exclude specific references to client financial information. The party requesting that a second certified public accounting firm or certified public accountant review the reports and working papers shall pay any additional expenses related to retaining the second certified public accounting firm or certified public accountant by the party who made the request. The written report of the second certified public accounting firm or certified public accountant shall be submitted
§ 13-90-107. Who may not testify without consent--definitions, CO ST § 13-90-107

to the board. The board may use the findings of the second certified public accounting firm or certified public accountant as grounds for discipline pursuant to article 100 of title 12.

(V) Disclosure of information under subsection (1)(f)(III) or (1)(f)(IV) of this section shall not waive or otherwise limit the confidentiality and privilege of such information nor relieve any certified public accountant, any certified public accounting firm, the Colorado state board of accountancy, or a person or group authorized by such board of the obligation of confidentiality. Disclosure that is not in good faith of such information shall subject the board, a member thereof, or its agent to civil liability pursuant to section 12-100-104(4).

(VI) Any certified public accountant or certified public accounting firm that receives a subpoena for reports or accountant's working papers related to the audit or review attest activities of the accountant or accounting firm pursuant to subparagraph (III) or (IV) of this paragraph (f) shall notify his or her client of the subpoena within three business days after the date of service of the subpoena.

(VII) Subparagraph (III) or (IV) of this paragraph (f) shall not operate as a waiver, on behalf of any third party or the certified public accountant or certified public accounting firm, of due process remedies available under the “State Administrative Procedure Act”, article 4 of title 24, C.R.S., the open records laws, article 72 of title 24, C.R.S., or any other provision of law.

(VIII) Prior to the disclosure of information pursuant to subparagraph (III) or (IV) of this paragraph (f), the certified public accountant, certified public accounting firm, or client thereof shall have the opportunity to designate reports or working papers related to the attest function under subpoena as privileged and confidential pursuant to this paragraph (f) or the open records laws, article 72 of title 24, C.R.S., in order to assure that the report or working papers shall not be disseminated or otherwise republished and shall only be reviewed pursuant to limited authority granted to the board under subparagraph (III) or (IV) of this paragraph (f).

(IX) No later than thirty days after the board of accountancy completes the investigation for which records or working papers are subpoenaed pursuant to subparagraph (III) or (IV) of this paragraph (f), the board shall return all original records, working papers, or copies thereof to the certified public accountant or certified public accounting firm.

(X) Nothing in subparagraphs (III) and (IV) of this paragraph (f) shall cause the accountant-client privilege to be waived as to customer financial and account information of depository institutions or to the regulatory examinations and other regulatory information relating to depository institutions.

(XI) For the purposes of subparagraphs (III) to (X) of this paragraph (f), “entity” shall have the same meaning as in section 7-90-102(20), C.R.S.

(g) A licensed psychologist, professional counselor, marriage and family therapist, social worker, or addiction counselor, a registered psychotherapist, a certified addiction counselor, a psychologist candidate registered pursuant to section 12-245-304(3), a marriage and family therapist candidate registered pursuant to section 12-245-504(4), a licensed professional counselor candidate registered pursuant to section 12-245-604(4), or a person described in section 12-245-217 shall not be examined without the consent of the licensee's, certificate holder's, registrant's, candidate's, or person's client as to any communication made by the client to the licensee, certificate holder, registrant, candidate, or person or the licensee's, certificate holder's, registrant's, candidate's, or person's advice given in the course of professional employment; nor shall any secretary,
stenographer, or clerk employed by a licensed psychologist, professional counselor, marriage and family therapist, social worker, or addiction counselor, a registered psychotherapist, a certified addiction counselor, a psychologist candidate registered pursuant to section 12-245-304(3), a marriage and family therapist candidate registered pursuant to section 12-245-504(4), a licensed professional counselor candidate registered pursuant to section 12-245-604(4), a marriage and family therapist candidate registered pursuant to section 12-245-604(4), or a person described in section 12-245-217 be examined without the consent of the employer of the secretary, stenographer, or clerk concerning any fact, the knowledge of which the employee has acquired in such capacity; nor shall any person who has participated in any psychotherapy, conducted under the supervision of a person authorized by law to conduct such therapy, including group therapy sessions, be examined concerning any knowledge gained during the course of such therapy without the consent of the person to whom the testimony sought relates.

(h) A qualified interpreter, pursuant to section 13-90-202, who is called upon to testify concerning the communications he interpreted between a hearing-impaired person and another person, one of whom holds a privilege pursuant to this subsection (1), shall not be examined without the written consent of the person who holds the privilege.

(i) A confidential intermediary, as defined in section 19-1-103(26), C.R.S., shall not be examined as to communications made to him or her in official confidence when the public interests, in the judgment of the court, would suffer by the disclosure of such communications.

(j)(I)(A) If any person or entity performs a voluntary self-evaluation, the person, any officer or employee of the entity or person involved with the voluntary self-evaluation, if a specific responsibility of such employee was the performance of or participation in the voluntary self-evaluation or the preparation of the environmental audit report, or any consultant who is hired for the purpose of performing the voluntary self-evaluation for the person or entity may not be examined as to the voluntary self-evaluation or environmental audit report without the consent of the person or entity or unless ordered to do so by any court of record, or, pursuant to section 24-4-105, C.R.S., by an administrative law judge. For the purposes of this paragraph (j), “voluntary self-evaluation” and “environmental audit report” have the meanings provided for the terms in section 13-25-126.5(2).

(B) This paragraph (j) does not apply if the voluntary self-evaluation is subject to an exception allowing admission into evidence or discovery pursuant to the provisions of section 13-25-126.5(3) or (4).

(II) This paragraph (j) applies to voluntary self-evaluations that are performed on or after June 1, 1994.

(k)(I) A victim's advocate shall not be examined as to any communication made to such victim's advocate by a victim of domestic violence, as defined in section 18-6-800.3(1), C.R.S., or a victim of sexual assault, as described in sections 18-3-401 to 18-3-405.5, 18-6-301, and 18-6-302, C.R.S., in person or through the media of written records or reports without the consent of the victim.

(II) For purposes of this paragraph (k), a “victim's advocate” means a person at a battered women's shelter or rape crisis organization or a comparable community-based advocacy program for victims of domestic violence or sexual assault and does not include an advocate employed by any law enforcement agency:

(A) Whose primary function is to render advice, counsel, or assist victims of domestic or family violence or sexual assault; and
(B) Who has undergone not less than fifteen hours of training as a victim's advocate or, with respect to an advocate who assists victims of sexual assault, not less than thirty hours of training as a sexual assault victim's advocate; and

(C) Who supervises employees of the program, administers the program, or works under the direction of a supervisor of the program.

(I)(I) A parent may not be examined as to any communication made in confidence by the parent's minor child to the parent when the minor child and the parent were in the presence of an attorney representing the minor child, or in the presence of a physician who has a confidential relationship with the minor child pursuant to paragraph (d) of this subsection (1), or in the presence of a mental health professional who has a confidential relationship with the minor child pursuant to paragraph (g) of this subsection (1), or in the presence of a clergy member, minister, priest, or rabbi who has a confidential relationship with the minor child pursuant to paragraph (c) of this subsection (1). The exception may be waived by express consent to disclosure by the minor child who made the communication or by failure of the minor child to object when the contents of the communication are demanded. This exception does not relieve any physician, mental health professional, or clergy member, minister, priest, or rabbi from any statutory reporting requirements.

(II) This exception does not apply to:

(A) Any civil action or proceeding by one parent against the other or by a parent or minor child against the other;

(B) Any proceeding to commit either the minor child or parent, pursuant to title 27, C.R.S., to whom the communication was made;

(C) Any guardianship or conservatorship action to place the person or property or both under the control of another because of an alleged mental or physical condition of the minor child or the minor child's parent;

(D) Any criminal action or proceeding in which a minor's parent is charged with a crime committed against the communicating minor child, the parent's spouse, the parent's partner in a civil union, or a minor child of either the parent or the parent's spouse or the parent's partner in a civil union;

(E) Any action or proceeding for termination of the parent-child legal relationship;

(F) Any action or proceeding for voluntary relinquishment of the parent-child legal relationship; or

(G) Any action or proceeding on a petition alleging child abuse, dependency or neglect, abandonment, or non-support by a parent.

(III) For purposes of this paragraph (I):

(A) “Minor child” means any person under the age of eighteen years.
§ 13-90-107. Who may not testify without consent--definitions, CO ST § 13-90-107

(B) “Parent” includes the legal guardian or legal custodian of a minor child as well as adoptive parents.

(C) “Partner in a civil union” means a person who has entered into a civil union in accordance with the requirements of article 15 of title 14, C.R.S.

(m)(I) A law enforcement or firefighter peer support team member shall not be examined without the consent of the person to whom peer support services have been provided as to any communication made by the person to the peer support team member under the circumstances described in subsection (1)(m)(III) of this section; nor shall a recipient of peer support services be examined as to any such communication without the recipient's consent.

(I.5) An emergency medical service provider or rescue unit peer support team member shall not be examined without the consent of the person to whom peer support services have been provided as to any communication made by the person to the peer support team member under the circumstances described in subsection (1)(m)(III) of this section; nor shall a recipient of peer support services be examined as to any such communication without the recipient's consent.

(II) For purposes of this paragraph (m):

(A) “Communication” means an oral statement, written statement, note, record, report, or document made during, or arising out of, a meeting with a peer support team member.

(A.5) “Emergency medical service provider or rescue unit peer support team member” means an emergency medical service provider, as defined in section 25-3.5-103(8), C.R.S., a regular or volunteer member of a rescue unit, as defined in section 25-3.5-103(11), C.R.S., or other person who has been trained in peer support skills and who is officially designated by the supervisor of an emergency medical service agency as defined in section 25-3.5-103(11.5), C.R.S., or a chief of a rescue unit as a member of an emergency medical service provider's peer support team or rescue unit's peer support team.

(B) “Law enforcement or firefighter peer support team member” means a peace officer, civilian employee, or volunteer member of a law enforcement agency or a regular or volunteer member of a fire department or other person who has been trained in peer support skills and who is officially designated by a police chief, the chief of the Colorado state patrol, a sheriff, or a fire chief as a member of a law enforcement agency's peer support team or a fire department's peer support team.

(III) The provisions of this subsection (1)(m) apply only to communications made during interactions conducted by a peer support team member:

(A) Acting in the person's official capacity as a law enforcement or firefighter peer support team member or an emergency medical service provider or rescue unit peer support team member; and

(B) Functioning within the written peer support guidelines that are in effect for the person's respective law enforcement agency, fire department, emergency medical service agency, or rescue unit.
(IV) This subsection (1)(m) does not apply in cases in which:

(A) A law enforcement or firefighter peer support team member or emergency medical service provider or rescue unit peer support team member was a witness or a party to an incident which prompted the delivery of peer support services;

(B) Information received by a peer support team member is indicative of actual or suspected child abuse, as described in section 18-6-401; actual or suspected child neglect, as described in section 19-3-102; or actual or suspected crimes against at-risk persons, as described in section 18-6.5-103;

(C) Due to alcohol or other substance intoxication or abuse, as described in sections 27-81-111 and 27-82-107, C.R.S., the person receiving peer support is a clear and immediate danger to the person's self or others;

(D) There is reasonable cause to believe that the person receiving peer support has a mental health disorder and, due to the mental health disorder, is an imminent threat to himself or herself or others or is gravely disabled as defined in section 27-65-102; or

(E) There is information indicative of any criminal conduct.

(2) The medical records produced for use in the review provided for in subparagraphs (III), (IV), and (V) of paragraph (d) of subsection (1) of this section shall not become public records by virtue of such use. The identity of any patient whose records are so reviewed shall not be disclosed to any person not directly involved in such review process, and procedures shall be adopted by the Colorado medical board or state board of nursing to ensure that the identity of the patient shall be concealed during the review process itself.

(3) The provisions of subsection (1)(d) of this section shall not apply to physicians required to make reports in accordance with section 12-240-139. In addition, the provisions of subsections (1)(d) and (1)(g) of this section shall not apply to physicians or psychologists eligible to testify concerning a criminal defendant's mental condition pursuant to section 16-8-103.6. Physicians and psychologists testifying concerning a criminal defendant's mental condition pursuant to section 16-8-103.6 do not fall under the attorney-client privilege in subsection (1)(b) of this section.

Credits
§ 13-90-107. Who may not testify without consent--definitions, CO ST § 13-90-107


Notes of Decisions (550)

C. R. S. A. § 13-90-107, CO ST § 13-90-107
Current with emergency legislation including H.B. 20-1021 of the Second Regular Session of the 72nd General Assembly (2020)

End of Document
§ 18-8-405. Second degree official misconduct

C.R.S.A. § 18-8-405

§ 18-8-405. Second degree official misconduct

Currentness

(1) A public servant commits second degree official misconduct if he knowingly, arbitrarily, and capriciously:

(a) Refrains from performing a duty imposed upon him by law; or

(b) Violates any statute or lawfully adopted rule or regulation relating to his office.

(2) Second degree official misconduct is a class 1 petty offense.

Credits

C. R. S. A. § 18-8-405, CO ST § 18-8-405
Current with emergency legislation including H.B. 20-1021 of the Second Regular Session of the 72nd General Assembly (2020)
§ 42-4-1301.1. Expressed consent for the taking of blood, breath, urine, or saliva sample--testing--fund--rules--repeal

Effective: May 31, 2019

Currentness

(1) Any person who drives any motor vehicle upon the streets and highways and elsewhere throughout this state shall be deemed to have expressed such person's consent to the provisions of this section.

(2)(a)(I) A person who drives a motor vehicle upon the streets and highways and elsewhere throughout this state shall be required to take and complete, and to cooperate in the taking and completing of, any test or tests of the person's breath or blood for the purpose of determining the alcoholic content of the person's blood or breath when so requested and directed by a law enforcement officer having probable cause to believe that the person was driving a motor vehicle in violation of the prohibitions against DUI, DUI per se, DWAI, or UDD. Except as otherwise provided in this section, if a person who is twenty-one years of age or older requests that the test be a blood test, then the test shall be of his or her blood; but, if the person requests that a specimen of his or her blood not be drawn, then a specimen of the person's breath shall be obtained and tested. A person who is under twenty-one years of age shall be entitled to request a blood test unless the alleged violation is UDD, in which case a specimen of the person's breath shall be obtained and tested, except as provided in subparagraph (II) of this paragraph (a).

(II) Except as otherwise provided in paragraph (a.5) of this subsection (2), if a person elects either a blood test or a breath test, the person shall not be permitted to change the election, and, if the person fails to take and complete, and to cooperate in the completing of, the test elected, the failure shall be deemed to be a refusal to submit to testing. If the person is unable to take, or to complete, or to cooperate in the completing of a breath test because of injuries, illness, disease, physical infirmity, or physical incapacity, or if the person is receiving medical treatment at a location at which a breath testing instrument certified by the department of public health and environment is not available, the test shall be of the person's blood.

(III) If a law enforcement officer requests a test under this paragraph (a), the person must cooperate with the request such that the sample of blood or breath can be obtained within two hours of the person's driving.

(a.5)(I) If a law enforcement officer who requests a person to take a breath or blood test under paragraph (a) of this subsection (2) determines there are extraordinary circumstances that prevent the completion of the test elected by the person within the two-hour time period required by subparagraph (III) of paragraph (a) of this subsection (2), the officer shall inform the person of the extraordinary circumstances and request and direct the person to take and complete the other test described in paragraph (a) of this subsection (2). The person shall then be required to take and complete, and to cooperate in the completing of, the other test.
(II) A person who initially requests and elects to take a blood or breath test, but who is requested and directed by the law enforcement officer to take the other test because of the extraordinary circumstances described in subparagraph (I) of this paragraph (a.5), may change his or her election for the purpose of complying with the officer's request. The change in the election of which test to take shall not be deemed to be a refusal to submit to testing.

(III) If the person fails to take and complete, and to cooperate in the completing of, the other test requested by the law enforcement officer pursuant to subparagraph (I) of this paragraph (a.5), the failure shall be deemed to be a refusal to submit to testing.

(IV)(A) As used in this paragraph (a.5), “extraordinary circumstances” means circumstances beyond the control of, and not created by, the law enforcement officer who requests and directs a person to take a blood or breath test in accordance with this subsection (2) or the law enforcement authority with whom the officer is employed.

(B) “Extraordinary circumstances” includes, but shall not be limited to, weather-related delays, high call volume affecting medical personnel, power outages, malfunctioning breath test equipment, and other circumstances that preclude the timely collection and testing of a blood or breath sample by a qualified person in accordance with law.

(C) “Extraordinary circumstances” does not include inconvenience, a busy workload on the part of the law enforcement officer or law enforcement authority, minor delay that does not compromise the two-hour test period specified in subparagraph (III) of paragraph (a) of this subsection (2), or routine circumstances that are subject to the control of the law enforcement officer or law enforcement authority.

(b)(I) Any person who drives any motor vehicle upon the streets and highways and elsewhere throughout this state shall be required to submit to and to complete, and to cooperate in the completing of, a test or tests of such person's blood, saliva, and urine for the purpose of determining the drug content within the person's system when so requested and directed by a law enforcement officer having probable cause to believe that the person was driving a motor vehicle in violation of the prohibitions against DUI or DWAI and when it is reasonable to require such testing of blood, saliva, and urine to determine whether such person was under the influence of, or impaired by, one or more drugs, or one or more controlled substances, or a combination of both alcohol and one or more drugs, or a combination of both alcohol and one or more controlled substances.

(II) If a law enforcement officer requests a test under this paragraph (b), the person must cooperate with the request such that the sample of blood, saliva, or urine can be obtained within two hours of the person's driving.

(3) Any person who is required to take and to complete, and to cooperate in the completing of, any test or tests shall cooperate with the person authorized to obtain specimens of such person's blood, breath, saliva, or urine, including the signing of any release or consent forms required by any person, hospital, clinic, or association authorized to obtain such specimens. If such person does not cooperate with the person, hospital, clinic, or association authorized to obtain such specimens, including the signing of any release or consent forms, such noncooperation shall be considered a refusal to submit to testing. No law enforcement officer shall physically restrain any person for the purpose of obtaining a specimen of such person's blood, breath, saliva, or urine for testing except when the officer has probable cause to believe that the person has committed criminally negligent homicide pursuant to section 18-3-105, C.R.S., vehicular homicide pursuant to section 18-3-106(1)(b), C.R.S., assault in the third degree pursuant to section 18-3-204, C.R.S., or vehicular assault pursuant to section 18-3-205(1)(b), C.R.S., and the person is refusing to take or to complete, or to cooperate in the completing of, any test or tests, then, in such event, the law enforcement officer may require a blood test.
§ 42-4-1301.1. Expressed consent for the taking of blood,..., CO ST § 42-4-1301.1

(4) Any driver of a commercial motor vehicle requested to submit to a test as provided in paragraph (a) or (b) of subsection (2) of this section shall be warned by the law enforcement officer requesting the test that a refusal to submit to the test shall result in an out-of-service order as defined under section 42-2-402(8) for a period of twenty-four hours and a revocation of the privilege to operate a commercial motor vehicle for one year as provided under section 42-2-126.

(5) The tests shall be administered at the direction of a law enforcement officer having probable cause to believe that the person had been driving a motor vehicle in violation of section 42-4-1301 and in accordance with rules and regulations prescribed by the department of public health and environment concerning the health of the person being tested and the accuracy of such testing.

(6)(a) No person except a physician, a registered nurse, an emergency medical service provider certified or licensed under part 2 of article 3.5 of title 25 who is authorized within his or her scope of practice to draw blood, or a person whose normal duties include withdrawing blood samples under the supervision of a physician or registered nurse shall withdraw blood to determine the alcohol or drug content of the blood for purposes of this section.

(b) No civil liability shall attach to any person authorized to obtain blood, breath, saliva, or urine specimens or to any hospital, clinic, or association in or for which such specimens are obtained as provided in this section as a result of the act of obtaining such specimens from any person submitting thereto if such specimens were obtained according to the rules and regulations prescribed by the department of public health and environment; except that this provision shall not relieve any such person from liability for negligence in the obtaining of any specimen sample.

(7) A preliminary screening test conducted by a law enforcement officer pursuant to section 42-4-1301(6)(i) shall not substitute for or qualify as the test or tests required by subsection (2) of this section.

(8) Any person who is dead or unconscious shall be tested to determine the alcohol or drug content of the person's blood or any drug content within such person's system as provided in this section. If a test cannot be administered to a person who is unconscious, hospitalized, or undergoing medical treatment because the test would endanger the person's life or health, the law enforcement agency shall be allowed to test any blood, urine, or saliva that was obtained and not utilized by a health care provider and shall have access to that portion of the analysis and results of any tests administered by such provider that shows the alcohol or drug content of the person's blood, urine, or saliva or any drug content within the person's system. Such test results shall not be considered privileged communications, and the provisions of section 13-90-107, C.R.S., relating to the physician-patient privilege shall not apply. Any person who is dead, in addition to the tests prescribed, shall also have the person's blood checked for carbon monoxide content and for the presence of drugs, as prescribed by the department of public health and environment. Such information obtained shall be made a part of the accident report.

(9)(a) There is created in the state treasury the evidential breath-testing cash fund, referred to in this section as the “fund”, for the collection of moneys to purchase breath-testing devices for law enforcement agencies. The fund includes any moneys appropriated to the fund by the general assembly and any moneys credited to the fund pursuant to paragraph (c) of this subsection (9). The moneys in the fund are subject to annual appropriation by the general assembly to the department of public health and environment created in section 25-1-102, C.R.S., for the purposes described in this subsection (9).

(b) All interest derived from the deposit and investment of moneys in the fund must remain in the fund. Any unexpended or unencumbered moneys remaining in the fund at the end of a fiscal year must remain in the fund and not be transferred or
§ 42-4-1301.1. Expressed consent for the taking of blood,...., CO ST § 42-4-1301.1

credited to the general fund or another fund; except that any such unexpended and unencumbered moneys in excess of two
million dollars must be credited to the general fund.

(c) The department of public health and environment is authorized to accept any gifts, grants, or donations from any private or
public source on behalf of the state for the purposes described in this section. The department of public health and environment
shall transmit all such gifts, grants, and donations to the state treasurer, who shall credit the same to the fund.

(d) The state board of health created in section 25-1-103, C.R.S., may promulgate rules for the administration of the fund for
the purposes described in this subsection (9).

(e) This subsection (9) is repealed, effective September 1, 2024. Before repeal, the department of regulatory agencies, pursuant
to 24-34-104, shall review the use of the fund by the department of public health and environment for the purposes described
in this subsection (9).

Credits
Added by Laws 2002, Ch. 342, § 3, eff. July 1, 2002. Amended by Laws 2007, Ch. 261, § 1, eff. July 1, 2007; Laws 2012,
Ch. 271, § 25, eff. July 1, 2012; Laws 2013, Ch. 331, § 14, eff. May 28, 2013; Laws 2014, Ch. 294, § 1, eff. Aug. 6, 2014;
Laws 2019, Ch. 396, § 26, eff. May 31, 2019.

C. R. S. A. § 42-4-1301.1, CO ST § 42-4-1301.1
Current with emergency legislation including H.B. 20-1021 of the Second Regular Session of the 72nd General Assembly (2020)
CITY OF COLORADO SPRINGS v. GIVAN

Cite as 897 P.2d 753 (Colo. 1995)

The CITY OF COLORADO SPRINGS, a home rule city and Colorado municipal corporation, Petitioner/Cross-Respondent,

v.

David L. GIVAN, Respondent/Cross-Petitioner.

No. 94SC47.

Supreme Court of Colorado, En Banc.

June 5, 1996.

City brought action for review of municipal court order which declared that city lacked proper grounds to discharge city employee following his plea of guilty to a conviction of felony incest, and employee asserted due process counterclaim under § 1983 and sought to assert counterclaim for breach of contract. The District Court, El Paso County, Donald E. Campbell, J., upheld municipal court decision, dismissed due process counterclaim and refused to allow employee to assert breach of contract counterclaim. Parties appealed. The Court of Appeals, Criswell, J., 876 P.2d 27, affirmed in part, reversed in part, and remanded. City petitioned for certiorari. The Supreme Court, Mullarkey, J., granted certiorari, and held that: (1) city did not exceed its jurisdiction or abuse its discretion in discharging employee; (2) city's decision to discharge employee was not arbitrary and afforded employee substantive due process, even assuming his continued employment was protected by substantive due process rights; (3) employee failed to properly raise claim based on city's failure to reinstate him while action was pending; and (4) any error in disallowing employee's proposed amendment was harmless.

Reversed and remanded.

1. Administrative Law and Procedure ⇨796

When reviewing decision under rule governing review of decisions by governmental bodies or officer or lower judicial body exercising judicial or quasi-judicial functions, court considers whether erroneous legal standard was applied by governmental body. Rules Civ.Proc., Rule 106(a)(4).

2. Administrative Law and Procedure ⇨788

Rule governing review of decisions by governmental body or officer or lower judicial body exercising judicial or quasi-judicial functions permits district court to reverse decision of inferior tribunal only if there is no competent evidence to support the decision. Rules Civ.Proc., Rule 106(a)(4).

3. Administrative Law and Procedure ⇨788

For purposes of rule which permits district court to reverse decision of inferior tribunal if there is no competent evidence to support the decision, "no competent evidence" means that ultimate decision of administrative body is so devoid of evidentiary support that it can only be explained as arbitrary and capricious exercise of authority. Rules Civ.Proc., Rule 106(a)(4).

See publication Words and Phrases for other judicial constructions and definitions.

4. Administrative Law and Procedure ⇨683

Under rule governing review of decisions by governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions, appropriate consideration for appellate court is whether there is sufficient evidentiary support for decision reached by administrative tribunal, not whether there is adequate evidentiary support for lower court's decision on reviewing the record. Rules Civ.Proc., Rule 106.

5. Administrative Law and Procedure ⇨683

Appellate court is in same position as district court, in reviewing administrative decision under rule governing review of decisions by governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions. Rules Civ.Proc., Rule 106.
6. Municipal Corporations ⇐ 218(8)

City did not exceed its jurisdiction or abuse its discretion in discharging supervisory employee who pled guilty to and was convicted of felony incest; record revealed that city considered factors and made necessary findings required by its personnel policies and procedures manual in decision to discharge employee from city employment, and there was competent evidence in record to support city's findings. West's C.R.S.A. § 18-6-301; Rules Civ.Proc., Rule 106(a)(4).

7. Municipal Corporations ⇐ 218(3)

Assuming that nexus between off-duty conduct and significant adverse impact on legitimate employer interests must be shown in order to discharge employee based on off-duty conduct, city demonstrated nexus between its interests and off-duty conduct of former employee who pled guilty to and was convicted of felony incest, as competent evidence in record supported city's determination that former employee's conviction of felony incest rendered him unfit to perform his job and brought disrepute upon city. West's C.R.S.A. § 18-6-301; Rules Civ.Proc., Rule 106(a)(4).

8. Civil Rights ⇐ 146

Former city employee could not recover under § 1983 for his discharge following his plea of guilty to and conviction of felony incest; city's decision to terminate him was properly based on standard supplied by personnel policies and procedures manual and was supported by competent record evidence, and assuming that his continued employment was protected by substantive due process rights, city's decision was not arbitrary and afforded him substantive due process. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

9. Appeal and Error ⇐ 170(2), 1082(1)

Former city employee failed to properly raise substantive due process claim under § 1983 premised on city's failure to reinstate him while action challenging his termination based on his plea of guilty to and conviction of felony sexual incest was pending; he did not raise issue before trial court, Court of Appeals, or on appeal to Supreme Court. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983; Rules Civ.Proc., Rule 106.

10. Appeal and Error ⇐ 1041(2)

Any error by district court in denying former city employee's motion to amend his pleadings to include breach of contract counterclaim alleging that he was terminated in breach of contract which provided that he would not be terminated without "cause" was harmless, as by finding that city manager's decision to terminate former city employee following his plea of guilty to and conviction of felony incest was not in excess of his jurisdiction and was not abuse of discretion, court implicitly found that former city employee was terminated for cause. West's C.R.S.A. § 18-6-301.


Cornish & Dell'Olio, Craig M. Cornish, Colorado Springs, for respondent/cross-petitioner.

Justice MULLARKEY delivered the Opinion of the Court.

Petitioner, the City of Colorado Springs (the City), discharged one of its employees, the respondent, David Givan (Givan), upon his conviction of felony incest. Pursuant to the provisions of the City's Personnel Policies and Procedures Manual (PPPM), Givan appealed the City's decision to the municipal court. The municipal court found that the City's decision constituted an abuse of discretion and ordered Givan reinstated.

The City filed for review of the decision of the municipal court in the district court pursuant to C.R.C.P. 106(a)(4), and Givan filed a counterclaim pursuant to 42 U.S.C. § 1983 on grounds that his dismissal violated his constitutional substantive due process rights. The district court upheld the findings of the municipal court on grounds that the municipal court did not abuse its discretion, but entered summary judgment for the City on Givan's substantive due process claim and denied Givan's request to amend his complaint to include a breach of contract claim.

On the City's petition to this court, we granted certiorari and now reverse the judgment of the court of appeals.¹

1.

Givan had been employed by the City of Colorado Springs for twenty years when, in October of 1988, he pled guilty to and was convicted of felony incest in violation of section 18-6-301, 8B C.R.S. (1986).² The incest conviction was based on Givan's sexual abuse of one of his two adopted daughters. While Givan was charged with a single incident of sexual contact, according to the record, there was a history of abuse that began with fondling when the girl was between four and six years old, culminated in sexual intercourse when the girl was ten years old, and continued for one to two years after that. Although Givan initially denied the allegations of abuse, he ultimately confessed to the charges and pled guilty. He was sentenced to five years of supervised probation and required to continue treatment in an incest perpetrators group.

At the time of his conviction, Givan was an electronic working foreman in the Water Division of the City's Utilities Department. As required by the City's PPPM, Givan reported the conviction to the head of the Water Division, Edward Bailey. Under the PPPM, conviction of a felony is grounds for discharge from City employment. Accordingly, Bailey conducted a pre-termination meeting with Givan and determined that discharge was the proper action to be taken.

Pursuant to the PPPM, Givan appealed his discharge first to Deputy City Manager of Utilities, James Phillips, then to City Manager, Roy Pederson, both of whom affirmed Bailey's decision. As the final recourse under City procedures, Givan appealed to the municipal court which found the discharge to be an abuse of discretion and reversed the City's decision.

The City filed for review of the municipal court's decision in the district court pursuant to C.R.C.P. 106. On appeal, the City argued that because the record before the City Manager contained competent evidence to support the decision to discharge Givan, the municipal court had abused its discretion in reversing the City Manager's decision. Givan asserted a counterclaim under 42 U.S.C. § 1983 (1994)³ on grounds that the city had deprived him of property in violation of the substantive due process requirements of the Fourteenth Amendment to the United States Constitution by discharging him for arbitrary and capricious reasons. He later sought to amend his counterclaim to include a state law claim for willful breach of contract.

1. We granted certiorari to review the following issues:
   
   1. Whether the court of appeals erred in finding no competent evidence in the record to support the city manager's decision to discharge Givan.
   2. Whether the court of appeals erred in holding that Givan has a substantive due process right to continued employment, and, if such a right exists, whether it was violated in this case.
   3. Whether the court of appeals erred in holding that the district court abused its discretion in refusing to allow Givan to amend his pleadings to include a counterclaim that the City had willfully violated its contract of employment with Givan.
   4. Whether the court of appeals erred in rejecting Givan's claim that he was entitled to partial summary judgment on his section 1983 claim.

2. § 18-6-301(1) provides:

   Any person who knowingly marries, inflicts sexual penetration or sexual intrusion on, or subjects to sexual contact, as defined in section 18-3-401, an ancestor or descendant, including a natural child, child by adoption, or stepchild twenty-one years of age or older ... commits incest which is a class 4 felony....

3. 42 U.S.C. § 1983 provides:

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
The district court dismissed the City's claim and held that the municipal court did not abuse its discretion in reversing the City's decision to discharge Givan. It also entered summary judgment dismissing Givan's section 1983 claim and refused to allow him to amend the pleadings to include a breach of contract claim. The court of appeals affirmed the judgment of the district court and held that the City's decision to terminate Givan was not supported by competent evidence. However, it found that material issues of fact remained concerning Givan’s section 1983 claim and that the trial court erred in refusing to consider Givan's breach of contract claim because it was a compulsory counterclaim.

II.

A.

[1–3] We review this case pursuant to C.R.C.P. 106(a)(4) which provides:

Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided for by law:
(1) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

When reviewing a decision under C.R.C.P. 106(a)(4), a court considers whether an erroneous legal standard was applied by the governmental body. Electric Power Research Inst. v. City & County of Denver, 737 P.2d 822, 826 (Colo.1987). C.R.C.P. 106(a)(4) also permits a district court to reverse a decision of an inferior tribunal only if there is “no competent evidence” to support the decision. “No competent evidence” means that the ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.


Substantial evidence ... “means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,” ... and must be enough to justify, if the trial were before a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

Id. (citations omitted).

[4,5] Under C.R.C.P. 106, the appropriate consideration for an appellate court is “whether there is sufficient evidentiary support for the [decision reached by the] administrative tribunal,” not whether there is adequate evidentiary support for the lower court's decision on reviewing the record. Id. at 1309 (emphasis added). Therefore, an appellate court is in the same position as the district court in reviewing an administrative decision under Rule 106. Empiragas, Inc. v. Pueblo County Court, 713 P.2d 937, 939 (Colo.1985).

[6] The municipal court’s ruling in this case was issued as the final appeal available to an employee under the Personnel Policies and Procedures promulgated by the City Manager pursuant to City ordinance. The PPPM requires a full evidentiary hearing and a written response at each level of appeal within the city hierarchy. Under the procedures in effect at the time of Givan’s discharge, after appealing to the City Manager, an employee could make one final appeal to the municipal court. However, the municipal court is not authorized to independently determine whether discharge is appropriate. The PPPM provides that the parties may only present evidence to the municipal judge that had been introduced at the hearing before the City Manager. Further, the scope of review by the municipal judge can not “extend ... further than to determine whether the City Manager exceeded his jurisdiction or abused his discretion.” Accordingly, the scope of review of the City Manag-
er's disciplinary decision authorized under the PPPM is the same as that applied under C.R.C.P. 106(a)(4).

Because the review by the municipal court authorized under the PPPM in this case is the same as that authorized under C.R.C.P. 106(a)(4), we are in the same position as the municipal court in reviewing the decision to discharge Givan in this case. We therefore must determine whether there is any competent evidence supporting the City Manager's decision under the PPPM, not whether there was competent evidence supporting the municipal court's determination.

1.

The PPPM gives the City authority to discharge an employee for "conviction of a felony" and for conduct unbecoming a City employee. Discharge is not automatic, however. The PPPM mandates certain procedures that the City must follow before discharging an employee for any reason. It requires that:

No permanent employee shall be discharged without being afforded a pre-termination meeting. Such a meeting shall be conducted by the Department/Division Head or the City Manager.

Prior to the meeting the employee must receive notice of the purpose of the meeting; at the meeting the employee must receive an explanation of the allegations, of the supporting evidence, and reasons for the proposed termination; and the employee must be given an opportunity to respond. The final decision must be communicated in writing to the employee, and a letter of discharge provided. The employee then has the opportunity to appeal the termination decision, according to who made the initial discharge decision, to the Department/Division Head, then to the Deputy City Manager or the City Manager, and finally to the municipal court.

4. The municipal judge reviewed the transcript of the hearing held before the City Manager and held:

I am unable to find any competent evidence that would support the decision of the City Manager Roy Pederson to terminate the employment of David L. Givan with the City of Colorado Springs. This means that the decision of the Givan has not challenged the City's adherence to these procedures.

The PPPM mandates special procedures when an employee has been convicted of a felony. The PPPM requires an employee who has been convicted of a felony to report the conviction to a supervisor. Upon notification that an employee has been convicted of a felony, the PPPM requires that:

the Department/Division Head, the appropriate Deputy City Manager and the Director of Human Resources shall determine the proper action to be taken. Factors considered may include the nature and type of the crime, the employee's City position, the employee's prior job performance, the employee's length of service, and the employee's fitness to perform. The City reserves the right to discipline an employee, up to and including discharge for conviction of any local, state, or federal criminal laws which, in its sole judgment, renders the employee unfit to perform their job, brings disrepute upon, and/or compromises the integrity of the City of Colorado Springs.

Accordingly, the City has discretion to discharge employees convicted of a felony, if upon consideration of the appropriate factors, it finds that (1) the employee is unfit to perform the job; or (2) the retention of the employee would have an adverse effect on public perception of the City. We find that the City considered the appropriate factors and made appropriate findings to support its decision to discharge Givan.

In his letter notifying Givan of his discharge, the City Manager recited the factors enumerated in the PPPM. He then stated:

A great deal of time at the hearing was spent in taking testimony from your co-workers, subordinates, and peers. Many of these witnesses testified that even though they were familiar in a general sense that you had been convicted of com-
mitting incest, they were nonetheless willing to continue working with you. Several of these witnesses were employees which you supervised. There was also testimony that not all of the employees who worked with you were as receptive to have you return to work. I do not find that this line of testimony is helpful in determining what type of discipline to impose in this case.

Due to the serious nature of the crime in which you were convicted of [sic] as well as your position with this organization, I hereby adopt the findings made by James Phillips in his letter of discharge to you on February 21, 1990, and find that pursuant to the guidelines set forth in the Policies and Procedures Manual, you have been rendered unfit to perform your job, have brought disrepute upon and have compromised the integrity of the City of Colorado Springs. Consequently, I have determined to discharge you from your position with the City of Colorado Springs effective this date.

The findings made by James Phillips and adopted by the City Manager were as follows:

Mr. Givan was found guilty of a Class 4 Felony (Incest). The nature of the crime is against the norms of the society in general, bringing disrepute to the person involved and considered beyond acceptable standards of right behavior. It, therefore, would reflect on the moral character of every City employee by association, if accepted.

The employee is a supervisor of six persons in an Electronic Working Foreman position. He is not in direct contact with the public but with many fellow workers.

The employee's past job performance has been good. The employee has been with the City for 21 years.

The employee's fitness to perform must be based on two areas—technical skill and effect on subordinates and other workers. A diminishment of technical skills is not expected unless outside problems affect the job through loss of concentration or stress-related difficulties.

The effect on subordinates is subjective in nature but is viewed that due to the nature of the act, morale of subordinates and other employees would be affected. Once a supervisor loses the respect of his/her employees, major problems occur. These extend from refusal to obey, destroying productivity, to blackmail for cover-up of others' infractions, i.e. "Why should you be upset that I am late for work when you got off on a felony charge?"

Although Mr. Givan has a number of letters from fellow employees praising his abilities, only two were from his six subordinates.

Mr. Givan has stated that he would take a reduction in job status to Technician or Specialist and give up his supervisory position. This is not a solution. A supervisor demoted to the same work group causes employee problems. Second-guessing the existing supervisor is not uncommon, and morale and productivity drop.

It is my position that Mr. Givan has been rendered unfit to perform his job by his felony conviction for incest. If returned to work, he would bring disrepute upon his fellow City employees by reputation and would compromise the integrity of the City since his soundness of moral principle and character have been found lacking.

From this statement of findings it is clear that the City in fact took into account the factors specified in the PPPM. Furthermore, these statements reveal that, based on its consideration of these factors, it made the two specific findings that require discharge upon a felony conviction: that the felony conviction rendered Mr. Givan unfit to perform the job and that his retention reflected badly on the integrity of the City.

2.

