

III. Reporting and Investigation of Police Misconduct

Executive Order 2020-11 directs that the Commission shall examine: “State and local procedures related to the reporting and investigation of police misconduct, and potential reforms which may include, but are not limited to, development of a uniform statewide system for the reporting, investigation, and punishment of police misconduct.” Executive Order 2020-11, at ¶ 3 (b).

This section of the report describes the current state of procedures related to the reporting and investigation of police misconduct, at both the state and local level; summarizes public testimony and recommendations on these subjects; and sets forth the Commission’s recommendations with respect to state and local procedures related to the reporting and investigation of police misconduct.

a. Current State of Laws, Policies and Procedures Governing Reporting and Investigation of Police Misconduct

Police Misconduct

There is no universal definition of police misconduct subject to reporting, investigation, and discipline. While on July 16, 2020, Governor Sununu signed HB 1645 into law, which defines “misconduct” in the context of law enforcement as: “assault, sexual assault, bribery, theft, tampering with evidence, tampering with a witness, use of a chokehold, or excessive and illegal use of force as defined by the New Hampshire criminal code,” this definition does not encompass all misconduct which could lead to criminal charges or departmental discipline.[#] The “misconduct” definition in HB 1645 becomes effective January 1, 2021.

New Hampshire Police Standards and Training Council (NH PSTC) has extensive enumerated powers as discussed above.[#] Among those powers is the authority to revoke or suspend a law enforcement officer’s certification. RSA 106-L:5; Pol 402.02. All law enforcement officers, except elected county sheriffs, must be certified by NH PSTC. RSA 106-L:2 (I). Reasons for revocation or suspension of a certification include conviction of a felony level offense; conviction of a misdemeanor level offense with a sentence of incarceration; and conviction of a crime of “moral turpitude or of a crime which tends to bring discredit on the police or corrections service.” Pol 402.02. The rule includes a non-exhaustive list of qualifying offenses, only some of which are also included in the “misconduct” definition above. Pol 402.02 (a) (4).

In determining whether to decertify an officer, NH PSTC must hold a hearing to determine if there has been a violation of NH PSTC rules. NH PSTC usually becomes aware of a rule violation in one of three ways: 1) notification that officer has allegedly engaged in criminal conduct; 2) notification of an officer’s change of status (e.g. demotion, suspension, termination); or 3) receipt of a complaint against an officer from the general public. When determining

[#] Discussed above at ¶ II (a) (iv).

[#] See ¶ II (a) (i).

whether to suspend or revoke a certification, NH PSTC must “apply a balancing test to determine whether factors constituting just cause [not to suspend or revoke a certification] outweigh the public interest in protecting the safety of the public or confidence in the criminal justice system.” Pol 402.02 (e). The officer facing suspension or revocation of certification has the burden to show just cause why his/her certification should not be suspended or revoked. *Id.* Examples of just cause may include “[s]uspension or revocation would not have a rehabilitative value and [t]he officer’s health or service status makes suspension or revocation a needless gesture.” Pol 402.02 (f).

Currently, there is no statewide database to track reports or investigations of police misconduct. NH PSTC tracks revocations and suspensions of certifications in an antiquated and not easily searched system often consisting of paper files or ad-hoc entries in an excel spreadsheet. Data maintained by NH PSTC is under-inclusive for purposes of tracking police misconduct throughout New Hampshire. Not every report or complaint of misconduct is made to NH PSTC in the first instance or reported by the law enforcement agency that received and/or investigated a complaint.

Similarly, there is no standardized process for how such complaints should be investigated or by whom. Investigations into police misconduct are generally not available to the public as the contents of law enforcement personnel files are confidential by statute. RSA 105:13-b (III). An exception to this rule is made for the disclosure of “exculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal case.” RSA 105:13-b (I). “The duty to disclose exculpatory evidence that should have been disclosed prior to trial under this paragraph is an ongoing duty that extends beyond a finding of guilt.” *Id.* Likewise, there is no standard period of time for how long a law enforcement personnel file must be retained, rather the time period is typically controlled by various collective bargaining agreements on behalf of the police unions in the State.

