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Chief's Counsel: Should Police Officers Who Lie Be Terminated as a Matter of Public Policy?

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On September 5, 2007, the State of Washington published the first opinion holding that a police officer who lies should be terminated as a matter of public policy. In *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, the sheriff terminated Deputy LaFrance for untruthfulness and erratic behavior. An arbitrator agreed that LaFrance had repeatedly been untruthful but was not convinced that termination was the proper form of discipline; the arbitrator therefore ordered him returned to full duty. Eventually the case found its way to the appellate court, which concluded that the arbitration award was unenforceable as against public policy.¹ It relied primarily on the sheriff's conclusion that LaFrance was not fit for duty due to *Brady* concerns about his ability to testify. In *Brady v. Maryland*, the U.S. Supreme Court ruled that a prosecutor must release information favorable to an accused upon request;² therefore, if LaFrance were to testify in a criminal proceeding, the prosecutor would be legally and ethically obligated to disclose his history of untruthfulness to defense counsel. "Put simply, LaFrance's proven record of dishonesty prevents him from useful service as a law enforcement officer. To require his reinstatement to a position of great public trust in which he cannot possibly serve violates public policy."³

Supreme Court Rulings

The U.S. Supreme Court decision of *United Paper Workers International Union v. Moscow, Inc.*, recognized that a court might set aside an arbitration award if the arbitration award creates an explicit conflict with other laws and legal precedents.⁴ The effect of this public-policy decision in Washington State is that if officers are found to be intentionally untruthful, any appeal of their termination will be limited to the issue of whether the untruthfulness was proven. If so, no arbitration panel or judicial authority will be able to reduce the penalty.

In order for the Washington court to overturn the arbitration award, they had to find an explicit, well-defined, dominant public policy. To make such a finding, the court had to point to some case or statutory law that created such a public policy. The Washington court turned to *Brady* without articulating the extensive case law supporting its position.

Following *Brady*, the U.S. Supreme Court, in *Giglio v. United States*, held that when the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within the rule that suppression of material evidence justifies a new trial irrespective of good faith or bad faith of the prosecution.⁵ Together, the *Brady* and *Giglio* decisions hold essentially that the credibility of a government witness amounts to exculpatory evidence that must be turned over to defense counsel upon request.

In *United States v. Agurs*, the Supreme Court expanded this rule, holding that prosecutors have a constitutional duty to turn over exculpatory information voluntarily to defense counsel.⁶ In *United States v. Bagley*, the court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes.⁷ Elaborating on *Agurs*, the *Bagley* Court held that “regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, ‘if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’”⁸

The Supreme Court went one step further in the case of *Kyles v. Whitley*. In applying *Brady*, the Court determined that prosecutors have a duty to learn of any favorable evidence known to others acting on the government’s behalf, including the police.⁹ The historical development of these cases has led to a formal policy of the U.S. Attorney’s Office requiring an investigative effort to determine whether any police officer who is about to testify in a federal prosecution has any record of dishonesty or untruthfulness.

Every U.S. Attorney’s Office has a specific prosecutor assigned to this task who is designated the title of “*Giglio* coordinator.” Anytime a police department employee is identified as a potential government witness, the U.S. Attorney’s Office sends a letter to the department requesting a review of personnel files that could reveal any findings or substantiate allegations that call into question the employee’s credibility.

Another case evidencing a strong public policy condemning untruthfulness and dishonesty of government employees is the Supreme Court’s validation of a law enforcement administrator’s ability to terminate officers for untruthfulness, in *LaChance v. Erickson*.¹⁰ In *LaChance*, there was a collection of government employees whose cases were merged under this decision. The facts underlying one of the cases are described in *King v. Erickson*.¹¹ Lester Erickson was a supervisory police officer who was terminated for conduct unbecoming a supervisor and for making false statements. The conduct in question amounted to humorous phone calls, referred to as “mad laughter” calls. It was alleged that Erickson encouraged an employee of an agency contractor to make these phone calls to another agency’s police officers during duty hours. The caller would laugh continuously and then hang up without identifying himself or herself. The false statement was based on Erickson’s denial that he participated in these activities. His denials were determined to be untruthful. The Supreme Court, in its unanimous decision, affirmed the agency’s ability to terminate Erickson for this untruthfulness, citing *Bryson v. United States*, in which the Court held, “Our legal system provides methods for challenging the government’s right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood.”¹²

State Law

The case law described to this point represents only the U.S. Supreme Court decisions supporting a public policy regarding the truthfulness of police officers. Additional case law may be found in circuit or state law.