We also find that there was competent evidence in the record to support the City's findings. In the hearings held before the City Manager, fifteen witnesses testified concerning Givan's discharge. In addition, Gi-
van presented twenty-two letters thanking him for volunteer efforts, supporting lenient sentencing after his incest conviction, and opposing his discharge from the City. Of these, six were from co-workers who also testified at his hearing. The record also contained Givan's psychological evaluation by Dr. Witty and copies of several of Givan's work evaluations.

With respect to Givan's fitness to perform his job, Givan's job evaluations and the testimony of his supervisors demonstrate that Givan was a valuable and skilled worker who had been with the City for many years. The evidence also shows that there was no reason to believe that his ability to perform the technical aspects of his job would be impaired by the incest conviction. Testimony from his co-workers shows that their respect for the quality of his work was also high.

Nevertheless, there is testimony on the record supporting the City Manager's conclusion that knowledge of Givan's crime had an adverse impact on his relationship with co-workers and subordinates. In particular, one co-worker admitted that "[t]hings of this sort are going to have to enter into your mind. I'm a father. I have two daughters. They're pretty young, but—." Another flatly stated, "I think I can work with [Givan]. I don't think I could have him manage me." The supervisor of the plant where Givan worked testified that female members of the plant staff in particular did not want to see Givan return to work.

While the majority of Givan's co-workers and subordinates testified that their working relationships with Givan were unaffected by knowledge of his conviction, when questioned about their knowledge of the crime committed, none was aware of the nature of the contact between Givan and his daughter. One believed that Givan had pled guilty to avoid a lawsuit. Another believed that he had been convicted of attempt to commit incest. The letters of support offered by Givan likewise reflected that the writers either had limited or no knowledge of the crime Givan committed. These factors reasonably could affect the credibility of this evidence in the judgment of the City Manager.

With the exception of Givan's foreman, Givan's supervisors and City management believed that Givan's incest conviction would adversely affect workplace morale and Givan's ability to supervise others. Specifically, they were concerned that subordinates would lose respect for Givan and it then would be difficult for Givan to impose discipline. Those who were aware of the charges against Givan prior to his conviction also expressed concern that Givan had initially claimed that he was innocent and that he considered a guilty plea purely because he could not afford to continue his legal defense. Edward Bailey, who held a pre-termination hearing with Givan, was concerned that Givan expressed no "serious remorse or concern regarding the incident itself." The City could reasonably find that these factors reflected adversely on Givan's character and judgment, his ability to supervise others, and thus his fitness to perform his job. Likewise, the City reasonably could accord more weight to the opinions of those who had management experience than those who did not.

6. While we agree with the City Manager that testimony of co-workers is of limited probative value in determining what impact Givan's conviction would have on his interaction with others in the workplace, because those individuals may or may not work with Givan in the future, we note that not all Givan's co-workers supported his retention.

- Rubia, Givan's subordinate; Michael Henry, Givan's subordinate; Robert Baker, co-worker and forty-year acquaintance; Donald Mulligan, Water Regulation and Treatment superintendent; and Jerry Julian, Givan's subordinate.
Finally, we note that City management was unanimous in its belief that retaining Givan would adversely impact the integrity of the City. The management officials voiced concern that Givan’s retention would be construed by the public as indifference to the crime Givan committed. Edward Bailey testified that Givan expressed “the disgrace that this brought to his family, to his church, to his friends.” From this Bailey concluded that “[c]ertainly if it brings disgrace to family and friends and church, it must bring disgrace to the City itself.” The Deputy City Manager of Utilities, James Phillips, testified that Givan’s retention was likely to adversely affect public perception of the City because an earlier decision to retain an employee convicted of shoplifting created “a public outcry that was unbelievable, both in the newspaper, direct to the City Council, and from employees who came to me who were quite concerned that the City was going to keep these [sic] type of people on board.” We find that these concerns expressed by City management and the rationale supporting them are reasonable.

While there was some testimony from Givan’s co-workers and supervisors expressing the belief that the public would not view Givan’s retention as improper, many expressed no opinion. Furthermore, we find that the City reasonably could have given more weight to the views of management officials who were responsible for personnel decisions and whose jobs entail representing the City before the public.

[7] Taken as a whole, we find that the record in this case reveals that the City considered the factors and made the necessary findings required by the PPPM in its decision to discharge Givan from City employment. We also find that there was competent evidence in the record to support the City’s findings. Accordingly, we hold that the City did not exceed its jurisdiction or abuse its discretion in discharging Givan.

B.

[8] Givan raised as a counterclaim to the City’s request for review under C.R.C.P. 106 that the City violated his right to substantive due process under the United States Constitution because the City’s decision to terminate his employment was arbitrary and capricious. He argued that this violation of his constitutional rights gave rise to a cause of action under 42 U.S.C. § 1983. On appeal to this court, he argues that because the lower courts found that his dismissal was an abuse of discretion by the City, the court of appeals erred in denying his motion for summary judgment on his section 1983 claims.

The court of appeals held that public employees’ rights to substantive due process protected them from arbitrary dismissal. However, the court held that Givan had failed to make out a section 1983 claim with respect to the City’s decision to terminate his employment. The court found that the City could not be held vicariously liable for arbitrary decisions made by its employees under section 1983. Instead, Givan must demonstrate that the decision represented City policy. City policy, the court determined, was set out in the PPPM. The court found that since enforcement of the policy ultimately rests with the municipal judge, the municipal court is the “policy maker” for purposes of section 1983, not the City. The City thus could not be held liable for the City Manager’s decision to terminate Givan. The court nevertheless found that Givan had stated a claim based on the City’s decision not to reinstate Givan during its action for C.R.C.P. 106 review of the municipal court’s decision.

7. Givan raises an independent argument that in order to discharge an employee based on off-duty conduct the City must demonstrate a nexus between the off-duty conduct and a significant adverse impact on legitimate employer interests. He argues that the City has failed to establish this nexus. We assume for purposes of argument that such a nexus must be shown. In finding that competent evidence in the record supports the City’s determination that Givan’s conviction of felony incest (1) rendered him unfit to perform his job and (2) brought disrepute upon the City, we have found that this nexus exists between Givan’s off-duty conduct and the City’s interests. Givan does not challenge the legitimacy of the City’s interests in its reputation and its employees’ job performance.

8. Because issues 2 and 4 on which we granted certiorari address the same claim, we will address them together.
CITY OF COLORADO SPRINGS v. GIVAN

In his proposed counterclaim Givan alleged that (1) Givan's employment contract with the City provided that he would not be terminated without cause; (2) he was terminated without cause; and (3) that his termination was "willful and wanton." By finding that the City Manager's decision to discharge Givan was not in excess of his jurisdiction and was not an abuse of discretion we implicitly found that Givan was terminated for cause. Accordingly, we have resolved the issue raised in Givan's breach of contract counterclaim in the City's favor and any error by the trial court in disallowing Givan's amendment did not affect the outcome of this case and was thus harmless.

III.

In conclusion, we reverse the judgment of the court of appeals and hold that the City Manager's decision to discharge Givan was neither in excess of his jurisdiction nor an abuse of discretion. In light of this holding, we affirm the trial court's dismissal of Givan's due process and section 1983 claims. For the same reason, we decline to reach the question of whether the trial court abused its discretion in refusing to allow Givan to amend his pleadings to include a counterclaim that the City had willfully violated its contract of employment with Givan. Accordingly, we return the case to the court of appeals with directions to remand it to the district court for entry of judgment for the City.

9. Givan does not argue that the criteria for discharge set out in the PPPM fail to provide substantive due process. He argues only that the City Manager's decision was unsupported by the evidence.
Employees removed by their agencies upon charges of job-related misconduct appealed agency actions. Presiding officials in the Atlanta, New York, Denver, and San Francisco field offices sustained each of the decisions, finding that selection of an appropriate penalty was a matter essentially committed to agency discretion and not subject to proof. The Merit Systems Protection Board thereupon reopened decisions to consider such issues. The Merit Systems Protection Board held that Board has authority to mitigate agency-imposed penalties when Board determines that penalty is clearly excessive, disproportionate to sustained charges, or arbitrary, capricious, or unreasonable.

Affirmed in part, reversed in part, and remanded in part.

West Headnotes (20)

[1] Public Employment

Determination and Disposition on Further Administrative Review

Merit Systems Protection Board's statutory authority to take final action on matters within its jurisdiction includes authority to modify or reduce agency-imposed penalties. 5 U.S.C.A. § 1205(a)(1).

4 Cases that cite this headnote

[2] Public Employment

Standard of Review

Factual findings in general

Appropriateness of an agency-imposed penalty, while depending upon resolution of questions of fact, is by means a certain factual determination; such decision involves not only an ascertainment of factual circumstances surrounding violations but also application of administrative judgment and discretion.

5 Cases that cite this headnote

[3] Public Employment

Standard of Review

Assessment of penalties by administrative agency is not a factual finding but exercise of a discretionary grant of power.

1 Cases that cite this headnote


Standard of Review

An adverse action may be adequately supported by evidence of record but still be arbitrary and capricious, e.g., if there is no rational connection between grounds charged and interest assertedly served by sanction.
In evaluating rationality of nonfactual administrative determinations reached through exercise of judgment and discretion, characteristic standard of review is arbitrary or capricious or abuse of discretion standard.

1 Cases that cite this headnote

[6] Public Employment

Standard of arbitrariness, capriciousness, or abuse of discretion is employed by courts in reviewing nonfactual agency determinations, including those made by former Civil Service Commission and by present Merit Systems Protection Board. 5 U.S.C.A. § 7703(c).

1 Cases that cite this headnote

[7] Public Employment

Scope of judicial review of “agency actions,” which utilizes “arbitrary-or-capricious,” or “abuse-of-discretion,” standard, does not apply equally to Merit Systems Protection Board's review of appealable personnel actions, since Board's review is de novo, and from an appellate court's standpoint, Board's action is itself part of “agency action.” 5 U.S.C.A. § 7703(c).

4 Cases that cite this headnote

[8] Public Employment

In reviewing agency-imposed penalties, standard utilized by Merit Systems Protection Board is whether penalties were “clearly excessive” or were “arbitrary, capricious, or unreasonable.”

[9] Public Employment

Merit Systems Protection Board's review of an agency-imposed penalty is essentially to assure that agency conscientiously considered relevant factors and did strike a responsible balance within tolerable limits of reasonableness; only if Board finds that agency failed to weigh relevant factors, or that agency's judgment clearly exceeded limits of reasonableness, is it appropriate for Board to specify how agency's decision should be corrected to bring penalty within parameters of reasonableness.

277 Cases that cite this headnote

[10] Public Employment

Agency tables of penalties should not be applied so inflexibly as to impair consideration of other factors relevant to individual case.

40 Cases that cite this headnote


An agency-imposed penalty may be excessive in a particular case even if within range permitted by statute or regulation.

10 Cases that cite this headnote

[12] Public Employment

A penalty grossly exceeding that provided by an agency's standard table of penalties may for that reason alone be arbitrary and capricious, even though such a table provides only suggested guidelines.
Appropriateness of a particular agency-imposed penalty is not a question of law, but a matter of judgment and discretion, susceptible to examination for arbitrariness or an abuse of discretion, rather than placing upon employee burden of proving penalty unlawful. 5 U.S.C.A. § 7701(c)(2)(C).

Penalty of removal for being absent without leave for 30 minutes from post of supply clerk dispatcher, for being away from assigned duty station without permission, and for selling employment services to a physically handicapped employee was not arbitrary or unreasonable in light of all the circumstances, including fact that removed employee had been disciplined for unauthorized absence on four previous occasions, and thus constituted an appropriate penalty.

Penalty of removal for being absent without leave for 30 minutes from post of supply clerk dispatcher, for being away from assigned duty station without permission, and for selling employment services to a physically handicapped employee was not arbitrary or unreasonable in light of all the circumstances, including fact that removed employee had been disciplined for unauthorized absence on four previous occasions, and thus constituted an appropriate penalty.

Department of the Air Force did not act arbitrarily in removing employee from his position as a sheet metal worker-helper (aircraft) for deliberate misrepresentation because he had submitted false evidence in order to prove college night class enrollment so that he might obtain a day shift assignment in view of employee's past disciplinary record.

Department of Air Force abused its discretion in removing employee from his position as a packer at air force base for failure to properly request leave for a period of 15 working days during which he was absent from duty due to chronic foot problems from which he had been suffering for several years where employee, who had previously been suspended for a total of 15 days for failure to adhere to established procedures for reporting absences on four separate occasions, had had a long career with government which had been unblemished with exception of disciplinary actions which related to his medical condition, and where there was no evidence presented indicating that times in preceding two years for failure to follow instructions, with a penalty of suspension imposed only three months prior to notice of proposed removal.
employee's performance on job was deficient; rather, a suspension of 30 days for instant violation of agency reporting procedures was appropriate.

6 Cases that cite this headnote

[19] Public Employment

Remand

In view of Department of the Army's failure to introduce any evidence to establish nature of duties and responsibilities or background and knowledge of employee removed from position of motor vehicle dispatcher for unauthorized use of a government-owned vehicle, presiding official's initial decision sustaining Department's removal would be vacated, since Merit Systems Protection Board was unable to determine whether alleged facts underlying presiding official's written rationale for removal penalty were supported by a preponderance of the evidence, and case would be remanded.

17 Cases that cite this headnote

[20] Public Employment

Particular cases in general

Naval shipyard workers' attempted theft of government property warranted penalty of removal, even though attempted thefts were first offenses.

7 Cases that cite this headnote

**284 *313** OPINION AND ORDER

Under 5 U.S.C. § 1205(a)(1), as enacted by the Civil Service Reform Act of 1978 (“the Reform Act”), this Board is authorized and directed to “take final action” on any matter within its jurisdiction. These cases present the question of whether that statutory power includes authority to modify or reduce a penalty imposed on an employee by an agency's adverse action, and if so, by what standards that authority should be exercised. For the reasons set out hereafter, we conclude that the Board does have authority to mitigate penalties when the Board determines that the agency-imposed penalty is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable. We also conclude that this authority may be exercised by the Board's presiding officials, subject to our review under 5 U.S.C. § 7701(e)(1).

The appellants in these cases, career employees in the competitive service, were each removed by their agencies upon charges of job-related misconduct under 5 U.S.C. § 7513. In all but one case, they alleged in their appeals before this Board that the penalty imposed by the agency was too severe. The Board's presiding officials sustained the agency decisions, finding that selection of an appropriate penalty is a matter essentially committed to agency discretion and not subject to proof. The Board thereupon reopened the initial decisions to consider these issues. Subsequently, by Federal Register notice the Board invited the submission of amicus briefs on whether the “preponderance of the evidence” standard is applicable in determining whether the agency-imposed punishment is to be sustained, and on whether the Board may modify or reduce an agency-imposed penalty when it finds that the penalty does not promote the efficiency of the service. Briefs were filed by a dozen federal departments and agencies, by four federal employee unions, and by the parties. Requests for oral argument, filed by OPM and AFGE, are hereby DENIED.

We address these issues, and the application of our determinations on these questions to the cases before us, in three parts herein. In Part I we consider whether the Board has authority to mitigate agency-imposed penalties, concluding that it has the same broad authority that the former Civil Service Commission had in this respect. In Part II we consider and elaborate upon the standards which govern the proper exercise of this authority. In Part III we consider the application of those standards to the cases of the seven individual appellants, which are hereby consolidated for purposes of this decision. 5 U.S.C. § 7701(f)(1); 5 C.F.R. § 1201.36(a)(1).

I. THE BOARD'S AUTHORITY TO MITIGATE PENALTIES

The Office of Personnel Management (OPM), most of the agencies, and AFGE urge that the Board lacks authority to mitigate an agency-selected penalty. They acknowledge that an agency's choice of penalty may be so disproportionate to
an offense or otherwise improper as to constitute an abuse of discretion warranting reversal by the Board. However, they assert that in such cases the Board may not itself reduce or modify the penalty but must instead remand the appeal to the employing agency for selection and imposition by the agency of a substitute penalty, subject to further appeal to the Board from the agency's substituted *315 penalty. 4 For the Board itself to modify or reduce a penalty, they contend, would intrude upon the employing agency's managerial functions. The proponents of this position cite various federal court decisions referring to selection of penalties as a matter within “agency” discretion; OPM also emphasizes the purpose of the Reform Act to separate managerial from adjudicatory functions in the civil service system.

**286 The other federal employee unions and the Acting Special Counsel, on the other hand, point to the authority previously reposed in the former Civil Service Commission to mitigate or lessen agency-imposed penalties. The Commission delegated that authority to its Federal Employee Appeals Authority (FEAA) and Appeals Review Board (ARB) for certain categories of cases, 5 otherwise reserving such authority to the Commissioners themselves. 6 Under Reorganization Plan No. 2 of 1978 and the Civil Service Reform Act, it is contended, this Board as the successor agency to the Commission is vested with the same power to mitigate or lessen penalties imposed by agencies. These participants also urge that such authority is inherent in the Board's adjudicative function and is necessary to the proper exercise of the Board's statutory role as a strong, independent protector of merit system principles, including particularly the principle of “fair and equitable treatment in all aspects of personnel management.” 7

None of the cases relied upon by OPM and those supporting its position holds or even states in dictum that the Board, or the Civil Service Commission before it, lacks mitigation authority. In numerous other cases, discussed below, the federal courts have directed the Board or *316 its predecessor Commission to redetermine agency-imposed penalties, or acted upon the clear premise that the courts and/or the Board or Commission possessed authority to impose lesser penalties, or the courts have themselves mitigated Commission-approved penalties. It is undisputed that the Commission did in fact exercise authority to mitigate penalties. Before examining **287 those cases, however, an important distinction which has been generally ignored in the agency briefs and elided by OPM should be clarified.

All of the cases cited to us relate to the scope of judicial review of agency action. Much confusion in the arguments before us arises from the unarticulated and mistaken assumption that the Board's role in relation to employing agencies must be assimilated to that of a reviewing federal court. It is indeed true that Congress clearly intended the Board to function in an independent, nonpartisan, quasi-judicial role with newly authorized powers normally exercised only by courts. 8 In this respect the Reform Act was responsive to studies which had long suggested a need for the appellate functions of the former Civil Service Commission to be performed in a more judicial manner. 9 However, the Board nonetheless remains and is designed to function as an independent administrative establishment within the Executive Branch, not as part of the Judicial Branch. The Board's authority may rest as uncomfortably on the shoulders of the agencies whose actions are appealable to it as the authority of the NLRB, SEC, FTC, FCC, and other independent regulatory agencies rests upon those whose actions are subject to their respective jurisdictions. Nevertheless, as is the case with those agencies, it is the final orders or decisions of the Board which constitute the acts of “the Government” for purposes of judicial review. 10

It is, therefore, incorrect to assume that federal court decisions concerning the scope of judicial review of “agency actions” apply equally to the Board's review of appealable personnel actions. Such an assumption most obviously ignores the fact that 5 U.S.C. § 7701 provides for de novo review by the Board of both factual and legal questions, 11 whereas *317 judicial review of Board decisions is limited to **288 the record established before the Board (except in discrimination cases). 12 We have previously referred to this distinction in explaining the special meaning of the term “appellate jurisdiction” as used in our regulations:

The term “appellate jurisdiction” is used because the Board is reviewing an appeal from an agency action. Use of this term is not meant to indicate that the Board's review of the agency determination is limited to a traditional appellate review. [44 Fed. Reg. 38342 (1979)]
More recently, in *Parker v. Defense Logistics Agency*, 1 MSPB 489, 497, 1 M.S.P.R. 505–518 (1980), we amplified on this same distinction:

... [T]he Board is not a Court of Appeals but rather is itself an administrative establishment within the Executive Branch, albeit one exercising independent quasi-judicial functions. It is the Board's decision, not the agency's, that constitutes an “adjudication” (5 U.S.C. 1205(a)(1)) which must be articulated in a reasoned opinion providing an adequate basis for review by a Court of Appeals (or by the Court of Claims, 5 U.S.C. 7703). The mere fact that the agency's decision is appealable to the Board does not limit the Board's scope of review to that of an appellate court....

The federal courts have recognized, in the very cases relied upon by OPM, that it was the exercise of the Civil Service Commission's discretionary authority that was under review and entitled to a **289 degree of judicial deference, not simply the employing agency's.** This has been **318 recognized in numerous other cases as well,** some of which emphasized the deference due the discretionary determinations of the Civil Service Commission as the agency charged by Congress with the primary responsibility for enforcing the employee protection provisions of the Veterans Preference Act. In consequence, courts have sometimes loosely equated the Civil Service Commission and now the Board with the agency taking the adverse action against the employee. Frequently the severity of the penalty has been explicitly referred to by the courts as a matter within the discretion of the Civil Service Commission.

**290 It cannot be doubted, and no one disputes, that the Civil Service Commission was vested with and exercised authority to mitigate penalties imposed by employing agencies.** Nor can it be doubted that the **319 federal courts have regarded that authority as properly within the Commission's power.** Indeed, the courts have themselves **291 exercised the power to mitigate Commission-sustained penalties.**

The Commission's mitigation authority was based on 5 U.S.C. § 7701 (1967) and on 5 U.S.C. § 1104(a)(5) and (b)(4) (1977). The former provision, relating only to adverse action appeals of preference eligibles, required employing agencies to “take the corrective action that the Commission finally recommends.” The latter provisions established a statutory basis for the Commission's function of “hearing or providing for the hearing of appeals” and “taking ... final action” in all matters appealable to it, as well as of “enforcing” its decisions.

**292 The authority granted by each of these provisions was expressly specified to “remain with the Board” under Reorganization Plan No. 2 of 1978, which redesignated the Commission as the Merit Systems Protection Board** and provided in Section 202:

* (a) There shall remain with the Board the hearing, adjudication, and appeals function of the United States Civil Service Commission specified in 5 U.S.C. 1104(b)(4) (except hearings, adjudications and appeals with respect to examination ratings), and also found in the following statutes:

    (i) 5 U.S.C....7701....

* (b) There shall remain with the Board the functions vested in the United States Civil Service Commission, or its Chairman, pursuant to 5 U.S.C. 1104(a)(5) and (b)(4) to enforce decisions rendered pursuant to the authorities described in Subsection (a) of this Section. [Emphasis supplied]

These provisions have now been succeeded by new Section 1205(a) of Title 5, as enacted by the Reform Act, sec. 202(a), 92 Stat. 1122, which provides:

* (a) The Merit Systems Protection Board shall—

    (1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title ... or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;
(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order...

Thus, unless “inconsistent with any provision in” the Reform Act, 24 the functions specified as remaining with the Board under Section 202 of Reorganization Plan No. 2 of 1978, including the former Commissioner's mitigation authority, remain vested in the Board through 5 U.S.C. § 1205(a). 25

**293** Neither OPM nor any other participant has claimed that the mitigation authority preserved in the Board by section 202 of Reorganization Plan No. 2 is inconsistent with any particular provision of the Reform Act. Instead, OPM argues broadly that the former Commission's mitigation authority reflected its “management responsibilities” in the Commission's dual capacity as government-wide personnel manager and appeals adjudicator, and that the separation of such “managerial decision-making” functions from the Board's adjudicatory function was one of the fundamental principles of the Reform Act. 26

OPM's statement of this Reform Act principle is generally unexceptionable. However, the argument that this principle excludes the Board's mitigation authority takes no account of the obvious fact that the identical principle was also embodied in Reorganization Plan No. 2 of 1978, 27 which as shown by the foregoing discussion expressly provided in section 202 that the statutory functions establishing the former Commission's mitigation authority were to remain with the Board. That authority was thus clearly included among those described by both the President and Congress, in explaining the Reorganization Plan, as comprising the former Commission's adjudicatory and appellate functions. 28 The Reform Act 322 was designed to make no change in the assignment to the Board of those functions. 29

The 1947 amendment to section 14 of the Veterans Preference Act, from which the Commission's mitigation authority originally derived, 30 had been similarly regarded as necessary to the Commission's 294 appellate adjudicative function. 31 That amendment was opposed by several agencies in 1947 on the same purported grounds of managerial prerogative now revived by OPM, but the objection was then deemed “groundless” by Congress, 32 and intervening law and history have rendered the argument obsolete. The Reform Act and Reorganization Plan No. 2 of 1978 were companion enactments adopting a complementary set of reforms as part of a comprehensive legislative proposal. 33 It is too late now to contend that a hitherto unperceived inconsistency between section 202 of the Reorganization Plan and unspecified provisions of the Reform Act somehow had the effect of silently abrogating the Board's mitigation authority, on the strength of theories about managerial prerogative that Congress expressly rejected more than 30 years ago. 34

**295** **323** Beyond legal analysis, there are also practical considerations which, although not mandating our construction of the Board's authority, assure us that this construction is consistent with the Reform Act's purposes and efficient performance of the agencies' responsibilities. If we were to conclude that the Board must remand cases involving excessive penalties to the employing agency for selection and imposition of a new penalty by that agency, then a renewed appeal to the Board to review the new penalty must be allowed, as OPM, the agencies, and AFGE concede. 35 Such successive appeals would prolong ultimate resolution of these cases, a result clearly contrary to Congress's desire for expedition in concluding adverse action appeals. 36

One agency suggests that if the Board has mitigation authority, managers might tend to impose unwarranted removal sanctions in reliance upon Board modification of such penalties, instead of carefully considering the most appropriate penalty at the outset. We doubt this is a substantial risk in many cases, given the care with which most agency managers properly approach the exercise of their disciplinary responsibilities, as shown in thousands of cases already reviewed by this Board and in innumerable cases before the former Civil Service Commission which was vested with that same mitigation authority. The question is not whether excessive penalties will sometimes be imposed by agencies, which is probably inevitable regardless of the scope of the Board's authority, but whether in such cases the Board must be powerless to prescribe a suitable remedy.

Virtually every objective study of the former Commission's appellate operations recommended more rather than less frequent exercise of the mitigation authority, in fairness both to employees and to agencies whose disciplinary actions might otherwise be reversed on insubstantial grounds to avoid imposition of a penalty perceived as too harsh. 37 We find no 324 reason to believe that Board mitigation
authority will encourage easy Draconianism in agency managers, or that any such tendency would be greater if the Board prescribes the modified penalty than if the Board directed the agency itself to select a lesser penalty. Any operational or disciplinary considerations deemed pertinent by the agency to selection of a penalty will have already been brought to the attention of the Board's presiding official if the agency has presented its case properly. Moreover, nothing in the Board's regulations restricts the discretion of a presiding official to afford the parties an opportunity to submit additional information relating to possible alternative penalties if the presiding official finds it advisable to do so.

We have no doubt that insofar as an agency's decision to impose the particular sanction rests upon considerations of fact, those facts must be established under the preponderance standard and the burden is on the agency to justify the particular punishment. Section 7701(c)(1) admits of no ambiguity in this regard, since an agency's adverse action “decision” necessarily includes selection of the particular penalty as well as the determination that some sanction was warranted. The statute clearly requires that all facts on which such agency decision rests must be supported by the standard of proof set out therein.

II. STANDARDS GOVERNING EXERCISE OF THE BOARD'S MITIGATION AUTHORITY

A. Scope of Review

Since the agency actions in these cases were taken under Chapter 75 of Title 5, the respective agency decisions to take those actions may be sustained only if supported by a preponderance of the evidence before the Board. 5 U.S.C. § 7701(c)(1)(B). We must therefore consider whether the preponderance standard applies only to an agency's burden in proving the actual occurrence of the alleged employee conduct or “cause” (5 U.S.C. § 7513) which led the agency to take disciplinary action, or whether that standard applies as well to an agency's selection of the particular disciplinary sanction.

We have no doubt that insofar as an agency's decision to impose the particular sanction rests upon considerations of fact, those facts must be established under the preponderance standard and the burden is on the agency to so establish them. This is so whether the facts relate to aggravating circumstances in the individual case, the employee's past work record, nature of the employee's responsibilities, specific effects of the employee's conduct on the agency's mission or reputation, consistency with other agency actions and with agency rules, or similar factual considerations which may be deemed relevant by the agency to justify the particular punishment. **297**
equally to the board's review of appealable personnel actions, since our review is de novo and from an appellate court's standpoint this Board's action is itself part of the "agency action" reviewed under Section 7703(c). For this Board to exercise only the limited review of adverse actions that the courts will subsequently exercise in reviewing our own decisions under Section 7703(c) would indeed seem anomalous. Such review would serve primarily to anticipate the review function performed by the courts, perhaps thereby screening out some adverse action decisions that would otherwise be reversed by the courts but failing entirely to exercise the degree of independent discretionary judgment entrusted to the Board by the Reform Act.

We need not resolve this conundrum for present purposes, however, since in mitigating penalties we are not construing an authority newly conferred upon us but are exercising only inherited authority. Our authority in this regard is the same as that previously vested in the former Civil Service Commission. In enacting Section 7701(c), Congress understood that it was codifying the standard of proof previously used by the Commission for misconduct cases, and that for both misconduct and performance cases the evidentiary standards of Section 7701(c) apply to resolution of factual issues. There is no suggestion in the Reform Act or its legislative history that Congress sought to alter the scope of the authority previously exercised by the Commission in reviewing agency-imposed penalties, as we have already found in Part I of this Opinion. Therefore, in the absence of any indication that Congress intended us to exercise a different authority, we will adhere to the standard of review that was consistently articulated by the Commission and presumably known to Congress.

By that standard, the Commission reviewed agency penalties to determine whether they were “clearly excessive” or were “arbitrary, capricious, unreasonable.” Other formulations of the standard commonly recited by the Commission were whether the penalty was “too harsh and unreasonable under the circumstances,” or was “unduly harsh, arbitrary, and unreasonable,” or reflected “an abuse of agency discretion, or ... an inherent disproportion between the offense and the personnel action, or disparity in treatment” in violation of the “principle of like penalties for like offense.” The latter principle dates to 1897, when it was originally promulgated by President McKinley as part of Civil Service Rule II under the Pendleton Act. In focusing not merely on whether a penalty was too harsh or otherwise arbitrary but also on whether it was “unreasonable,” the Commission's standard appears considerably broader than that generally employed by the federal courts. Both the Court of Claims and the Courts of Appeals have characteristically reviewed Commission-approved penalties only to determine whether they were so disproportionate to the offense as to amount to an abuse of discretion or whether they exceeded the range of sanctions permitted by statute, regulation, or an applicable table of penalties. The Commission's broad standard of “unreasonableness,” encompassing greater latitude of review than is typically employed by the appellate courts in appeals from Commission or Board decisions, accords a measure of scope to the Commission's and now this Board's independent discretionary authority which the courts have recognized.

The Board's marginally greater latitude of review compared to that of the appellate courts does not, of course, mean that the Board is free simply to substitute its judgment for that of the employing agencies. Management of the federal work force and maintenance of discipline among its members is not the Board's function. Any margin of discretion available to the Board in reviewing penalties must be exercised with appropriate deference to the primary discretion which has been entrusted to agency management, not to the Board. Our role in this area, as in others, is principally to assure that managerial discretion has been legitimately invoked and properly exercised.

At all events the Board must exercise a scope of review adequate to produce results which will not be found “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” when reviewed by appellate courts under Section 7703(c). This is the identical standard prescribed by Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V). To assure that its decisions meet that standard under Section 7703(c), the Board must, in addition to determining that procedural requirements have been observed, review the agency's penalty selection to be satisfied (1) that on the charges sustained by the Board the agency's penalty is within the range allowed by law, regulation, and any applicable table of penalties, and (2) that the penalty “was based on a consideration of the relevant factors and [that] ... there has [not] been a clear error of judgment.”
simple error of judgment” in the sense of “clearly erroneous,” i.e., a determination “is ‘clearly erroneous’ when although there is evidence to support it, ... is left with the definite and firm conviction that a mistake has been committed.”

Therefore, in reviewing an agency-imposed penalty, the Board must at a minimum assure that the Overton Park criteria for measuring arbitrariness or capriciousness have been satisfied. In addition, with greater latitude than the appellate courts are free to exercise, the Board like its predecessor Commission will consider whether a penalty is clearly excessive in proportion to the sustained charges, violates the principle of like penalties for like offenses, or is otherwise unreasonable under all the relevant circumstances. In making such determination the Board must give due weight to the agency's primary discretion in exercising the managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.

Before turning to matters which may be pertinent in determining whether the agency's selection of a penalty was based on consideration of the relevant factors, it seems advisable to address one further point which has been a source of much semantic muddle. The appropriateness of a particular penalty is a separate and distinct question from that of whether there is an adequate relationship or “nexus” between the grounds for an adverse action and the efficiency of the service.” The establishment of such a relationship between the employee's conduct and the efficiency of the service, while adequate to satisfy the general requirement of Section 7513(a) that no action covered by Subchapter II of Chapter 75 may otherwise be taken, “is not sufficient to meet the statutory requirement that removal for cause promote the efficiency of the service.”

Any disciplinary action demands the exercise of responsible judgment so that an employee will not be penalized out of proportion to the character of the offense; this is particularly true of an employee who has a previous record of completely satisfactory service. An adverse action, such as suspension, should be ordered only after a responsible determination that a less severe penalty, such as admonition or reprimand, is inadequate.

Further, OPM has specifically counseled agencies that:

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Moreover, OPM has specifically counseled agencies that:

*Indeed, under some circumstances “an unduly harsh penalty can effectively ruin [an agency's] ... goal of deterrence,” Power v. United States, supra, 531 F.2d at 509. Before it can properly be concluded that a particular penalty will promote the efficiency of the service, it must appear that the penalty takes reasonable account of the factors relevant to promotion of service efficiency in the individual case. Thus, while the efficiency of the service is the ultimate criterion for determining both whether any disciplinary action is warranted and whether the particular sanction may be sustained, those determinations are quite distinct and must be separately considered.

B. Relevant Factors in Assessing Penalties

A well developed body of regulatory and case law provides guidance to agencies, and to the Board, on the considerations pertinent to selection of an appropriate disciplinary sanction. Much of that guidance is directed to the fundamental requirement that agencies exercise responsible judgment in each case, based on rather specific, individual considerations, rather than acting automatically on the basis of generalizations unrelated to the individual situation. OPM's rules on this subject, like those of the Commission before it, emphasize to agencies that in considering available disciplinary actions, “There is no substitute for judgment in selecting among them.”

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Section 7513(b)(4) of Title 5 requires that written agency decisions taking adverse actions must include “the specific reasons therefor.” While neither this provision nor OPM's implementing regulation, 5 C.F.R. § 752.404(f), requires the decision notice to contain information demonstrating that the agency has considered all mitigating factors and has reached a responsible judgment that a lesser penalty is inadequate, a decision notice which does demonstrate such reasoned consideration may be entitled to greater deference from the Board as well as from the courts. Moreover, aggravating factors on which the agency intends to rely for imposition of an enhanced penalty, such as a prior disciplinary record, should be included in the advance notice of charges so that the employee will have a fair opportunity to respond to those alleged factors before the agency's deciding official, and the decision notice should explain what weight was given to those factors in reaching the agency's final decision.

Court decisions and OPM and Civil Service Commission issuances have recognized a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Without purporting to be exhaustive, those generally recognized as relevant include the following:

1. The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3. The employee's past disciplinary record;
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7. Consistency of the penalty with any applicable agency table of penalties;
8. The notoriety of the offense or its impact upon the reputation of the agency;
9. The clarity with which the employee was on notice of any rules that where violated in committing the offense, or had been warned about the conduct in question;
10. Potential for the employee's rehabilitation;
11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Not all of these factors will be pertinent in every case, and frequently in the individual case some of the pertinent factors will weigh in the appellant's favor while others may not or may even constitute aggravating circumstances. Selection of an appropriate penalty must thus involve a responsible balancing of the relevant factors in the individual case. The Board's role in this process is not to insist that the balance be struck precisely where the Board would choose to strike it if the Board were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the Board's review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the Board finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the Board then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.

In considering whether the agency's judgment was reasonably exercised, it must be borne in mind that the relevant factors are not to be evaluated mechanistically by any preordained formula. For example, the principle of “like penalties for like offenses” does not require mathematical rigidity or perfect consistency regardless of variations in circumstances...
or changes in prevailing regulations, standards, or mores. This consideration is redolent of equal protection concepts, also reflected in the merit system principle calling for "fair and equitable treatment" of employees and applicants in all aspects of personnel management. 68 As such, this principle must be applied with practical realism, eschewing insistence upon rigid formalism so long as the substance of equity in relation to genuinely **307 similar cases is preserved. 69 OPM has required that agencies "should be as consistent as possible" when deciding on disciplinary actions, but has also cautioned that "surface consistency should be avoided" in order to allow for consideration of all relevant factors including "whether the action accords with justice in the particular situation." 70 Similarly, agency tables of penalties should not be applied so inflexibly as to impair consideration of other factors relevant to the individual case. 71

Lastly, it should be clear that the ultimate burden is upon the agency to persuade the Board of the appropriateness of the penalty imposed. This follows from the fact that selection of the penalty is necessarily an element of the agency's "decision" which can be sustained under *334 Section 7701(c)(1) only if the agency establishes the facts on which that decision rests by the requisite standard of proof. The deference to which the agency's managerial discretion may entitle its choice of penalty cannot have the effect of shifting to the appellant the burden of proving that the penalty is unlawful, when it is the agency's obligation to present all evidence necessary to support each element of its decision. 72 The selection of an appropriate penalty is a distinct element of the agency's decision, **308 and therefore properly within its burden of persuasion, just as its burden includes proof that the alleged misconduct actually occurred and that such misconduct affects the efficiency of the service. See Young v. Hampton, supra, 568 F.2d at 1264.

In many cases the penalty, as distinct from the underlying conduct alleged by the agency, will go unchallenged and need not require more than prima facie justification. An agency may establish a prima facie case supporting the appropriateness of its penalty by presenting to the Board evidence of the facts on which selection of the penalty was based, a concise statement of its reasoning from those facts or information otherwise sufficient to show that its reasoning is not on its fact inherently irrational, and by showing that the penalty conforms with applicable law and regulation. When no issue has been raised concerning the penalty, such a prima facie case will normally suffice to meet also the agency's burden of persuasion on the appropriateness of the penalty. However, when the appellant challenges the severity of the penalty, or when the Board's presiding official perceives genuine issues of justice or equity casting doubt on the appropriateness of the penalty selected by the agency, 73 the agency will be called upon to present such further evidence as it may choose to rebut the appellant's challenge or to satisfy the presiding official. 74

Whenever the agency's action is based on multiple charges some of which are not sustained, the presiding official should consider carefully whether the sustained charges merited the penalty imposed by the agency. 75 In all cases in which the appropriateness of the penalty has *335 been placed in issue, the initial decision should contain a reasoned explanation of the presiding official's decision to sustain or modify the penalty, adequate to demonstrate that the Board itself has properly considered all relevant factors and has exercised its judgment responsibly.

III. APPLICATION TO APPELLANTS

We turn now to the application of these standards to the cases of the individual appellants. In doing so, we shall discuss the relevant facts of each case and the arguments of the parties.

**309 A. Curtis Douglas v. Veterans Administration**

Appellant Douglas was employed by the Veterans Administration as a Supply Clerk Dispatcher, GS–4. He was removed from the agency for being absent without leave for thirty minutes, for being away from his assigned duty station without permission, and for selling his employment services to a physically handicapped employee. These charges all arose out of events occurring on January 14, 1979. In selecting the penalty, the agency considered four past disciplinary actions: (1) a February 25, 1977 admonishment for eight hours of being AWOL; (2) a June 3, 1977 reprimand for failure to report for duty on May 28, 1977 and four hours of being AWOL on June 2, 1977; (3) a five-day suspension of June 28, 1977 for a 45-minute period of AWOL; and (4) a 20-day suspension of October 2, 1978 for another period of AWOL.