Individual law enforcement agencies routinely conduct internal affairs investigations of the officers in their agencies. As stated above, such investigations are not regulated by a uniform policy or procedure. A complaint made directly to NH PSTC is often referred back to the law enforcement agency that is the subject of the complaint, or, if the conduct is alleged to be criminal, to the Office of the Attorney General or the County Attorney’s Office with jurisdiction over that agency. NH PSTC has the authority to audit law enforcement agencies’ compliance with Council rules, however this authority does not allow for the examination of police personnel files.

Currently, the Public Integrity Unit of the Office of the Attorney General investigates and prosecutes allegations of criminal misconduct by state officials including state law enforcement officers. The criminal misconduct must typically bear a connection to the officer’s performance of his or her official responsibilities. The Public Integrity Unit is not currently legislatively mandated. Allegations of criminal misconduct by county or municipal law enforcement officers are usually most appropriately reviewed and investigated by county and municipal authorities. However, how such matters are investigated and prosecuted vary amongst the ten county attorney offices.

Police Commissions

Individual law enforcement agencies are accountable to their municipalities via a town manager, board of selectmen or aldermen, an elected or appointed police commission, or a combination thereof. There are at least two types of police commissions in New Hampshire. Those authorized by RSA 105-C and those that are otherwise authorized by a city or town charter. The adoption of a traditional three-person police commission and its method of selection is decided by the voters of a municipality. RSA 105-C:2 & 3. The police commissioners' duties and powers include the appointment, promotion and removal of police personnel, and creation and enforcement of rules "necessary for the operation of the police force in the manner most beneficial to the public interest." RSA 105-C:4. A police commission otherwise created by a city or town charter does not have the same powers.

Prosecutors' Obligations

Prosecutors in criminal cases have constitutional obligations to disclose potentially exculpatory evidence and information that could be used to impeach the testimony of a prosecution witness. *Brady v. Maryland*, 373 U.S. 83 (1963) ("Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."); *Giglio v. United States*, 405 U.S. 150 (1972) (If information would be material to the preparation or presentation of the defendant's cases, it must be turned over.); *State v. Laurie*, 139 N.H. 325 (1995) (State is required to provide all evidence of favorable proofs). The Exculpatory Evidence Schedule (EES) (formerly known as the *Laurie* List) is a device originally intended for prosecutors to reconcile their obligation to disclose exculpatory evidence with the legislatively mandated confidentiality of police files. The EES contains the names of officers that have been deemed by the head of his/her law enforcement agency as having potentially exculpatory information in his/her personnel file. Based on current law, the EES is not publicly available. Public access to the EES is currently being litigated at the New Hampshire Supreme Court.

Immunity

Law enforcement agencies and officers are subject to civil lawsuits for federal and state causes of action alleging violations of constitutional rights or intentional torts. When facing a federal suit, an officer may assert the judicial doctrine of qualified immunity. The purpose of qualified immunity is to protect government officials acting under the color of law and engaged in conduct that might touch upon constitutional rights. It is immunity from suit itself and is determined at the earliest possible stage of the proceedings. Once qualified immunity is raised, the litigation may continue only if the plaintiff can show a clearly established constitutional right that was violated. In order to show the constitutional right was "clearly established," there must be a robust consensus such that would put the officer on notice that his/her action(s) were impermissible.