In addition to state case law, almost every state has statutes that would support this public policy. Most states have exculpatory evidence statutes that essentially codify the *Brady/Giglio* rule. In addition, there are numerous state statutes criminalizing untruthfulness, such as statutes dealing with providing a false statement, forgery, perjury, and other statutes dealing with forms of lying. Some states even have statutes specifically addressing untruthfulness of police officers. For example, title 7, section 7-294d of the Connecticut General Statute provides that officers who have committed any act that would constitute tampering with or fabricating physical evidence, committed perjury, or made a false statement in violation of specific state statutes may have their state certification cancelled or revoked. The effect of this is that if police officers are found to be intentionally untruthful in a manner that could constitute a violation of these statutes, they will not be able to be employed as police officers anywhere in the state.

Importance of Police Honesty

Every person involved in the criminal justice system relies on police honesty:

- Under the application of the collective knowledge doctrine, police officers rely on the validity of information provided to them by fellow officers.
- Supervisors render decisions based on information received from officers.
- According to the tenets of community policing, citizens are urged to communicate and cooperate with law enforcement officials. If they trust and respect police officers, the ability to garner their support will only be enhanced.
- Prosecutors depend on honest reports, statements, and affidavits when prosecuting criminals.
- Judges rely on honesty in evaluating warrants.
- Jurors determine guilt or innocence and often liability based on an officer's investigation and testimony.

The societal benefits of creating a public policy of police honesty are enormous. If all parties in the criminal justice system believe that police officers would not lie at the risk of losing their careers, issues of credibility regarding police will be greatly reduced, leading to more successful prosecutions, a reduced number of constitutional violations, and fewer liability cases and losses. In addition, officers are increasingly reluctant to cover for fellow officers who have committed acts of misconduct because of increased moral and ethical standards as well as the risk of discipline. If lying for a fellow officer will lead to almost certain termination, such a policy might in time eliminate the "code of silence" completely.

Washington State officers are now on notice that if they are found to be intentionally untruthful, they will be terminated as a matter of public policy. This case law will presumably be taught to all recruits and in-service officers, putting them on notice that if they lie they will not be police officers anywhere in the state.

Some might argue that lying is a natural part of law enforcement work. It is undeniable that officers lie while working undercover and very often while conducting investigations and interrogations, as well as when using trickery for legitimate law enforcement purposes. However, a clear line can be drawn between sanctioned lying and prohibited lying. That clear line could be that police officers found to have lied intentionally in an official document such as a police report, statement, or affidavit or in an official proceeding such as an internal affairs investigation, administrative hearing, or in court will be terminated as a matter of public policy, as such officers cannot work effectively and should therefore not be allowed to work within the law enforcement profession.

Until such public policy is adopted by the state in which an agency is located, the best way to encourage honesty is to have a clear code of conduct stating that officers who are untruthful will be subject to termination for a first offense and to implement this code standard in a consistent manner. ■

Notes:

¹*Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 165 P.3d 1266 (2007).

²*Brady v. Maryland*, 373 U.S. 83 (1963).

³*Kitsap County Deputy Sheriff's Guild*, 165 P.3d at 1271.

⁴*United Paper Workers International Union v. Moscow, Inc.*, 44 U.S. 29 (1987).

⁵*Giglio v. United States*, 405 U.S. 150, 153–154 (1972).

⁶*United States v. Agurs*, 427 U.S. 97 (1976).

⁷*United States v. Bagley*, 473 U.S. 667 (1985).

⁸*Kyles v. Whitley*, 514 U.S. 419, 433–434 (U.S. 1995), citing *Bagley*.

⁹*Id.*, 514 U.S. 419.

¹⁰*LaChance v. Erickson*, 522 U.S. 262 (1998).

¹¹*King v. Erickson*, 89 F.3d 1575 (1996).

¹²*Bryson v. United States*, 396 U.S. 64, 72 (1969).

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