Upon appeal to the Board, the appellant declined a hearing and the presiding official sustained the action based on the
In his initial decision the presiding official described the facts surrounding the conduct which resulted in appellant's removal, stating:

Here, the record reveals that on January 14, 1979 the appellant was assigned the job of SPD Dispatcher with a tour of duty from 8:00 a.m. to 4:30 p.m. and that at approximately 9:10 a.m. the telephone at the appellant's dispatch station rang several times and in his absence was finally answered by the SPD Preparation Area Supervisor, Mr. Edward L. Regan, who, after taking a request for supplies and arranging for their deliverance, became aware that the appellant was absent from his work station without permission. In the meantime, the Ward Supply Clerk Supervisor, Ms. Margaret B. Thomas, was trying to contact the appellant on several occasions at his work site, the Dispatch Office, between 9:00 a.m. and 9:35 a.m. from the wards by use of the executive without success. Consequently, at 9:35 a.m., she asked Mr. Regan of the appellant's whereabouts only to learn that Mr. Regan did not know since the appellant had not requested permission to leave the work station. Thereafter, Ms. Thomas found the appellant on the sixth floor stocking nurseries for physically handicapped Supply Clerk Richard B. Eckert from whom, according to Mr. Eckert, the appellant has solicited $5.00 in payment for helping him do his work and to which the appellant offered that he needed the money.

The presiding official found, after carefully considering appellant's argument to the contrary, that the agency had proven the above facts by a preponderance of the evidence. The record does not contain any evidence which would cause us to change those factual determinations.

Appellant contended that the penalty was too severe. However, he did not explain why he believed the penalty to be too severe, nor did he introduce any evidence to support this contention. In the absence of any specific explanation of this contention from the appellant, we will consider whether, after relevant factors are considered, the penalty of removal was disproportionate to the seriousness of the offense.

The offense in this case was serious. It had a direct impact on the agency's ability to accomplish its mission. According to the agency, appellant's position was "critical to the process of furnishing vital supplies and equipment for emergency as well as routine patient care to all areas of the Medical Center." By being absent from his post, appellant created a situation which could have resulted in serious consequences to a patient who needed equipment or supplies immediately. The seriousness of the offense is compounded by the fact that appellant's absence was intentional and was occasioned by his desire for personal gain.

The record also shows that appellant has been disciplined for unauthorized absence on four previous occasions. This record of progressive discipline demonstrates that appellant was clearly on notice that unauthorized absence from his duty station was a serious offense. It also demonstrates that sanctions less severe than removal have not been successful in curbing appellant's misconduct. On the basis of the above findings, we conclude that the removal penalty was not arbitrary or unreasonable in light of all the circumstances and constituted an appropriate penalty.

Accordingly, the removal action is AFFIRMED.

B. Joseph E. Cicero v. Veterans Administration

Appellant Cicero was removed from his position as a Housekeeping Aide, effective July 13, 1979, at the Franklin Delano Roosevelt Hospital, Montrose, New York, for failure to comply with the instructions of his supervisor to remove boxes from a hallway which were considered to be hazardous to elderly patients. Appellant's prior disciplinary record, consisting of four similar incidents involving failure to perform his work in a timely fashion, was considered by the agency. On appeal, appellant testified that although his supervisor had ordered him to remove several large boxes, the boxes had already been removed by another Housekeeping Aide. The presiding official found the appellant's testimony
less credible than the supervisor's and concluded that the preponderance of evidence supported the reasons for the action. The presiding official also found that removal for failure to carry out instructions relating to the *337 well-being of the patients “constitutes such cause as will promote the efficiency of the service.”

**311** Appellant argues that the lack of any discipline against him for a number of months prove that the removal sanction was not for such cause as will promote the efficiency of the service. The agency argued that in light of a pattern of disregard for supervisory authority reflected in all of appellant's incidents of misconduct, his removal was “patently” for the efficiency of the service.

The instant charge, standing alone, although significant, would not warrant removal because the agency failed to establish the likelihood of injury of patients as a result of appellant's failure to timely comply with his orders. However, the agency has demonstrated that its imposition of lesser penalties in the past has failed to correct appellant's insubordination. Namely, between June 1978 and January 1979 appellant was (1) suspended for 10 working days for deliberate failure or unreasonable delay in carrying out instructions; (2) issued a letter of reprimand for disobeying a direct order; (3) issued a letter of reprimand for failing to complete a work assignment; and, (4) admonished for willful idleness. This record of progressive discipline also demonstrates that appellant was on notice regarding the consequences of his failure to follow the instructions of his supervisor.

[15] Appellant's argument that he had not been disciplined for a number of months is relevant in considering the appropriateness of the penalty. However, in this instance appellant's argument is not persuasive due to the fact that this was appellant's fourth offense involving failure to follow instructions in two years, with the suspension occurring only three months prior to notice of the proposed removal. Thus in the absence of any other relevant argument from the appellant, the question turns on the presence of other mitigating circumstances in the record. The record shows that appellant's performance was otherwise satisfactory and that he had completed five and a half years of service. However these factors are outweighed by the appellant's continued insubordination, and the fact that such continued insubordination indicates little likelihood of potential rehabilitation. An agency need not exercise forbearance indefinitely.

On the basis of the above findings, we conclude that the removal penalty was not arbitrary or unreasonable in light of all the circumstances.

C. Douglas C. Jackson v. Department of the Air Force

Appellant Jackson was employed as a Sheet Metal Worker-Helper (Aircraft) with the Department of the Air Force. He was removed from his position for “deliberate misrepresentation” because he had submitted false evidence in order to prove college nightclass enrollment so that he might obtain a day-shift assignment. In addition, **312 four elements of appellant's past disciplinary record were considered by the agency in determining the severity of the penalty. In his initial decision, the presiding *338 official found that a preponderance of the evidence of record supported the charge of deliberate misrepresentation. He further found that the appellant failed to show that the removal penalty exceeded the penalty listed in the table of penalties, and that the agency's action was neither arbitrary nor capricious, but was taken for cause such as would promote the efficiency of the service. Accordingly, the agency's action was affirmed.

The agency did not allege that the misrepresentation impacted on appellant's job performance but in determining the severity of the penalty, the agency also considered the appellant's past disciplinary record which included a letter of reprimand for "wanton disregard of directives" involving parking without a valid permit on four occasions; a one-day suspension for being AWOL and failing to request leave in accordance with established procedures; a letter of reprimand for being AWOL and failing to request leave in accordance with established procedures; and a letter of reprimand for the offense of deliberate misrepresentation for driving on base with an unauthorized base registration decal.

Appellant did not deny having engaged in the charged offense, but requested consideration of his age (22) and the fact that he was the sole support of his wife and child. Appellant also asked to be put on a trial period, assured the agency of no further wrongdoing, and requested a lesser penalty. Notwithstanding these pleas in mitigation, the agency determined that removal would promote the efficiency of the service.
The likelihood of rehabilitation is the most persuasive of appellant's pleas in support of mitigation. The hardship caused by removal is not unique in most cases. Similarly, unless the employee's age is somehow connected to the offense, failure to consider age would not make an agency's selection of a particular penalty arbitrary or unreasonable.

The likelihood of rehabilitation must be viewed in light of appellant's past actions. Under the circumstances, appellant's promise that he would not engage in future prohibited conduct is insufficient to outweigh other relevant factors which tend to indicate otherwise. This was not appellant's first offense. Appellant frequently disregarded agency rules in committing various offenses. An agency is entitled to expect its employees to adhere to reasonable directives and to discipline them for failure to do so. Appellant had repeatedly been warned about such conduct, and due to the number of disciplinary actions during two years of employment, the agency could reasonably conclude that the likelihood of rehabilitation was too remote to warrant mitigating the penalty.

Accordingly, we find that the agency did not act arbitrarily in its decision not to mitigate this case, and that the penalty of removal was not unreasonable.

**313** D. James K. Anderson v. Department of the Air Force

At the time of his removal on August 10, 1979, appellant, a veteran, had been employed by the Department of the Air Force at Robins Air Force Base, Georgia, as a Packer, WG-6, for most of his 24 years of civilian government service. He was removed for failure to properly request leave between May 31 and June 20, 1979, a total of 15 working days, when he was absent from duty due to chronic foot problems from which he had been suffering since 1975.

In reaching its decision to remove him, the agency considered two previous ten-day suspensions which also related to absence arising from appellant's medical condition. The agency considered no other factors in its decision to remove appellant. The agency was aware of appellant's medical condition, and did not charge him with unauthorized absence or absence without leave (AWOL).

Appellant did not deny that he was absent on the days in question, but did deny that he had failed to properly request leave. The presiding official sustained the charges, and found that removal would promote the efficiency of the service. However, he did not explain his reasons for the latter conclusion.

Under the particular circumstances of this case, we find that the agency has not carried its burden of demonstrating that removal was reasonable. Our decision in this case is based on the unique arrangement which the agency had with the appellant with respect to the manner in which appellant was required to request leave for medical reasons, as is explained in detail below.

The record reveals that for some time prior to 1976, the appellant, whose duties required standing on his feet for lengthy periods of time, had been experiencing considerable difficulty with his feet. In May of 1976 he underwent a foot operation which appears to have done little to alleviate this troubling condition. Substantially all of appellant's absences after 1976 were related to this medical problem.

When appellant was absent from work, it was his practice to send a short letter to his supervisor requesting that he be placed on sick or annual leave. Appellant's supervisor testified that appellant was "real good" about reporting his absences by letter, and that if the letter did not come in on the day of the absence, it would always appear a day or two later. (Tr 9). He also testified that if appellant did not send a letter, appellant would bring in a doctor's certificate, and that he had never placed appellant in an AWOL status (Tr 7). The agency did not offer evidence of any regulations demonstrating a contrary method for requesting leave, nor did it suggest that the practice followed by appellant was unsatisfactory. Therefore we conclude that the practice established by appellant and his supervisor was acceptable to the agency. It is important to note, however, that a consequence of this practice was that the agency was unable to determine in advance whether the appellant would be absent on any particular day.

On May 25, 1979, appellant had a conversation with his second level supervisor during which he indicated that he was going to see his doctor that day because of pain in his feet, and that he was under medication. Appellant reported for work the following day, but experienced a great deal of pain in his feet. The 27th and 28th of May were appellant's
days off. Appellant failed to return to work until June 21, but he did send letters to his supervisor on May 29 and May 30 requesting leave for those two days. In the letter of May 30, appellant stated that his absence was due to his foot problems. Appellant did not send the agency any letters requesting leave for his subsequent absences; consequently, he failed to follow the established practice for reporting his absence. The agency charged appellant with failure to properly request leave for each working day he was absent except for May 29 and 30. Sometime after his return to work on June 21st, appellant provided a doctor's certificate which appears to address appellant's problems only on May 25th. Although appellant contended that the agency should have realized his absences after May 30 were also due to his foot problems, and that his letter of May 30 was sufficient to cover him for the remaining time, he has also admitted that he had no good reason for his subsequent failure to contact the agency.

The agency has, however, presented no evidence or argument to establish the impact of appellant's failure to properly request leave on the accomplishment of the agency mission. Under the more common practice of requiring an employee to call in as soon as he or she knows of an impending absence, an agency has some advance notice in which to plan for the replacement of that worker. Consequently, the disruption to the orderly process of accomplishing the agency's work upon failure to adhere to the proper method requesting leave is readily apparent under such circumstances. Such is not the case here. The agency could not reasonably expect to know that appellant would be absent in advance, nor would it know the reasons for that absence, until two or three days after it had occurred. In the absence of any readily apparent adverse impact on the agency, we conclude that the seriousness of the offense must be discounted. In drawing this conclusion, we emphasize that appellant was not charged with a serious offense on the job, but was charged with unauthorized absence or absence without leave. The serious adverse impact on the agency's mission resulting from an authorized absence of some three weeks is self-evident, and, in the absence of any rebuttal from the appellant, an agency need not expect to present detailed evidence concerning that impact. Had the agency established that appellant had been AWOL for the time here in question, our conclusion with respect to the appropriateness of removal might well be different.

[18] This, however, does not mean that the agency may not discipline the appellant for failing to adhere to the established procedures for reporting his absences. An agency is entitled to expect its employees to adhere to its reasonable directives, and to discipline them for failure to do so. The appellant has clearly failed to do so here, and the record shows that he has violated these procedures in the past. The severity of the discipline under such circumstances should be determined in light of the number of past violations of the directive and the importance to the agency mission of carrying out the directive. The record indicates that appellant failed to adhere to the established procedures on four separate occasions, and has been suspended for a total of 15 days, but does not indicate the importance to the agency of carrying out the directives. The record also indicates that appellant has had a long career with the government, which has been unblemished with the exception of the disciplinary actions which relate to his medical condition. Moreover, since the agency has presented no evidence indicating that appellant's performance on the job was deficient, the appellant is entitled to the presumption that his performance has been satisfactory. In light of these considerations, we find that the penalty of removal was unreasonable and that a suspension of 30 days for the instant violation of agency procedures is appropriate. Accordingly, the agency action is REVERSED and the agency is hereby ORDERED to cancel the removal action and substitute in its place a thirty-day suspension.

E. Luis A. Jimenez v. Army

Appellant, a Motor Vehicle Dispatcher, GS–4, employed by the Department of the Army at Fort Buchanan, Puerto Rico, was removed for unauthorized use of a government-owned vehicle. He admits the facts underlying the charges as set forth below, but contends that the penalty is too severe.

On the morning of June 4, 1979, the transportation officer for whom appellant worked discovered that one of the government vehicles was absent from its normal parking place but was not signed out to anyone. Upon inquiry to the military police, he learned that appellant had been seen leaving the NCO Club with three women in the vehicle at approximately 1:45 a.m. on Saturday, June 2, 1979. When questioned by the guard at the gate, appellant had produced a dispatch ticket, stated that the women were scheduled to perform at a show on the post on Sunday, and that he was taking them to their downtown hotel.

Appellant was off duty from 3:30 p.m. on Friday, June 1, 1979, until 7:30 a.m. on Tuesday, June 5, 1979, and was not authorized to use a government vehicle between those hours. Appellant failed to report as scheduled on the 5th, but called
in later that day to report that he had been involved in an accident while driving the government vehicle, on June 4th, at approximately 7:30 p.m., had gone to the hospital, and needed a wrecker to tow the car back to the motor pool.

In deciding to remove the appellant, the agency considered his written and oral pleas in mitigation, which included the claim that this was the first offense as a federal employee; that he was not responsible for the accident; that he wanted to make the federal service his career and removal would prevent him from doing so; that he had four children to support, was heavily in debt and could not afford to lose his job; that his work had always been satisfactory and he was a dedicated employee; that his four years of good service should be considered in selecting the penalty and he was proud to work for the federal government; and that a lesser penalty would benefit both him and the service. We find that all the mitigating factors raised by the appellant were proper matters for the agency to consider in selecting the penalty. Notwithstanding these considerations, the agency determined that removal would promote the efficiency of the service. The deciding official gave appellant the following explanation for that decision.

In your verbal reply you told me that the allegations in the Proposed Notice of Removal were true, specifically, that you were guilty of unauthorized use of government vehicle while serving as a Motor Vehicle Dispatcher. You reiterated the fact that you were aware of the provisions against unauthorized use of government property and that you were guilty of the charge ... I am convinced that you were aware of the “Official Use” requirement contained in Army Reg. 600–50, and that you failed to observe that regulation ... As a Motor Vehicle Dispatcher you are entrusted with insuring that the government's interests are protected in the area of vehicle usage. You were held responsible for approving or disapproving requests for motor transportation. You are expected to report violations of “Official Use” to higher level officials for corrective action. You occupy a position of trust and by taking a vehicle during the period specified in the proposed notice for your own purposes which included driving three people from the NCO Club to their downtown hotel, you have violated that trust placed upon you. In light of that trust inherent in your position the unauthorized use of government property is considered a major offense. Removal is warranted for this offense and falls within the Department of Army, Table of Penalty Guidelines ... You intentionally ignored AR 600–50, Standard of Conduct, which is a regulation prescribed by competent authority. Within that regulation is a provision prescribing when government property can be used. You chose not to adhere to the “Official Use” requirement contained in AR 600–50 which I consider much more serious than accidentally forgetting to observe an order or regulation ...

Appellant appealed the removal to the New York Field Office of the Board, but did not request a hearing. His arguments were limited to the question of the severity of the penalty. In its response to appellant's petition, the agency contended that the appellant had proven himself untrustworthy in the performance of his duties and to retain him under those circumstances would not promote the efficiency of the service. The presiding official found that removal was appropriate under the circumstances, and affirmed the removal.

In response to our briefing order, the appellant reiterated the factors he considered relevant to mitigation which he had set forth to the agency and the presiding official, but made no attempt to explain why, in light of his conduct, a lesser penalty would be appropriate. The agency argued that in cases such as this, where the relationship between the employee's conduct and the adverse impact on the accomplishment of the agency mission is obvious on its face, it need not present evidence concerning that relationship.
We agree with the general proposition stated by the agency. However, whether that relationship is “obvious” depends to a great extent on the background and knowledge of the person to whom such an argument is addressed. Nor is it self-evident that the appellant was responsible to approve or disapprove vehicle requests, to report violations of the “Official Use” regulations to his supervisor, or that he was aware of the contents of those regulations. Such matters are, however, important considerations in determining whether removal is appropriate under the circumstances of this case, and the agency bears the burden of introducing evidence to establish these facts. If it had done so, the agency would then be in a position to argue that appellant's improper conduct casts grave doubt upon his ability to faithfully discharge his duties, that his misconduct was such that the agency could no longer reasonably rely on his ability to properly carry out his duties in the future, and that removal would therefore be warranted.

The agency has not, however, introduced any evidence to establish the nature of appellant's duties and responsibilities or his background and knowledge. The only indication of the nature of appellant's duties is found in the rationale utilized by the deciding official's decision to effectuate appellant's removal. Accordingly, we are unable to determine whether the alleged facts underlying the rationale for the removal penalty are supported by a preponderance of the evidence. In the future, an agency will risk having its selected penalty reduced, if it does not meet its burden of proof on the underlying factual issues. However, because the agency's burden has been outlined for the first time in this decision, it would not serve the interest of justice to take that course here. Consequently, the presiding official's initial decision sustaining the agency's removal of appellant is VACATED and the case is REMANDED to the New York Field Office. On remand the presiding official shall afford the parties the opportunity to introduce additional evidence on the question of mitigation, including evidence of the appellant's duties and responsibilities and his awareness of the agency's rules concerning unauthorized use of motor vehicle.

[19] The agency has not, however, introduced any evidence to establish the nature of appellant's duties and responsibilities or his background and knowledge. The only indication of the nature of appellant's duties is found in the rationale utilized by the deciding official's decision to effectuate appellant's removal. Accordingly, we are unable to determine whether the alleged facts underlying the rationale for the removal penalty are supported by a preponderance of the evidence. In the future, an agency will risk having its selected penalty reduced, if it does not meet its burden of proof on the underlying factual issues. However, because the agency's burden has been outlined for the first time in this decision, it would not serve the interest of justice to take that course here. Consequently, the presiding official's initial decision sustaining the agency's removal of appellant is VACATED and the case is REMANDED to the New York Field Office. On remand the presiding official shall afford the parties the opportunity to introduce additional evidence on the question of mitigation, including evidence of the appellant's duties and responsibilities and his awareness of the agency's rules concerning unauthorized use of motor vehicle.

F. John Nocifore and John Dennis v. Department of the Navy

Appellants Nocifore and Dennis were removed for the attempted theft of a satchel of brass fittings from the Long Beach Naval Shipyard. According to the agency's Inventory and Identification of Recovered Evidence, the fittings were worth approximately $600.00. Appellants did not deny the charged misconduct, either before the agency or the Board's presiding official. The presiding official of the Board's San Francisco Field Office sustained the charge, and the removal actions were affirmed. A joint hearing was held incident to their appeals, and their cases will be considered together in this section.

While the agency has a policy of considering mitigating factors and imposing the minimum penalty that can be reasonably expected to correct an offending employee, it recognizes that certain misconduct may warrant removal in the first instance. (CMMI 751.1, Sec. 1–2a, December 1975, Agency Exhibit 2.) The Shipyard officially identified the offense of attempted or actual theft of government property as warranting the penalty of removal for the first offense, “unless extraordinary mitigating circumstances exist which would indicate the suitability of a lesser penalty.” (NAVSHIPDLBEC/SHIPNOTE 12750, 26 September 1977, Agency Exhibit 2.) This Notice required that the agency's policy regarding the offense be “published in the Digest semi-annually and that all employees are (to be) informed of this policy upon entrance to duty.” We find that the Shipyard clearly articulated and communicated its policy regarding proven theft-related offenses.

In deciding whether to impose lesser penalties, the agency considered Mr. Nocifore's 13 years, and Mr. Dennis' 6 years, of good job performance in the Shipyard, an award for meritorious service received by Mr. Dennis in 1977, the fact that they had no prior disciplinary records, and the “financial problems” of Mr. Nocifore. The agency did not find that these factors warranted reductions in the penalties. These decisions were made in the context of approximately $300,000 worth of losses due to theft which the Shipyard claims to suffer annually, (Tr. at 23), and the Shipyard's need to deter such misconduct.

Appellants did not deny having engaged in the charged misconduct, but claimed that they were treated disparately as compared with other employees disciplined for theft-related offenses in the 2-year period preceding their removals.

We find that the record does not support appellants’ contention that the agency practice was to impose suspensions rather than removals for theft-related offenses. In each of the six cases cited by the appellants, removal had been initially proposed. The proposed penalty was effected in two cases and reduced in four others after consideration of mitigating factors.
In one case the penalty was reduced because the agency concluded that the offense was not committed for personal gain; in another there was insufficient evidence of intent; and in a third the agency reprimanded a temporary employee for taking a jacket which he claimed he mistakenly picked up. The fifth case referred to by the appellants was comparable to theirs in its seriousness. A supervisor had utilized his position to have certain goods made for him by his subordinate employees. His removal was originally proposed but he was ultimately suspended because the agency concluded, based on his years of good service, his offer to make restitution, and good character attestations, that a repeat of the offense was unlikely. We do not find that the agency's consideration of the mitigating factors in the supervisor's case indicates that appellants were treated disparately. See Jones v. United States, 617 F.2d 233, 223 Ct.Cl. 138 (1980). We agree with the presiding official that the agency could reasonably decide not to reduce the penalty in the instant cases. As the presiding official noted:

... appellant's supervisors did not come forward on his behalf and although union officials did so they volunteered information about appellant's personal financial condition rather than his "character"; employees in the cases cited by appellant were more cooperative [sic] freely providing additional assistance and information to the agency; and, the others were not shown to be involved in resale activities whereas the credible evidence indicated appellant intended to convert the property to cash.... (Nocifore Initial Decision at 5).

Accordingly, we find that the seeming disparity has been adequately explained by the agency. The agency has demonstrated that its practice is to weigh the individual merits and mitigating factors applicable in each instance of a theft-related offense, to arrive at a penalty resulting from reasoned deliberation of those factors, and that it did so in this case.

Theft of government property "carries on its face prejudice to the service," and is "without question related to the faithful and loyal performance of his duties by an employee...." Phillips v. Berglund, 586 F.2d 1007, 1011 (4th Cir. 1978). The thefts in these cases were serious offenses. They were intentional misdeeds, motivated by the desire for personal gain. They were committed despite the clear notice the appellants and other employees received that the agency considered theft a serious offense. If appellants were not removed they would continue to have access to government material, and the agency's ability to deter such conduct by other employees could be lessened. This consideration is significant in view of the substantial losses the Shipyard has been suffering through theft. Under all the circumstances in these cases, we find that the penalties of removal were not arbitrary or unreasonable. Accordingly, the removal actions of John Nocifore and John Dennis are AFFIRMED.

This is the final order of the Merit Systems Protection Board in these appeals.

Appellants are hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellants' receipt of this order.

For the Board:

RONALD P. WERTHEIM,
ERSA H. POSTON,
RUTH T. PROKOP,
WASHINGTON, D.C.

1 All citations herein to Title 5 of the United States Code are to U.S.C.A. (1980), unless otherwise stated.
3 Briefs were received from the Office of Personnel Management (OPM), the Acting Special Counsel of the Board, the Departments of Agriculture, Health Education and Welfare (now Health and Human Services), Interior, Justice, and the Navy, the Defense Logistics Agency, the Federal Trade Commission, the Internal Revenue Service, the

U.S. Postal Service, the American Federation of Government Employees (AFGE), the National Federation of Federal Employees, the National Association of Government Employees, and the National Treasury Employees Union. A statement in support of OPM's brief was submitted by the Securities and Exchange Commission. Briefs had also been received from OPM as intervenor in response to our reopening orders, and OPM with the Board's leave filed a response to the amicus briefs.

AFGE contends that the Board can only reverse the entire adverse action, providing such guidance as the Board chooses to reduce the likelihood of a further appeal from a newly-imposed penalty upon a second adverse action which may thereupon be instituted by the agency. AFGE Br. at 11–12.

Civil Service Commission Personnel Manual, Delegations of Authority, secs. 106.01(G), 109.01(C) (May 1975) (authority delegated to FEAA and ARB to “mitigate or lessen penalties imposed by agencies by adverse actions, when ... the penalties imposed are not in accord with agency policy or practice in similar situations”). The predecessor of the ARB was the Commission's Board of Appeals and Review (BAR).

Id., secs. 106.01(I), 109.01(D).

5 U.S.C. § 2301(b)(2). In addition, these unions and the Acting Special Counsel refer to 5 U.S.C. § 7121(e)(2), which requires arbitrators when considering grievances otherwise appealable to the Board to be governed by the same standards that govern adverse actions before the Board, a provision designed to promote consistency in resolution of adverse action disputes and to avoid forum-shopping. See Conference Report on S.2640, H. Rep. No. 95–1717, 95th Cong., 2d Sess. 157 (1978), U.S.Code Cong. & Admin.News 1978, p. 2723. This provision, they contend, indicates that Congress understood the Board's authority to include mitigation of penalties, since Congress was presumably aware of the well-known power of arbitrators to mitigate or modify agency-imposed discipline and the Congressional purpose of achieving consistent outcomes and avoiding forum-shopping could not be achieved if the Board were not expected to exercise the same power. We find it unnecessary to address this contention in view of the other grounds for our decision.


See McTiernan v. Gronouski, 337 F.2d 31, 35–36 (2d Cir. 1964). See also H.Rep. No. 96–1080 on H.R. 2510, 96th Cong., 2d Sess. 3 (1980) (“... it is true as OPM points out that ... section 7701 of Title 5, United States Code, ... provides for a de novo review by the Board of both procedural and factual questions....”); S.Rep. No. 96–1004 on H.R. 2510, 96th Cong., 2d Sess. 2–3, 5 (1980), U.S.Code Cong. & Admin.News 1980, p. 5986. The power of de novo review includes the power to modify penalties. See Goodman v. United States, 518 F.2d 505 (5th Cir. 1975); Cross v. United States, 512 F.2d 1212 (4th Cir. 1975) (en banc); Brennan v. Occupational Safety and Health Review Comm’n, 487 F.2d 438, 441 (8th Cir. 1973); United States v. Daniels, 418 F.Supp. 1074, 1080–81, (D. S.Dak. 1976). Moreover, the Board, unlike the courts, “deals with the relationship of penalty to violation on a frequent basis” and is thus better positioned than the courts to achieve “uniformity and coherence of administration,” See Kulkin v. Bergland, 626 F.2d 181, 185 (1st Cir. 1980).

See 5 U.S.C. § 7703(c); Pascal v. United States, 543 F.2d 1284, 1287 n.3, 211 Ct.Cl. 183 (1976); Dabney v. Freeman, 358 F.2d 533, 537 (D.C. Cir. 1965). This distinction is overlooked by OPM in asserting erroneously that Congress established “a similar reviewing role for both MSPB and the courts” (OPM Memorandum as Intervenor in Douglas and Jackson, at 3 n.2). On that mistaken premise OPM then erects the argument that judicial principles governing review of an agency-imposed penalty should also be applied by the Board,
courts, citing Morgan v. United States, 307 U.S. 183, 191, 59 S.Ct. 795, 799, 83 L.Ed. 1211 (1939). However, Morgan held that a federal court of equity should avoid reaching a result contrary to that of a federal agency on a rate-making question within the agency's statutory jurisdiction, a conclusion which, if pertinent at all to the present issue, suggests rather that the courts should respect the results reached by the Board within its statutory jurisdiction. See Butz v. Glover Livestock Commission Co., 411 U.S. 182, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973). Morgan, of course, predates the Administrative Procedure Act of 1946 whose judicial review provision, section 10(e), 5 U.S.C. § 706 (1977), is now paralleled by 5 U.S.C. § 7703(c).

13 Henley v. United States, 379 F.Supp. 1044, 1049 (M.D. Pa. 1974); Grover v. United States, 200 Ct.Cl. 337, 354 (1973); Birnholz v. United States, 199 Ct.Cl. 532, 538 (1972); Heffron v. United States, 405 F.2d 1307, 1310, 186 Ct.Cl. 474 (1969). In Harvey v. Nunlist, 499 F.2d 335 (5th Cir. 1974), the employee bypassed Civil Service Commission appellate procedures which were then optional for Post Office employees, see 5 C.F.R. § 771.222 (1973), and appealed directly to federal court after exhausting internal Post Office administrative appeals. Henley v. United States, supra, in regarding the penalty selected as beyond the court's scope of review, relied upon a statement in Jaeger v. Stephens, 346 F.Supp. 1217, 1226 (D.Colo. 1971), quoting Bishop v. McKee, 400 F.2d 87, 88 (10th Cir. 1968), for the principle that the “remedy necessary to promote the efficiency of the civil service is a matter peculiarly and necessarily within the discretion of the Civil Service [Commission] and cannot be disturbed on judicial review absent exceptional circumstances not here present.” Bishop v. McKee and its progeny thus expressed no limitation on the Civil Service Commission's authority concerning penalties.


15 E.g., Adkins v. Hampton, 586 F.2d 1070, 1074 (5th Cir. 1978); Guerry v. Hampton, 510 F.2d 1222, 1227 (D.C. Cir. 1974).


18 OPM so concedes in its Memorandum as Intervenor in Douglas and Jackson, at 4. While the Board's records of CSC cases are incomplete, the following examples are sufficient to illustrate the actual exercise of the Commission's mitigation authority: Clyde Hayes (TVA), No. RB752B50288 (ARB Sept. 19, 1974) (removal reduced to 30-day suspension); James F. Lillard (TVA). No. RB752B50289 (ARB Sept. 19, 1974) (removal reduced to 30-day suspension); David C. Corson (Dept. of Army), Commissioners' Letter to agency reopening BAR No. 752B–73–558 (May 11, 1973) (removal reduced to 30-day suspension); James D. King, Jr. (Post Office), No. 752B–72–—— (ARB Sept. 19, 1972) (removal reduced
to 30-day suspension); Thomas A. Horan (Postal Service), No. 752B–73–33 (BAR July 25, 1972) (removal reduced to 60-day suspension); Richard D. Meehan (Canal Zone), CSC Minutes of Proceedings Oct. 7, 1970 (Appeals Examining Office's reduction of removal to 90-day suspension following remand from Court of Appeals for “agency” reconsideration of penalty, 425 F.2d at 473, approved by Commissioners notwithstanding Canal Zone Government's contention upon request for reopening that “the issue remanded was to be resolved by the agency, and not the Commission,” Letter of Canal Zone governor to CSC Chairman, Aug. 28, 1970, at 6). See also Minnie L. Dixon (Internal Revenue Service), No. 752B–74–4 (BAR July 3, 1973) (removal reduced to 60-day suspension) and Margaret E. Boyce (Internal Revenue Service), No. 752B–74–6 (BAR July 3, 1973) (removal reduced to 90-day suspension), both of which were subsequently overruled by the Commissioners whose decision was thereafter reversed by the Court of Claims in Boyce v. United States, 543 F.2d 1290, 211 Ct.Cl. 57 (1976). In numerous other cases the Commission explicitly weighed the severity of the penalty as distinct from whether some disciplinary action was warranted, e.g., No. AR752B90458 (Office of Appeals Review, July 5, 1979); No. RB752B80194 (ARB May 17, 1978); No. RB752B70253 (ARB Sept. 9, 1977); No. 752B–73–666 (BAR April 17, 1973).

E.g., Cafferello v. Civil Service Commission, 625 F.2d 285 (9th Cir. 1980) (reversing district court which found that ARB should have mitigated penalty, but not questioning ARB's authority to mitigate); Howard v. United States, No. Civ. LV–77–219 RDF (D. Nev. July 3, 1980) (remanding to MSPB to reconsider severity of penalty and, if removal is found unwarranted, to “formulate an appropriate remedy”); Byrd v. Campbell, 591 F.2d 326, 331–32 (5th Cir. 1979) (remanding to FEAA for reconsideration of severity of penalty); Boyce v. United States, 543 F.2d 1290, 211 Ct.Cl. 57 (1976) (Commissioners provided inadequate explanation for overruling BAR's decision to reduce penalties); Slowick v. Hampton, 470 F.2d 467, 469 (D.C. Cir. 1972) (ordering remand for “administrative redetermination of the proper sanction”), thereafter remanded to the Commission by the district court's order of Dec. 13, 1972 for “a determination of the proper sanction,” whereupon the Commission, after affording the parties an opportunity to comment, directed the agency to cancel the removal action and reinstate the employee with no suspension, No. 752B–73–666 (BAR April 17, 1973); Meehan v. Macy, 425 F.2d 472, 473 (D.C. Cir. 1969) (en banc) (remanding to Civil Service Commission to reconsider severity of penalty), thereafter considered by the Commission in Richard D. Meehan (Canal Zone), discussed in note 18, supra. See also case cited in note 17, supra.

E.g., Francisco v. Campbell, 625 F.2d 266 (9th Cir. 1980) (affirming district court's finding that penalty was excessive but reversing reinstatement order and remanding to district court for “reconsideration of the imposition of proper discipline”); Power v. United States, 531 F.2d 505, 510, 209 Ct.Cl. 126 (1976), cert. denied, 444 U.S. 1044, 100 S.Ct. 731, 62 L.Ed.2d 730 (1980) (awarding back pay because removal penalty was excessive but not ordering reinstatement); Clark v. United States, 162 Ct.Cl. 477, 486–87 (1963) (back pay award for improper removal reduced to allow for 90-day suspension); cf. Cuiffo v. United States, 137 F.Supp. 944, 950 (Ct. Cl. 1955) (back pay award for excessive suspension reduced to allow for 30-day suspension).

393, 395–96, 149 Ct.Cl. 22 (1960); Goodwin v. United States, 118 F.Supp. 369, 370–71, 127 Ct.Cl. 417 (1954); Wettre v. Hague, 74 F.Supp. 396, 399 (D. Mass. 1947), vacated on other grounds, 168 F.2d 825 (1st Cir. 1948); 33 Comp. Gen. 295, 296 (1954) (“the Commission has the authority to determine what constitutes proper ‘corrective action’ ...”); 28 Comp. Gen. 489, 491 (1949) (“it is clear that the Civil Service Commission is authorized to determine the nature and extent of the corrective action to be taken”).

Section 1104 in 1966 codified section 2(a)(6) of Reorganization Plan No. 5 of 1949, 14 Fed. Reg. 5227, 63 Stat. 1067, which provided for the Commission's function with respect to “enforcing” its decisions and “the hearing or providing for the hearing of appeals ... and the taking of such final action on such appeals as is now authorized to be taken by the Commission.” Appeal rights were extended to non-preference eligibles in the competitive service by Executive Order No. 10,988 of January 17, 1962, 3 C.F.R. § 521, 5 U.S.C. § 631 (1964), and Executive Order No. 11,491 of October 29, 1969, 3 C.F.R. § 861 (Supp. 1966–1970), 5 U.S.C. § 7301 (1970).


Of course, Section 1205(a) is not the exclusive provision embodying the surviving authorities set forth in the pre-Reform Act provisions of 5 U.S.C. §§ 1104 and 7701. Both of those provisions, as amended substantially by the Reform Act in respects not pertinent here, survive as sources of important authorities for OPM and the Board respectively.

OPM Memorandum as Intervenor in Douglas and Jackson, at 4–5. See also amicus brief of the Department of the Navy, at 5–6.


See Message from the President, id. at 1 (“The ... Board will exercise all of the adjudication and appellate functions now vested in the Civil Service Commission”); S.Rep. No. 95–1049, supra, at 2 (same); Hearings Before a Subcom. of the House Comm. on Government Operations on Reorganization Plan No. 2 of 1978, 95th Cong., 2d Sess. 13, 22 (statements of James T. McIntyre), 56, 70, 92 (statements of Alan K. Campbell) (1978).

See H.Rep. No. 95–1403, 95th Cong., 2d Sess. 4, 6 (1978); 124 Cong. Rec. H9375 (daily ed. Sept. 11, 1978) (statement of Rep. Ford) (“... there is a merit system protection board of three members which performs the merit system protection functions that the present three Civil Service Commissioners have traditionally performed”). See also note 33, infra, and accompanying text.

See note 21, supra.

See H.Rep. No. 315 on H.R. 966, 80th Cong., 1st Sess. 1–2 (1947); S.Rep. No. 568 on H.R. 966, 80th Cong., 1st Sess. 1–3 (1947); S.Rep. No. 631 on S.1494, 80th Cong. 1st Sess. 1 (1947); 93 Cong. Rec. 7467 (daily ed. June 19, 1947) (amendment “protects veterans from arbitrary administrative decisions by making the recommendations of the Civil Service Commission binding on the executive departments and agencies”); Hearings Before Senate Comm. on Civil Service, on Veterans' Legislation, 80th Cong., 1st Sess. 29 (“In this instance [under prior law] we have an appeal system, but the final court of appeals is unable to enforce its findings upon the agencies involved”), 35 (“We feel that the Civil Service Commission, sitting in judicial capacity, can much more fairly pass on these things than the supervisors of some of these agencies, and on up the line....”) (1947).


See Message from the President, supra, at 1; S.Rep. No. 95–1049, supra, at 1; Hearings before a Subcom. of the House Comm. on Government Operations on Reorganization Plan No. 2 of 1978,
OPM does not claim that either the Reorganization Plan or the Reform Act assigned to OPM the authority to order a modification in an agency-imposed penalty, nor has OPM purported to assert such authority in any of the roughly 12,000 cases already adjudicated by the Board under the Reform Act. OPM's argument thus amounts to a contention that Congress in 1978 repealed altogether the mitigation authority conferred by the 1947 amendment to the Veterans Preference Act. Nothing in the Reform Act or Reorganization Plan, or their legislative history, supports such a contention. Of course, repeals by implication are disfavored. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 189–90, 98 S.Ct. 2279, 2299–2300, 57 L.Ed.2d 117 (1978); Regional Rail Reorganization Act Cases, 419 U.S. 102, 133–34, 95 S.Ct. 335, 353–54, 42 L.Ed.2d 370 (1974). If the Reform Act and the mitigation authority vested in the Board by Section 202 of the Reorganization Plan are “capable of co-existence, it is the duty of the courts, absent clearly expressed congressional intention to the contrary, to regard each as effective.” Morton v. Mancari, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974). Here, not only is there no such clearly expressed congressional intention, there is clear indication that Congress intended in the combined Reform Act and Reorganization Plan to provide for all of the former Commission's functions. In transmitting the Reorganization Plan to Congress, the President expressly stated that, “No functions are abolished by the Plan....” Message from the President, supra, at 2.

