



HARRIS COUNTY DEPUTIES' ORGANIZATION FOP Lodge 39

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Chairwoman Melanie Miles
1310 Prairie Suite 680
Houston, Texas 77002-2042

Sent via email to Sheriff's Civil Service

Dear Chairwoman Miles:

The Harris County Deputies' Organization, Fraternal Order of Police Lodge 39 (HCDO FOP 39), is formally requesting a hearing to consider proposed changes to Rule 12 of the Civil Service Regulations. We request that the rule be restructured to comply with the 1985 United States Supreme Court decision *Cleveland Board of Education v. Loudermill* as well as to comply with Tex. Loc. Government Code 614.021-023.

1. Compliance with *Loudermill* Standards

Cleveland Board of Education v. Loudermill solidified the due process rights of public employees by requiring hearings prior to disciplinary action. Under the current rules, the employee's first opportunity to defend themselves against accusations of discipline occurs under rule 12.04(a) that states:

Every employee receiving disciplinary action has the right to appeal that decision and may do so, by letter, within ten (10) days, to the Sheriff. This notice must particularly state the reason for appeal.

This hearing occurs after discipline has already been imposed to include terminations.

Under *Loudermill*, an employee is able to confront the evidence against themselves prior to the discipline being imposed. By having a hearing prior to the finalization and implementation of discipline, the due process rights of the employees would be solidified in line with the mandates prescribed by the Supreme Court in *Loudermill*. The current process of having discipline imposed and then a hearing well after discipline subjects the employee to irreversible harm aside from wage loss, which is the only remedy given on reversal. Harm includes loss of health benefits, loss opportunity to seek promotion and transfers, gaps in retirement contributions, and damage to reputation. As stated by the Supreme Court in *Loudermill*, these losses should be avoided prior to the employee having the benefit of procedural and substantive due process and being able to properly speak for themselves on the subject of the allegations against them.

Currently, the Harris County Sheriff's Office is the largest law enforcement agency in the State of Texas that does not comply with *Loudermill* hearings. All agencies comparable in size to HCSO – like Houston Police Department and Dallas Police Department – have formal pre-discipline *Loudermill* hearings. Changing Rule 12 to mandate pre-disciplinary hearings prior to

the final decision on discipline would put HCSO in line with other State agencies and with Constitutional mandates. In addition, it is anticipated by having robust due process pre-discipline would reduce the number of needed civil service hearings.

HCDO FOP 39 proposes that Rule 12 be changed to read as follows with the additional language in red and the language to be removed in the current rule crossed out:

12.04 EMPLOYEE RIGHT OF APPEAL OF DISCIPLINARY ACTION:

(a) Every employee ~~receiving~~ subject to disciplinary action shall be notified by letter of the disciplinary action they are subject to. The employee may request a formal hearing to defend or dispute the proposed discipline prior to discipline being actually imposed. The employee must send the request ~~has the right to appeal that decision and may do so,~~ by letter, within ten (10) days, to the Sheriff. ~~This notice must particularly state the reason for appeal.~~ If an employee fails to request a formal hearing within the ten (10) days, then the Sheriff may then make the final decision of discipline, if any, under rule 12.04(d). The employee still retains their right to appeal to Civil Service under rule 12.04(e). In cases where the Sheriff believes an employee poses a credible and valid danger to the public, inmates, or other employees, an employee may be placed on a paid administrative relief prior to any hearings on proposed disciplinary action being conducted without being in violation of these rules.

(b) Upon receipt of ~~that a~~ written request for hearing prior to discipline ~~notice of appeal,~~ the Sheriff (or designee to whom the employee does not object) has thirty (30) days to conduct any further investigation ~~and or~~ hold any hearing relative to the ~~appeal~~ request. The Sheriff must provide to the employee or the employee's representative at least ten (10) days prior to the hearing date the entire investigative file and all evidence being used to justify and impose the proposed disciplinary action, the list of persons who will attend the hearing on behalf of the Sheriff's Office, and a list of all persons contacted by the Sheriff's Office in investigating the discipline. ~~and to make a decision which shall be provided in writing to the employee.~~

(c) The employee may appear personally, produce evidence, call witnesses, or have counsel/union representation when a ~~pre-disciplinary~~ hearing before the Sheriff is held. The time limit for a hearing shall be 45 minutes for a non-termination and 60 minutes for a reduction in rank or a termination. Time may be extended upon agreement. The hearing shall be recorded unless waived by the parties. The Sheriff or the named Sheriff's designee may ask questions of the employee (only if the employee consents to making statements at the hearing) and of any witnesses. The Sheriff or the named Sheriff's designee may be advised by appropriate counsel, however, that counsel may not ask questions, make statements, or cross-examine the employee or the witnesses.