In response to state causes of action in New Hampshire, law enforcement officers may assert official immunity pursuant to RSA 99-D or 541-B. An officer is immune from civil suit if the officers took some discretionary action that was within the scope of the officer's

employment, and the action was not taken in a wanton or reckless manner. Whether RSA 99-D provides official immunity is based on an objective, reasonable person standard while 541-B accounts for the subjective mindset of the officer. If the request for immunity is denied, an officer may still litigate any other available defenses. For state causes of action, the employing entity, either State or municipality, decides whether to indemnify the individual officer so long as the officer's conduct was not wanton or reckless.[#]

b. Summary of Public Testimony Received by the Commission

In addition to the information discussed above, the Commission heard testimony from eight members of the public during the session dedicated to this topic. Other individuals submitted written testimony. The Commission received testimony on the reporting and investigation of police misconduct throughout the entirety of its work. Several themes repeated throughout the discussion of police misconduct. These included the need for greater transparency of police misconduct allegations, investigations, the names of officers on the *Laurie* List/EES and police personnel files as well as the need for civilian oversight.

Recordings of all the Commission's hearings are available on its website: governor.nh.gov/accountability. In addition, members of the public submitted extensive written materials. Those are also available on the Commission's website.

i. Specific Recommendations Submitted by the Public

Members of the public made the following specific recommendations for improvements and reforms with respect to the reporting and investigation of police misconduct:

1. Make law enforcement personnel records public and require a retention period consistent with other municipality records.
2. Require full cooperation with public safety background investigations to including allowing breach of non-disclosure agreements.
3. Establish a statewide civilian board to review all allegations of police misconduct, including all use of force, with the authority to issue punishment and publish findings.
4. Establish a statewide database to track problem officers and prevent fired officers from being re-hired.
5. Require every police shooting to be deemed justified or unjustified.

[#]“Every agreement to settle a lawsuit against a governmental unit, threatened lawsuit, or other claim, entered into by any political subdivision or its insurer, shall be kept on file at the municipal clerk's office and made available for public inspection for a period of no less than 10 years from the date of settlement.” RSA 91-A:4(VI). “In any action against a governmental unit where the governmental unit has agreed to a settlement of such action, the complete terms of the settlement and the decree of the court judgment shall be available as a matter of public record pursuant to RSA 91-A.” RSA 507:17(II).

6. Require data collection and publication for all police encounters with demographics including race and ethnicity.
7. Require every law enforcement agency to have body and dash cameras with right to access the footage.
8. Require ethics training for law enforcement officers.
9. Eliminate qualified immunity and official immunity.
10. Require all New Hampshire prosecutors to receive implicit bias and racial profiling training.
11. Require New Hampshire prosecutors to report police misconduct and create Professional Code of Conduct rule mandating this.
12. Encourage prosecutors' offices to increase diversity of staff and create policies on dealing with racial profiling and police misconduct.
13. Require data collection and publication of charges, indictments, dismissals and decisions not to charge or indict with demographics including race and ethnicity.
14. Require publication of the cost of litigation and lawsuit settlement amounts involving law enforcement officers.
15. Require NH PSTC to re-evaluate its members' backgrounds.
16. Establish civilian oversight of officer-involved shootings.
17. Abolish the *Laurie* List/EES.
18. Make the *Laurie* List/EES public.
19. Create a culture of accountability in law enforcement.
20. Ban pre-textual stops.
21. Create a state cause of action for police violations of citizens' state constitutional civil rights, which eliminates qualified immunity as a defense.

22. Third-parties and organizations assisting with law enforcement responsibilities should be subject to statewide entity responsible for reporting, investigation, and punishing police misconduct.
23. Provide NH PSTC with additional staffing to conduct audits.
24. Explore the adaptation of current NH PSTC administrative rules to review cases more transparently.
25. The County Attorney should decide whether an officer's name is placed on the EES and oversee any internal investigation involving serious allegations against an officer.
26. The EES should contain separate categories for active, inactive, and decertified officers.
27. Law enforcement officer applications should include specific questions to determine if there were any issues with the applicant's prior employment.
28. Establish one unit at the Attorney General's Office to handle all allegations of criminal behavior by officers.
29. Enact legislation that creates a duty for officers to report police misconduct or dishonesty.
30. Ban the use of private cell phone communications by on-duty officers.