See note 4, supra, and accompanying text. Under that view there could in principle be an indefinite number of such successive appeals in any particular case, until the agency finally hits on a penalty that the Board sustains.


In Parker v. Defense Logistics Agency, 1 MSPB 489, 499 n. 14, 1 M.S.P.R. 505, 520 n. 14 (1980), we noted with respect to an evidentiary standard that had previously been applied by the Commission but was modified by the Reform Act, “Regardless of whether the Commission's adoption of this standard may have ‘confused the standard for judicial review ... with the standard of proof governing the agency,’ ... the Commission's consistent use of this standard ... was presumably known to Congress.”

E.g., No. RB752B80194 (ARB May 17, 1978; No. RB752B80080 (ARB Dec. 28, 1977); No. RB752B70204 (ARB June 21, 1977); Richard R. Swanson (National Security Agency), No. RB752B60094 (ARB Sept. 3, 1976). See CSC Board of Appeals and Review, Memorandum No. 2, Guidelines for Determining When to Request a Single Delegation of Authority From the Commissioners to Reduce Penalties in Part 752–B Cases, § 7, Sept. 28, 1972 (“Whether the penalty imposed is clearly excessive, or is arbitrary, capricious or unreasonable, i.e., whether there are compelling reasons for reducing the penalty. In other words, when the fact of error in the penalty assessed is so evident that justice or equity demands a reduction of that penalty”).

E.g., Clyde Hayes (TVA), No. RB752B50288 (ARB Sept. 19, 1974); James F. Lillard (TVA), No. RB752B50289 (ARB Sept. 19, 1974).


Fourteenth Report of the Civil Service Commission 113 (1896–1897). Rule II, § 6, provided: “In making removals or reductions, or in imposing punishment, for delinquency or misconduct, penalties like in character shall be imposed for like offenses, and action thereupon shall be taken irrespective of the political or religious opinions or affiliations of the offenders.” See also Federal Personnel Manual, ch. 751, subch. 1–2c (Dec. 21, 1976); compare 5 U.S.C. § 2301(b)(2).

E.g., Francisco v. Campbell, 625 F.2d 266, 269–70 (9th Cir. 1980); Phillips v. Bergland, 866 F.2d 1007 (4th Cir. 1978); Young v. Hampton 568 F.2d 1253, 1264 n. 12 (7th Cir. 1977); Giles v. United States, 553 F.2d 647, 213 Ct.Cl. 602 (1977); Boyce v. United States, 543 F.2d 1290, 211 Ct.Cl. 57 (1976); Power v. United States, 531 F.2d 505, 209 Ct.Cl. 126 (1976), cert. denied, 444 U.S. 1044, 100 S.Ct. 731, 62 L.Ed.2d 730 (1980); Rifkin v. United States, 209 Ct.Cl. 566 (1976); Grover v. United States, 200 Ct.Cl. 337 (1973); Heffron v. United States, 405
F.2d 1307, 186 Ct.Cl. 474 (1969). But see Cuiffo v. United States, 137 F.Supp. 944, 950 (Ct. Cl. 1955) (penalty “was determined by accident, and not by a process of logical deliberation and decision”).

53 See text and cases cited at notes 13–17, supra.


56 See also Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285, 95 S.Ct. 438, 441, 42 L.Ed.2d 447 (1974); Amer. Optometric Ass’n v. FTC, 626 F.2d 896, 905 (D.C. Cir. 1980); Howard v. United States, No. Civ. LV–77–219 RDF (D. Nev. July 3, 1980) (court reviewing federal employee removal considers “whether the agency decision was based on consideration of the factors relevant to a reasoned determination” of “the appropriateness of removal as a sanction”) (Mem. Order at 9); Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff’d, 450 U.S. 91, 101 S.Ct. 999, 67 L.Ed.2d 69 (1981) (when Commission imposes most drastic sanction, “At the least the Commission specifically ought to consider and discuss ... the factors that have been deemed relevant to the [penalty]...”).


58 Subchapter II of Chapter 75, Title 5, applies to a removal, a suspension for more than 14 days, a reduction in grade, a reduction in pay, or a furlough of 30 days or less. 5 U.S.C. § 7512. The “efficiency of the service” requirement applies to the determination of whether any such action may be taken, as well as to the particular action. 5 U.S.C. § 7513(a).


60 Congress has declared that merit system principles should be adhered to in Federal personnel management “in order to provide the people of the United States with a competent, honest, and productive Federal work force ... and to improve the quality of public service.” Sec. 3(1) of the Reform Act, 5 U.S.C. § 1101 note.


63 Id., subch. 1–2b, 1–2(c)(2). Regardless of whether these provisions of the Federal Personnel Manual are “mandatory” or “precatory,” see Doe v. Hampton, supra, 566 F.2d at 281, many such provisions have been made mandatory by implementing regulations of the individual agencies. In any event, in reviewing any particular agency action the Board may consider whether the agency has acted reasonably in light of such OPM guidance.

64 See Democratic Senatorial Campaign Committee v. FEC, 660 F.2d 773 (D.C. Cir. 1980) (agency's entitlement to deference “depends upon the quality of its determinations. Factors to be considered include ‘the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements’ ”) (At 776–777); Boyce v. United States, 543 F.2d 1290, 1294–95, 211 Ct.Cl. 57 (1976) (“where the agency fails to give reasons, the court cannot accord the usual deference to the exercise of administrative discretion”); Cf. Steadman v. SEC, supra, 603 F.2d at 1137, 1139 (when Commission
imposes most drastic sanction, it must articulate carefully the grounds for its decision, including an explanation of why a lesser sanction will not suffice).

Since 5 C.F.R. § 752.404(f) forbids the agency from considering any reason not specified in the advance notice of proposed action, agencies must consider in preparing the advance notice required by Section 7513(b)(1) all of the factors on which they intend to rely in any consequent decision. Cf. Albert v. Chafee, 571 F.2d 1063, 1066 (9th Cir. 1977); Iannarelli v. Morton, 327 F.Supp. 873, 882 (E.D. Pa. 1971), aff’d, 463 F.2d 179 (3d Cir. 1972). Of course, this does not require designation in the notices of all circumstances that could conceivably be relevant to the penalty; for example, if an appellant contends that a penalty exceeds that imposed upon other employees in like circumstances, the agency would remain free to present evidence to rebut such contention notwithstanding its failure to have recited such information in its advance or final notices. Cf. Cafferello v. Civil Service Commission, 625 F.2d 285, 288 (9th Cir. 1980).


Some of the factors listed above may be pertinent to other issues as well as to penalty selection, such as the alleged relationship of the appellant’s conduct to the efficiency of the service or affirmative defenses of various kinds. Care should be taken to distinguish issues relating to whether any sanction may be imposed from those relating to whether a particular penalty may be sustained, even though the same facts may sometimes be pertinent to both types of issues.

The Supreme Court has recently observed that, “The equal protection obligation imposed by the Due Process Clause of the Fifth Amendment is not an obligation to provide the best governance possible.” Schweiker v. Wilson, 450 U.S. 221, 230, 101 S.Ct. 1074, 1080, 67 L.Ed.2d 186 (1981).


Id., subch. 1–2c(3). An penalty may be excessive in a particular case even if within the range permitted by statute or regulation. Power v. United States, 531 F.2d 505, 507–508, 209 Ct.Cl. 126 (1976), cert. denied, 444 U.S. 1044, 100 S.Ct. 731, 62 L.Ed.2d 730 (1980); Rifkin v. United States, 209 Ct.Cl. 566, 584–85 (1976). However, a penalty grossly exceeding that provided by an agency’s standard table of penalties may for that reason alone be arbitrary and capricious, even though such a table provides only suggested guidelines. Power, supra; Grover v. United States, 200 Ct.Cl. 337, 353 (1973); Daub v. United States, 292 F.2d 895, 897, 194 Ct.Cl. 434 (1961); Cuiffo v. United States, 137 F.Supp. 944, 950 (Ct. Cl. 1955).

For this reason we reject the contention, urged upon us by NTEU, that the appropriateness of a particular penalty is a question of law which arises under 5 U.S.C. § 7701(c)(2)(C). Such a conclusion would place the burden upon the appellant to prove the penalty unlawful, since Section 7701(c) (2) deals with affirmative defenses. See Parker v. Defense Logistics Agency, 1 MSPB 489, 492, 495–96, 1 M.S.P.R. 505, 512, 516–517 (1980). Moreover, while it is possible for a penalty to be so disproportionate to the offense as to be “illegal,” Albert v. Chafee, 571 F.2d 1063, 1068 (9th Cir. 1981).
1978); Jacobowitz v. United States, 424 F.2d 555, 563, 191 Ct.Cl. 444 (1970), that is merely another way of saying that imposition of such a penalty is arbitrary and constitutes an abuse of discretion. The appropriateness of a penalty is a matter of judgment and discretion, not a question of law per se. See text and authorities cited at note 40, supra.

73 Cf. Parker v. Defense Logistics Agency, 1 MSPB 489, 496 n. 9, 1 M.S.P.R. 505, 517 n. 9 (1980).


75 See CSC Board of Appeals and Review, Memorandum No. 2, note 47 supra, § 3a; Francisco v. Campbell, 625 F.2d 266 (9th Cir. 1980); Meehan v. Macy, 425 F.2d 472 (D.C. Cir. 1969) (en banc).

76 Of course if a particular penalty was selected as a result of age discrimination, the penalty could not be affirmed. 5 U.S.C. § 2302(b)(1) and 5 U.S.C. § 7701(c)(2)(B).

77 Appellant was suspended in October 1977 for unauthorized absence on seven working days, and in October 1976 for failing to properly request leave on nine days. Not considered by the agency was a 5-day suspension in July 1975 for failure to properly request leave on six days, and a reprimand in March 1975 for failure to properly request leave on three days. The record is devoid of any other evidence of misconduct by appellant during his lengthy government service.

78 The agency originally stated it would present testimony from the proposing and deciding officials to establish their reasons for selection of the penalty of removal, but these witnesses were not called at the hearing.

79 Although the record indicates that the agency had not modified appellant's duties to accommodate his medical problems, it also suggests that the agency was very tolerant of appellant's frequent absence due to his foot condition.

80 Apparently, appellant's immediate supervisor was on leave and it was this second level supervisor who marked appellant's time cards for the period through June 20, 1979.

81 The record does not indicate how long the appellant, a veteran, had been employed in this capacity, but he had worked at Fort Buchanan for four years. His service computation date was January 2, 1968.

82 The agency action was not based on the accident, and we agree with the agency that this consideration is irrelevant.

83 In essence, the agency appears to have determined that there was a good potential for the employee's rehabilitation. This is a valid mitigating factor which an agency may consider. See text at notes 66–67, supra.

84 Evaluation of the factors pertinent to individual cases of employees charged with misconduct by the agency precludes mathematical rigidity or perfect consistency. See text at notes 67–70, supra.

All Citations

5 M.S.P.B. 313, 5 M.S.P.R. 280
Police officers were convicted in state court of conspiracy to obstruct justice. The New Jersey Supreme Court, 44 N.J. 209, 207 A.2d 689, affirmed the judgment. The United States Supreme Court treated the papers of the officers as a petition for certiorari. The Supreme Court, Mr. Justice Douglas, held that where police officers being investigated were given choice either to incriminate themselves or to forfeit their jobs under New Jersey statute dealing with forfeiture of office or employment tenure, and pension rights of persons refusing to testify on ground of self-incrimination, and officers chose to make confessions, confessions were not voluntary but were coerced, and Fourteenth Amendment prohibited their use in subsequent criminal prosecution in state court.

Judgment reversed.

Mr. Justice Harlan, Mr. Justice Clark, Mr. Justice Stewart, and Mr. Justice White, dissent.

For dissenting opinion of Mr. Justice White, see 87 S.Ct. 636.

1. Courts $\equiv$397½
Where New Jersey Supreme Court refused to reach question whether New Jersey forfeiture of office statute was valid and deemed voluntariness of statements of defendant police officers as only issue presented, statute was too tangentially involved to satisfy appeal provision of federal statute, and United States Supreme Court would dismiss appeal, treat papers of appealing defendants as petition for certiorari, grant the petition, and proceed to merits. 28 U.S.C.A. §§ 1257(2), 2103; N.J.S. 2A:81–17.1, N.J.S.A.

2. Criminal Law $\equiv$522(1)
"Coercion" that vitiates confession can be mental as well as physical, and question is whether accused was deprived of his free choice to admit, deny, or refuse to answer. U.S.C.A.Const. Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

3. Constitutional Law $\equiv$266
Where police officers being investigated were given choice either to incriminate themselves or to forfeit their jobs under New Jersey statute dealing with forfeiture of office or employment, tenure, and pension rights of persons refusing to testify on ground of self-incrimination, and officers chose to make confessions, confessions were not voluntary but were coerced, and Fourteenth Amendment prohibited their use in subsequent criminal prosecution of officers in state court. U.S.C.A.Const. Amends. 5, 14; N.J.S. 2A:81–17.1, N.J.S.A.

4. Courts $\equiv$394(3)
Where police officers being investigated were given choice either to incriminate themselves or to forfeit their jobs under New Jersey statute dealing with forfeiture of office or employment, tenure, and pension rights of persons refusing to testify on ground of self-incrimination, and officers chose to make confessions, question whether officers waived protection under Fourteenth Amendment against coerced confessions was a federal question for United States Supreme Court to decide. U.S.C.A.Const. Amends. 5, 14; N.J.S. 2A:81–17.1, N.J.S.A.

5. Constitutional Law $\equiv$43(1)
Where police officers were given choice either to incriminate themselves
or to forfeit their jobs under New Jersey statute dealing with forfeiture of office or employment, tenure, and pension rights of persons refusing to testify on ground of self-incrimination, and officers chose to make confessions, there was no waiver by officers of protection under Fourteenth Amendment against coerced confessions. U.S.C.A.Const. Amends. 5, 14; N.J.S. 2A:81–17.1, N.J.S.A.

6. Constitutional Law ≈ 82

There are rights of constitutional stature whose exercise a State may not condition by exaction of a price.

7. Constitutional Law ≈ 266

Protection of individual under Fourteenth Amendment against coerced confessions prohibits use in subsequent criminal proceedings of confessions obtained under threat of removal from office, and protection extends to all, whether they are policemen or other members of body politic. U.S.C.A.Const. Amends. 5, 14; N.J.S. 2A:81–17.1, N.J.S.A.

494


Alan B. Handler, Newark, N. J., for appellee.

Mr. Justice DOUGLAS delivered the opinion of the Court.

Appellants were police officers in certain New Jersey boroughs. The Supreme Court of New Jersey ordered that alleged irregularities in handling cases in the municipal courts of those boroughs be investigated by the Attorney General, invested him with broad powers of inquiry and investigation, and directed him to make a report to the court. The matters investigated concerned alleged fixing of traffic tickets.

Before being questioned, each appellant was warned (1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer he would be subject to removal from office.¹

495

Appellants answered the questions. No immunity was granted, as there is no immunity statute applicable in these circumstances. Over their objections, some of the answers given were used in subsequent prosecutions for conspiracy to obstruct the administration of the traffic laws. Appellants were convicted and their convictions were sustained over their protests that their statements were coerced,² by reason of the fact that, if

1. "Any person holding or who has held any elective or appointive public office, position or employment (whether State, county or municipal), who refuses to testify upon matters relating to the office, position or employment in any criminal proceeding wherein he is a defendant or is called as a witness on behalf of the prosecution, upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself or refuses to waive immunity when called by a grand jury to testify thereon or who willfully refuses or fails to appear before any court, commission or body of this State which has the right to inquire under oath upon matters relating to the office, position or employment of such person or who, having been sworn, refuses to testify or to answer any material question upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself, shall, if holding elective or public office, position or employment, be removed therefrom or shall thereby forfeit his office, position or employment and any vested or future right of tenure or pension granted to him by any law of this State provided the inquiry relates to a matter which occurred or arose within the preceding five years. Any person so forfeiting his office, position or employment shall not thereafter be eligible for election or appointment to any public office, position or employment in this State." N.J.Rev.Stat. § 2A:81–17.1 (Supp.1965), N.J.S.A.

2. At the trial the court excused the jury and conducted a hearing to determine
they refused to answer, they could lose their positions with the police department. See State v. Naglee, 44 N.J. 209, 207 A.2d 689; 44 N.J. 259, 208 A.2d 146.

[1] We postponed the question of jurisdiction to a hearing on the merits. 383 U.S. 941, 86 S.Ct. 941, 16 L.Ed.2d 205. The statute whose validity was sought to be “drawn in question,” 28 U.S.C. § 1257(2), was the forfeiture statute. But the New Jersey Supreme Court refused to reach that question (44 N.J., at 223, 207 A.2d, at 697), deeming the voluntariness of the statements as the only issue presented. Id., at 220–222, 207 A.2d at 696–696. The statute is therefore too tangentially involved to satisfy 28 U.S.C. § 1257(2), for the only bearing it had was whether, valid or not, the fear of being discharged under it for refusal to answer on the one hand and the fear of self-incrimination on the other was “a choice between the rock and the whirlpool” which made the statements products of coercion in violation of the Fourteenth Amendment. We therefore dismiss the appeal, treat the papers as a petition for certiorari (28 U.S.C. § 2103), grant the petition and proceed to the merits.

We agree with the New Jersey Supreme Court that the forfeiture-of-office statute is relevant here only for the bearing it has on the voluntary character of the statements used to convict petitioners in their criminal prosecutions.

[2] The choice imposed on petitioners was one between self-incrimination or job forfeiture. Coercion that vitiates a confession under Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716, and related cases can be “mental as well as physical”; “the blood of the accused is not the only hallmark of an unconstitutional inquisition.” Blackburn v. State of Alabama, 361 U.S. 199, 206, 80 S.Ct. 274, 279, 4 L.Ed.2d 242. Subtle pressures (Leyra v. Denno, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948; Haynes v. State of Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513) may be as telling as coarse and vulgar ones. The question is whether the accused was deprived of his “free choice to admit, to deny, or to refuse to answer.” Lisenga v. People of State of California, 314 U.S. 219, 241, 62 S.Ct. 280, 292, 86 L.Ed. 166.

We adhere to Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, a civil forfeiture action against property. A statute offered

the owner an election between producing a document or forfeiture of the goods at issue in the proceeding. This was held to be a form of compulsion in violation of both the Fifth Amendment and the Fourth Amendment. Id., at 634–635, 6 S.Ct. It is that principle that we adhere to and apply in Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574.

[3] The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices we reviewed in Miranda v. State of Arizona, 384 U.S. 436, 464–465, 86 S.Ct. 1602, 1623, 16 L.Ed.2d 694, is “likely to exert such pressure upon an individual as to disable him from making a free and rational choice.” We think the statements were infected by

whether, inter alia, the statements were voluntary. The State offered witnesses who testified as to the manner in which the statements were taken: the appellants did not testify at that hearing. The court held the statements to be voluntary.

the coercion inherent in this scheme of questioning

and cannot be sustained as voluntary under our prior decisions.

[4, 5] It is said that there was a "waiver." That, however, is a federal question for us to decide. Union Pac. R. R. Co. v. Public Service Comm., 248 U.S. 67, 69-70, 39 S.Ct. 24, 25, 63 L.Ed. 131. Stevens v. Marks, supra, 383 U.S. 234, 243-244, 86 S.Ct. 788, 793. The Court in Union Pac. R. R. Co. v. Public Service Comm., supra, in speaking of a certificate exacted under protest and in violation of the Commerce Clause, said:

"Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary * * *." Id., 248 U.S., at 70, 39 S.Ct. at 25.

Where the choice is "between the rock and the whirlpool," duress is inherent in deciding to "waive" one or the other.


"It should be pointed out, at the very outset, that the Halakah does not distinguish between voluntary and forced confessions, for reasons which will be discussed later. And it is here that one of the basic differences between Constitutional and Talmudic Law arises. According to the Constitution, a man cannot be compelled to testify against himself. The provision against self-incrimination is a privilege of which a citizen may or may not avail himself, as he wishes. The Halakah, however, does not permit self-incriminating testimony. It is inadmissible, even if voluntarily offered. Confession, in other than a religious context, or financial cases completely free from any traces of criminality, is simply not an instrument of the Law. The issue, then, is not compulsion, but the whole idea of legal confession.

* * *

"The Halakah, then, is obviously concerned with protecting the confessant from his own aberrations which manifest themselves, either as completely fabricated confessions, or as exaggerations of the real facts. * * * While certainly not all, or even most criminal confessions are directly attributable, in whole or in part, to the Death Instinct, the Halakah is sufficiently concerned with the minority of instances, where such is the case, to disqualify all criminal confessions and to discard confession as a legal instrument. Its function is to ensure the total victory of the Life Instinct over its omnipresent antagonist. Such are the conclusions to be drawn from Maimonides' interpretation of the Halakhah's equivalent of the Fifth Amendment.

"In summary, therefore, the Constitutional ruling on self-incrimination concerns only forced confessions, and its restricted character is a result of its historical evolution as a civilized protest against the use of torture in extorting confessions. The Halakhic ruling, however, is much broader and discards confessions in toto, and this because of its psychological insight and its concern for saving man from his own destructive inclinations." Id., at 10, 12.
man. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control." Id., at 220, 29 N.E., at 517–518.

The question in this case, however, is not cognizable in those terms. Our question is whether a State, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee.

We held in Slochower v. Board of Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692, that a public school teacher could not be discharged merely because he had invoked the Fifth Amendment privilege against self-incrimination when questioned by a congressional committee:

"The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. * * * The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." Id., at 557–558, 76 S.Ct. at 641.

We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.

[8-7] There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one. Western Union Tel. Co. v. State of Kansas, 216 U.S. 1, 30 S.Ct. 190, 54 L.Ed. 555. Resort to the federal courts in diversity of citizenship cases is another. Terral v. Burke Constr. Co., 257 U.S. 529, 42 S.Ct. 188, 66 L.Ed. 352. Assertion of a First Amendment right is still another. Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Murdock v. Com. of Pennsylvania, 319 U.S. 105, 63 S.Ct. 780, 87 L.Ed. 1292; Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430; Lamont v. Postmaster General, 381 U.S. 301, 305–306, 85 S.Ct. 1493, 1495–1496, 14 L.Ed.2d 398. The imposition of a burden on the exercise of a Twenty-fourth Amendment right is also banned. Harman v. Forssenius, 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50. We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.

Reversed.

Mr. Justice HARLAN, whom Mr. Justice CLARK and Mr. Justice STEWART join, dissenting.

The majority opinion here and the plurality opinion in Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574, stem from fundamental misconceptions about the logic and necessities of the constitutional privilege against self-incrimination. I fear that these opinions will seriously and quite needlessly hinder the protection of other important public values. I must dissent here, as I do in Spevack.

The majority employs a curious mixture of doctrines to invalidate these convictions, and I confess to difficulty in perceiving the intended relationships among the various segments of its opinion. I gather that the majority believes that the possibility that these policemen might have been discharged had they refused to provide information pertinent to their public responsibilities is an impermissible "condition" imposed by New Jersey upon petitioners' privilege against self-incrimination. From this premise the majority draws the conclusion that
the statements obtained from petitioners after a warning that discharge was possible were inadmissible. Evidently recognizing the weakness of its conclusion, the majority attempts to bring to its support illustrations from the lengthy series of cases in which this Court, in light of all the relevant circumstances, has adjudged the voluntariness in fact of statements obtained from accused persons.

The majority is apparently engaged in the delicate task of riding two unruly horses at once: it is presumably arguing simultaneously that the statements were involuntary as a matter of fact, in the same fashion that the statements in Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716, and Haynes v. State of Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513, were thought to be involuntary, and that the statements were inadmissible as a matter of law, on the premise that they were products of an impermissible condition imposed on the constitutional privilege. These are very different contentions and require separate replies, but in my opinion both contentions are plainly mistaken, for reasons that follow.

503

I.

I turn first to the suggestion that these statements were involuntary in fact. An assessment of the voluntariness of the various statements in issue here requires a more comprehensive examination of the pertinent circumstances than the majority has undertaken.

The petitioners were at all material times policemen in the boroughs of Bellmawr and Barrington, New Jersey. Garrity was Bellmawr's chief of police and Virtue one of its police officers; Holroyd, Elwell, and Murray were police officers in Barrington. Another defendant below, Mrs. Naglee, the clerk of Bellmawr's municipal court, has since died. In June 1961 the New Jersey Supreme Court sua sponte directed the State's Attorney General to investigate reports of traffic ticket fixing in Bellmawr and Barrington. Subsequent investigations produced evidence that the petitioners, in separate conspiracies, had falsified municipal court records, altered traffic tickets, and diverted moneys produced from bail and fines to unauthorized purposes. In the course of these investigations the State obtained two sworn statements from each of the petitioners; portions of those statements were admitted at trial. The petitioners were convicted in two separate trials of conspiracy to obstruct the proper administration of the state motor traffic laws, the cases being now consolidated for purposes of our review. The Supreme Court of New Jersey affirmed all the convictions.

The first statements were taken from the petitioners by the State's Deputy Attorney General in August and November 1961. All of the usual indicia of duress are wholly absent. As the state court noted, there was "no physical coercion, no overbearing tactics of psychological persuasion, no lengthy incommunicado detention, or efforts to humiliate or ridicule the defendants." 44 N.J. 503 209, 220, 207 A.2d 689, 695. The state court found no evidence that any of the petitioners were reluctant to offer statements, and concluded that the interrogations were conducted with a "high degree of civility and restraint." Ibid.

These conclusions are fully substantiated by the record. The statements of the Bellmawr petitioners were taken in a room in the local firehouse, for which Chief Garrity himself had made arrangements. None of the petitioners were in custody before or after the depositions were taken; each apparently continued to pursue his ordinary duties as a public official of the community. The statements were recorded by a court stenographer, who testified that he witnessed no indications of unwillingness or even significant hesitation on the part of any of the petitioners. The Bellmawr petitioners did not have counsel present, but the Deputy Attorney
General testified without contradiction that Garrity had informed him as they strolled between Garrity's office and the firehouse that he had arranged for counsel, but thought that none would be required at that stage. The interrogations were not excessively lengthy, and reasonable efforts were made to assure the physical comfort of the witnesses. Mrs. Naglee, the clerk of the Bellmawr municipal court, who was known to suffer from a heart ailment, was assured that questioning would cease if she felt any discomfort.

The circumstances in which the depositions of the Barrington petitioners were taken are less certain, for the New Jersey Supreme Court found that there was an informal agreement at the Barrington trial that the defendants would argue simply that the possibility of dismissal made the statements "involuntary as a matter of law." The defense did not contend that the statements were the result of physical or mental coercion, or that the wills of the Barrington petitioners were overborne. Accordingly, the State was never obliged to offer evidence of the voluntariness in fact of the statements. We are, however, informed that the three Barrington petitioners had counsel present as their depositions were taken. Insofar as the majority suggests that the Barrington statements are involuntary in fact, in the fashion of Chambers or Haynes, it has introduced a factual contention never urged by the Barrington petitioners and never considered by the courts of New Jersey.

As interrogation commenced, each of the petitioners was sworn, carefully informed that he need not give any information, reminded that any information given might be used in a subsequent criminal prosecution, and warned that as a police officer he was subject to a proceeding to discharge him if he failed to provide information relevant to his public responsibilities. The cautionary statements varied slightly, but all, except that given to Mrs. Naglee, included each of the three warnings. Mrs. Naglee was not told that she could be removed from her position at the court if she failed to give information pertinent to the discharge of her duties. All of the petitioners consented to give statements, none displayed any significant hesitation, and none suggested that the decision to offer information was motivated by the possibility of discharge.

A second statement was obtained from each of the petitioners in September and December 1962. These statements were not materially different in content or circumstances from the first. The only significant distinction was that the interrogator did not advert even obliquely to any possibility of dismissal. All the petitioners were cautioned that they relevant to such disclosure in this investigation.

"This right or privilege which you have is somewhat limited to the extent that you as a police officer under the laws of our state, may be subjected to a proceeding to have you removed from office if you refuse to answer a question put to you under oath pertaining to your office or your function within that office. It doesn't mean, however, you can't exercise the right. You do have the right."
A. "No, I will cooperate."
Q. "Understanding this, are you willing to proceed at this time and answer any questions?"
A. "Yes."
were entitled to remain silent, and there was no evidence whatever of physical or mental coercion.

All of the petitioners testified at trial, and gave evidence essentially consistent with the statements taken from them. At a preliminary hearing conducted at the Bellmawr trial to determine the voluntariness of the statements, the Bellmawr petitioners offered no evidence beyond proof of the warning given them.

The standards employed by the Court to assess the voluntariness of an accused’s statements have reflected a number of values, and thus have emphasized a variety of factual criteria. The criteria employed have included threats of imminent danger, Payne v. State of Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975, physical deprivations, Reck v. Pate, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948, repeated or extended interrogation, Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, limits on access to counsel or friends, Crooker v. State of California, 395 U.S. 433, 89 S.Ct. 1498, 20 L.Ed.2d 496, 1287, 2 L.Ed.2d 1448, length and illegality of detention under state law, Haynes v. State of Washington, 373 U.S. 508, 83 S.Ct. 1336, 10 L.Ed.2d 513, individual weakness or incapacity, Lynum v. State of Illinois, 372 U.S. 528, and the adequacy of warnings of constitutional rights, Davis v. State of North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895. Whatever the criteria employed, the duty of the Court has been “to examine the entire

record,” and thereby to determine whether the accused’s will “was overborne by the sustained pressures upon him.” Davis v. State of North Carolina, 384 U.S. 737, 741, 739, 86 S.Ct. 1761, 1764, 1763.

It would be difficult to imagine interrogations to which these criteria of duress were more completely inapplicable, or in which the requirements which have subsequently been imposed by this Court on police questioning were more thoroughly satisfied. Each of the petitioners received a complete and explicit reminder of his constitutional privilege. Three of the petitioners had counsel present; at least a fourth had consulted counsel but freely determined that his presence was unnecessary. These petitioners were not in any fashion “swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion * * *.” Miranda v. State of Arizona, 384 U.S. 436, 461, 86 S.Ct. 1602, 1621. I think it manifest that, under the standards developed by this Court to assess voluntariness, there is no basis for saying that any of these statements were made involuntarily.

II.

The issue remaining is whether the statements were inadmissible because they were “involuntary as a matter of law,” in that they were given after a warning that New Jersey policemen may be discharged for failure to provide information pertinent to their public responsibilities. What is really involved on this score, however, is not in truth a question of “voluntariness” at all, but rather whether the condition imposed by the State on the exercise of the privilege against self-incrimination, namely dismissal from office, in this instance serves in itself to render the statements inadmissible. Absent evidence of involuntariness in fact, the admissibility of these statements thus hinges on the validity of the consequence which the State acknowledged might have resulted if the statements had not been given. If the consequence is

constitutionally permissible, there can surely be no objection if the State cautions the witness that it may follow if he remains silent. If both the consequence and the warning are constitutionally permissible, a witness is obliged, in order to prevent the use of his statements against him in a criminal prosecution, to prove under the standards established since Brown v. State of Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80
L.Ed. 682, that as a matter of fact the statements were involuntarily made. The central issues here are therefore identical to those presented in Spiegel v. Klein, supra: whether consequences may properly be permitted to result to a claimant after his invocation of the constitutional privilege, and if so, whether the consequence in question is permissible. For reasons which I have stated in Spiegel v. Klein, in my view nothing in the logic or purposes of the privilege demands that all consequences which may result from a witness' silence be forbidden merely because that silence is privileged. The validity of a consequence depends both upon the hazards, if any, it presents to the integrity of the privilege and upon the urgency of the public interests it is designed to protect.

It can hardly be denied that New Jersey is permitted by the Constitution to establish reasonable qualifications and standards of conduct for its public employees. Nor can it be said that it is arbitrary or unreasonable for New Jersey to insist that its employees furnish the appropriate authorities with information pertinent to their employment. Cf. Beilin v. Board of Public Education, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414; Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692. Finally, it is surely plain that New Jersey may in particular require its employees to assist in the prevention and detection of unlawful activities by officers of the state government. The urgency of these requirements is the more obvious here, where the conduct in question is that of officials directly entrusted with the administration of justice. The importance for our system of justice 506 of the integrity of local police forces can scarcely be exaggerated. Thus, it need only be recalled that this Court itself has often intervened in state criminal prosecutions precisely on the ground that this might encourage high standards of police behavior. See, e.g., Ashcraft v. State of Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192; Miranda v. State of Arizona, supra. It must be concluded, therefore, that the sanction at issue here is reasonably calculated to serve the most basic interests of the citizens of New Jersey.

The final question is the hazard, if any, which this sanction presents to the constitutional privilege. The purposes for which, and the circumstances in which, an officer's discharge might be ordered under New Jersey law plainly may vary. It is of course possible that discharge might in a given case be predicated on an imputation of guilt drawn from the use of the privilege, as was thought by this Court to have occurred in Slochower v. Board of Higher Education, supra. But from our vantage point, it would be quite improper to assume that New Jersey will employ these procedures for purposes other than to assess in good faith an employee's continued fitness for public employment. This Court, when a state procedure for investigating the loyalty and fitness of public employees might result either in the Slochower situation or in an assessment in good faith of an employee, has until today consistently paused to examine the actual circumstances of each case. Beilin v. Board of Public Education, supra; Nelson v. Los Angeles County, 362 U.S. 1, 80 S.Ct. 527, 4 L.Ed.2d 494. I am unable to see any justification for the majority's abandonment of that process; it is well calculated both to protect the essential purposes of the privilege and to guarantee the most generous opportunities for the pursuit of other public values. The majority's broad prohibition, on the other hand, extends the scope of the privilege beyond its essential purposes, and seriously hampers the protection of other important values. Despite the majority's disclaimer, it is quite plain that the logic of its prohibiting rule would in this situation prevent the discharge of these policemen. It would therefore entirely forbid a sanction which presents, at least on its face, no hazard to the
purposes of the constitutional privilege, and which may reasonably be expected to serve important public interests. We are not entitled to assume that discharges will be used either to vindicate impermissible inferences of guilt or to penalize privileged silence, but must instead presume that this procedure is only intended and will only be used to establish and enforce standards of conduct for public employees.\(^2\) As such, it does not minimize or endanger the petitioners' constitutional privilege against self-incrimination.\(^3\)

510

I would therefore conclude that the sanction provided by the State is constitutionally permissible. From this, it surely follows that the warning given of the possibility of discharge is constitutionally unobjectionable. Given the constitutionality both of the sanction and of the warning of its application, the petitioners would be constitutionally entitled to exclude the use of their statements as evidence in a criminal prosecution against them only if it is found that the statements were, when given, involuntary in fact. For the reasons stated above, I cannot agree that these statements were involuntary in fact.

I would affirm the judgments of the Supreme Court of New Jersey.

2. The legislative history of N.J.Rev.Stat. 2A:81-17.1, N.J.S.A. provides nothing which clearly indicates the purposes of the statute, beyond what is to be inferred from its face. In any event, the New Jersey Supreme Court noted below that the State would be entitled, even without the statutory authorization, to discharge state employees who declined to provide information relevant to their official responsibilities. There is therefore nothing to which this Court could properly now look to forecast the purposes for which or circumstances in which New Jersey might discharge those who have invoked the constitutional privilege.

3. The late Judge Jerome Frank thus once noted, in the course of a spirited defense of the privilege, that it would be entirely permissible to discharge police officers who decline, on grounds of the privilege, to disclose information pertinent to their public responsibilities. Judge Frank quoted the following with approval:

"Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege, but the exercise of such privilege was wholly inconsistent with their duty as police officers. They claim that they had a constitutional right to refuse to answer under the circumstances, but * * * they had no constitutional right to remain police officers in the face of their clear violation of the duty imposed upon them." Christal v. Police Commission of San Francisco". Citing 33 Cal.App.2d 564, 92 P.2d 410. (Emphasis added by Judge Frank.) United States v. Field, 2 Cir., 193 F.2d 92, 106 (separate opinion).
IV.

¶ 18 Because a determination of maximum medical improvement has no statutory significance with regard to injuries resulting in the loss of no more than three days or shifts of work time, Loofbourrow’s award of temporary total disability benefits was not barred by her failure to first seek a division-sponsored independent medical examination. The judgment of the court of appeals is therefore affirmed.

2014 CO 12
Ronald Brett GRASSI, Petitioner  v.  The PEOPLE of the State of Colorado, Respondent.
Supreme Court Case No. 11SC720
Supreme Court of Colorado.
February 18, 2014
Rehearing Denied March 24, 2014

Background: Defendant was convicted in the District Court, Douglas County, Thomas J. Curry, J., of vehicular homicide, manslaughter, driving with excessive blood alcohol content (BAC), and driving under influence (DUI). Defendant appealed. The Court of Appeals, 192 P.3d 496, reversed and remanded for determination whether troopers had probable cause to obtain involuntary blood sample. On remand, the District Court ruled that, under fellow officer rule, troopers had probable cause, and defendant appealed. The Court of Appeals affirmed. Certiorari was granted.

Holding: The Supreme Court, Boatright, J., held that under fellow officer rule, law enforcement had probable cause to believe that defendant, who was unconscious at hospital, had committed alcohol-related offense, as required to obtain involuntary blood sample. Affirmed.

1. Criminal Law ⇔1158.12
   In reviewing a suppression order, the appellate court defers to the trial court’s findings of fact as long as they are supported by competent evidence.

2. Criminal Law ⇔1139
   On appeal from a suppression order, the appellate court reviews the trial court’s conclusions of law de novo.

3. Arrest ⇔60.2(9), 63.4(11)
   Searches and Seizures ⇔41
   Under the “fellow officer rule,” where law enforcement authorities are cooperating in an investigation, the knowledge of one is presumed shared by all.
   See publication Words and Phrases for other judicial constructions and definitions.

4. Searches and Seizures ⇔41
   In cases when the police expand the scope of their investigation to include other officers not currently on the scene, the “fellow officer rule” operates to integrate those outside officers and make them part of the coordinated investigation.
   See publication Words and Phrases for other judicial constructions and definitions.

5. Arrest ⇔60.2(9), 63.4(11)
   Searches and Seizures ⇔41
   The rationale supporting the fellow officer rule is that law enforcement officers regularly work as a team, meaning each individual officer need not possess the particularized information that forms the basis for conducting a search or making an arrest; thus, the rule reflects the realities of modern police work and recognizes that often many officers will be assigned to investigate the same case. U.S. Const. Amend. 4.

6. Arrest ⇔63.4(11)
   Searches and Seizures ⇔41
   The fellow officer rule does not permit law enforcement to cull its archives subse-
sequent to a search or arrest in hopes of justifying a search or arrest which is not supported by probable cause. U.S. Const. Amend. 4.

7. Arrest ⇔60.2(9), 63.4(11) Searches and Seizures ⇔41

The fellow officer rule does impute information from officers who possess it to those who do not, but it does not require a linear chain of communication from one officer to the next; rather, the rule pools the collective knowledge of officers engaged in a coordinated investigation.

8. Arrest ⇔63.4(11) Searches and Seizures ⇔41

As long as the police remain engaged in a coordinated investigation, the fellow officer rule encompasses information that the police as a whole possess at the time of the relevant action, i.e., the search or arrest. U.S. Const. Amend. 4.

9. Arrest ⇔63.4(11) Searches and Seizures ⇔41

The fellow officer rule imputes information that the police possess as a whole to an individual officer who effects a search or arrest if (1) that officer acts pursuant to a coordinated investigation and (2) the police possess the information at the time of the search or arrest, and it encompasses any information that the police gather between the initial assignment and the officer’s ultimate action as part of a coordinated investigation.