(d) After a pre-disciplinary hearing, the Sheriff shall make the final decision on discipline pursuant to just cause standards and notify the employee in writing within seven (7) days of when the hearing was held. ~~may modify his original decision if he finds that the charges are not supported by the facts.~~ The Sheriff and employee are required to seek a good faith resolution regarding the terms and conditions of any proposed disciplinary action prior to a final decision by the Sheriff.

(e) Upon receipt of written notice of the Sheriff's final decision, the employee has ten (10) days to file a written notice of appeal to the Civil Service Commission.

This proposed rule change would not be overly burdensome to the administration and would help to protect employees prior to irreversible loss, such as loss of health insurance benefits, retirement contributions, and other county benefits, in the case of terminations and long suspensions.

2. Compliance with Tex. Loc. Gov't Code 614

Tex. Loc. Gov't Code 614 gives certain rights legislatively to peace officers and jailers. We are requesting that these rights be specifically codified into Civil Service regulations in order to protect the rights of Sheriff's Office employees and to ensure that a policy change within the Sheriff's Office does not lead to irreversible harm to an employee as well as a protracted legal battle. Tex. Loc. Gov't Code 614.021-023 states:

COMPLAINT AGAINST LAW ENFORCEMENT OFFICER OR FIRE FIGHTER

Sec. 614.021. **APPLICABILITY OF SUBCHAPTER.** (a) Except as provided by Subsection (b), this subchapter applies only to a complaint against:

(1) a law enforcement officer of the State of Texas, including an officer of the Department of Public Safety or of the Texas Alcoholic Beverage Commission;

(2) a fire fighter who is employed by this state or a political subdivision of this state;

(3) a peace officer under Article 2.12, Code of Criminal Procedure, or other law who is appointed or employed by a political subdivision of this state; or

(4) a detention officer or county jailer who is appointed or employed by a political subdivision of this state.

(b) This subchapter does not apply to a peace officer or fire fighter appointed or employed by a political subdivision that is covered by a meet and confer or collective bargaining agreement under Chapter 143 or 174, Local Government Code, if that agreement includes provisions relating to the investigation of, and disciplinary action resulting from, a complaint against a peace officer or fire fighter, as applicable.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.

Amended by:

Acts 2005, 79th Leg., Ch. 507 (H.B. 639), Sec. 1, eff. September 1, 2005.

Sec. 614.022. COMPLAINT TO BE IN WRITING AND SIGNED BY COMPLAINANT. To be considered by the head of a state agency or by the head of a fire department or local law enforcement agency, the complaint must be:

- (1) in writing; and
- (2) signed by the person making the complaint.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.

Amended by:

Acts 2005, 79th Leg., Ch. 507 (H.B. 639), Sec. 1, eff. September 1, 2005.

Sec. 614.023. COPY OF COMPLAINT TO BE GIVEN TO OFFICER OR EMPLOYEE. (a) A copy of a signed complaint against a law enforcement officer of this state or a fire fighter, detention officer, county jailer, or peace officer appointed or employed by a political subdivision of this state shall be given to the officer or employee within a reasonable time after the complaint is filed.

(b) Disciplinary action may not be taken against the officer or employee unless a copy of the signed complaint is given to the officer or employee.

(c) In addition to the requirement of Subsection (b), the officer or employee may not be indefinitely suspended or terminated from employment based on the subject matter of the complaint unless:

- (1) the complaint is investigated; and
- (2) there is evidence to prove the allegation of misconduct.

These provisions make it clear that Sheriff's Office employees have a clear right to have a copy of the complaint against them that is sworn to by the person making the complaint against the employee, that the complaint be investigated, and discipline cannot occur without proof of the allegations against the employee. Currently, there is no provision in the Civil Service regulations to address the compliance with this law.

HCDO FOP 39 respectively requests these additions to the Harris County Sheriff's Civil Service Regulations:

Rule 2; Definitions: (numbering to be determined by Civil Service)

2.XX. Complaint – A written allegation of misconduct signed by the person making the complaint against the employee. A representative of the Sheriff may be the complainant on

behalf of the Harris County Sheriff only when no other person generated the complaint to be investigated to include a person within the Sheriff's Office that generated the complaint against the employee. The complaint must contain sufficient information to give the employee notice of the allegations against them, to include all relevant dates and all policy violations that are being investigated by the Department.