c. Commission Recommendations

The Commission makes the following recommendations for reforms and improvements with respect to reporting and investigation of police misconduct:

1. Support the establishment of a single, neutral and independent statewide entity to receive complaints alleging misconduct regarding all sworn and elected law enforcement officers:
 - a. Staffed by full-time attorneys, paralegals, legal assistants and investigators
 - b. Provide robust due process with multiple levels of review, including both sides having the right to appeal
 - c. Members of the various committees and panels to be appointed by the Governor, consisting of community members, current or retired judges, law enforcement officers, attorneys; 3 year terms (initially staggered). Any committee or panel would be slightly weighted toward law enforcement
 - d. Statewide, universal definition regarding what constitutes misconduct[#]

[#] Definition of misconduct should take into consideration the policy guidelines regarding Code of Conduct to be developed by NH PSTC. See ¶ II(c)(II)(5).

- e. Notice of complaint to the officer and an opportunity to be heard
 - f. Initial screening of all complaints received by the entity to determine if an investigation is warranted
 - g. Investigation following consistent and defined standards
 - h. Statewide, universal standards to apply with respect to determination of whether misconduct occurred
 - i. Executive summary of finding to be made available to the public with the full investigative report subject to disclosure upon in-camera review. Sustained findings publicly accessible in a database maintained by the entity.
 - j. Right of appeal to New Hampshire Supreme Court
 - k. Nothing in this recommendation would limit the ability of the hiring law enforcement agency or NH PSTC to investigate, discipline, or take any action consistent with their rules, regulations, and collective bargaining agreements; or would limit the ability of the Office of the Attorney General or County Attorney with jurisdiction to investigate or prosecute any criminal conduct
 - l. Require all law enforcement agencies to report alleged misconduct to this entity
2. To promote a uniform approach to investigation and prosecution of alleged criminal conduct by government officials, including law enforcement officials, establish by statute a dedicated Public Integrity Unit within the Attorney General's Office with permanent and sustainable resources including fulltime attorneys, paralegals, legal assistants, and investigators.
 3. To promote equal justice under the law in all aspects of the criminal justice system, the Commission strongly encourages implicit bias and racial profiling training for all prosecutors, including all police prosecutors, all criminal defense attorneys, and all judges.
 - a. The Office of the Attorney General shall require such training for all attorneys, investigators, legal staff and victim/witness advocates in the Attorney General's Office; all County Attorney Offices; and all state agency attorneys.
 - b. The Office of the Attorney General shall facilitate and arrange for such trainings as described in 3(a) no later than April 1, 2021.
 - c. The Office of the Attorney General shall establish a system whereby all new prosecutor hires receive implicit bias and racial profiling training within thirty days of their start date.
 - d. Recommend the New Hampshire Supreme Court require one hour of yearly continuing legal education credits (CLEs) to be dedicated to implicit bias and racial profiling training.
 4. Establish community outreach position within the Attorney General's Office to facilitate communication between all state, county and local prosecution offices and New Hampshire's diverse communities.

5. Amend RSA 33-A:3-a(CVIII) to require “police, non-criminal-internal affairs investigations” to be retained, at a minimum, for a period of 20 years after retirement or separation.
6. Encourage all law enforcement agencies to use body and/or dash cameras.
7. Make the existing Exculpatory Evidence Schedule (EES) public subject to the following provisions:
 - a. The Office of the Attorney General will provide immediate written notice to all living persons on the current list that they are on the list with the following notifications:
 - i. Six (6) months from date of notification to request a hearing in Superior Court to have his/her name removed from the EES.
 - ii. Six (6) months from date of notification, individual names on the list with a sustained finding shall be made public, except for any individual with a pending Superior or Supreme Court action in regards to removal from the EES.
 - a. The names of deceased individuals shall be released once there has been a determination that the officer was afforded due process prior to placement on the list or the conduct subject to EES was previously provided as discovery in a criminal case.