10. Searches and Seizures ⇔14

Drawing blood from an unconscious party is a search that is subject to the protections of the Fourth Amendment to the United States Constitution. U.S. Const. Amend. 4.

11. Automobiles ⇔419

In the motor vehicle context, the police infringe upon the Fourth Amendment protections against unreasonable search and seizure if they draw blood from a non-consenting driver absent probable cause that he committed an alcohol-related driving offense. U.S. Const. Amend. 4.

12. Automobiles ⇔420

To establish probable cause that an unconscious driver had committed an alcohol-related offense, as required to obtain an involuntary blood sample, the police need not possess absolute certainty of the driver’s misconduct but must instead develop that degree of certainty upon which reasonable and prudent people rely in making decisions in everyday life. U.S. Const. Amend. 4.

13. Arrest ⇔63.4(2)

While certain facts may not establish probable cause to arrest in isolation, those same facts may support a finding of probable cause when considered in combination. U.S. Const. Amend. 4.

14. Automobiles ⇔420

Trooper assigned by corporal to travel to hospital to see whether alcohol was involved in single-car accident that resulted in passenger’s death had probable cause to believe that defendant, who was unconscious at hospital, had committed alcohol-related offense, as required to obtain involuntary blood sample, under fellow officer rule; trooper was engaged in coordinated investigation of accident with other officers investigating scene of crash, officers at scene observed no skid or yaw marks and ruled out external cause for crash, indicating that defendant literally drove vehicle off highway, those observations were imputed to trooper assigned to hospital prior to first blood draw, and trooper detected strong odor of alcohol on defendant’s breath. U.S. Const. Amend. 4.

Certiorari to the Colorado Court of Appeals, Court of Appeals Case No. 09CA400


John W. Suthers, Attorney General, Brock J. Swanson, Assistant Attorney General, Denver, Colorado, Attorneys for Respondent

En Banc
JUSTICE BOATRIGHT delivered the Opinion of the Court.

¶ 1 We granted certiorari to determine whether the police possessed probable cause pursuant to the fellow officer rule to draw blood from an unconscious driver following a motor vehicle accident, even though the officer who actually ordered the blood draws lacked independent probable cause. We hold that the fellow officer rule imputes information that the police possess as a whole to an individual officer who effects a search or arrest if (1) that officer acts pursuant to a coordinated investigation and (2) the police possess the information at the time of the search or arrest. Because the record in this case reflects that the police as a whole, pursuant to a coordinated investigation, possessed probable cause to believe that the defendant had committed an alcohol-related offense at the time of the blood draws, the fellow officer rule imputed that probable cause to the officer who ordered the blood draws, meaning no Fourth Amendment violation occurred. Accordingly, we affirm the judgment of the court of appeals.

I. Facts and Procedural History

¶ 2 On September 4, 2003, Petitioner Ronald Brett Grassi was involved in a single-car accident at approximately 3:50 a.m. Grassi, the driver of the car, suffered serious injuries, and a passenger in the car was killed. Paramedics transported Grassi to a local hospital for treatment, where he remained unconscious for several hours.

¶ 3 At 4:17 a.m., Trooper Benavides arrived at the crash site. Because the accident had resulted in a fatality, Trooper Benavides contacted both his supervisor and an accident reconstruction team through the police department's dispatch unit. Trooper Benavides then "walked the crash site," searching for the potential cause of the accident. He discovered no evidence of skid marks, yaw marks, or roadway obstruction, nor any suggestion that the driver had applied the brakes. Furthermore, the weather conditions were "clear and dry and . . . fairly warm." Based on his preliminary observations, Trooper Benavides could find no external explanation for the crash, instead testifying that "[i]t looked like the car just ran off the right side of the roadway."

¶ 4 At 4:58 a.m., Trooper Waters, an accident reconstruction specialist, arrived on the scene. Over the next two hours, Trooper Waters examined the crash site and ultimately corroborated Trooper Benavides's initial suspicions, concluding that no "mechanical defects or failures occurred that could have contributed to or . . . caused the crash." Moreover, Trooper Waters deduced at the scene that the driver of the vehicle had likely followed the fog line off of the roadway, which "[i]ntoxicated drivers have a propensity" to do. Trooper Waters completed his investigation prior to the time of the blood draws.

¶ 5 Meanwhile, shortly after 5:00 a.m., Corporal Riley directed Trooper Duncan to travel to the hospital where Grassi was being treated. Specifically, Corporal Riley assigned Trooper Duncan the task of investigating whether a male driver had recently been transported from the crash site and to obtain a blood draw if Trooper Duncan determined "that alcohol was involved." Trooper Duncan arrived at the hospital shortly after Grassi's testimony, the presence of yaw marks can suggest that "there was an input from the driver, whether it be a reaction or an overreaction."

1. Specifically, we granted certiorari to consider the following issue:
   Whether the court of appeals erred in holding that a police officer had probable cause to order an involuntary blood draw from a defendant by imputing the findings of an accident reconstruction analysis to the officer under the "fellow officer rule" even though (1) the findings were unknown to the officer at the time he ordered the blood draw and (2) the officer did not order the blood draw at the behest of anyone who knew the findings.

2. A yaw mark is created when a vehicle's tires slide laterally. According to Trooper Benavides, the presence of yaw marks can suggest that "there was an input from the driver, whether it be a reaction or an overreaction."

3. A fog line is a solid white line that runs along the right edge of a roadway.

4. It is unclear from the record whether Corporal Riley spoke with Trooper Duncan directly or whether Corporal Riley contacted dispatch, which in turn contacted Trooper Duncan. It is undisputed, however, that Trooper Duncan traveled to the hospital at Corporal Riley's behest.
5:30 a.m. and learned from a paramedic that Grassi was the driver who had been injured in the accident. Although Grassi remained unconscious, Trooper Duncan detected a strong odor of alcohol emanating from Grassi's mouth. Trooper Duncan then ordered a blood draw, which a phlebotomist performed at 7:12 a.m.; the phlebotomist later conducted a second blood draw at 7:51 a.m. Prior to these blood draws, the police knew collectively that Grassi had been driving the vehicle when it crashed, that no road conditions or other external factors appeared to have caused the crash, that Grassi's driving was consistent with that of an intoxicated driver, and that his breath smelled of alcohol. The blood draws then revealed that Grassi's blood alcohol content ("BAC") exceeded the legal limit for driving under the influence of alcohol or drugs ("DUI"), as provided by section 42–4–1301, C.R.S. (2013).

¶ 6 The People initially charged Grassi with vehicular homicide, manslaughter, and driving with excessive BAC, and they later amended the complaint to add a charge for DUI. At trial, Grassi moved to suppress the evidence of his BAC, arguing that the police lacked probable cause to order the blood draws and thus had probable cause to order the blood draws.

¶ 8 On remand, the trial court conducted an evidentiary hearing, at which it heard testimony from Troopers Benavides, Duncan, and Waters. The trial court then considered "what the police knew at the time of the draw." Applying the fellow officer rule, the trial court aggregated the knowledge of the three troopers and found that, at the time of the first blood draw, the police as a whole possessed sufficient information to reasonably believe that Grassi had committed an alcohol-related driving offense and thus had probable cause to order the blood draws.

¶ 9 Grassi again appealed, and the court of appeals affirmed. People v. Grassi, — P.3d ——, 2011 WL 4837291, at *1 (Colo. App. Oct. 13, 2011). In its probable cause analysis, the court of appeals considered not only Trooper Duncan's observations but also those of Trooper Waters, noting that Trooper Waters, the accident reconstruction specialist, had surveyed the crash site before the phlebotomist performed the blood draws. Id. at —— ——, 2011 WL 4837291 at *3-4. The court of appeals then applied the fellow officer rule and held that the rule did "not require direct contact between [Troopers] Duncan and Waters in order for the latter's observations to enter into the probable cause determination." Id. at ——, 2011 WL 4837291 at *4. Therefore, the court of appeals concluded that the police as a whole possessed probable cause at the time of the blood draws. See id. at ——, 2011 WL 4837291 at *5.

¶ 10 We granted certiorari to consider whether the fellow officer rule provided the police with probable cause to order the blood draws.

II. Standard of Review

[1, 2] ¶ 11 In reviewing a suppression order, we defer to the trial court's findings of fact as long as they are supported by competent evidence. People v. Gutierrez, 222 P.3d 925, 931–32 (Colo.2009). We review the trial court's conclusions of law de novo. Id. at 981.

5. A phlebotomist is a medical technician who is specifically certified to collect blood.

6. Corporal Riley did not testify at the evidentiary hearing on remand.
III. Analysis ¶12 Under Colorado’s express consent statute, a person who drives a motor vehicle within the state must submit to a breath or blood test “when so requested and directed by a law enforcement officer having probable cause to believe that the person was driving a motor vehicle in violation of the prohibitions against DUI” or other alcohol-related offenses. § 42–4–1301.1(2)(a)(I) (emphasis added). The statute further provides that “[a]ny person who is dead or unconscious shall be tested to determine the alcohol or drug content of the person’s blood . . . as provided in this section.” § 42–4–1301.1(8).

Thus, the narrow issue here is whether Trooper Duncan possessed probable cause to order the phlebotomist to draw Grassi’s blood. That issue, however, implicates a specific legal question: whether Trooper Benavides’s and Trooper Waters’s observations at the scene of the accident could be imputed to Trooper Duncan—and thus factor into the probable cause analysis—pursuant to the fellow officer rule.

¶13 We have previously established that the fellow officer rule operates to impute information that the police possess as a whole to an individual officer. See People v. Arias, 159 P.3d 134, 139 (Colo.2007). We now consider whether the rule imputes that information either at the time of the police’s initial assignment to an outside officer (as Grassi contends) or at the time of that officer’s ultimate action (as the People contend).

A. Timing of the Fellow Officer Rule ¶14 It is well-established that law enforcement officers regularly engage in coordinated investigations when working a case. See United States v. Ventresca, 380 U.S. 102, 111, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965) (“Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number.”). As such, “[W]here law enforcement authorities are cooperating in an investigation, . . . the knowledge of one is presumed shared by all.” Illinois v. Andreas, 463 U.S. 765, 771 n. 5, 103 S.Ct. 3319, 77 L.Ed.2d 1003 (1983). In some situations, however, the police expand the scope of their investigation to include other officers not currently on scene. In those scenarios, the fellow officer rule operates to integrate those outside officers and make them part of the coordinated investigation. See Arias, 159 P.3d at 139–40 (recognizing that the fellow officer rule functions to “include officers outside the common investigation”).

¶15 Specifically, we have previously held that the fellow officer rule imputes shared information to an individual officer if two conditions are met: First, the officer must act “at the direction [of] or as a result of communications with another officer,” thus ensuring that he acted pursuant to a coordinated investigation. See id. at 139. Second, “the police as a whole” must possess the information. See id. The rationale supporting the rule is that law enforcement officers regularly work as a team, meaning each individual officer need not “possess the particularized information” that forms the basis for conducting a search or making an arrest. See id. Thus, the rule reflects the “realities of modern police work” and “recognizes that often many officers will be assigned to investigate the same case.” People v. Hazelhurst, 662 P.2d 1081, 1086–87 (Colo.1983) (noting, in the context of an arrest, that the Fourth Amendment “does not require an individualized probable cause analysis of all the facts and circumstances by the officer making the arrest”). We have cautioned, however, that law enforcement may not wield the fellow officer rule in order to “creat[e] probable cause by using post hoc combinations of information available to the police.” Id. at 1087. As such, the police may not “cull its archives” subsequent to a search or arrest “in hopes of justifying [a search or] arrest er, is equally applicable to a search prior to an arrest, as both scenarios require probable cause. Cf. Arias, 159 P.3d at 139–40 (considering whether the fellow officer rule justified an investigatory stop based on other officers’ reasonable suspicion).
which is not supported by probable cause.”

¶ 16 It is clear, then, that the fellow officer
rule imputes information from one officer to
another; it is less clear, however, precisely
when that imputation occurs. More specifi-
cally, when an outside officer is assigned to
join an ongoing coordinated investigation, we
have never considered whether the fellow
officer rule encompasses information discov-
ered after the initial assignment but before
the ultimate action (i.e., the search or arrest).

[7] ¶ 17 Grassi contends that the rule
only applies to information that the police
possess at the time of the assignment. Thus,
derived from Grassi’s view of the doctrine, any
information that the police gather subsequent
to the assignment is not imputed under the
fellow officer rule. We do not read the fel-
lo officer rule so narrowly. The rule does
impute information from officers who possess
it to those who do not, but it does not require
a linear chain of communication from one
officer to the next. Rather, the rule pools
the collective knowledge of officers engaged
in a coordinated investigation. See Arias,
159 P.3d at 139 (“The purpose of the fellow
officer rule is to allow law enforcement agen-
cies to work together as a team . . . .” ).
Thus, the rule reflects the “realities of mod-
er police work,” Hazelhurst, 662 P.2d at
1087, recognizing that different officers who
perform distinct duties are nevertheless
working collaboratively in the same case.

[8] ¶ 18 Furthermore, any contrary rule
would preclude the police from considering
any information that they discover subse-
quently to their assignment, even though their
investigation may be ongoing. That is, a
contrary holding would essentially force law
enforcement officers to conduct their investi-
gations in discrete, linear stages rather than
working together as a cohesive unit. We do
not wish to limit the fellow officer rule in this
fashion, as doing so would both frustrate its
purpose and ignore the collaborative process
inherent to criminal investigation. Instead,
the more appropriate reading of the fellow
officer rule is that, as long as the police
remain engaged in a coordinated investiga-
tion, the rule encompasses information that
the police as a whole possess at the time of
the relevant action (i.e., the search or arrest).

¶ 19 In reaching this conclusion, we distin-
guish our earlier holding in Arias. In that
case, drug enforcement agents were surveil-
ling a pickup truck, believing the driver to be
“involved in drug activity.” 159 P.3d at 136.
The agents contacted the local police depart-
ment’s dispatch unit and requested that it
send a patrolman to conduct a traffic stop
and search the truck. Id. Because the
agents wanted to maintain their cover, how-
ever, they did not relay their suspicions of
the driver’s drug activity to dispatch; rather,
they specifically requested the local police to
“develop an independent basis for a traffic
stop so that the driver would not discover the
nature and extent of the surveillance.” Id.
Subsequently, a patrolman followed the truck
for several minutes before pulling it over,
suspecting that an air freshener hanging
from the truck’s rearview mirror unlawfully
obscured the driver’s view. Id. During the
traffic stop, the patrolman ran the defen-
dant’s name through a crime database and
learned that a warrant was outstanding for
his arrest. Id. The patrolman then arrested
the driver, and a subsequent search of the
truck yielded fifteen grams of cocaine. Id.

¶ 20 We held that the trial court correctly
suppressed the evidence of the search, con-
cluding that the patrolman’s independent ob-
servations did not provide him with reason-
able suspicion that the driver had violated
any traffic laws. Id. at 140. We further
held that the fellow officer rule did not im-
pute the drug agents’ observations to the
patrolman. See id. Specifically, we recog-
nized that because the drug agents explicitly
directed the patrolman to develop an inde-
pendent basis to stop the truck, they affirm-
atively “chose not to rely on the existing infor-
mation known to [them] at the time of the
traffic stop.” Id. (emphasis added). As
such, we declared that “the People cannot
later claim that, through the fellow officer
rule, information is imputed to” the patrol-
man. Id. Thus, in Arias, the rule could not
impute the drug agents’ knowledge to the
patrolman at all; in that case, the precise
timing of the agents’ instruction relative to
their development of reasonable suspicion
was irrelevant. Therefore, Arias is distinguishable from the present case because the drug agents specifically refused to inform the patrolman of their suspicions, and as such, he was not part of a coordinated investigation.

Therefore, Arias is distinguishable from the present case because the drug agents specifically refused to inform the patrolman of their suspicions, and as such, he was not part of a coordinated investigation.

¶ 21 Accordingly, we hold that the fellow officer rule imputes information that the police possess as a whole to an individual officer who effects a search or arrest if (1) that officer acts pursuant to a coordinated investigation and (2) the police possess the information at the time of the search or arrest. Furthermore, the rule encompasses any information that the police gather between the initial assignment and the officer’s ultimate action as part of a coordinated investigation.

¶ 22 Having established the proper scope of the fellow officer rule, we now turn to the case before us and determine whether the rule imputed sufficient information to Trooper Duncan to provide him with probable cause to order the blood draws.

B. Application of the Fellow Officer Rule to This Case

¶ 23 Drawing blood from an unconscious party is a search that is “subject to the protections of the Fourth Amendment to the United States Constitution.” People v. Schall, 59 P.3d 848, 851 (Colo.2002). In the motor vehicle context, the police infringe upon these protections if they draw blood from a non-consenting driver absent probable cause that he committed an alcohol-related driving offense. Id. To establish probable cause, the police need not possess absolute certainty of the driver’s misconduct but must instead develop “that degree of certainty upon which reasonable and prudent people rely in making decisions in everyday life.” Id. While certain facts may not establish probable cause in isolation, those same facts may support a finding of probable cause when considered in combination. Id. at 852.

¶ 24 In the instant case, Trooper Duncan—the officer who ultimately ordered the blood draws—need not himself have possessed information amounting to probable cause in order to justify the search. Rather, if (1) Duncan acted pursuant to a coordinated investigation and (2) the police as a whole possessed information that amounted to probable cause at the time of the search, then the fellow officer rule imputed that probable cause to Trooper Duncan.

¶ 25 Here, although Trooper Duncan performed his duties in a different location from Troopers Benavides and Waters, Corporal Riley assigned Trooper Duncan the task of traveling to the hospital where Grassi was being treated and obtaining a blood draw if he determined “that alcohol was involved.” In performing this assignment, Trooper Duncan joined the police’s ongoing coordinated investigation, thus satisfying the first prong of the fellow officer rule. The issue, then, is whether the police as a whole possessed probable cause to believe that Grassi had committed an alcohol-related offense when the phlebotomist drew Grassi’s blood (on Trooper Duncan’s orders) at 7:12 a.m.

¶ 26 Because Troopers Benavides, Waters, and Duncan were jointly engaged in a coordinated investigation, we must consider their observations collectively. Trooper Benavides testified that the weather was clear, that the vehicle had imprinted no skid or yaw marks, and that he could locate no external explanation for the crash, as “[i]t looked like the car just ran off the right side of the roadway.” Trooper Waters similarly testified that, based on his preliminary observations of the crash site, no “mechanical defects or failures . . . could have contributed to or . . . caused the crash.” Moreover, shortly after arriving on the scene, Trooper Waters deduced that Grassi had simply followed the fog line off of the roadway, and he testified that “[i]ntoxicated drivers have a propensity to follow the fog line.” Crucially, both officers completed their observations prior to the first blood draw, meaning those findings are imputed to Trooper Duncan through the fellow officer rule. Finally, Trooper Duncan himself de-
tected a strong odor of alcohol on Grassi's breath. These observations, when considered in their totality, substantiated the police's reasonable belief not only that Grassi's driving had caused the crash but that he was driving while under the influence of alcohol. Therefore, the police as a whole possessed "that degree of certainty" that constitutes probable cause to believe that Grassi had committed an alcohol-related offense at the time of the blood draws.

¶ 27 Grassi nevertheless argues that our decisions in People v. Roybal, 655 P.2d 410 (Colo.1982), and People v. Reynolds, 895 P.2d 1059 (Colo.1995), compel us to conclude that the police in fact lacked probable cause. We disagree. In Roybal, the police discerned an odor of alcohol from the driver while investigating a motor vehicle collision. 655 P.2d at 411. Although the driver exhibited "none of the common indicia of intoxication in [his] speech, walk, and ability to understand," the police nevertheless detained him for further questioning. Id. at 411, 413. After concluding that the detention was an arrest, we determined that the odor of alcohol constituted "the single objective fact" suggestive of the driver's intoxication. Id. at 412–13. We thus held that the police lacked probable cause to arrest the driver, noting that "[a]n odor of alcoholic beverage is not inconsistent with [the] ability to operate a motor vehicle in compliance with Colorado law." Id. at 413. Specifically, we recognized that there exists "no case in which an odor of alcoholic beverage, without more, has been held to constitute probable cause to believe a person is under the influence of intoxicating liquor." Id. at 413 n. 8 (emphasis added).

¶ 28 Reynolds featured similar circumstances. In that case, following a single-car accident, the driver admitted to a police officer that he had consumed three beers more than six hours before the accident. 895 P.2d at 1060. The officer then ordered the driver's blood to be drawn without his consent. Id. We held that the police lacked probable cause to order the blood draw. Id. at 1062. In particular, we noted that the officer had assumed that the driver was intoxicated "based solely on evidence that an accident had occurred in which [the driver] was involved and that [the driver] had admitted to drinking three beers some six to nine hours prior to the accident." Id. We acknowledged that such evidence may have been "sufficient to create a 'mere suspicion' " but concluded that it failed to meet the more stringent standard of probable cause. Id.

¶ 29 Both Roybal and Reynolds are inapposite to the present case. Together, they simply stand for the well-established proposition that an unexplained motor vehicle accident coupled with a single indicium of alcohol consumption (e.g., an odor of alcohol or an admission of having consumed alcohol well before the accident), absent additional evidence, does not constitute probable cause that a driver committed an alcohol-related offense. See Reynolds, 895 P.2d at 1062 ("To justify an internal search without consent or a warrant, there must be a 'clear indication' that the defendant was intoxicated. But here there was mere suspicion uncorroborated by any of the familiar signs of intoxication." (emphasis removed) (quoting People v. Williams, 192 Colo. 249, 258–59, 557 P.2d 399, 407 (1976))).

¶ 30 In this case, however, the police's collective observations went well beyond a "mere suspicion" that Grassi had been driving while intoxicated. Not only did Trooper Duncan detect a strong odor of alcohol on Grassi's breath, but Troopers Benavides and Waters both determined that Grassi's personal inability to safely operate his car and keep it on the road was the sole cause of the crash, having affirmatively ruled out any external factor such as mechanical failure or road obstruction. Indeed, Trooper Waters determined that Grassi behaved as intoxicated drivers typically do when he followed the fog line off of the roadway. Cf. id. ("There was no evidence offered that would rule out mechanical failure. In addition there were no facts to suggest that [the driver] was not forced off the road by circumstances beyond his control."). Thus, unlike in Roybal, where the record was "barren of evidence that the
collision occurred as a result of misconduct by the defendant,” 655 P.2d at 413, here Troopers Benavides and Waters possessed affirmative evidence that Grassi had been driving while intoxicated. Because the fellow officer rule imputed Trooper Benavides’s and Trooper Waters’s observations to Trooper Duncan, the police as a whole possessed “that degree of certainty” constituting probable cause to believe that Grassi had committed an alcohol-related offense at the time of the blood draws.

¶ 31 Accordingly, we hold that the fellow officer rule provided the police with probable cause to order the blood draws.

IV. Conclusion

¶ 32 The fellow officer rule imputes information that the police possess as a whole to an individual officer who effects a search or arrest if (1) that officer acts pursuant to a coordinated investigation and (2) the police possess the information at the time of the search or arrest. In the instant case, the police as a whole, pursuant to a coordinated investigation, possessed probable cause to believe that Grassi had committed an alcohol-related offense at the time of the blood draws, and the fellow officer rule imputed that probable cause to Trooper Duncan, meaning no Fourth Amendment violation occurred. The judgment of the court of appeals is therefore affirmed.

1. Habeas Corpus ⊛ 207

The writ of habeas corpus is designed primarily to determine whether a person is being detained unlawfully and therefore should be immediately released from custody.

2. Habeas Corpus ⊛ 516.1

Habeas corpus is available as a remedy to adjudicate a prisoner’s claim that he was being denied consideration for discretionary parole.

3. Appeal and Error ⊛ 843(1)

Generally, an appellate court will decline to render an opinion on the merits of an
counted for far less than they should have because of their partisan affiliation. When faced with such constitutional wrongs, courts must intervene: “It is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). That is what the courts below did. Their decisions are worth a read. They (and others that have recently remedied similar violations) are detailed, thorough, painstaking. They evaluated with immense care the factual evidence and legal arguments the parties presented. They used neutral and manageable and strict standards. They had not a shred of politics about them. Contra the majority, see *ante*, at 2508, this was law.

That is not to deny, of course, that these cases have great political consequence. They do. Among the *amicus* briefs here is one from a bipartisan group of current and former Members of the House of Representatives. They describe all the ways partisan gerrymandering harms our political system—what they call “a cascade of negative results.” Brief as *Amicus Curiae* 5. These artificially drawn districts shift influence from swing voters to party-base voters who participate in primaries; make bipartisanship and pragmatic compromise politically difficult or impossible; and drive voters away from an ever more dysfunctional political process. See *id.*, at 5–6. Last year, we heard much the same from current and former state legislators. In their view, partisan gerrymandering has “sounded the death-knell of bipartisanship,” creating a legislative environment that is “toxic” and “tribal.” Brief as *Amicus Curiae* in *Gill v. Whitford*, O. T. 2016, No. 16–1161, pp. 6, 25. Gerrymandering, in short, helps create the polarized political system so many Americans loathe.

And gerrymandering is, as so many Justices have emphasized before, anti-democratic in the most profound sense. See *supra*, at 2494 – 2495. In our government, “all political power flows from the people.” *Arizona State Legislature*, 576 U.S., at ——, 135 S.Ct., at 2677. And that means, as Alexander Hamilton once said, “that the people should choose whom they please to govern them.” 2 Debates on the Constitution 257 (J. Elliot ed. 1891). But in Maryland and North Carolina they cannot do so. In Maryland, election in and election out, there are 7 Democrats and 1 Republican in the congressional delegation. In North Carolina, however the political winds blow, there are 10 Republicans and 3 Democrats. Is it conceivable that someday voters will be able to break out of that prefabricated box? Sure. But everything possible has been done to make that hard. To create a world in which power does not flow from the people because they do not choose their governors.

Of all times to abandon the Court’s duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court’s role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.

Gerald P. MITCHELL, Petitioner

v.

WISCONSIN

No. 18-6210

Supreme Court of the United States.

Argued April 23, 2019

Decided June 27, 2019

**Background:** Following the denial of his motion to suppress the results of a blood
test taken without a warrant while he was unconscious, defendant was convicted in the Circuit Court, Sheboygan County, Terence T. Bourke, J., of operating a motor vehicle while intoxicated (OWI) and with a prohibited alcohol concentration (PAC). Defendant appealed. On certification, the Supreme Court of Wisconsin, Patience Drake Roggensack, C.J., 383 Wis.2d 192, 914 N.W.2d 151, affirmed. Certiorari was granted.

**Holdings:** The Supreme Court, Justice Alito, held that:

1. **Exigent-Circumstances Exception**
   - The exigent-circumstances exception to the Fourth Amendment’s warrant requirement almost always permits a blood test without a warrant where a driver suspected of drunk driving is unconscious and therefore cannot be given a breath test.

2. **State of Wisconsin**
   - The State of Wisconsin did not waive argument that the Supreme Court adopted, namely that exigent circumstances almost always permitted warrantless blood test on unconscious drunk-driving suspect; and

3. **Decreased Time**
   - The decreased time required to obtain a search warrant did not preclude warrantless draws from unconscious drunk-driving suspects.

Vacated and remanded.

Justice Thomas filed an opinion concurring in the judgment.

Justice Sotomayor filed a dissenting opinion in which Justice Ginsburg and Justice Kagan joined.

Justice Gorsuch filed a dissenting opinion.

1. **Automobiles **
   - An officer may conduct a blood alcohol concentration (BAC) test on a motorist if the facts of a particular case bring it within the exigent-circumstances exception to the Fourth Amendment’s general requirement of a warrant. (Per Justice Alito, joined by three Justices, with one Justice concurring in the judgment.) U.S. Const. Amend. 4.

2. **Automobiles **
   - If an officer has probable cause to arrest a motorist for drunk driving, the officer may conduct a breath test, but not a blood test, under the rule allowing warrantless searches of a person incident to arrest. (Per Justice Alito, joined by three Justices, with one Justice concurring in the judgment.) U.S. Const. Amend. 4.

3. **Automobiles **
   - The exigent-circumstances exception to the Fourth Amendment’s warrant requirement almost always permits a blood test without a warrant where a driver suspected of drunk driving is unconscious and therefore cannot be given a breath test. (Per Justice Alito, joined by three Justices, with one Justice concurring in the judgment.) U.S. Const. Amend. 4.

4. **Automobiles **
   - Forcing drunk-driving suspects to undergo a blood test does not violate their constitutional right against self-incrimination, nor does using their refusal against them in court. (Per Justice Alito, joined by three Justices, with one Justice concurring in the judgment.) U.S. Const. Amend. 5.

5. **Automobiles **
   - Punishing drunk-driving suspects' refusal to undergo a blood test with automatic license revocation does not violate their due process rights if they have been arrested upon probable cause; on the contrary, this kind of summary penalty is unquestionably legitimate. (Per Justice Alito, joined by three Justices, with one Justice concurring in the judgment.) U.S. Const. Amends. 4, 14.
6. Searches and Seizures warf35

Though a warrant is normally required for a lawful search, there are well-defined exceptions to this rule. (Per Justice Alito, joined by three Justices, with one Justice concurring in the judgment.) U.S. Const. Amend. 4.

7. Searches and Seizures warf35

The exigent-circumstances exception to the Fourth Amendment’s warrant requirement allows warrantless searches to prevent the imminent destruction of evidence. (Per Justice Alito, joined by three Justices, with one Justice concurring in the judgment.) U.S. Const. Amend. 4.

8. Searches and Seizures warf35

A blood draw is a “search” of the person under the Fourth Amendment. (Per Justice Alito, joined by three Justices, with one Justice concurring in the judgment.) U.S. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

9. Searches and Seizures warf35

Under the exception for exigent circumstances, a warrantless search is allowed when there is compelling need for official action and no time to secure a warrant. (Per Justice Alito, joined by three Justices, with one Justice concurring in the judgment.) U.S. Const. Amend. 4.

10. Federal Courts warf35

State of Wisconsin did not waive argument that United States Supreme Court adopted, namely that exigent circumstances exception to Fourth Amendment’s warrant requirement almost always permitted a warrantless blood test on a drunk-driving suspect who was unconscious and therefore could not be given a breath test; although intermediate state appellate court’s certified question to Wisconsin Supreme Court asked whether warrantless blood draw of an unconscious motorist pursuant to Wisconsin’s implied consent law violated Fourth Amendment, where no exigent circumstances existed or had been argued, the State Supreme Court took a broader view, as was its right, and regarded the defendant’s appeal of drunk driving conviction as presenting question whether warrantless blood draw from unconscious person violated Fourth Amendment. (Per Justice Alito, joined by three Justices, with one Justice concurring in the judgment.) U.S. Const. Amend. 4; Wis. Stat. Ann. § 343.305(3)(b).

11. Searches and Seizures warf35

The exigent-circumstances exception to the Fourth Amendment’s warrant requirement requires a totality of the circumstances analysis. (Per Justice Alito, joined by three Justices, with one Justice concurring in the judgment.) U.S. Const. Amend. 4.

12. Searches and Seizures warf35

Under the exigent-circumstances exception to the Fourth Amendment’s warrant requirement, the police may proceed without a warrant when an occupant of a home requires emergency assistance. (Per Justice Alito, joined by three Justices, with one Justice concurring in the judgment.) U.S. Const. Amend. 4.

13. Searches and Seizures warf35

Under the exigent-circumstances exception to the Fourth Amendment’s warrant requirement, the police may proceed without a warrant when a building is on fire. (Per Justice Alito, joined by three Justices, with one Justice concurring in the judgment.) U.S. Const. Amend. 4.

14. Searches and Seizures warf35

Under the exigent-circumstances exception to the Fourth Amendment’s warrant requirement, the police may proceed without a warrant when an armed robber
has just entered a home. (Per Justice Alito, joined by three Justices, with one Justice concurring in the judgment.) U.S. Const. Amend. 4.

15. **Automobiles ⇔ 419**

Even if the constant dissipation of blood alcohol concentration (BAC) evidence alone does not create an exigency to justify a warrantless blood draw from a drunk-driving suspect, it does so when combined with other pressing needs. (Per Justice Alito, joined by three Justices, with one Justice concurring in the judgment.) U.S. Const. Amend. 4.

16. **Automobiles ⇔ 419**

Exigency exists to justify a warrantless blood draw from a drunk-driving suspect when (1) blood alcohol concentration (BAC) evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. (Per Justice Alito, joined by three Justices, with one Justice concurring in the judgment.) U.S. Const. Amend. 4.

17. **Automobiles ⇔ 420**

Although the time required to obtain a search warrant had shrunk, it had not disappeared, and thus the current age of rapid communication did not preclude warrantless blood draws from unconscious drunk-driving suspects, pursuant to the exigent-circumstances exception to the Fourth Amendment's warrant requirement; in the emergency scenarios created by unconscious drivers, forcing police to put off other tasks for even a relatively short period of time may have terrible collateral costs. (Per Justice Alito, joined by three Justices, with one Justice concurring in the judgment.) U.S. Const. Amend. 4.

18. **Automobiles ⇔ 420**

When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's blood alcohol concentration (BAC) without offending the Fourth Amendment. (Per Justice Alito, joined by three Justices, with one Justice concurring in the judgment.) U.S. Const. Amend. 4.

19. **Automobiles ⇔ 420**

In an unusual case, a defendant charged with drunk driving may be able to challenge warrantless blood draw conducted while he was unconscious by showing that his blood would not have been drawn if police had not been seeking blood alcohol concentration (BAC) information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. (Per Justice Alito, joined by three Justices, with one Justice concurring in the judgment.) U.S. Const. Amend. 4.

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*Syllabus*

Petitioner Gerald Mitchell was arrested for operating a vehicle while intoxicated after a preliminary breath test registered a blood alcohol concentration (BAC) that was triple Wisconsin's legal limit for driving. As is standard practice, the arresting officer drove Mitchell to a police station for a more reliable breath test using evidence-grade equipment. By the time Mitchell reached the station, he was unconscious or stuporous, and police placed Mitchell in the hospital. The hospital determined that Mitchell was unconscious and unable to properly consent to a standard evidentiary breath test before he was transported to a police station. Police officers obtained a warrantless blood draw and the blood was analyzed for BAC content. Mitchell was convicted of operating a vehicle while intoxicated.

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* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
too lethargic for a breath test, so the officer drove him to a nearby hospital for a blood test. Mitchell was unconscious by the time he arrived at the hospital, but his blood was drawn anyway under a state law that presumes that a person incapable of withdrawing implied consent to BAC testing has not done so. The blood analysis showed Mitchell’s BAC to be above the legal limit, and he was charged with violating two drunk-driving laws. Mitchell moved to suppress the results of the blood test on the ground that it violated his Fourth Amendment right against “unreasonable searches” because it was conducted without a warrant. The trial court denied the motion, and Mitchell was convicted. On certification from the intermediate appellate court, the Wisconsin Supreme Court affirmed the lawfulness of Mitchell’s blood test.

Held: The judgment is vacated, and the case is remanded.

2018 WI 84, 383 Wis.2d 192, 914 N.W.2d 151, vacated and remanded.

Justice ALITO, joined by THE CHIEF JUSTICE, Justice BREYER, and Justice KAVANAUGH, concluded that when a driver is unconscious and cannot be given a breath test, the exigent-circumstances doctrine generally permits a blood test without a warrant. Pp. 2532 – 2539.

(a) BAC tests are Fourth Amendment searches. See Birchfield v. North Dakota, 579 U.S. ——, ——, 136 S.Ct. 2160, 195 L.Ed.2d 560. A warrant is normally required for a lawful search, but there are well-defined exceptions to this rule, including the “exigent circumstances” exception, which allows warrantless searches “to prevent the imminent destruction of evidence.” Missouri v. McNeely, 569 U.S. 141, 149, 133 S.Ct. 1552, 185 L.Ed.2d 696. In McNeely, this Court held that the fleeting nature of blood-alcohol evidence alone was not enough to bring BAC testing within the exigency exception. Id., at 156, 133 S.Ct. 1552. But in Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908, the dissipation of BAC did justify a blood test of a drunk driver whose accident gave police other pressing duties, for then the further delay caused by a warrant application would indeed have threatened the destruction of evidence. Like Schmerber, unconscious-driver cases will involve a heightened degree of urgency for several reasons. And when the driver’s stupor or unconsciousness deprives officials of a reasonable opportunity to administer a breath test using evidence-grade equipment, a blood test will be essential for achieving the goals of BAC testing. Pp. 2532 – 2534.

(b) Under the exigent circumstances exception, a warrantless search is allowed when “there is compelling need for official action and no time to secure a warrant.” McNeely, 569 U.S., at 149, 133 S.Ct. 1552. P. 2534.

(1) There is clearly a “compelling need” for a blood test of drunk-driving suspects whose condition deprives officials of a reasonable opportunity to conduct a breath test. First, highway safety is a vital public interest—a “compelling” and “paramount” interest, Mackey v. Montrym, 443 U.S. 1, 17–18, 99 S.Ct. 2612, 61 L.Ed.2d 321. Second, when it comes to promoting that interest, federal and state lawmakers have long been convinced that legal limits on a driver’s BAC make a big difference. And there is good reason to think that such laws have worked. Birchfield, 579 U.S., at ——, 136 S.Ct., at ——. Third, enforcing BAC limits obviously requires a test that is accurate enough to stand up in court. Id., at ——, 136 S.Ct., at ——. And such testing must be prompt because it is “a biological certainty” that “[a]lcohol dissipates from the bloodstream,” “literally disappearing by the minute.” McNeely, 569 U.S., at 169, 133 S.Ct. 1552 (ROB-
ERTS, C.J., concurring). Finally, when a breath test is unavailable to promote the interests served by legal BAC limits, “a blood draw becomes necessary.” *Id.*, at 170, 133 S.Ct. 1552. Pp. 2535 – 2537.

(2) *Schmerber* demonstrates that an exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Because both conditions are met when a drunk-driving suspect is unconscious, *Schmerber* controls. A driver’s unconsciousness does not just create pressing needs; it is itself a medical emergency. In such a case, as in *Schmerber*, an officer could “reasonably have believed that he was confronted with an emergency.” 384 U.S., at 771, 86 S.Ct. 1826. And in many unconscious-driver cases, the exigency will be especially acute. A driver so drunk as to lose consciousness is quite likely to crash, giving officers a slew of urgent tasks beyond that of securing medical care for the suspect—tasks that would require them to put off applying for a warrant. The time needed to secure a warrant may have shrunk over the years, but it has not disappeared; and forcing police to put off other urgent tasks for even a relatively short period of time may have terrible collateral costs. Pp. 2536 – 2539.

(c) On remand, Mitchell may attempt to show that his was an unusual case, in which his blood would not have been drawn had police not been seeking BAC information and police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. Pp. 2538 – 2539.

Justice THOMAS would apply a *per se* rule, under which the natural metabolism of alcohol in the blood stream “creates an exigency once police have probable cause to believe the driver is drunk,” regardless of whether the driver is conscious. *Missouri v. McNeely*, 569 U.S. 141, 178, 133 S.Ct. 1552, 185 L.Ed.2d 696 (THOMAS, J., dissenting). Pp. 2539 – 2541.

ALITO, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C.J., and BREYER and KAVANAUGH, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG and KAGAN, JJ., joined. GORSUCH, J., filed a dissenting opinion.

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For U.S. Supreme Court briefs, see:

2019 WL 951420 (Pet.Brief)
2019 WL 1418538 (Resp.Brief)
2019 WL 1650326 (Reply.Brief)

Justice ALITO announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice BREYER, and Justice KAVANAUGH join.