Rule 12; Discipline: (numbering to be determined by Civil Service)

12. XX. **COMPLAINTS AGAINST AN EMPLOYEE:**

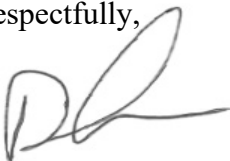
- a. An employee subject to disciplinary action must be given a complete copy of the complaint against them within a reasonable time of the complaint being filed with the Harris County Sheriff's Office. A complete copy includes all allegations against an employee to include any allegations that the investigator believes to be false and all policy violations being investigated. An employee may only be interviewed and questioned regarding information provided in the complaint and the policies disclosed in the complaint. During any interview in an administrative investigation, the employee shall have the right to contact counsel or a union representative at any point during the interview on their own device in a secure environment. Time shall be deemed as reasonable if the employee is not unduly burdened by any delay by the department due to the loss of any ability to properly defend themselves due to delay. The complaint given to the employee must be signed only by the person lodging the complaint. Only a complaint signed by the complainant may be considered for investigation. The complainant may be the Harris County Sheriff's Office only when no person generated the complaint for investigation to include any person within the Sheriff's Office that filed the complaint against the employee to be investigated. The person submitting the complaint against the employee cannot be the investigator of the complaint against the employee.
- b. **Statements:** Once a complaint is given to the employee, the employee may be ordered to make a statement regarding the complaint at that time or the Sheriff's Office may elect to have the employee submit a statement at a later date. The employee shall have at least 48 hours in which to write a statement regarding the complaint once ordered to do so. An employee may confer with an attorney or union representative regarding the writing of the statement without being in violation of any do not discuss order. An attorney or union representative cannot be connected or associated with the investigation or the generation of the complaint against the employee.
 1. An employee may elect to not take their 48 hours to make a statement but must be given warnings by the investigator of their right to take their 48 hours. If an employee waives their right to take 48 hours to make a statement, the statement must still contain the constitutional warnings regarding the statement not being a voluntary statement (warnings consistent with *Garrity v New Jersey*).
 2. A voluntary statement can only be sought when an employee is not the target of an investigation. No employee may be coerced by the Sheriff's Office into making a voluntary statement against interests through deceitful means. No employee can be ordered into making a voluntary statement. When an employee is asked to make a voluntary statement to a Sheriff's Office investigator, the employee must be warned:

- i. The statement is voluntary, and the employee has the right to refuse to make the statement;
 - ii. That any voluntary statement given can be used in criminal and civil proceedings against the employee, including actions taken by the District Attorney's Office in any investigation pending or in the future;
 - iii. The employee has the right to request to take 48 hours to make the statement and request the *Garrity* warnings on the statement. If the employee makes such a request, the investigator may choose to cancel the interview and statement from the employee at no penalty to the employee exercising their rights under the law; and
 - iv. The employee has the right to consult with an attorney or union representative prior to agreeing to make a voluntary statement.
- c. An employee may not be disciplined based on the allegations of a complaint unless:
 1. The complaint was fully investigated within a reasonable time;
 2. The employee was given an opportunity to write a statement regarding the complaint;
 3. There is substantial evidence to prove the allegation of misconduct against the employee as alleged in the complaint. An employee may not be disciplined for any allegations or policy violations that were not outlined in the complaint; and
 4. The proposed disciplinary actions must be supported under just cause standards.
- d. It shall be a violation of Civil Service Regulations for any employee who has made a complaint or has had a complaint made against them to be retaliated against or discriminated against based on the making of a complaint. An involuntary transfer to a comparable position within the Sheriff's Office based on a complaint will not be considered retaliation unless the transfer is made arbitrarily or capriciously or in violation of any other Civil Service Regulation. If an employee is transferred based on a complaint and subsequently cleared of the allegations, that employee shall be put back into their original position unless otherwise requested by the employee.

By making these changes to the Civil Service Regulations, the regulations would be brought in line with state and federal law and solidify the rights of employees to have notice of the complaint against them and an opportunity to be heard prior to any proposed discipline being imposed. By creating this rule, Civil Service will give employees assurances that they will be given proper and timely notice of complaints against them and that they will always have the rights as outlined above under any administration.

Thank you for your consideration of both of these rule changes. We formally request a hearing on this proposed rule change and request to be notified of the schedule. Thank you for your time.

Respectfully,



David Cuevas
President HCDO FOP 39