[1, 2] In this case, we return to a topic that we have addressed twice in recent years: the circumstances under which a
police officer may administer a warrantless blood alcohol concentration (BAC) test to a motorist who appears to have been driving under the influence of alcohol. We have previously addressed what officers may do in two broad categories of cases. First, an officer may conduct a BAC test if the facts of a particular case bring it within the exigent-circumstances exception to the Fourth Amendment's general requirement of a warrant. Second, if an officer has probable cause to arrest a motorist for drunk driving, the officer may conduct a breath test (but not a blood test) under the rule allowing warrantless searches of a person incident to arrest.

Today, we consider what police officers may do in a narrow but important category of cases: those in which the driver is unconscious and therefore cannot be given a breath test. In such cases, we hold, the exigent-circumstances rule almost always permits a blood test without a warrant. When a breath test is impossible, enforcement of the drunk-driving laws depends upon the administration of a blood test. And when a police officer encounters an unconscious driver, it is very likely that the driver would be taken to an emergency room and that his blood would be drawn for diagnostic purposes even if the police were not seeking BAC information. In addition, police officers most frequently come upon unconscious drivers when they report to the scene of an accident, and under those circumstances, the officers' many responsibilities—such as attending to other injured drivers or passengers and preventing further accidents—may be incompatible with the procedures that would be required to obtain a warrant. Thus, when a driver is unconscious, the general rule is that a warrant is not needed.

I

A

In Birchfield v. North Dakota, 579 U.S. —, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016), we recounted the country's efforts over the years to address the terrible problem of drunk driving. Today, “all States have laws that prohibit motorists from driving with a [BAC] that exceeds a specified level.” Id., at —, 136 S.Ct., at 2166. And to help enforce BAC limits, every State has passed what are popularly called implied-consent laws. Ibid. As “a condition of the privilege of” using the public roads, these laws require that drivers submit to BAC testing “when there is sufficient reason to believe they are violating the State’s drunk-driving laws.” Id., at —, —, 136 S.Ct., at 2166; 2169).

Wisconsin's implied-consent law is much like those of the other 49 States and the District of Columbia. It deems drivers to have consented to breath or blood tests if an officer has reason to believe they have committed one of several drug- or alcohol-related offenses.1 See Wis. Stat. §§ 343.305(2), (3). Officers seeking to conduct a BAC test must read aloud a statement declaring their intent to administer the test and advising drivers of their options and the implications of their choice. § 343.305(4). If a driver's BAC level proves too high, his license will be suspended; but if he refuses testing, his license will be revoked and his refusal may be used against him in court. See ibid. No

1. Wisconsin also authorizes BAC testing of drivers involved in accidents that cause significant bodily harm, with or without probable cause of drunk driving. See Wis. Stat. § 343.305(3)(2) (2016). We do not address those provisions. And while Wisconsin's and other implied-consent laws permit urine tests, those tests are less common, see Birchfield v. North Dakota, 579 U.S. —, —, n. 1, 136 S.Ct. 2160, 2169 n. 1, 195 L.Ed.2d 560 (2016), and we do not consider them here.
test will be administered if a driver refuses—or, as the State would put it, “withdraws” his statutorily presumed consent. But “[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have” withdrawn it. § 343.305(3)(b). See also §§ 343.305(3)(ar)1–2. More than half the States have provisions like this one regarding unconscious drivers.

The sequence of events that gave rise to this case began when Officer Alexander Jaeger of the Sheboygan Police Department received a report that petitioner Gerald Mitchell, appearing to be very drunk, had climbed into a van and driven off. Jaeger soon found Mitchell wandering near a lake. Stumbling and slurring his words, Mitchell could hardly stand without the support of two officers. Jaeger judged a field sobriety test hopeless, if not dangerous, and gave Mitchell a preliminary breath test. It registered a BAC level of 0.24%, triple the legal limit for driving in Wisconsin. Jaeger arrested Mitchell for operating a vehicle while intoxicated and, as is standard practice, drove him to a police station for a more reliable breath test using better equipment.

On the way, Mitchell’s condition continued to deteriorate—so much so that by the time the squad car had reached the station, he was too lethargic even for a breath test. Jaeger therefore drove Mitchell to a nearby hospital for a blood test; Mitchell lost consciousness on the ride over and had to be wheeled in. Even so, Jaeger read aloud to a slumped Mitchell the standard statement giving drivers a chance to refuse BAC testing. Hearing no response, Jaeger asked hospital staff to draw a blood sample. Mitchell remained unconscious while the sample was taken, and analysis of his blood showed that his BAC, about 90 minutes after his arrest, was 0.222%.

Mitchell was charged with violating two related drunk-driving provisions. See §§ 346.63(1)(a), (b). He moved to suppress the results of the blood test on the ground that it violated his Fourth Amendment rights against “unreasonable searches” because it was conducted without a warrant. Wisconsin chose to rest its response on the notion that its implied-consent law (together with Mitchell’s free choice to drive on its highways) rendered the blood test a consensual one, thus curing any Fourth Amendment problem. In the end, the trial court denied Mitchell’s motion to suppress, and a jury found him guilty of the charged offenses. The intermediate appellate court certified two questions to the Wisconsin Supreme Court: first, whether compliance with the State’s implied-consent law was sufficient to show that Mitchell’s test was consistent with the Fourth Amendment and, second, whether a warrantless blood draw from an unconscious person violates the Fourth Amendment. See 2018 WI 84, ¶15, 383 Wis.2d 192, 202–203, 914 N.W.2d 151, 155–156 (2018). The Wisconsin Supreme Court affirmed Mitchell’s convictions, and we granted certiorari, 586 U.S. ——, 139 S.Ct. 915, 202 L.Ed.2d 642 (2019), to decide “[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement,” Pet. for Cert. ii.

II

In considering Wisconsin’s implied-consent law, we do not write on a blank slate. “Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply.” Birchfield, 579 U.S., at ——, 136 S.Ct., at 2185. But
our decisions have not rested on the idea that these laws do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize. Instead, we have based our decisions on the precedent regarding the specific constitutional claims in each case, while keeping in mind the wider regulatory scheme developed over the years to combat drunk driving. That scheme is centered on legally specified BAC limits for drivers—limits enforced by the BAC tests promoted by implied-consent laws.

[4, 5] Over the last 50 years, we have approved many of the defining elements of this scheme. We have held that forcing drunk-driving suspects to undergo a blood test does not violate their constitutional right against self-incrimination. See Schmerber v. California, 384 U.S. 757, 765, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). Nor does using their refusal against them in court. See South Dakota v. Neville, 459 U.S. 553, 563, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983). And punishing that refusal with automatic license revocation does not violate drivers’ due process rights if they have been arrested upon probable cause, Mackey v. Montrym, 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979); on the contrary, this kind of summary penalty is “unquestionably legitimate.” Neville, supra, at 560, 103 S.Ct. 916.

[6] These cases generally concerned the Fifth and Fourteenth Amendments, but motorists charged with drunk driving have also invoked the Fourth Amendment’s ban on “unreasonable searches” since BAC tests are “searches.” See Birchfield, 579 U.S., at ——, 136 S.Ct., at 2173. Though our precedent normally requires a warrant for a lawful search, there are well-defined exceptions to this rule. In Birchfield, we applied precedent on the “search-incident-to-arrest” exception to BAC testing of conscious drunk-driving suspects. We held that their drunk-driving arrests, taken alone, justify warrantless breath tests but not blood tests, since breath tests are less intrusive, just as informative, and (in the case of conscious suspects) readily available. Id., at ——, 136 S.Ct., at 2184–85.

[7] We have also reviewed BAC tests under the “exigent circumstances” exception—which, as noted, allows warrantless searches “to prevent the imminent destruction of evidence.” Missouri v. McNeely, 569 U.S. 141, 149, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). In McNeely, we were asked if this exception covers BAC testing of drunk-driving suspects in light of the fact that blood-alcohol evidence is always dissipating due to “natural metabolic processes.” Id., at 152, 133 S.Ct. 1552. We answered that the fleeting quality of BAC evidence alone is not enough. Id., at 156, 133 S.Ct. 1552. But in Schmerber it did justify a blood test of a drunk driver who had gotten into a car accident that gave police other pressing duties, for then the “further delay” caused by a warrant application really “would have threatened the destruction of evidence.” McNeely, supra, at 152, 133 S.Ct. 1552 (emphasis added).

Like Schmerber, this case sits much higher than McNeely on the exigency spectrum. McNeely was about the minimum degree of urgency common to all drunk-driving cases. In Schmerber, a car accident heightened that urgency. And here Mitchell’s medical condition did just the same.

Mitchell’s stupor and eventual unconsciousness also deprived officials of a reasonable opportunity to administer a breath test. To be sure, Officer Jaeger managed to conduct “a preliminary breath test” using a portable machine when he first encountered Mitchell at the lake. App. to Pet.
for Cert. 60a. But he had no reasonable opportunity to give Mitchell a breath test using “evidence-grade breath testing machinery.” *Birchfield*, 579 U.S., at —, 136 S.Ct., at 2192 (SOTOMAYOR, J., concurring in part and dissenting in part). As a result, it was reasonable for Jaeger to seek a better breath test at the station; he acted with reasonable dispatch to procure one; and when Mitchell’s condition got in the way, it was reasonable for Jaeger to pursue a blood test. As Justice SOTOMAYOR explained in her partial dissent in *Birchfield*:

“There is a common misconception that breath tests are conducted roadside, immediately after a driver is arrested. While some preliminary testing is conducted roadside, reliability concerns with roadside tests confine their use in most circumstances to establishing probable cause for an arrest.... The standard evidentiary breath test is conducted after a motorist is arrested and transported to a police station, governmental building, or mobile testing facility where officers can access reliable, evidence-grade breath testing machinery.” *Id.*, at —, 136 S.Ct., at 2192.

Because the “standard evidentiary breath test is conducted after a motorist is arrested and transported to a police station, governmental building, or mobile testing facility where officers can access reliable, evidence-grade breath testing machinery.” *Id.*, at —, 136 S.Ct., at 2192.

2. Justice SOTOMAYOR’s dissent argues that Wisconsin waived the argument that we now adopt, but the dissent paints a misleading picture of both the proceedings below and the ground for our decision.

First, as to the proceedings below, the dissent contends that the sole question certified to the Wisconsin Supreme Court was “whether a warrantless blood draw from an unconscious person pursuant to Wisconsin’s implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment.” *Post*, at 2542 (quoting *App. 61*). That is indeed how the intermediate appellate court understood the issue in the case, but the State Supreme Court took a broader view, as was its right. It regarded the appeal as presenting two questions, one of which was “whether a warrantless blood draw from an unconscious person pursuant to Wis. Stat. § 343.305(3)(b) violates the Fourth Amendment.” See 383 Wis.2d 192, 202–203, 914 N.W.2d 151, 155–156 (2018). This broad question easily encompasses the rationale that we adopt today.

III

[8–14] The Fourth Amendment guards the “right of the people to be secure in their persons . . . against unreasonable searches” and provides that “no Warrants shall issue, but upon probable cause.” A blood draw is a search of the person, so we must determine if its administration here without a warrant was reasonable. See *Birchfield*, 579 U.S. at —, 136 S.Ct., at 2174. Though we have held that a warrant is normally required, we have also “made it clear that there are exceptions to the warrant requirement.” *Illinois v. McArthur*, 531 U.S. 326, 330, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001). And under the exception for exigent circumstances, a warrantless search is allowed when “there is compelling need for official action and no time to secure a warrant.” *McNeely*, supra, at 149, 133 S.Ct. 1552 (quoting *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978)). In *McNeely*, we considered how the exigent-circumstances exception applies to the broad category of cases in which a police officer has probable cause to believe that a motorist was driving under the influence of alcohol, and we do not revisit that question. Nor do we settle whether the exigent-circumstances exception covers the specific facts of this case. Instead, we address how the excep-
tion bears on the category of cases encompassed by the question on which we granted certiorari—those involving unconscious drivers. In those cases, the need for a blood test is compelling, and an officer’s duty to attend to more pressing needs may leave no time to seek a warrant.

A

The importance of the needs served by BAC testing is hard to overstate. The bottom line is that BAC tests are needed for enforcing laws that save lives. The specifics, in short, are these: Highway safety is critical; it is served by laws that criminalize driving with a certain BAC level; and enforcing these legal BAC limits requires efficient testing to obtain BAC evidence, which naturally dissipates. So BAC tests are crucial links in a chain on which vital interests hang. And when a breath test is unavailable to advance those aims, a blood test becomes essential. Here we add a word about each of these points.

First, highway safety is a vital public interest. For decades, we have strained our vocal chords to give adequate expression to the stakes. We have called highway safety a “compelling interest,” Mackey, 443 U.S., at 19, 99 S.Ct. 2612; we have called it “paramount,” id., at 17, 99 S.Ct. 2612. Twice we have referred to the effects of irresponsible driving as “slaughter” comparable to the ravages of war. Breithaupt v. Abram, 352 U.S. 432, 439, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957); Perez v. Campbell, 402 U.S. 637, 657, 672, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971) (Blackmun, J., concurring in result in part and dissenting in part). We have spoken of “carnage,” Neville, 459 U.S., at 558–559, 103 S.Ct. 916, and even “frightful carnage,” Tate v. Short, 401 U.S. 395, 401, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971) (Blackmun, J., concurring). The frequency of preventable collisions, we have said, is “tragic,” Neville, supra, at 558, 103 S.Ct. 916, and “astound-

3. While our exigent-circumstances precedent requires a "'totality of the circumstances'" analysis, "'the circumstances in drunk driving cases are often typical, and the Court should be able to offer guidance on how police should handle cases like the one before us.'" McNeely, 569 U.S., at 166, 133 S.Ct. 1552 (ROBERTS, C.J., concurring in part and dissenting in part). Indeed, our exigency case law is full of general rules providing such guidance. Thus, we allow police to proceed without a warrant when an occupant of a home requires "'emergency assistance,'" Brigham City v. Stuart, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006); when a building is on fire, see Michigan v. Tyler, 436 U.S. 499, 509, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978); and when an armed robber has just entered a home, see United States v. Santana, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976). "'In each of these cases, the requirement that we base our decision on the 'totality of the circumstances' has not prevented us from spelling out a general rule for the police to follow.'" McNeely, supra, at 168, 133 S.Ct. 1552 (opinion of ROBERTS, C.J.). Neither does it prevent us here.

Second, after noting that the State did not attempt below to make a case-specific showing of exigent circumstances, the dissent claims that our decision is based on this very ground. But that is not at all the basis for our decision. We do not hold that the State established that the facts of this particular case involve exigent circumstances under McNeely. Rather, we adopt a rule for an entire category of cases—those in which a motorist believed to have driven under the influence of alcohol is unconscious and thus cannot be given a breath test. This rule is not based on what happened in petitioner’s particular case but on the circumstances generally present in cases that fall within the scope of the rule. Those are just the sorts of features of unconscious-driver cases that Wisconsin brought to our attention, see Brief for Respondent 54–55; Tr. of Oral Arg. at 32–34, 48–51, which petitioner addressed, see Reply Brief at 14–15; Tr. of Oral Arg. at 15–20, 23–24, 29–31, 63–66. So it is entirely proper for us to decide the case on this ground. See Thigpen v. Roberts, 468 U.S. 27, 29–30, 104 S.Ct. 2916, 28 L.Ed.2d 23 (1984).
ing,” *Breithaupt*, *supra*, at 439, 77 S.Ct. 408. And behind this fervent language lie chilling figures, all captured in the fact that from 1982 to 2016, alcohol-related accidents took roughly 10,000 to 20,000 lives in this Nation every single year. See National Highway Traffic Safety Admin. (NHTSA), Traffic Safety Facts 2016, p. 40 (May 2018). In the best years, that would add up to more than one fatality per hour.

*Second*, when it comes to fighting these harms and promoting highway safety, federal and state lawmakers have long been convinced that specified BAC limits make a big difference. States resorted to these limits when earlier laws that included no “statistical definition of intoxication” proved ineffectual or hard to enforce. See *Birchfield*, 579 U.S., at ——, 136 S.Ct., at 2167. The maximum permissible BAC, initially set at 0.15%, was first lowered to 0.10% and then to 0.08%. *Id.*, at ——, ——, 136 S.Ct., at 2167, 2168–69. Congress encouraged this process by conditioning the award of federal highway funds on the establishment of a BAC limit of 0.08%, see 23 U.S. C. § 163(a); 23 CFR § 1225.1 (2012), and every State has adopted this limit.4 Not only that, many States, including Wisconsin, have passed laws imposing increased penalties for recidivists or for drivers with a BAC level that exceeds a higher threshold. See Wis. Stat. § 346.65(2)(am); *Birchfield*, 579 U.S., at ——, 136 S.Ct., at 2169.

There is good reason to think this strategy has worked. As we noted in *Birchfield*, these tougher measures corresponded with a dramatic drop in highway deaths and injuries: From the mid-1970’s to the mid-1980’s, “the number of annual fatalities averaged 25,000; by 2014 . . . , the number had fallen to below 10,000.” *Id.*, at ——, 136 S.Ct., at 2169.

*Third*, enforcing BAC limits obviously requires a test that is accurate enough to stand up in court, *id.*, at ——, ——, 136 S.Ct., at 2167–68; see also *McNeely*, 569 U.S., at 159–160, 133 S.Ct. 1552 (plurality opinion). And we have recognized that “[e]xtraction of blood samples for testing is a highly effective means of” measuring “the influence of alcohol.” *Schmerber*, 384 U.S., at 771, 86 S.Ct. 1826.

Enforcement of BAC limits also requires prompt testing because it is “a biological certainty” that “[a]lcohol dissipates from the bloodstream at a rate of 0.01 percent to 0.025 percent per hour . . . . Evidence is literally disappearing by the minute.” *McNeely*, 569 U.S., at 169, 133 S.Ct. 1552 (opinion of ROBERTS, C.J.). As noted, the ephemeral nature of BAC was “essential to our holding in *Schmerber*,” which itself allowed a warrantless blood test for BAC. *Id.*, at 152, 133 S.Ct. 1552 (opinion of the Court). And even when we later held that the exigent-circumstances exception would not permit a warrantless blood draw in every drunk-driving case, we acknowledged that delays in BAC testing can “raise questions about . . . accuracy.” *Id.*, at 156, 133 S.Ct. 1552.

It is no wonder, then, that the implied-consent laws that incentivize prompt BAC testing have been with us for 65 years and now exist in all 50 States. *Birchfield*, *supra*, at ——, 136 S.Ct., at 2169. These laws and the BAC tests they require are tightly linked to a regulatory scheme that serves the most pressing of interests.

Finally, when a breath test is unavailable to promote those interests, “a blood draw becomes necessary.” *McNeely*, 569

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4. See NHTSA, Alcohol and Highway Safety: A Review of the State of Knowledge 167 (DO

U.S., at 170, 133 S.Ct. 1552 (opinion of ROBERTS, C.J.). Thus, in the case of unconscious drivers, who cannot blow into a breathalyzer, blood tests are essential for achieving the compelling interests described above.

Indeed, not only is the link to pressing interests here tighter; the interests themselves are greater: Drivers who are drunk enough to pass out at the wheel or soon afterward pose a much greater risk. It would be perverse if the more wanton behavior were rewarded—if the more harrowing threat were harder to punish.

For these reasons, there clearly is a "compelling need" for a blood test of drunk-driving suspects whose condition deprives officials of a reasonable opportunity to conduct a breath test. Id., at 149, 133 S.Ct. 1552 (opinion of the Court) (internal quotation marks omitted). The only question left, under our exigency doctrine, is whether this compelling need justifies a warrantless search because there is, furthermore, "no time to secure a warrant." Ibid.

B

[15, 16] We held that there was no time to secure a warrant before a blood test of a drunk-driving suspect in Schmerber because the officer there could "reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." 384 U.S., at 770, 86 S.Ct. 1826 (internal quotation marks omitted). So even if the constant dissipation of BAC evidence alone does not create an exigency, see McNeely, supra, at 150–151, 133 S.Ct. 1552, Schmerber shows that it does so when combined with other pressing needs:

"We are told that [1] the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where [2] time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case [without a warrant] was . . . appropriate . . . ." 384 U.S., at 770–771, 86 S.Ct. 1826.

Thus, exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when a drunk-driving suspect is unconscious, so Schmerber controls: With such suspects, too, a warrantless blood draw is lawful.

1

In Schmerber, the extra factor giving rise to urgent needs that would only add to the delay caused by a warrant application was a car accident; here it is the driver's unconsciousness. Indeed, unconsciousness does not just create pressing needs; it is itself a medical emergency.5 It means that the suspect will have to be rushed to the hospital or similar facility not just for the blood test itself but for urgent medical care.6 Police can reasonably anticipate that such a driver might require monitoring,


positioning, and support on the way to the hospital; that his blood may be drawn anyway, for diagnostic purposes, immediately on arrival; and that immediate medical treatment could delay (or otherwise distort the results of) a blood draw conducted later, upon receipt of a warrant, thus reducing its evidentiary value. See *McNeely*, supra, at 156, 133 S.Ct. 1552 (plurality opinion). All of that sets this case apart from the uncomplicated drunk-driving scenarios addressed in *McNeely*. Just as the ramifications of a car accident pushed *Schmerber* over the line into exigency, so does the condition of an unconscious driver bring his blood draw under the exception. In such a case, as in *Schmerber*, an officer could “reasonably have believed that he was confronted with an emergency.” 384 U.S., at 770, 86 S.Ct. 1826.

Indeed, in many unconscious-driver cases, the exigency will be more acute, as elaborated in the briefing and argument in this case. A driver so drunk as to lose consciousness is quite likely to crash, especially if he passes out before managing to park. And then the accident might give officers a slew of urgent tasks beyond that of securing (and working around) medical care for the suspect. Police may have to ensure that others who are injured receive prompt medical attention; they may have to provide first aid themselves until medical personnel arrive at the scene. In some cases, they may have to deal with fatalities. They may have to preserve evidence at the scene and block or redirect traffic to prevent further accidents. These pressing matters, too, would require responsible officers to put off applying for a warrant, and that would only exacerbate the delay—and imprecision—of any subsequent BAC test.

In sum, all these rival priorities would put officers, who must often engage in a form of triage, to a dilemma. It would force them to choose between prioritizing a warrant application, to the detriment of critical health and safety needs, and delaying the warrant application, and thus the BAC test, to the detriment of its evidentiary value and all the compelling interests served by BAC limits. This is just the kind of scenario for which the exigency rule was born—just the kind of grim dilemma it lives to dissolve.

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7. See *id.*, at 593–594.

8. See J. Kwasnoski, G. Partridge, & J. Stephen, Officer’s DUI Handbook 142 (6th ed. 2013) (“[M]ost hospitals routinely withdraw blood from the driver immediately upon admittance”); see also E. Mitchell & R. Medzon, *Introduction to Emergency Medicine* 269 (2005) (“Serum glucose and blood alcohol concentrations are two pieces of information that are of paramount importance when an apparently intoxicated patient arrives at the [emergency room]”). Mayo Clinic, *Alcohol Poisoning: Diagnosis & Treatment* (2019), https://www.mayoclinic.org/diseases-conditions/alcohol-poisoning/diagnosis-treatment/drc-20354392. In this respect, the case for allowing a blood draw is stronger here than in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). In the latter, it gave us pause that blood draws involve piercing a person’s skin. See *id.*, at 762, 770, 86 S.Ct. 1826. But since unconscious suspects will often have their skin pierced and blood drawn for diagnostic purposes, allowing law enforcement to use blood taken from that initial piercing would not increase the bodily intrusion. In fact, dispensing with the warrant rule could lessen the intrusion. It could enable authorities to use blood obtained by hospital staff when the suspect is admitted rather than having to wait to hear back about a warrant and then order what might be a second blood draw.
more easily. But even in our age of rapid communication,

“[w]arrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review. Telephonic and electronic warrants may still require officers to follow time-consuming formalities designed to create an adequate record, such as preparing a duplicate warrant before calling the magistrate judge. . . . And improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest.” McNeely, 569 U.S., at 155, 133 S.Ct. 1552.

In other words, with better technology, the time required has shrunk, but it has not disappeared. In the emergency scenarios created by unconscious drivers, forcing police to put off other tasks for even a relatively short period of time may have terrible collateral costs. That is just what it means for these situations to be emergencies.

IV

[18, 19] When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment. We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. Because Mitchell did not have a chance to attempt to make that showing, a remand for that purpose is necessary.

* * *

The judgment of the Supreme Court of Wisconsin is vacated, and the case is remanded for further proceedings.

It is so ordered.

Justice THOMAS, concurring in the judgment.

Today, the plurality adopts a difficult-to-administer rule: Exigent circumstances are generally present when police encounter a person suspected of drunk driving—except when they aren’t. Compare ante, at 2537, with ante, at 2539. The plurality’s presumption will rarely be rebutted, but it will nevertheless burden both officers and courts who must attempt to apply it. “The better (and far simpler) way to resolve” this case is to apply “the per se rule” I proposed in Missouri v. McNeely, 569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013) (dissenting opinion). Birchfield v. North Dakota, 579 U.S. ––––, ––––, 136 S.Ct. 2160, 2197, 195 L.Ed.2d 560 (2016) (THOMAS, J., concurring in judgment in part and dissenting in part). Under that rule, the natural metabolization of alcohol in the blood stream “creates an exigency once police have probable cause to believe the driver is drunk,” regardless of whether the driver is conscious. Id., at ––––, 136 S.Ct., at 2198. Because I am of the view that the Wisconsin Supreme Court should apply that rule on remand, I concur only in the judgment.

I

The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” Although the Fourth Amendment does not, by its text,
require that searches be supported by a warrant, see *Groh v. Ramirez*, 540 U.S. 551, 571–573, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (THOMAS, J., dissenting), “this Court has inferred that a warrant must generally be secured” for a search to comply with the Fourth Amendment, *Kentucky v. King*, 563 U.S. 452, 459, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011). We have also recognized, however, that this warrant presumption “may be overcome in some circumstances because ‘[t]he ultimate touchstone of the Fourth Amendment is “reasonableness.” ’” *Ibid.* Accordingly, we have held that “the warrant requirement is subject to certain reasonable exceptions.” *Ibid.*

In recent years, this Court has twice considered whether warrantless blood draws fall within an exception to the warrant requirement. First, in *McNeely*, a divided court held that the natural metabolization of alcohol in the bloodstream does not present a *per se* exigency that justifies an exception to the Fourth Amendment’s warrant requirement. 569 U.S., at 145, 133 S.Ct. 1552. Then, in *Birchfield*, we held that blood draws may not be administered as a search incident to a lawful arrest for drunk driving. 579 U.S., at ––––, 136 S.Ct., at 2184–85. The question we face in this case is whether the blood draw here fell within one of the “reasonable exceptions” to the warrant requirement.

II

The “exigent circumstances” exception applies when “the needs of law enforcement [are] so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.” *King*, 563 U.S., at 460, 131 S.Ct. 1849 (internal quotation marks omitted). Applying this doctrine, the Court has held that officers may conduct a warrantless search when failure to act would result in “the imminent destruction of evidence.” *Ibid.* (internal quotation marks omitted).

As I have explained before, “the imminent destruction of evidence” is a risk in every drunk-driving arrest and thus “implicates the exigent-circumstances doctrine.” *McNeely*, 569 U.S., at 178, 133 S.Ct. 1552. “Once police arrest a suspect for drunk driving, each passing minute eliminates probative evidence of the crime” as alcohol dissipates from the bloodstream. *Id.*, at 177, 133 S.Ct. 1552. In many States, this “rapid destruction of evidence,” *id.*, at 178, 133 S.Ct. 1552, is particularly problematic because the penalty for drunk driving depends in part on the driver’s blood alcohol concentration, see *ante*, at 2536. Because the provisions of Wisconsin law at issue here allow blood draws only when the driver is suspected of impaired driving, *ante*, at 2531 – 2532, they fit easily within the exigency exception to the warrant requirement.

Instead of adopting this straightforward rule, the plurality makes a flawed distinction between ordinary drunk-driving cases in which blood alcohol concentration evidence “is dissipating” and those that also include “some other [pressing] factor.” *Ante*, at 2533, 2537, 2539. But whether “some other factor creates pressing health, safety, or law-enforcement needs that would take priority over a warrant application” is irrelevant. *Ante*, at 2537. When police have probable cause to conclude that an individual was driving drunk, probative evidence is dissipating by the minute. And that evidence dissipates regardless of whether police had another reason to draw the driver’s blood or whether “a warrant application would interfere with other pressing needs or duties.” *Ante*, at 2539. The destruction of evidence alone is sufficient to justify a warrantless search based on exigent circumstances. See generally
Presumably, the plurality draws these lines to avoid overturning *McNeely*. See *id.*, at 156, 133 S.Ct. 1552 (majority opinion) (holding that “the natural dissipation of alcohol in the blood” does not “categorically” support a finding of exigency). But *McNeely* was wrongly decided, see *id.*, at 176–183, 133 S.Ct. 1552 (opinion of THOMAS, J.), and our decision in *Birchfield* has already undermined its rationale. Specifically, the Court determined in *McNeely* that “[t]he context of blood testing is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a now or never situation.” 569 U.S., at 153, 133 S.Ct. 1552 (majority opinion) (internal quotation marks omitted). But the Court stated in *Birchfield* that a distinction between “an arrestee’s active destruction of evidence and the loss of evidence due to a natural process makes little sense.” 579 U.S., at 2182; see also ante, at 2536 – 2537. Moreover, to the extent *McNeely* was grounded in the belief that a *per se* rule was inconsistent with the “case by case,” “totality of the circumstances” analysis ordinarily applied in exigent-circumstances cases, see 569 U.S., at 156, 133 S.Ct. 1552, that rationale was suspect from the start. That the exigent-circumstances exception might ordinarily require “an evaluation of the particular facts of each case,” *Birchfield*, supra, at ———, 136 S.Ct., at 2183, does not foreclose us from recognizing that a certain, dispositive fact is always present in some categories of cases. In other words, acknowledging that destruction of evidence is at issue in every drunk-driving case does not undermine the general totality-of-the-circumstances approach that *McNeely* and *Birchfield* endorsed. Cf. ante, at 2535, n. 3.

* * *


Justice SOTOMAYOR, with whom Justice GINSBURG and Justice KAGAN join, dissenting.

The plurality’s decision rests on the false premise that today’s holding is necessary to spare law enforcement from a choice between attending to emergency situations and securing evidence used to enforce state drunk-driving laws. Not so. To be sure, drunk driving poses significant dangers that Wisconsin and other States must be able to curb. But the question here is narrow: What must police do before ordering a blood draw of a person suspected of drunk driving who has become unconscious? Under the Fourth Amendment, the answer is clear: If there is time, get a warrant.

The State of Wisconsin conceded in the state courts that it had time to get a warrant to draw Gerald Mitchell’s blood, and that should be the end of the matter. Because the plurality needlessly casts aside the established protections of the warrant requirement in favor of a brand new presumption of exigent circumstances that Wisconsin does not urge, that the state courts did not consider, and that
In May 2013, Wisconsin police received a report that Gerald Mitchell, seemingly intoxicated, had driven away from his apartment building. A police officer later found Mitchell walking near a lake, slurring his speech and walking with difficulty. His van was parked nearby. The officer administered a preliminary breath test, which revealed a blood-alcohol concentration (BAC) of 0.24%. The officer arrested Mitchell for operating a vehicle while intoxicated.

Once at the police station, the officer placed Mitchell in a holding cell, where Mitchell began to drift into either sleep or unconsciousness. At that point, the officer decided against administering a more definitive breath test and instead took Mitchell to the hospital for a blood test. Mitchell became fully unconscious on the way. At the hospital, the officer read Mitchell a notice, required by Wisconsin’s so-called “implied consent” law, which gave him the opportunity to refuse BAC testing. See Wis. Stat. § 343.305 (2016). But Mitchell was too incapacitated to respond. The officer then asked the hospital to test Mitchell’s blood. Mitchell’s blood was drawn about 90 minutes after his arrest, and the test revealed a BAC of 0.22%. At no point did the officer attempt to secure a warrant.

Mitchell was charged with violating two Wisconsin drunk-driving laws. See §§ 346.63(1)(a), (b). He moved to suppress the blood-test results, arguing that the warrantless blood draw was an unreasonable search under the Fourth Amendment. In response, Wisconsin conceded that exigent circumstances did not justify the warrantless blood draw. As the State’s attorney told the trial court, “There is nothing to suggest that this is a blood draw on any exigent circumstances situation when there has been a concern for exigency. This is not that case.” App. 134. Instead, Wisconsin argued that the warrantless blood draw was lawful because of Wisconsin’s implied-consent statute. Id., at 133.

The trial court denied Mitchell’s motion to suppress, and a jury convicted him of the charged offenses. On appeal, the State Court of Appeals noted that Wisconsin had “expressly disclaimed that it was relying on exigent circumstances to justify the draw,” id., at 64, and that this case offered a chance to clarify the law on implied consent because the case “is not susceptible to resolution on the ground of exigent circumstances,” id., at 66. The Court of Appeals then certified the appeal to the Wisconsin Supreme Court, identifying the sole issue on appeal as “whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin’s implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment.” Id., at 61.

On certification from the state appellate court, the Supreme Court of Wisconsin upheld the search. The Court granted certiorari to decide whether a statute like Wisconsin’s, which allows police to draw

1. Although the Wisconsin Supreme Court referred to the lapse in time between the arrest and the blood draw as lasting “approximately one hour,” App. 11, the state appellate court explained that Mitchell was arrested around 4:26 p.m. and that the blood draw took place at 5:59 p.m., id., at 63–64.

2. The Wisconsin Supreme Court rephrased the certified question, but, like the Court of Appeals, it recognized the State’s concession that the exigency exception did not apply and, accordingly, did not consider the issue in reaching its decision. See 2018 WI 84, ¶12, 383 Wis.2d 192, 202, 914 N.W.2d 151, 155.
blood from an unconscious drunk-driving suspect, provides an exception to the Fourth Amendment’s warrant requirement.

II

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons... against unreasonable searches and seizures.” When the aim of a search is to uncover evidence of a crime, the Fourth Amendment generally requires police to obtain a warrant. Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995).

The warrant requirement is not a mere formality; it ensures that necessary judgment calls are made “by a neutral and detached magistrate,” not “by the officer engaged in the often competitive enterprise of ferreting out crime.” Schmerber v. California, 384 U.S. 757, 770, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). A warrant thus serves as a check against searches that violate the Fourth Amendment by ensuring that a police officer is not made the sole interpreter of the Constitution’s protections. Accordingly, a search conducted without a warrant is “per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” Katz v. United States, 389 U.S. 347, 357, 86 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted); see Riley v. California, 573 U.S. 373, 382, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) (“In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement”).

The carefully circumscribed exceptions to the warrant requirement, as relevant here, include the exigent-circumstances exception, which applies when “the exigencies of the situation” make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable,” Kentucky v. King, 563 U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011) (some internal quotation marks omitted); the consent exception for cases where voluntary consent is given to the search, see, e.g., Georgia v. Randolph, 547 U.S. 103, 109, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006); and the exception for “searches incident to arrest,” see, e.g., Riley, 573 U.S., at 382, 134 S.Ct. 2473.

A

Blood draws are “searches” under the Fourth Amendment. The act of drawing a person’s blood, whether or not he is unconscious, “involve[s] a compelled physical intrusion beneath [the] skin and into [a person’s] veins,” all for the purpose of extracting evidence for a criminal investigation. Missouri v. McNeely, 569 U.S. 141, 148, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). The blood draw also “places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading.” Birchfield v. North Dakota, 579 U.S. ——, ——, 136 S.Ct. 2160, 2178, 195 L.Ed.2d 560 (2016), such as whether a person is pregnant, is taking certain medications, or suffers from an illness. That “invasion of bodily integrity” disturbs “an individual’s most personal and deep-rooted expectations of privacy.” McNeely, 569 U.S., at 148, 133 S.Ct. 1552.

For decades, this Court has stayed true to the Fourth Amendment’s warrant requirement and the narrowness of its exceptions, even in the face of attempts categorically to exempt blood testing from its protections. In Schmerber, a man was hospitalized following a car accident. 384 U.S., at 758, 86 S.Ct. 1826. At the scene of the accident and later at the hospital, a police officer noticed signs of intoxication, and he arrested Schmerber for drunk driving. Id.,
at 768–769, 86 S.Ct. 1826. Without obtaining a warrant, the officer ordered a blood draw to measure Schmerber's BAC, and Schmerber later challenged the blood test as an unreasonable search under the Fourth Amendment. Id., at 758–759, 86 S.Ct. 1826. The Court reinforced that search warrants are “ordinarily required ... where intrusions into the human body are concerned,” id., at 770, 86 S.Ct. 1826, but it ultimately held that exigent circumstances justified the particular search at issue because certain “special facts”—namely, an unusual delay caused by the investigation at the scene and the subsequent hospital trip—left the police with “no time to seek out a magistrate and secure a warrant” before losing the evidence. Id., at 770–771, 86 S.Ct. 1826.

More recently, in McNeely, the Court held that blood tests are not categorically exempt from the warrant requirement, explaining that exigency “must be determined case by case based on the totality of the circumstances.” 569 U.S., at 156, 133 S.Ct. 1552. “[T]he natural dissipation of alcohol in the blood may support a finding of exigency in a specific case,” but “it does not do so categorically.” Ibid. If officers “can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search,” the Court made clear, “the Fourth Amendment mandates that they do so.” Id., at 152, 133 S.Ct. 1552; see id., at 167, 133 S.Ct. 1552 (ROBERTS, C.J., concurring in part and dissenting in part) (“The natural dissipation of alcohol in the bloodstream ... would qualify as an exigent circumstance, except that there may be time to secure a warrant before blood can be drawn. If there is, an officer must seek a warrant”).

In Birchfield, the Court rejected another attempt categorically to exempt blood draws from the warrant requirement. 579 U.S., at ——, 136 S.Ct., at 2184. The Court considered whether warrantless breath and blood tests to determine a person's BAC level were permissible as searches incident to arrest. The Court held that warrantless breath tests were permitted because they are insufficiently intrusive to outweigh the State’s need for BAC testing. See ibid. As to blood tests, however, the Court held the opposite: Because they are significantly more intrusive than breath tests, the warrant requirement applies unless particular exigent circumstances prevent officers from obtaining a warrant. Ibid.; see id., at ——, 136 S.Ct., at 2184 (“Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception ... when there is not”).

B

Those cases resolve this one. Schmerber and McNeely establish that there is no categorical exigency exception for blood draws, although exigent circumstances might justify a warrantless blood draw on the facts of a particular case. And from Birchfield, we know that warrantless blood draws cannot be justified as searches incident to arrest. The lesson is straightforward: Unless there is too little time to do so, police officers must get a warrant before

3. The Court in Birchfield concluded as much even while acknowledging that, in some cases, the suspect would be unconscious and thus unable to perform a breath test. 579 U.S., at ——, 136 S.Ct., at 2184–85 (“It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be”).
fore ordering a blood draw. See 579 U.S., at ——, 136 S.Ct., at 2184; McNeely, 569 U.S., at 152, 133 S.Ct. 1552.

Against this precedential backdrop, Wisconsin's primary argument has always been that Mitchell consented to the blood draw through the State's "implied-consent law." Under that statute, a motorist who drives on the State's roads is "deemed" to have consented to a blood draw, breath test, and urine test, and that supposed consent allows a warrantless blood draw from an unconscious motorist as long as the police have probable cause to believe that the motorist has violated one of the State's impaired driving statutes. See Wis. Stat. § 343.305.

The plurality does not rely on the consent exception here. See ante, at 2532. With that sliver of the plurality's reasoning I agree. I would go further and hold that the state statute, however phrased, cannot itself create the actual and informed consent that the Fourth Amendment requires. See Randolph, 547 U.S., at 109, 126 S.Ct. 1515 (describing the "voluntary consent" exception to the warrant requirement as " 'jealously and carefully drawn' "); Bumper v. North Carolina, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968) (stating that consent must be "freely and voluntarily given"); see also Schneckloth v. Bustamonte, 412 U.S. 218, 226–227, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (explaining that the existence of consent must "be determined from the totality of all the circumstances"). That should be the end of this case.

III

Rather than simply applying this Court’s precedents to address—and reject—Wisconsin's implied-consent theory, the plurality today takes the extraordinary step of relying on an issue, exigency, that Wisconsin has affirmatively waived.4 Wisconsin has not once, in any of its briefing before this Court or the state courts, argued that exigent circumstances were present here. In fact, in the state proceedings, Wisconsin "conceded" that the exigency exception does not justify the warrantless blood draw in this case. App. 66; see 2018 WI 84, ¶12, 383 Wis.2d 192, 202, 914 N.W.2d 151, 155 ("The State expressly stated that it was not relying on exigent circumstances to justify the blood draw"). Accordingly, the state courts proceeded on the acknowledgment that no exigency is at issue here. As the Wisconsin Court of Appeals put it:

"In particular, this case is not susceptible to resolution on the ground of exigent circumstances. No testimony was received that would support the conclusion that exigent circumstances justified the warrantless blood draw. [The officer] expressed agnosticism as to how long it would have taken to obtain a warrant, and he never once testified (or even implied) that there was no time to get a warrant." App. 66.

The exigency issue is therefore waived—that is, knowingly and intentionally aban-

4. The plurality criticizes me for supposedly suggesting that today's decision is based on a "case-specific showing of exigent circumstances." Ante, at 2534 n. 2. But I acknowledge that the plurality does not go so far as to decide that exigent circumstances justify the search in Mitchell's case, perhaps because the facts here support no such conclusion. See infra, at 2550. Indeed, rather than confine itself to the facts and legal issues actually presented in this case, the plurality instead creates a new de facto categorical rule out of thin air. The plurality does so without any evidence that such a rule is necessary in all, or even most, cases. See infra, at 2550. That the plurality reaches out to determine the rights of all drivers, rather than just Mitchell, makes today's decision more misguided, not less.
doned, see Wood v. Milyard, 566 U.S. 463, 474, 132 S.Ct. 1826, 182 L.Ed.2d 733 (2012)—and the Court should not have considered it. See, e.g., Heckler v. Campbell, 461 U.S. 458, 468, n. 12, 103 S.Ct. 1952, 76 L.Ed.2d 66 (1983); cf. Alabama v. Shelton, 535 U.S. 654, 674, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002) ("We confine our review to the ruling the Alabama Supreme Court made in the case as presented to it").

Rather than hold Wisconsin to a concession from which it has never wavered, the plurality takes on the waived theory. As "'a court of review, not of first view,'" however, this Court is not in the business of volunteering new rationales neither raised nor addressed below, and even less ones that no party has raised here. Timbs v. Indiana, 586 U.S. —, —, 139 S.Ct. 682, 690, 203 L.Ed.2d 11 (2019); see, e.g., Star Athletica, L. L. C. v. Varsity Brands, Inc., 580 U.S. —, —, 137 S.Ct. 1002, 1009, 197 L.Ed.2d 354 (2017); cf. Kentucky v. Stincer, 482 U.S. 730, 747–748, n. 22, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987) (declining to review a respondent’s previously unraised claim "[b]ecause the judgment [was] that of a state court" and no “exceptional” circumstances were present).

There are good reasons for this restraint. Ensuring that an issue has been fully litigated allows the Court "the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." Yee v. Escondido, 503 U.S. 519, 538, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). It also reflects a central "‘premise of our adversarial system’: Courts sit to resolve disputes among the parties, not ‘as self-directed boards of legal inquiry and research.’" Lebron v. National Railroad Passenger Corporation, 513 U.S. 374, 408, 115 S.Ct. 1002, 1009, 197 L.Ed.2d 354 (2017) (O’Connor, J., dissenting) (quoting Carducci v. Regan, 714 F.2d 171, 177 (CADC 1983) (Scalia, J.)).

These rules, in other words, beget more informed decisionmaking by the Court and ensure greater fairness to litigants, who cannot be expected to respond preemptively to arguments that live only in the minds of the Justices. Cf. Granite Rock Co. v. Teamsters, 561 U.S. 287, 306, and n. 14, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010); Yee, 503 U.S., at 535–536, 112 S.Ct. 1522. These principles should apply with greater force when the issues were not merely forfeited but affirmatively "conceded" below, App. 66, and where, as here, the question is one of constitutional dimension. The plurality acts recklessly in failing to honor these fundamental principles here.5

IV

There are good reasons why Wisconsin never asked any court to consider applying

5. A related but distinct point: The issue on which the plurality resolves this case is not "fairly included" in the question on which the Court granted certiorari. See this Court’s Rule 14.1(a). The Court granted certiorari to answer "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.” Pet. for Cert. ii; accord, ante, at 2532–2533. The answer to that question is no. Whether exigent circumstances nevertheless require that the warrantless blood draw be upheld is an independent issue. True, that issue might affect the same "category of cases," ante, at 2534, n. 2, but that would be true of all sorts of matters not fairly included in the question on which this Court granted certiorari. "Both [issues] might be subsidiary to a question embracing both—[Was suppression appropriate?]—but they exist side by side, neither encompassing the other.” Yee v. Escondido, 503 U.S. 519, 537, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). This Court applies a "heavy presumption against" venturing beyond the question presented, even when the parties ask it to do so. Ibid. Here, of course, the plurality ventures forth to provide guidance entirely of its own accord. One wonders why the Court asked for briefing and oral argument at all.
any version of the exigency exception here: This Court’s precedents foreclose it. According to the plurality, when the police attempt to obtain a blood sample from a person suspected of drunk driving, there will “almost always” be exigent circumstances if the person falls unconscious. Ante, at 2530. As this case demonstrates, however, the fact that a suspect fell unconscious at some point before the blood draw does not mean that there was insufficient time to get a warrant. And if the police have time to secure a warrant before the blood draw, “the Fourth Amendment mandates that they do so.” McNeely, 569 U.S., at 152, 133 S.Ct. 1552. In discarding that rule for its own, the plurality may not “revisit” McNeely, ante, at 2534, but the plurality does ignore it.

A

The exigent-circumstances exception to the Fourth Amendment warrant requirement applies if the State can demonstrate a “compelling need for official action and no time to secure a warrant.” Michigan v. Tyler, 436 U.S. 499, 509, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978); see also King, 563 U.S., at 460, 131 S.Ct. 1849 (The exception applies “when the exigencies of the situation” make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable” (some internal quotation marks omitted)). The Court has identified exigencies when officers need to enter a home without a warrant to provide assistance to a “seriously injured” occupant or one facing an imminent threat of such injury, Brigham City v. Stuart, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006); when officers are in “hot pursuit” of a fleeing suspect, United States v. Santana, 427 U.S. 38, 42–43, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976); and when officers need to enter a burning building to extinguish a fire, Tyler, 436 U.S., at 509, 98 S.Ct. 1942.

Blood draws implicate a different type of exigency. The Court has “recognized that in some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence.” McNeely, 569 U.S., at 149, 133 S.Ct. 1552. To determine whether exigent circumstances justify a warrantless search, the Court “looks to the totality of circumstances” in the particular case. Ibid. “The critical point is that . . . the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case.” Riley, 573 U.S., at 402, 134 S.Ct. 2473.

In McNeely, Missouri urged the Court to adopt a categorical rule that the natural dissipation of alcohol from a person’s bloodstream will always create exigent circumstances that allow police officers to order a blood draw without obtaining a warrant. 569 U.S., at 149–150, 133 S.Ct. 1552. The Court declined. Even though the gradual dissipation of a person’s BAC means that “a significant delay in testing will negatively affect the probative value” of a blood test, eight Justices hewed to the traditional, “case-by-case assessment of exigency,” given that police will at least in some instances have time to get a warrant. Id., at 152, 133 S.Ct. 1552; see id., at 166–167, 133 S.Ct. 1552 (opinion of ROBERTS, C.J.); id., at 175, 133 S.Ct. 1552 (“The majority answers ‘It depends,’ and so do I”).

In that way, cases involving blood draws are “different in critical respects” from the typical destruction-of-evidence case that presents police officers with a “‘now or never’” situation. Id., at 153, 133 S.Ct. 1552 (opinion of the Court). Unlike situations in which “police are just outside the door to a home” and “evidence is about to be destroyed, a person is about to be
injured, or a fire has broken out,” some delay is inherent when officers seek a blood test regardless of whether officers are required to obtain a warrant first. Id., at 171, 133 S.Ct. 1552 (opinion of ROBERTS, C.J.); see id., at 153, 133 S.Ct. 1552 (opinion of the Court). In the typical situation, the police cannot test a person’s blood as soon as the person is arrested; police officers do not draw blood roadside. Rather, they generally must transport the drunk-driving suspect to a hospital or other medical facility and wait for a medical professional to draw the blood. That built-in delay may give police officers time to seek a warrant, especially if the suspect is brought to the hospital by an officer or emergency-response professional other than the one who applies for the warrant.

Moreover, although “the alcohol level in a person’s blood begins to dissipate once the alcohol is fully absorbed,” id., at 152, 133 S.Ct. 1552, it does so “over time in a gradual and relatively predictable manner,” id., at 153, 133 S.Ct. 1552. Thus, even though BAC evidence is of course critical for law enforcement purposes, “the fact that the dissipation persists for some time means that the police—although they may not be able to do anything about it right away—may still be able to respond to the ongoing destruction of evidence later on.” Id., at 172, 133 S.Ct. 1552 (opinion of ROBERTS, C.J.). For one, there may well be time for police officers to get a warrant before a person’s BAC drops significantly. See id., at 172–173, 133 S.Ct. 1552. In addition, assuming delays do not stretch so long as to cause accuracy concerns, “experts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense.” Id., at 156, 133 S.Ct. 1552 (opinion of the Court). Contrary to the plurality’s fear mongering, in other words, a small delay to obtain a warrant is hardly a recipe for lawless roadways.

Meanwhile, as the Court has observed, significant technological advances have allowed for “more expeditious processing of warrant applications.” Id., at 154, 133 S.Ct. 1552; see Riley, 573 U.S., at 401, 134 S.Ct. 2473. In the federal system, magistrate judges can issue warrants based on sworn testimony communicated over the phone or through “‘other reliable electronic means.’” McNeely, 569 U.S., at 154, 133 S.Ct. 1552 (quoting Fed. Rule Crim. Proc. 4.1). In a sizable majority of States, police officers can apply for warrants “remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing.” McNeely, 569 U.S., at 154, 133 S.Ct. 1552; see ibid., n. 4 (collecting state statutes). And the use of “standard-form warrant applications” has streamlined the warrant process in many States as well, especially in this context. Id., at 154–155, 133 S.Ct. 1552. As a result, judges can often issue warrants in 5 to 15 minutes. Id., at 173, 133 S.Ct. 1552 (opinion of ROBERTS, C.J.). Of course, securing a warrant will always take some time, and that time will vary case to case. But “[t]here might . . . be time to obtain a warrant in many cases.” Id., at 172, 133 S.Ct. 1552. Thus, as McNeely made clear, the exigency exception is appropriate only in those cases in which time is not on the officer’s side.

**B**

The reasons the Court gave for rejecting a categorical exigency exception in McNeely apply with full force when the suspected drunk driver is (or becomes) unconscious.

In these cases, there is still a period of delay during which a police officer might take steps to secure a warrant. Indeed, as the plurality observes, see ante, at 2537–2538, that delay is guaranteed because an unconscious person will need to be trans-
ported to the hospital for medical attention. Such a delay occurred in Mitchell's case, even more so than it did in McNeely's. See McNeely, 569 U.S., at 145–146, 133 S.Ct. 1552 (explaining that the police officer transported McNeely first to the police station and then to the hospital for blood testing, taking approximately 25 minutes); App. 63–64 (explaining that the police officer arrested Mitchell, drove him to the police station, placed him in a holding cell, and then transported him to the hospital and obtained a blood sample over the course of 90 minutes).

Likewise, an unconscious person's BAC dissipates just as gradually and predictably as a conscious person's does. Furthermore, because unconsciousness is more likely to occur at higher BACs, see Martin, Measuring Acute Alcohol Impairment, in Forensic Issues in Alcohol Testing 1, 8 (S. Karch ed. 2008), the BACs of suspected drunk drivers who are unconscious will presumably be higher above the legal limit—and thus remain above the legal limit for longer—than is true for suspects who are conscious and close to sobering up. And, of course, the process for getting a warrant remains the same.

All told, the mere fact that a person is unconscious does not materially change the calculation that the Court made in McNeely when it rejected a categorical exigency exception for blood draws. In many cases, even when the suspect falls unconscious, police officers will have sufficient time to secure a warrant—meaning that the Fourth Amendment requires that they do so.

C

The plurality distinguishes unconscious drunk-driving suspects from others based on the fact that their unconsciousness means that they will, invariably, need urgent medical attention due to their loss of consciousness. See ante, at 2537–2538. But the need for medical care is not unique to unconscious suspects. "Drunk drivers often end up in an emergency room," whether or not they are unconscious when the police encounter them. See McNeely, 569 U.S., at 171, 133 S.Ct. 1552 (opinion of ROBERTS, C.J.). The defendant in Schmerber was hospitalized, yet the Court did not, in that case or in McNeely decades later, promulgate a categorical exception for every warrantless blood draw. That Mitchell was hospitalized is likewise insufficient here. Even if the plurality is right that every suspect who loses consciousness will need medical care, not every medical response will interfere with law enforcement's ability to secure a warrant before ordering a blood draw. See McNeely, 569 U.S., at 153–154, 133 S.Ct. 1552; id., at 171–172, 133 S.Ct. 1552 (opinion of ROBERTS, C.J.).

6. The plurality’s new rule, in addition to requiring a defendant to prove that the officer had no time to get a warrant, also appears to require the defendant to show that his blood would not have been drawn absent law enforcement’s need for a blood sample. See ante, at 2539. That is, a suspect can never prevail under the new rule if the hospital staff draws his blood for its own noninvestigatory medical reasons. But, again, the relevant question is whether the evidence is likely to dissipate before the police can obtain a warrant. This particular aspect of the plurality’s approach offers no help in answering that question. The plurality separately suggests that, because an unconscious person may well undergo a blood test for medical purposes regardless, its de facto categorical exception “could lessen the intrusion” of a blood draw. See ante, at 2538, n. 8. But the fact that “people voluntarily submit to the taking of blood samples as part of a physical examination,” Birchfield v. North Dakota, 579 U.S. 169, 136 S.Ct. 2160, 2178, 195 L.Ed.2d 560 (2016), does not make the process any less intrusive when performed at the behest of law enforcement. Although one piercing is of course less cumbersome than two, the privacy
Because the precedent is so squarely against it, the plurality devotes much of its opinion instead to painting a dire picture: the scene of a drunk-driving-related accident, where police officers must tend to the unconscious person, others who need medical attention, oncoming traffic, and investigatory needs. See \textit{ante}, at 2538. There is no indication, however, in the record or elsewhere that the tableau of horribles the plurality depicts materializes in most cases. Such circumstances are certainly not present in this case, in which the police encountered Mitchell alone, after he had parked and left his car; indeed, Mitchell lost consciousness over an hour after he was found walking along the lake. The potential variation in circumstances is a good reason to decide each case on its own facts, as \textit{McNeely} instructs and as the Court did in \textit{Schmerber}. See \textit{McNeely}, 569 U.S., at 149–151, 156, 133 S.Ct. 1552. The plurality instead bases its \textit{de facto} categorical exigency exception on nothing more than a “'considerable overgeneralization,'” id., at 153, 133 S.Ct. 1552, as well as empirical assumptions that the parties not only lacked a chance to address, but that are also belied by Wisconsin’s concession in this case.\footnote{In addition to offering a justification for Wisconsin's warrantless search that the State itself has disavowed, the plurality also relieves all States of their burden to justify similar warrantless searches. Until now, the Court has said that "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches." \textit{Welsh v. Wisconsin}, 466 U.S. 740, 749–750, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984); see \textit{Coolidge v. New Hampshire}, 403 U.S. 443, 455, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Today, the plurality turns that presumption on its head in favor of a new one that "almost always" authorizes the police to conduct warrantless blood draws even in the absence of an actual emergency. See \textit{ante}, at 2530.}

If and when a case like the one the plurality imagines does arise, however, the police officers would not be "force[d] . . . to choose between" the "rival priorities" of getting a warrant and attending to "critical health and safety needs." \textit{Ante}, at 2538. Of course, the police and other first responders must dutifully attend to any urgent medical needs of the driver and any others at the scene; no one suggests that the warrant process should interfere with medical care. The point is that, in many cases, the police will have enough time to address medical needs and still get a warrant before the putative evidence (i.e., any alcohol in the suspect's blood) dissipates. And if police officers "are truly confronted with a 'now or never' situation," they will be able to rely on the exigent-circumstances exception to order the blood draw immediately. \textit{McNeely}, 569 U.S., at 153, 133 S.Ct. 1552 (some internal quotation marks omitted); \textit{Riley}, 573 U.S., at 391, 134 S.Ct. 2473. In any other situation, though—such as in Mitchell's and in many others—the officers can secure a warrant.

\textbf{V}

The Fourth Amendment, as interpreted by our precedents, requires police officers seeking to draw blood from a person suspected of drunk driving to get a warrant if possible. That rule should resolve this case.

The plurality misguidedly departs from this rule, setting forth its own convoluted counterpresumption instead. But the Fourth Amendment is not as pliable as the plurality suggests. The warrant requirement safeguards privacy and physical autonomy by "assuring citizens" that searches "are not the random or arbitrary interests at stake go well beyond physical discomfort. See \textit{supra}, at 2532–2533; \textit{Birchfield}, 579 U.S., at ——, 136 S.Ct., at 2178; \textit{McNeely}, 569 U.S., at 148, 133 S.Ct. 1552.

There is no doubt that drunk drivers create grave danger on our roads. It is, however, “[p]recisely because the need for action . . . is manifest” in such cases that “the need for vigilance against unconstitutional excess is great.” *Id.*, at 635, 109 S.Ct. 1402 (Marshall, J., dissenting). “Requiring a warrant whenever practicable helps ensure that when blood draws occur, they are indeed justified.” *McNeely*, 569 U.S., at 174, 133 S.Ct. 1552 (opinion of ROBERTS, C.J.). For that reason, “the police bear a heavy burden” to justify a warrantless search like the one here based on “urgent need.” *Welsh v. Wisconsin*, 466 U.S. 740, 749–750, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984).

The plurality today carries that burden for a State that never asked it to do so, not only here but also in a scattershot mass of future cases. Acting entirely on its own freewheeling instincts—with no briefing or decision below on the question—the plurality permits officers to order a blood draw of an unconscious person in all but the rarest cases, even when there is ample time to obtain a warrant. The plurality may believe it is helping to ameliorate the scourge of drunk driving, but what it really does is to strike another needless blow at the protections guaranteed by the Fourth Amendment. With respect, I dissent.

Justice GORSUCH, dissenting.

We took this case to decide whether Wisconsin drivers impliedly consent to blood alcohol tests thanks to a state statute. That law says that anyone driving in Wisconsin agrees—by the very act of driving—to testing under certain circumstances. But the Court today declines to answer the question presented. Instead, it upholds Wisconsin’s law on an entirely different ground—citing the exigent circumstances doctrine. While I do not doubt that the Court may affirm for any reason supported by the record, the application of the exigent circumstances doctrine in this area poses complex and difficult questions that neither the parties nor the courts below discussed. Rather than proceeding solely by self-direction, I would have dismissed this case as improvidently granted and waited for a case presenting the exigent circumstances question.

DEPARTMENT OF COMMERCE, et al., Petitioners

v.

NEW YORK, et al.

No. 18-966

Supreme Court of the United States.

Argued April 23, 2019

Decided June 27, 2019

Background: States, District of Columbia, counties, cities, a group of mayors, and non-governmental organizations (NGO) brought actions challenging decision of Secretary of Commerce to reinstate in decennial census a question concerning citizenship status, asserting claims under the Enumeration Clause, the Equal Protection Clause, the Census Act, and the Administrative Procedure Act (APA). After consolidation of actions, the United States District Court for the Southern District of New York, Jesse M. Furman, J., 315 F.Supp.3d 766, dismissed the Enumeration Clause claim, and later, 333
ment was entered and the creditor seeks a charging order, then the creditor must engage in a two-step process to obtain an effective charging order: “(1) Domesticate the money judgment in the LLC’s state of formation [and] (2) Seek a charging order from a competent court in that state.” Bishop, LLC Charging Orders, 12 No. 3 Bus. Entities, at 21. After doing so, “[t]he LLC would be clearly bound by the order, and ignoring it would invite a contempt penalty.” Id.

¶ 42 In this scenario, Chase would have needed to domesticate the Arizona judgment in Colorado and then to obtain and serve Colorado charging orders. Again assuming without deciding that domesticking the Arizona judgment and then domesticking the Arizona charging orders would suffice to satisfy these requirements, Chase did not acquire effective charging orders until, at the earliest, August 11, 2014, when it domesticate its Arizona charging orders in Colorado.5

¶ 43 For these reasons, whether we analyze this case as implicating either in rem jurisdiction over Fowler’s membership interests or personal jurisdiction over the LLCs, Chase’s charging orders did not become effective until, at the earliest, August 11, 2014, which was after the McClures had obtained and served effective charging orders on the LLCs.

¶ 44 Accordingly, we agree with the division that the McClures’ charging orders had priority over Chase’s later-effective charging orders. See Union Colony, 832 P.2d at 1115–17.

III. Conclusion

¶ 45 For these reasons, we affirm the judgment of the court of appeals.

5. One commentator has noted that personal jurisdiction over the LLC may not be required because in complying with a charging order, “the LLC is simply carrying out an order rendered by any court of jurisdiction.” Id. Under this view, the LLC need only assure itself that the court had jurisdiction to enter the order against the debtor-member, and the judgment creditor’s domestication of that order in the LLC’s state of formation would likely provide the requisite assurance. See id. Thereafter, service of the foreign state’s charging order on the LLC would likely be deemed sufficient. See id. Like the above-described scenarios, however, this approach would not assist Chase here because even if it were enough for Chase to domesticate and serve the Arizona charging orders, it did so, at the earliest, on August 11, 2014, after the McClures obtained and served their charging orders.
Reversed.

Eid, J., filed concurring opinion in which Rice and Coats, JJ., joined.

1. Criminal Law ☞1134.49(4)
   Review of a trial court’s suppression order presents a mixed question of fact and law.

2. Criminal Law ☞1139, 1158.12
   When reviewing a trial court’s suppression order, the appellate court defers to the trial court’s findings of fact that are supported by the record, but assesses the legal effect of those facts de novo.

3. Automobiles ☞418
   A blood draw conducted pursuant to the state’s expressed consent statute must comport with the Fourth Amendment to the United States Constitution, which prohibits unreasonable searches and seizures.  U.S. Const. Amend. 4; Colo. Rev. Stat. Ann. § 42-4-1301.1.

4. Searches and Seizures ☞23, 24
   Before the government may conduct a search, the Fourth Amendment generally requires a warrant; still, the ultimate measure of the constitutionality of a government search is reasonableness.  U.S. Const. Amend. 4.

5. Searches and Seizures ☞24
   A warrantless search is reasonable if it falls within one of certain recognized exceptions to the warrant requirement.  U.S. Const. Amend. 4.

6. Searches and Seizures ☞180
   The consent exception to the warrant requirement may justify a warrantless search if it is the product of an essentially free and unconstrained choice by its maker.  U.S. Const. Amend. 4.

7. Searches and Seizures ☞180
   Consent which would otherwise permit a warrantless search is rendered involuntary if it is the result of duress or coercion, express or implied, or any other form of undue influence exercised by the police against the defendant.  U.S. Const. Amend. 4.

8. Automobiles ☞420
   By choosing to drive in state, driver gave his statutory consent, under expressed consent statute, to chemical testing in the event that law enforcement officers found him unconscious and had probable cause to believe he was guilty of driving under the influence of alcohol (DUI).  U.S. Const. Amend. 4; Colo. Rev. Stat. Ann. § 42-4-1301.1(8).

9. Automobiles ☞420
   Driver’s statutory consent, pursuant to state’s expressed consent statute, to chemical testing in the event that law enforcement officers found him unconscious and had probable cause to believe that he was guilty of driving under the influence of alcohol (DUI) satisfied consent exception to Fourth Amendment warrant requirement and, thus, warrantless blood draw conducted while driver was unconscious, based on probable cause of DUI, did not violate Fourth Amendment.  U.S. Const. Amend. 4; Colo. Rev. Stat. Ann. § 42-4-1301.1(8).

10. Automobiles ☞414
    There is no constitutional right to refuse a blood-alcohol test; any opportunity to refuse chemical testing is simply a matter of grace bestowed by the state legislature.

11. Statutes ☞1407
    The legislature’s use of the word “shall” in a statute generally indicates its intent for the term to be mandatory.

12. Automobiles ☞412
    Constitutional Law ☞3733
    Provision of state’s expressed consent statute permitting a blood-alcohol test on an unconscious driver suspected of driving under the influence of alcohol (DUI) did not involve a suspect class or abridge a fundamental right and, thus, driver’s challenge to statute as violating Equal Protection Clause would be reviewed under rational basis standard of review.  U.S. Const. Amend. 14; Colo. Rev. Stat. Ann. § 42-4-1301.1(8).
 ¶ 1 The defendant, Oliver Hyde, was involved in a single-vehicle accident that left him unconscious. The police suspected that he might have been driving under the influence of alcohol. Hyde was transported to the hospital, and, in accordance with Colorado law, a sample of his blood was taken to establish his blood-alcohol concentration ("BAC").

 ¶ 2 Hyde was charged with driving under the influence of alcohol ("DUI"). He sought to have the result of the blood test suppressed as evidence obtained through an illegal search in violation of the Fourth Amendment to the United States Constitution. The trial court granted his motion to suppress, and the People filed this interlocutory appeal.

 ¶ 3 In this opinion, we consider whether this warrantless blood draw violated the Fourth Amendment's prohibition on unreasonable searches. By driving in Colorado, Hyde consented to the terms of the Express Consent Statute, including its requirement that he submit to blood-alcohol testing under the circumstances present here. Hyde's statutory consent satisfied the consent exception to the Fourth Amendment warrant requirement. We therefore conclude that in the circumstances presented here, the blood draw was constitutional. Accordingly, we reverse the trial court's suppression order.

I. Facts and Procedural History

 ¶ 4 On February 10, 2015, just after midnight, Aurora Police Department ("APD") officers responded to an accident at Iliff Avenue and I-225, where the defendant had driven his pickup truck into a light pole, despite seemingly safe driving conditions. One of the first officers to arrive on the scene found Hyde unconscious, pinned in the driver's seat, with blood gurgling from his mouth. She got within a few inches of Hyde to determine whether he was breathing and smelled alcohol. Passengers in the truck explained that they had attended a basketball game earlier that evening; one passenger stated that Hyde had consumed three beers. After fire personnel extracted Hyde from the
truck, an ambulance crew took him to a nearby hospital. En route, Hyde regained consciousness and became combative. Therefore, the ambulance crew sedated him.

¶ 5 APD requested that hospital staff perform a blood draw, which revealed that slightly less than two hours after the accident, Hyde’s BAC was 0.06. That BAC level permits an inference that Hyde drove while impaired by the consumption of alcohol. See § 42-4-1301(6)(a)(II), C.R.S. (2016). Because Hyde was unconscious, APD did not ask for his consent before ordering the blood draw. APD also did not seek a search warrant.

¶ 6 The People charged Hyde with DUI. Hyde sought to suppress the blood-draw evidence, arguing that the police lacked probable cause to request a blood-alcohol test and that, by conducting a warrantless draw without his contemporaneous consent, the police violated his Fourth Amendment right to be free from unreasonable searches.

¶ 7 The trial court found there was probable cause to believe Hyde was driving under the influence, but it agreed with Hyde that the warrantless blood draw, administered while he was unconscious and had no opportunity to refuse, violated the Fourth Amendment. Relying primarily on Missouri v. McNeely, — U.S. —, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), and the plurality opinion in People v. Schaufele, 2014 CO 43, 325 P.3d 330, 338 (examining the standards of review this court has historically applied to questions of voluntariness); People v. Matheny, 46 P.3d 453, 459 (Colo.2002) (“When a constitutional right is implicated ... appellate courts should not defer to a lower court’s judgment when applying legal standards to the facts found by the trial court.”).

II. Standard of Review

¶ 9 Review of a trial court’s suppression order presents a mixed question of fact and law. People v. Munoz-Gutierrez, 2015 CO 9, ¶ 14, 342 P.3d 439, 443. We defer to the trial court’s findings of fact that are supported by the record, but we assess the legal effect of those facts de novo. Id.; see also People v. Chavez-Barragan, 2016 CO 66, ¶¶ 33–35, 379 P.3d 330, 338 (examining the standards of review this court has historically applied to questions of voluntariness); People v. Matheny, 46 P.3d 453, 459 (Colo.2002) (“When a constitutional right is implicated ... appellate courts should not defer to a lower court’s judgment when applying legal standards to the facts found by the trial court.”).

III. Analysis

¶ 10 We begin with an overview of the relevant provisions of Colorado’s Expressed Consent Statute and the Fourth Amendment to the United States Constitution. We then consider whether the blood draw conducted in this case was permissible under the Fourth Amendment. By driving in Colorado, Hyde consented to the terms of the Expressed Consent Statute, including its requirement that he submit to blood-alcohol testing under the circumstances present here. Hyde’s statutory consent satisfied the consent exception to the Fourth Amendment warrant requirement. We therefore conclude that in the circumstances presented here, the blood draw was constitutional. Accordingly, we reverse the trial court’s suppression order.

A. The Legal Backdrop

¶ 11 With the rise of motor vehicle usage in the twentieth century, states found themselves confronting a grave problem: the devastating consequences of drunk drivers on the nation’s roadways. Birchfield v. North Dakota, — U.S. —, 136 S.Ct. 2160, 2167, 195 L.Ed.2d 560 (2016). In response, states enacted laws making it illegal to drive while intoxicated. Id. But a prohibition on drunk driving was not enough to conquer the problem. In order to obtain evidence necessary for securing convictions under the new laws,
states began to enact implied consent laws designed to encourage drivers to submit to blood-alcohol tests. See Comment, The Theory and Practice of Implied Consent in Colorado, 47 U. Colo. L. Rev. 723, 724 (1976); Colo. Legis. Council, Research Pub. No. 123, Highway Safety in Colorado 43 (1966) (“Advocates of implied consent argue that a much greater conviction rate could be obtained against persons charged with driving while under the influence than at present through adoption of implied consent legislation.”). These laws “require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense.” McNeely, 133 S.Ct. at 1566 (plurality opinion).

¶ 12 Colorado first enacted an implied consent statute in 1967. Ch. 356, sec. 2, § 13-5-30(3), 1967 Colo. Sess. Laws 753, 753–55. The current version of the law is the Expressed Consent Statute (“the Statute”), codified at section 42-4-1301.1. The Statute provides that any person who drives in the state is required to submit to a test to determine the alcoholic content of the person’s blood or breath when requested to do so by a law enforcement officer who has probable cause to believe the person was driving under the influence of alcohol. § 42-4-1301.1(2)(a)(I). The Statute also states that “[a]ny person who drives any motor vehicle through the state shall be deemed to have expressed such person’s consent to the provisions of this section.” § 42-4-1301.1(1).

¶ 13 A conscious driver who refuses to submit to a test is subject to certain administrative and evidentiary consequences spelled out in the statutory scheme. See § 42-2-126(3)(c)(I), C.R.S. (2016) (refusal leads to revocation of driver’s license); § 42-4-1301(6)(d), C.R.S. (2016) (refusal admissible at trial to prove guilt of DUI).

¶ 14 An unconscious driver, on the other hand, “shall be tested to determine the alcohol or drug content of the person’s blood.” § 42-4-1301.1(8). In other words, under the Expressed Consent Statute, the police need not wait until a drunk-driving suspect returns to consciousness, in order to afford that suspect an opportunity to refuse.

3

¶ 15 A blood draw conducted pursuant to the Statute must comport with the Fourth Amendment to the United States Constitution, which prohibits unreasonable searches and seizures. U.S. Const. amend. IV; see also Colo. Const. art. II, § 7; Eddie’s Leaf Spring Shop & Towing LLC v. Colo. Pub. Utils. Comm’n, 218 P.3d 326, 333 (Colo. 2009) (“The Colorado and U.S. Constitutions are generally coextensive with regard to warrantless searches and seizures.”); McNeely, 133 S.Ct. at 1558 (majority opinion) (explaining that a blood draw is a search).

4, 5

¶ 16 Before the government may conduct a search, the Fourth Amendment generally requires a warrant. See Kentucky v. King, 563 U.S. 452, 459, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011). Still, “the ultimate measure of the constitutionality of a governmental search is ‘reasonableness.’ ” Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). A warrantless search is reasonable if it falls within one of certain recognized exceptions to the warrant requirement. King, 563 U.S. at 459, 131 S.Ct. 1849; see also People v. Rodriguez, 945 P.2d 1351, 1359 (Colo.1997) (“Generally, warrantless searches and seizures are per se unreasonable unless they satisfy one of the specifically established and clearly articulated exceptions to the warrant requirement.”).

¶ 17 From time to time, the United States Supreme Court has been presented with cases questioning whether warrantless blood tests are nevertheless reasonable under the Fourth Amendment. In Schmerber v. California, 384 U.S. 757, 758–59, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), law enforcement arrested the petitioner for DUI and ordered a blood test conducted despite the petitioner’s refusal to consent. The petitioner claimed the blood-test result was the product of an unconstitutional search and sought to have it excluded from evidence. Id. at 766–67, 86

1. Though Colorado’s statute is phrased in terms of “expressed consent,” its language and effect are similar to “implied consent” laws in other states. Compare § 42-4-1301.1 (Colorado’s Ex-
The Court explained that “the Fourth Amendment’s proper function is to constrain, not against all intrusions . . . , but against intrusions which are not justified in the circumstances, or which are made in an improper manner.” Id. at 768, 86 S.Ct. 1826. In the specific circumstances presented in the petitioner’s case, the Court concluded that the need to procure BAC evidence before it was naturally eliminated from the petitioner’s blood justified the warrantless test. Id. at 770–71, 86 S.Ct. 1826 (“Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant.”).

¶18 More recently, in McNeely, the Supreme Court clarified that the body’s natural metabolization of alcohol does not create an exigency in all circumstances. 133 S.Ct. at 1563 (“While the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in Schmerber, it does not do so categorically.”). However, while the Court rejected a per se exigency justification for warrantless blood tests, the plurality spoke approvingly of implied consent laws such as Colorado’s as alternate means for states to enforce their drunk-driving laws and secure BAC evidence. Id. at 1566 (plurality opinion).

¶19 The Supreme Court’s latest examination of warrantless blood tests in the drunk-driving context occurred last term, when the Court decided Birchfield v. North Dakota, 136 S.Ct. 2160, 195 L.Ed.2d 560. In that case, a trio of petitioners challenged state laws imposing criminal—rather than merely administrative or evidentiary—penalties on lawfully arrested drivers who refuse to submit to blood or breath testing. See id. at 2185. On its way to reaching a determination on the validity of those laws, the Court considered whether the search-incident-to-arrest exception to the Fourth Amendment warrant requirement can justify warrantless chemical testing. The Court concluded that a warrantless breath test is constitutionally permissible as a search incident to a lawful arrest for drunk driving, but a blood test, which it found more intrusive, is not. Id. at 2184–85.

[6, 7] ¶20 Although the Birchfield Court ruled out justifying warrantless blood tests on the basis of the search-incident-to-arrest exception, it expressed approval for justifying them on the basis of still another exception: consent. The consent exception to the warrant requirement may justify a warrantless search if it is “the product of an essentially free and unconstrained choice by its maker.” People v. Licea, 918 P.2d 1109, 1112 (Colo.1996) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 225, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). Consent is involuntary if it is “the result of duress or coercion, express or implied, or any other form of undue influence exercised [by the police] against the defendant.” Munoz-Gutierrez, ¶ 17, 342 P.3d at 444 (alteration in original) (quoting People v. Magallanes-Aragon, 948 P.2d 528, 531 (Colo.1997)).

¶21 In Birchfield, the Court endorsed the use of implied consent laws like Colorado’s Expressed Consent Statute to secure BAC evidence in compliance with the Fourth Amendment. The Court explained: “It is well established that a search is reasonable when the subject consents, and that sometimes consent to a search need not be express but may be fairly inferred from context.” 136 S.Ct. at 2185 (citation omitted). The Court went on to affirm the constitutionality of implied consent laws that impose civil penalties and evidentiary consequences on drivers who refuse to comply with blood-alcohol testing, id., as the Expressed Consent Statute does.

¶22 With this legal backdrop in mind, we now consider whether the warrantless blood draw conducted while Hyde was unconscious violated the Fourth Amendment.

B. The Blood Draw Was Constitutional

[8, 9] ¶23 By choosing to drive in the state of Colorado, Hyde gave his statutory consent to chemical testing in the event that law enforcement officers found him unconscious and had probable cause to believe he
was guilty of DUI. § 42-4-1301.1(1) (“Any person who drives any motor vehicle . . . throughout this state shall be deemed to have expressed such person’s consent to the provisions of [the Expressed Consent Statute].”).

¶ 24 Hyde’s statutory consent also satisfied the consent exception to the Fourth Amendment warrant requirement. This conclusion flows from recent Supreme Court precedent. As discussed above, in McNeely, 133 S.Ct. at 1563 (majority opinion), the Supreme Court held that there is no categorical, per se exigency exception to the warrant requirement based on the natural dissipation of alcohol in the bloodstream. While Hyde suggests that this means that all warrantless, non-exigent, forced blood draws are unconstitutional, McNeely was not so broad. McNeely concerned the exigent-circumstances exception exclusively. And the McNeely plurality underscored the utility of implied consent laws such as Colorado’s Expressed Consent Statute. See id. at 1566 (plurality opinion).

¶ 25 The Supreme Court reaffirmed its approval of implied consent laws in Birchfield. The respondents in that case argued that warrantless blood draws “are justified based on the driver’s legally implied consent to submit to them.” Birchfield, 136 S.Ct. at 2185. In response, the Court explained: “Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.” Id. (emphasis added) (citations omitted).

¶ 26 True, the Court’s approval extended only to implied consent laws that impose civil penalties if a driver refuses to take a blood test; the Court considered laws that impose criminal penalties on a driver’s refusal to be going a step too far. See id. But Colorado’s Expressed Consent Statute falls into the former category—the Statute imposes only civil, and not criminal, penalties on drivers who refuse to submit to a blood test. Birchfield therefore sanctions the warrantless blood draw that was conducted here on the basis of statutory consent.

We recognize that section 42-4-1301.1(8) does not explicitly mention probable cause. But it mandates that “[a]ny person who is dead or unconscious shall be tested to determine the alcohol or drug content of the person’s blood . . . as provided in this section.” § 42-4-1301.1(8) (emphasis added). We read “as provided in this section” to incorporate the probable cause requirement contained in section 42-4-1301.1(5), which states: “The tests shall be administered at the direction of a law enforcement officer having probable cause to believe that the person had been driving a motor vehicle in violation of [the prohibitions on DUI]. . . .” The People do not dispute the existence of this probable cause requirement. Hyde does not now challenge the trial court’s factual determination that there was probable cause to believe that he was driving under the influence.

3. While we reach this conclusion in the unconscious-driver situation presented here, we do not intend to suggest that a law enforcement officer may forcibly conduct a blood draw on any driver who has revoked his or her statutory consent by refusing to submit to a blood-alcohol test—in fact, the Expressed Consent Statute forbids forced draws, except when there is probable cause to believe the driver has committed one of a limited number of enumerated crimes. § 42-4-1301.1(3) (“No law enforcement officer shall physically restrain any person for the purpose of obtaining a specimen of such person’s blood, breath, saliva, or urine for testing except when the officer has probable cause to believe that the person has committed criminally negligent homicide . . . , vehicular homicide . . . , assault in the third degree . . . , or vehicular assault . . . , and the person is refusing to take or to complete [a test]. . . .”).

4. In Birchfield, the Court briefly touched on the problem of securing BAC evidence from unconscious drivers, noting that “the police may apply for a warrant if need be.” Id. at 2184–85. But this statement was made in the context of the Court’s discussion of whether blood draws may be justified under the search-incident-to-arrest exception to the warrant requirement. The Court concluded that they may not. Id. at 2185. The Court approved of the use of implied consent laws to secure BAC evidence, id., and the Birchfield opinion does not call into question the constitutionality of section 42-4-1301.1(8).
74 L.Ed.2d 748 (1983) ("[A] person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test."); Cox v. People, 735 P.2d 153, 155 n.3 (Colo.1987) ("[T]here is no constitutional right to refuse to submit to a chemical test for blood alcohol content."); Brewer v. Motor Vehicle Div., 720 P.2d 564, 568 (Colo.1986) (same). To the contrary, any opportunity to refuse chemical testing is "simply a matter of grace bestowed by the [state] legislature." Neville, 459 U.S. at 565, 103 S.Ct. 916.

¶ 28 The plain language of the Expressed Consent Statute indicates that the Colorado legislature did not intend to bestow that grace upon unconscious drivers. Section 42-4-1301.1(8) provides that an unconscious driver "shall be tested to determine [blood-alcohol content]." (Emphasis added.) The legislature's use of the word "shall" in a statute generally indicates its intent for the term to be mandatory. See, e.g., Pearson v. Dist. Court, 924 P.2d 512, 516 (Colo.1996); People v. Dist. Court, 713 P.2d 918, 921 (Colo.1986). Thus, Hyde had neither a constitutional nor a statutory right to refuse the blood draw.

¶ 29 Hyde relies on Schaufele, which, like this case, involved an unconscious driver and a warrantless blood draw suppressed by the trial court. But in Schaufele, the People sought—and were denied—a rule that would justify the warrantless blood draw based on the exigent-circumstances exception to the warrant requirement. See Schaufele, ¶¶ 2–3, 325 P.3d at 1062 (plurality opinion). Here, the People expressly waived exigent circumstances as a justification for the blood draw. Because exigent circumstances are not at issue, Schaufele is inapposite.5

¶ 30 Finally, we respond to Hyde's argument that allowing a blood test on an unconscious driver violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, by treating an unconscious driver differently from a conscious driver, who is given the opportunity to refuse a test. Because section 42-4-1301.1(8) does not involve a suspect class or abridge a fundamental right, we analyze Hyde's challenge under the rational basis standard of review. See Higgs v. W. Landscaping & Sprinkler Sys., Inc., 804 P.2d 161, 164 (Colo.1991). Under this standard, "a statutory classification will stand if it bears a rational relationship to legitimate governmental objectives and is not unreasonable, arbitrary, or capricious." HealthONE v. Rodriguez ex rel. Rodriguez, 50 P.3d 879, 883 (Colo.2002). A classification analyzed under the rational basis standard is presumed to be constitutional, and the party challenging the classification bears the burden of proving its unconstitutionality beyond a reasonable doubt. Id.

¶ 31 Hyde has not met that burden. When drivers are unconscious, law enforcement officers are deprived of the evidence they typically rely on in drunk-driving prosecutions: unlike conscious drivers, unconscious drivers cannot perform roadside maneuvers, display speech or conduct indicative of alcohol impairment, or admit to alcohol consumption. In order to effectively combat drunk driving, the state needs some means of gathering evidence to deter and prosecute drunk drivers who wind up unconscious. Section 42-4-1301.1(8) satisfies that need. Therefore, Hyde's equal protection challenge, like his Fourth Amendment claim, fails.

IV. Conclusion

¶ 32 By driving in Colorado, Hyde consented to the terms of the Expressed Consent Statute, including its requirement that he submit to blood-alcohol testing under the circumstances present here. Hyde's statutory consent satisfied the consent exception to the Fourth Amendment warrant requirement. We therefore conclude that in the circumstances presented here, the blood draw was constitutional. Accordingly, we reverse the trial court's suppression order.

JUSTICE EID concurs in the judgment, and CHIEF JUSTICE RICE and JUSTICE COATS join in the concurrence in the judgment.

5. Furthermore, we do not see any conflict with the plurality's statement in Schaufele that "Colorado's express consent statute does not abrogate constitutional requirements." Id. at ¶ 28, 325 P.3d at 1066. Our holding today makes clear that Colorado's Expressed Consent Statute complies with constitutional requirements by satisfying the consent exception to the warrant requirement.
¶ 33 I agree with the majority's ultimate disposition in this case and in the two companion cases before the court, People v. Simpson, 2017 CO 25, 392 P.3d 1207, and Fitzgerald v. People, 2017 CO 26, 394 P.3d 671. I write separately, however, to explain why I believe the results reached today are consistent with the rationale adopted in Birchfield v. North Dakota, — U.S. —, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016). Specifically, Birchfield holds that traditional implied consent statutes such as Colorado’s—which deem drivers to have consented to BAC testing as a condition of driving upon the state’s roads and impose administrative and evidentiary consequences upon refusal to test—meet the dictates of the Fourth Amendment. In Birchfield, the Court reasoned that “inferr[ing]” such consent to search is reasonable, essentially as a matter of law, from the statutory “context.” Id. at 2185. This rationale easily disposes of the cases before us today. In Hyde, the defendant is deemed by statute to have consented to BAC testing by virtue of driving on the roads, making irrelevant his inability to consent (due to his unconscious state) at the scene. In Simpson, there is no impermissible coercion in informing the defendant that he has been deemed to have consented to testing as a result of driving, with administrative and evidentiary consequences for refusal, given that he was not threatened with criminal sanctions for refusal (the problem in Birchfield). And in Fitzgerald, there is no Fourth Amendment violation in imposing evidentiary sanctions for refusal to take a test to which the defendant was deemed to have impliedly consented. Because the majority does not fully embrace and apply this rationale, I respectfully concur only in the judgments it reaches.

¶ 34 As the majority points out, under Colorado’s Expressed Consent law—what other states call “implied consent”—anyone who drives in Colorado “shall be deemed to have expressed such person’s consent” to the provisions of section 42-4-1301.1, including taking a BAC test, either of breath or blood, when required to do so by a law enforcement officer. § 42-4-1301.1(1), (2)(a), C.R.S. (2016). If the driver refuses to submit to such testing, his or her driver’s license is revoked for a year or more, § 42-2-126(3)(c)(l), C.R.S. (2016), and evidence of such refusal is admissible at a subsequent trial for certain driving-related offenses. § 42-4-1301(6)(d), C.R.S. (2016). If the driver is unconscious, he or she “shall be tested” through administration of a blood test. § 42-4-1301.1(8), C.R.S. (2016). In this instance, Hyde was unconscious; once at the hospital, his blood was drawn and tested.

¶ 35 Hyde argued before the trial court that the results of his blood test should be suppressed because he was given no opportunity to refuse the test due to his unconscious state. The trial court agreed. The court relied on the plurality opinion of this court in People v. Schaufele, 2014 CO 43, ¶ 28, 325 P.3d 1060, 1066 (plurality opinion), which appeared to cast doubt on the validity of implied consent as an adequate justification under the Fourth Amendment. Specifically, the Schaufele plurality stated, in a passage cited by the trial court in this case, “[T]he trial court [in Schaufele] correctly noted that, notwithstanding Missouri’s implied consent statute, the Supreme Court presumed in [Missouri v. McNeely, ––– U.S. ––––, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013) (plurality opinion)] that the Fourth Amendment requires a search warrant before a blood draw, absent exigent circumstances. And it correctly noted that our own case law makes clear that Colorado’s express consent statute does not abrogate constitutional requirements.” Schaufele, ¶ 28, 325 P.3d at 1066 (emphasis added) (citation omitted). This passage from the Schaufele plurality seems to suggest that implied consent was not sufficient to justify a warrantless blood draw, and that instead the police would have to rely on exigent circumstances. See also id. at ¶ 42, 325 P.3d at 1065 (“Like Schaufele, the defendant [in McNeely] was subject to a statutory implied consent law due to his operation of a motor vehicle. Yet he successfully moved to suppress his blood draw results [on the ground that] . . . the police officer who ordered it did not attempt to secure a warrant.” (citation and footnote omitted)). But see id. at ¶ 42, 325 P.3d at 1068 (stating that the plurality “[did]...
not mean to imply that a warrant is always necessary in involuntary blood draw cases").

¶ 36 Today, the majority implicitly—and correctly, in my view—rejects this implication from Schaufele, recognizing that “[i]n Birchfield, the Court endorsed the use of implied consent laws like Colorado’s Expressed Consent Statute to secure BAC evidence in compliance with the Fourth Amendment.” Maj. op. ¶ 21; see also id. at ¶ 29 n.5 (noting that there is no conflict between the result it reaches and the Schaufele plurality’s statement that the expressed consent statute does not abrogate constitutional requirements, as those requirements are met by the statute). But the majority goes no further in analyzing Birchfield’s rationale for its approval of implied consent statutes like Colorado’s. See, e.g., maj. op. ¶¶ 21, 25 (noting Birchfield’s approval of implied consent laws).

¶ 37 The Court in Birchfield reasoned that traditional implied consent laws like Colorado’s—namely, laws that deem a person to have consented to BAC testing by virtue of driving, with administrative and evidentiary consequences for refusal to test—are reasonable under the Fourth Amendment. The initial question before the Court was whether a blood or breath test could be performed consistent with the Fourth Amendment as a search incident to arrest. See 136 S.Ct. at 2174 (“We therefore consider how the search-incident-to-arrest doctrine applies to breath and blood tests incident to such arrests.”). The Court stated that breath tests do not implicate significant privacy concerns, emphasizing that “the physical intrusion of the breath test is almost negligible.” Id. at 2176. Blood tests, by contrast, are significantly more intrusive, and “place[ ] in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading.” Id. at 2178. The Court went on to consider the need for BAC testing, which it determined to be “great.” Id. at 2184. “Having assessed the effect of BAC tests on privacy interests and the need for such tests,” the Court concluded that a warrantless breath test, but not a warrantless blood test, could be conducted as a search incident to arrest. Id. at 2184–85.

¶ 38 Because the warrantless blood test could not be justified by the search-incident-to-arrest doctrine, the Court moved on to consider the state’s alternate argument: that the test was justified by the driver’s implied consent. Id. at 2185. In considering whether the driver’s implied consent could justify the warrantless blood draw in question, the Court stated that “[i]t is well established that a search is reasonable when the subject consents.” Id. (citing Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). Further, the Court stated that “sometimes consent to a search need not be express but may be fairly inferred from context.” Id. For this proposition, the Court cited, inter alia, Marshall v. Barlow’s, Inc., 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), which involved implied consent principles as applied to highly regulated industries.1

¶ 39 From here, the Birchfield Court emphasized: “Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. See, e.g., [McNeely and South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) ]. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.” 136 S.Ct. at 2185 (emphasis added). The problem with using implied consent in the case before it, however, was that North Dakota—unlike Colorado—“impose[d] criminal penalties on the refusal to submit to such a test.” Id. According to the Court, “[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads,” id., and North Dakota had exceeded that limit by imposing a criminal sanction on refusal.

¶ 40 Importantly for the cases before us today, the Birchfield Court reaffirmed the

1. The Birchfield Court also cited Florida v. Jardines, — U.S. —, 133 S.Ct. 1409, 1415–16, 185 L.Ed.2d 495 (2013); the context there involved the front porch, where one implicitly consents to visitors knocking on the door, but not to visitors conducting a dog sniff.
validity of implied consent statutes that “infer[ ]” consent from the “context” of the search. Id. For example, the Court cited to Marshall, where the question was whether implied consent could justify an OSHA search of a plumbing business. OSHA pointed to cases involving highly regulated industries where there is “such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise.” Marshall, 436 U.S. at 313, 98 S.Ct. 1816 (citation omitted). The Court recognized that “[t]he businessman in a regulated industry in effect consents to the restrictions placed upon him.” Id. (citation omitted). The Court rejected OSHA’s reliance on this rationale, however, reasoning that a plumbing business would fall outside the category of highly regulated businesses in which consent to a search is implied. Id.

¶ 41 In both Birchfield and Marshall, the Court looked at the overall statutory regime in which the search was to take place, not the individual facts at the time the search was conducted, to determine whether implied consent would apply. To use Birchfield’s terminology, the Court essentially “inferred” consent as a matter of law from the “context.” Driving on the roads and being engaged in a highly regulated industry are two such contexts from which consent can be inferred. Reinforcing this point, the Birchfield Court remanded the case involving the North Dakota defendant for further proceedings to determine whether his consent was voluntary under the totality of the circumstances. 136 S.Ct. at 2186. Because implied consent could not support the search given the impermissible threat of criminal sanction, the Court left it to the state court on remand “to reevaluate [the defendant’s] consent given the partial inaccuracy of the officer’s advisory.” Id.

¶ 42 Applying this reasoning here, the defendants’ arguments in the three cases before us must fail. In this case, Hyde emphasizes that he was unconscious at the time and was incapable of consenting to the blood draw at the time it was performed. But in light of Birchfield, his consent is implied from the context of driving. In particular, section 42-4-1301.1(2)(a)(I) states that “[a] person who drives a motor vehicle upon the streets and highways and elsewhere throughout this state shall be required to take and complete, and to cooperate in the taking and completing of, any test or tests of the person’s breath or blood . . . when so requested and directed by a law enforcement officer.” (Emphasis added). Further, in the case of the unconscious driver such as Hyde, the driver is not “requested and directed” to take the test, but rather “shall be tested.” § 42-4-1301.1(8). Therefore, when the officers arrived at the scene, Hyde had already been deemed to have consented to a blood draw by virtue of the fact that he drove on the roads of Colorado. Under Birchfield, nothing more was necessary to comport with the Fourth Amendment. Thus, contrary to the trial court’s ruling in this case, it was of no consequence that Hyde was not in a position to consent at the scene, nor was it necessary for the police to obtain a warrant. Accordingly, the trial court’s suppression order should be reversed.

¶ 43 This rationale similarly disposes of the companion cases we address today. In Simpson, for example, the trial court’s suppression order was based on the same misunderstanding as the trial court’s ruling in this case—namely, that implied consent is insufficient to satisfy the dictates of the Fourth Amendment. The trial court reasoned that Simpson’s consent could not be voluntary because he was presented with a form stating that, by driving in Colorado, he had consented to taking a BAC test, and would face administrative and evidentiary consequences for refusal. Hearing Tr. 89 (finding that the form contained “express threats and statements that [Simpson] already consented to submit to a blood and breath test” and stating that “[u]nder those circumstances, . . . [the court] [has] to find that this does not constitute valid consent for [constitutional purposes]”).

¶ 44 The trial court’s reasoning is misguided because there can be no coercion in a form that accurately summarizes the relevant provisions of Colorado’s implied consent statute—namely, one that informs the defendant that a driver is deemed to have consented to
a BAC test by virtue of driving, and will face evidentiary and administrative consequences for refusing to be tested. Under Birchfield, implied consent is permissible here because, as noted above, the Colorado statute, unlike North Dakota’s, does not impose criminal sanctions for refusal to test, and Simpson makes no claim that he was threatened with criminal sanctions. Therefore, the majority should reverse the trial court’s suppression order on the ground that, because the form accurately summarized the relevant (and constitutionally sufficient) provisions of Colorado’s implied consent statute, it could not be coercive. Instead, the majority holds that there was no need for the trial court to assess Simpson’s consent at the time of his encounter with law enforcement, Simpson, 2017 CO 25, ¶ 25, 392 P.3d 1207, which is true, but only because the form was not coercive. See, e.g., Birchfield, 136 S.Ct. at 2186 (remanding case for voluntariness determination where implied consent could not support search given threat of criminal sanction).

¶ 45 Finally, in Fitzgerald, Fitzgerald argues that the introduction of evidence of his refusal to test at his trial for driving while ability impaired violated the Fourth Amendment. Fitzgerald’s argument must be rejected because, as noted above, the Birchfield Court held that statutes that imply consent to BAC testing from the act of driving, as well as impose evidentiary consequences for refusal, are reasonable under the Fourth Amendment. Therefore, the Supreme Court has more than “all but said” as much, as the majority concludes, Fitzgerald, 2017 CO 26, ¶ 26, 394 P.3d 671; it has said it. Accordingly, I would, on this ground, affirm the district court’s opinion affirming the county court’s disposition of the case.

¶ 46 In the end, these three cases raise the same question: does Colorado’s statute providing for implied consent satisfy the dictates of the Fourth Amendment under the circumstances of these cases. All three should be resolved with the same answer; yes. I therefore concur only in the judgment reached by the majority in the three cases.

I am authorized to state that CHIEF JUSTICE RICE and JUSTICE COATS join in this concurrence in the judgment.

2017 CO 37

Benjamin John ROMERO, Petitioner,

v.

The PEOPLE of the State of Colorado, Respondent.

Supreme Court Case No. 13SC791

Supreme Court of Colorado.

May 1, 2017

Background: Defendant was convicted in the District Court, Adams County, Chris Melonakis, J., of sexual assault on a child and sexual assault on a child as part of a pattern of abuse. Defendant appealed. The Court of Appeals affirmed. Defendant appealed.

Holdings: The Supreme Court, Rice, C.J., held that:

(1) any error by the trial court in not limiting jury access to recorded statements made by defendant and one of the alleged victims was not plain error;

(2) police officer could not give detailed testimony as a lay witness about “grooming” as it related to a sexual predator’s methods of acquiring victims; and

(3) police officer’s improper lay testimony about “grooming” was not harmless error.

Reversed and remanded.

1. Criminal Law ⇨1039

Review for plain error applied to the trial court’s decision not to limit jury access to recorded statements made by defendant and one of the victims in defendant’s trial for sexual assault on a child and sexual assault
The PEOPLE of the State of Colorado,
Plaintiff-Appellant,

v.

Andrew ROYBAL, Defendant-Appellee.

No. 82SA365.

Supreme Court of Colorado,
En Banc.


Defendant was charged with vehicular assault. Prior to trial, the District Court, City and County of Denver, Warren O. Martin, J., granted defendant's motion to suppress his statements relating to incident on ground that they were products of illegal arrest, and the State appealed. The Supreme Court, Lohr, J., held that: (1) defendant's oral statement made voluntarily, prior to being put in custody or under restraint of any kind, could not be suppressed as product of illegal arrest; (2) defendant's detention after preliminary questioning was arrest, not investigatory stop; and (3) there was no probable cause to arrest defendant for driving under influence of intoxicating liquor, and thus, defendant's written statement relating to incident, made after arrest, was inadmissible as product of illegal arrest.

Affirmed in part, reversed in part, and remanded.

Rovira, J., dissented and filed opinion, in which Lee, J., joined.

1. Criminal Law \(\equiv 412.1(3)\)

Where defendant's oral statement that he was missing driver of one of cars involved in accident was made voluntarily, prior to being put in custody or under restraint of any kind, statement should not have been suppressed prior to defendant's trial for vehicular assault as product of illegal arrest. C.R.S.1973, 18-3-205.

2. Arrest \(\equiv 63.5(7)\)

Whenever detention and questioning by police officer are more than brief and cursory there is "arrest," which must be supported by probable cause.

See publication Words and Phrases for other judicial constructions and definitions.

3. Arrest \(\equiv 63.5(7)\)

Where defendant suspected of driving under influence of intoxicating liquor remained in custody after initial questioning and was transported "downtown" in handcuffs for purpose of administering blood alcohol test, and there was no indication that decision of police to perform blood alcohol test was dependent in any way upon defendant's responses to previous questioning, defendant's detention was "arrest," not investigatory stop.

4. Arrest \(\equiv 63.4(2)\)

To pass constitutional muster, arrest must be supported by "probable cause," which exists when facts available to reasonably cautious officer at moment of arrest would warrant his belief that offense has been or is being committed by person to be detained.

See publication Words and Phrases for other judicial constructions and definitions.

5. Arrest \(\equiv 63.4(18)\)

Burden of proving facts constituting probable cause to arrest without warrant is on prosecution.

6. Automobiles \(\equiv 332\)

Odor of alcoholic beverage is not inconsistent with ability to operate motor vehicle in compliance with law. C.R.S.1973, 42-4-1202(2)(a).

7. Automobiles \(\equiv 349\)

Criminal Law \(\equiv 412(4)\)

Where there was no indication that defendant caused collision, and arresting officer observed none of common indicia of intoxication in defendant's speech, walk, or ability to understand, there was no probable cause to arrest defendant for driving under influence of intoxicating liquor, notwithstanding that officer noticed odor of alcoholic beverage about defendant, and thus, defendant's written statement relating to incident was inadmissible as product of ille-
The prosecution brings this interlocutory appeal from an order of the Denver District Court suppressing certain statements made by the defendant from use as evidence in his forthcoming trial on the charge of vehicular assault, section 18-3-205, C.R.S.1973 (1978 Repl.Vol. 8). We affirm in part and reverse in part.

The defendant, Andrew Roybal, was the driver of an automobile that was involved in a collision with another car at 18th Avenue and Logan Street in Denver in the early morning hours of May 3, 1980. Officer Eaton of the Denver Police Department, one of the investigating officers, was the sole witness at the suppression hearing and gave the following account of the events. Roybal's car was at the scene, but he was absent, when the officers arrived. During the course of the investigation the defendant returned and advised the officers that he was the driver of one of the vehicles and had left the scene earlier to call the police. Officer Eaton noticed an odor of alcoholic beverage about the defendant. The officers placed him in a police car, where one policeman advised him of his Miranda rights. Thereafter, while in the squad car at the accident scene, the defendant gave a written statement about the collision and his activities leading up to it.

The defendant was charged with vehicular assault, driving under the influence of intoxicating liquor and a narcotic drug, and reckless driving. The latter two charges were dismissed on the motion of the prosecution on the day set for trial.

The defendant moved to suppress all his statements relating to the incident on the ground, among others, that they were the products of an illegal arrest. This motion was heard immediately in advance of the scheduled trial. After hearing the evidence, the trial court suppressed the statements as the products of an arrest that violated the defendant's constitutional rights because it was not supported by probable cause to believe the defendant had committed a crime. The prosecution challenges that ruling on two bases. First, it contends that the trial court erred in concluding that there was no probable cause to arrest the defendant. Second, the People argue that even if the arrest was unconstitutional the defendant's verbal statement when he first returned to the accident scene preceded the arrest and should not have been suppressed. We agree with the second argument but not with the first. We begin by addressing that second contention.

I.

[1] Although the minute order based on the suppression hearing reflects that the defendant's motion to suppress was granted in its entirety, it is apparent from the transcript of the hearing that the trial judge focused on the written statement alone in making his ruling. A motion for clarification of the order most likely would have eliminated any need to appeal the suppression of the oral statement.

Officer Eaton's testimony is undisputed and unequivocal that, before the officers spoke to the defendant, Roybal approached them and volunteered that he was the missing driver. There is no support in the record for a conclusion that the defendant was in custody or under restraint of any kind when he made the oral statement. The sole basis on which the trial court grounded its


2. Section 42-4-1202(1)(a) and (1)(c), C.R.S. 1973.

suppression order was that the statements were products of an illegal arrest. As the evidence is undisputed that the oral statement preceded the defendant's arrest, the order suppressing that statement must be reversed.

II.

The People concede that Roybal was in custody when he gave his written statement and do not argue that the statement was not the product of that detention. Rather, the prosecution bases its argument for reversal on the assertion that, contrary to the court's ruling, there was probable cause to take the defendant into custody for the purpose of determining accurately the alcoholic content of his blood.4

The evidence at the suppression hearing was scanty. When the officers arrived at the scene they discovered that a driver was absent. After the officers began their investigation, the defendant appeared, volunteered that he was the missing driver, and stated that he had left the scene to call the police. Officer Eaton remembered that it was a “pretty serious accident”5 and that the defendant had “an odor of alcoholic beverage about him.” When questioned in detail by defense counsel, the officer said that Roybal “appeared coherent,” “seemed to walk in a fairly normal manner, didn’t have any problems talking or anything,” and seemed to understand the questions asked during the Miranda advisement. In the course of that questioning the following exchange took place:

Q: As I understand your testimony, other than just an odor of alcohol, nothing about him indicated to you he was intoxicated.

A: Well, I didn’t say he didn’t indicate to me he wasn’t [sic] intoxicated. I just said he appeared in a fairly normal manner, not what would you say overly drunk.

[2, 3] It is not entirely clear whether the People concede that the defendant was under arrest when he gave his written statement or whether by describing the custody as accomplished for the purpose of determining accurately the alcoholic content of his blood they are asserting that this was only an investigatory stop. See, e.g., Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); Stone v. People, 174 Colo. 504, 485 P.2d 496 (1971). It appears from the record, however, that the defendant remained in custody after his questioning and was transported “downtown” in handcuffs for the purpose of administering a blood alcohol test. There is no indication in the record that the decision of the police to perform the blood alcohol test was dependent in any way upon his responses to the questioning in the squad car. Whenever detention and questioning by a police officer are more than brief and cursory there is an arrest, which must be supported by probable cause. Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); People v. Schreyer, 640 P.2d 1147 (Colo.1982); People v. Tooker, 198 Colo. 496, 601 P.2d 1388 (1979). We believe the trial court correctly concluded that the defendant's detention was an arrest, not an investigatory stop, so the standards to test the constitutional validity of a brief investigative stop are not applicable here. See generally People v. Schreyer, supra.

[4, 5] To pass constitutional muster, an arrest must be supported by probable cause. E.g., People v. Gomez, 193 Colo. 208, 563

6. In Dunaway v. New York, supra, the United States Supreme Court recognized that whether a “seizure” has taken place for Fourth Amendment purposes is not dependent on the definition of “arrest” under state law. 442 U.S. at 212, 99 S.Ct. at 2256, 60 L.Ed.2d at 836. In People v. Schreyer, supra, we implicitly treated an arrest under Colorado law as equivalent to a Fourth Amendment seizure. See section 16–3–102, C.R.S.1973 (1978 Repl.Vol. 8).
PEOPLE v. ROYBAL
Cite as, Colo., 655 P.2d 410

P.2d 952 (1977). Probable cause to arrest exists when “facts available to a reasonably cautious officer at the moment of arrest would warrant his belief that an offense has been or is being committed” by the person to be detained. People v. Navran, 174 Colo. 222, 225, 483 P.2d 228, 230 (1971); accord, e.g., People v. Schreyer, supra; see section 16–3–102, C.R.S.1973 (1978 Repl.Vol. 8). The burden of proving facts constituting probable cause to arrest without a warrant is on the prosecution. E.g., People v. Eichelberger, 620 P.2d 1067 (Colo.1980); People v. Gomez, supra.

[6,7] The record is barren of evidence that the collision occurred as a result of misconduct by the defendant. All that we learn from the record is that an accident took place, the defendant was driving one of the cars involved, and he had an odor of alcoholic beverage about him. Although the officer’s testimony and his decision to administer a blood alcohol test are suggestive of an opinion that the defendant was under the influence of alcohol, the single objective fact to which he testified in support of any such conclusion is the odor of alcoholic beverage.7 An odor of alcoholic beverage is not inconsistent with ability to operate a motor vehicle in compliance with Colorado law. See section 42–4–1202(2)(a), C.R.S.1973 (1978 Repl.Vol. 8) (1982 Supp.). The prosecution argued to the trial court that the driving, the accident and the odor of alcoholic beverage taken together are enough to establish probable cause. Under the circumstances here, including the lack of any indication that the defendant was at fault in causing the collision, and officer Eaton’s testimony reflecting that he observed none of the common indicia of intoxication in the defendant’s speech, walk, and ability to understand, we agree with the trial court that the People did not carry their burden to prove the existence of probable cause.8 Therefore, we affirm the trial court’s order suppressing the written statement from use as evidence at the defendant’s trial.

We affirm in part, reverse in part, and remand the case for further proceedings.

ROVIRA, J., dissents, and LEE, J., joins in the dissent.

ROVIRA, Justice, dissenting:

I respectfully dissent from Part II of the majority opinion holding that there was not probable cause to take the defendant into custody and that probable cause was necessary.

A brief review of the facts and circumstances surrounding this case, in addition to those set out in the majority opinion, will be helpful. The accident in which the defendant was involved took place on May 3, 1980. He was charged with vehicular assault, driving under the influence of intoxicating liquor, and reckless driving. He failed to appear in court as required, and an alias

7. We find Eaton’s testimony that the defendant was not “overly drunk,” taken together with that officer’s statements that Roybal exhibited no significant problems in ability to walk, talk and understand, to be too ambiguous to be equated with an opinion that the defendant was under the influence of intoxicating liquor.

8. The prosecution has cited no case in which an odor of alcoholic beverage, without more, has been held to constitute probable cause to believe a person is under the influence of intoxicating liquor. Compare People v. Smith, 175 Colo. 212, 486 P.2d 8 (1971) (probable cause found to arrest driver who had an accident after driving in excess of eighty miles an hour where an odor of alcoholic beverage was present in the car and on the breath of several of the other occupants, but was not detected on the driver); Hall v. Charnes, 42 Colo.App. 111, 590 P.2d 516 (1979) (there were reasonable grounds to believe driver was under the influence of alcohol where his auto was weaving and speeding, there was an odor of alcoholic beverage on his breath, and he did not satisfactorily perform roadside sobriety test); and Gilbert v. Dolan, 41 Colo.App. 173, 586 P.2d 233 (1978) (there were reasonable grounds to believe a driver was under the influence of alcohol where he drove erratically, had a strong odor of alcoholic beverage on his breath, slurred speech, a staggered walk, and other indicia of intoxication) with Lucero v. Charnes, 44 Colo.App. 73, 607 P.2d 405 (1980) (no reasonable grounds to believe defendant was under influence of alcohol based on involvement in accident and having bloodshot, watery eyes). See generally People v. Helm, 633 P.2d 1071 (Colo.1981).
warrant for his arrest was issued on October 20, 1980. It was not until April 23, 1982, that the defendant was apprehended. His trial began on July 28, 1982, and on the next day, the defendant filed his motion to suppress, which is the subject of this interlocutory appeal.

Officer Eaton testified that the accident which he and his partner investigated on May 3, 1980, was serious enough to call in the traffic investigators. He further testified that the defendant approached him and his partner and stated that he was the driver of one of the cars involved in the accident and he had gone to call the police and just returned. Officer Eaton established without contradiction that the defendant had an odor of alcoholic beverage about him but was not staggering, did not have trouble walking, and seemed to understand the Miranda advisement that he had been given.

During the course of his examination and cross-examination, Officer Eaton was frank to admit that because of the passage of over two years from the date of the accident he could not remember every detail, and on more than one occasion stated that he would have to check his notes to refresh his recollection.

The trial court determined that the defendant was appropriately advised of his constitutional rights under Miranda and his written statement was voluntarily made. However, the court concluded there was no probable cause to arrest because the mere smell of alcohol on the defendant’s breath does not warrant an arrest for drunk driving.

The majority opinion does not find probable cause to arrest because all we know is that the defendant was driving a car involved in an accident and he had an odor of alcohol about him. In my view, there was probable cause to arrest because the officer knew that a serious accident had occurred at approximately 1:00 a.m., the defendant orally admitted he was one of the drivers, and he had an odor of alcoholic beverage about him. The fact that there was no evidence in the record of the suppression hearing to show that the defendant caused the accident is not relevant, as the purpose of the drunk-driving laws is not merely to punish those drivers who commit traffic violations while their ability is impaired by alcohol. See Johnson v. Motor Vehicle Division, 38 Colo.App. 230, 556 P.2d 488 (1976).

We have said on numerous occasions that probable cause to arrest exists where the facts and circumstances within an officer’s knowledge are sufficient to warrant a cautious and prudent officer’s believing, in light of his training and experience, that an offense has been committed and the person arrested committed it. People v. Vigil, 198 Colo. 185, 597 P.2d 567 (1979); People v. Gonzalez, 186 Colo. 48, 525 P.2d 1139 (1974).

We have also held that probable cause may be based on the personal observations of the arresting officer. People v. Saars, 196 Colo. 294, 584 P.2d 622 (1978). It has often been noted that experienced police officers “naturally develop an ability to perceive the unusual and suspicious which is of enormous value in the difficult task of protecting the security and safety of law-abiding citizens.” People v. Gale, 9 Cal.3d 788, 795–96, 108 Cal.Rptr. 852, 858, 511 P.2d 1204, 1210 (1973). The question of whether a person’s ability is impaired by alcohol is a highly subjective one in the absence of objective measures of blood-alcohol content. That the suppression hearing was held more than two years after the accident is the result of defendant’s failure to appear when required. It is hardly equitable to conclude that probable cause does not exist when the defendant has absented himself until memories have dimmed. In such a case, the court at the suppression hearing is deprived of “all the particularized perceptions which may have been so meaningful at the scene.” Id.

Probability, not certainty, is the touchstone of reasonableness, Hill v. California, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971), and it is under this standard that we should review the act of the officer in arresting the defendant. As we have stated so often, probable cause involves probabilities that “are not technical, but are factual

The citizens of Colorado have spoken frequently of their concern about drunken drivers on the highways. The mortality and injury statistics have clearly demonstrated that persons who drink and drive are a danger to themselves and others. The legislature has passed, and the Governor has approved, legislation to protect citizens and has placed a major portion of the responsibility for enforcing those laws on the police. The “implied consent” law, section 42-4-1202(3)(a), C.R.S.1973 (1982 Supp.), demonstrates the well-founded concern of the legislature of getting drinking drivers off the highway and protecting the lives and property of citizens.

In the case before us, the officers knew that a serious accident had occurred at 1:00 a.m. and the defendant had the smell of alcohol about him. Obviously, they did not know whether the defendant had consumed enough alcohol to raise the presumption that he was driving under the influence of intoxicating beverage or while his ability to drive was impaired. That knowledge could be obtained only after he was given the opportunity to take a blood or breath test pursuant to section 42-4-1202(3)(b), C.R.S. 1973. What the officers did know, however, was sufficient to meet the test of “sufficient probability” to arrest.

The majority makes much of the fact that other indicia of intoxication, such as slurred speech and a staggering gait, were not exhibited by the defendant. I believe that requirement of such indicia thwarts the administration of the drunk-driving laws. The legislature has seen fit to define two different offenses involving driving after drinking—driving while ability impaired by alcohol and driving under the influence of alcohol. Section 42-4-1202(2)(b), (c), C.R.S.1973 (1982 Supp.). A blood-alcohol content of between 0.05 percent and 0.10 percent raises a presumption of impairment, yet a person whose content is slightly over 0.05 percent often will not exhibit the gross indicia seemingly required by the majority. Nevertheless, their reflexes, coordination, and judgment are diminished to an extent rendering them less fit to drive.

Even if probable cause did not exist in this case, I would not suppress the statement, because I do not believe that full probable cause is required in such a circumstance. The majority's conclusion that the defendant was under arrest is based in part upon the fact that after the defendant made his statement he was handcuffed and taken “downtown” for the purpose of administering a blood-alcohol test. That fact, however, is largely irrelevant to the question of whether the defendant was under arrest at the time he made his statement.

There is nothing in the record, except the giving of Miranda warnings, to distinguish this case from the thousands of accident cases that occur every year in Colorado. When there is a traffic accident, the police generally fill out an accident report based upon what is told them by the parties, as well as upon their own observations. Quite often, the drivers' statements are taken in the patrol car. Although the trial court based its decision on the police officer's testimony that the defendant was not free to leave, that is a factor that is present in most accident investigations. Section 42-4-1406(1), C.R.S.1973 (1982 Supp.), requires the driver of a vehicle involved in a traffic accident, if so requested, to “remain at the scene of the accident until [the] police have arrived at the scene and completed their investigation thereat.” In other words, under the statute, the police have the authority to detain the drivers until they have completed their investigations. That is what they did here.

As mentioned above, the only distinguishing feature of this case is the fact that Miranda warnings were given. Curiously, these warnings appear to have converted an otherwise proper investigatory stop into an illegal arrest, despite the fact that we have previously held that the police officer's
characterization as either a "stop" or an "arrest" is not controlling. People v. Stevens, supra. See also People v. Pancoast, 644 P.2d 314 (1982) (The police officer's subjective state of mind as to whether suspect is free to leave is not the standard for determining whether and when a person has been arrested.) I am unable to perceive the benefits of creating a disincentive for the police to give Miranda warnings. The conclusion that because Miranda warnings are required if a person is interrogated while under arrest, a person is under arrest if the Miranda warnings are given, is logically flawed.

In my opinion, the majority is doing one of two things. One alternative is that it is declaring section 42-4-1406(1) unconstitutional sub silentio as permitting an "arrest" without probable cause. The other alternative is that the giving of Miranda warnings converts a detention permissible under section 42-4-1406(1) into an impermissible arrest if the warnings are given at a time when probable cause to arrest does not exist. I believe neither of these results desirable.

For all of the above reasons, I do not believe that the defendant's written statement should be suppressed.

LEE, J., joins in this dissent.

The PEOPLE of the State of Colorado, Plaintiff-Appellant,

v.

Caleb THOMPSON, Defendant-Appellee.

No. 81SA435.

Supreme Court of Colorado, En Banc.


Prosecution appealed order of the District Court, County of Douglas, Richard D. Turelli, J., dismissing charges against defendant on basis that evidence was insufficient to establish probable cause. The Supreme Court, Erickson, J., held that, district court erred when, in dismissing charges following preliminary hearing, it overlooked or ignored complicity statute.

Remanded with directions.

1. Criminal Law &le; 59(1)

To support responsibility under complicity statute, it is only necessary to prove that principal committed crime, knowledge by complicitor that principal intended to commit crime, and complicitor having requisite knowledge, did aid, abet or encourage principal in commission of crime. C.R.S. 1973, 18-1-603.

2. Criminal Law &le; 59(1)

Indictment and Information &le; 83

Complicity is not a separate and distinct crime or offense under criminal code and it is not necessary to specifically charge complicity; it is merely a theory by which defendant becomes accountable for criminal offense committed by another. C.R.S. 1973, 18-1-603.

3. Criminal Law &le; 238(3)

Trial court in dismissing charges against defendant following preliminary hearing erred in overlooking or ignoring complicity statute in light of fact that there was evidence to establish probable cause that four individuals participated in criminal episode and in assault and robbery of victim and there was extensive damage to victim's automobile from acts of four defendants and prosecution was not required to prove that defendants threw first rock at automobile or struck first blow to effectuate robbery or that he profited from acts of his partners to establish probable cause. C.R.S. 1973, 18-1-603.

Robert J. Gallagher, Jr., Dist. Atty., Catherine P. Richardson, Deputy Dist. Atty., Littleton, for plaintiff-appellant.