

Middlebury Police Department REGULATION

Subject: Professional Assurance and Quality Control

Number: 1.32

Effective Date: July 1, 2018

Approved and Ordered: _____
Chief of Police

I. Policy

The Middlebury Police Department aspires to achieve the highest standards of professional performance both administratively and operationally by all employees. In doing so it is incumbent on the department to have an internal review and audit process that allows transparency, encourages public input, and maintains a fair and thorough process for reviewing, following up on, and coming to a resolution on that input, whether that input is complimentary, a concern, or an allegation of wrong doing. At the end of that process to provide a substantive, public response.

II. Purpose

Professional assurance and quality control requires a standardized process that will:

1. Identify the need for formal policies
2. Identify the need to update and/or amend existing policies
3. Provide a mechanism to investigate actions or inactions of employees as it relates to performance, duty, policy and legal obligations;
4. Encourage reports and inquiries from the public on matters related to department and employee performance;
5. A process to come to a resolution on matters related to department or employee performance;
6. A process by which provides a final, substantive response to those making reports and inquires;
7. A process for fair and equitable personnel actions, be they commendatory, disciplinary, or remedial.

III. Definitions

A. As referred to in this regulation, the following definitions apply:

Category A Conduct: Commission of a felony; commission of a misdemeanor while on duty that did not involve the legitimate performance of duty; any of the following acts committed while off duty – simple assault 2nd offense; domestic assault; false reports and statements; driving under the influence 2nd offense; violation of a relief from abuse order or condition of release; stalking; false pretenses; voyeurism; prostitution or soliciting prostitution; distribution of a regulated substance; simple assault on a law enforcement officer; possession of a regulated substance 2nd offense.

Category B Conduct: Gross professional misconduct amounting to actions on duty or under color of authority that involve the willful failure to comply with State-required policy or substantial deviation from General Order 1.03 Standards of Conduct and other policies regulating harassment in the workplace, fair and impartial policing, use of force, improper use of records or records systems.

Collective Bargaining Agreement (CBA): Union contract. The CBA defines the disciplinary process should one be applied.

Complaint: A complaint shall be defined as an act of expressed dissatisfaction relative to the conduct and/or performance of Middlebury Police Department employees. A complaint may be anonymous and/or made by one person on behalf of another. The absence of a signed complaint or statement does not mitigate a complaint.

Complainant: Any person who files a complaint regarding misconduct or malfeasance on the part of an agency employee.

Citizen inquiries: When a person contacts the department with questions regarding a policy, procedure, or tactic used by the department.

Civilian Review Board: The Board of Selectmen constitutes the civilian review board unless the board makes appointments otherwise.

Employee: Any person employed by the agency, whether sworn or civilian.

Interim Control: An administrative action to re-assign an employee from regular duty during the course of an internal investigation pending a finding. This may include paid administrative leave, assignment to non-enforcement duties or other action to ensure the integrity of the investigation.

Internal Inquiry: An initial review or audit of the action or inaction of an employee, initiated internally or externally, to determine a further course of action.

Internal Investigation: A formal process that includes the gathering of facts, evidence, and testimony in order to arrive at a finding on whether or not department rules or policies have been violated.

Investigatory Interview: An investigatory interview is one in which a Supervisor questions an employee to obtain information which could be used as a basis for discipline or asks an employee to defend his/her conduct. Examples of an investigatory interview are:

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1. The interview is part of the department's disciplinary procedure or is a component of the department's procedure for determining whether discipline will be imposed.
2. The purpose of the interview is to investigate an employee's performance where discipline, demotion or other adverse consequences to the employee's job status or working conditions are a possible result.
3. The purpose of the interview is to elicit facts from the employee to support disciplinary action \ that is probable or that is being considered, or to obtain admissions of misconduct or other evidence to support a disciplinary decision already made.
4. The employee is required to explain his/her conduct, or defend it during the interview, or is compelled to answer questions or give evidence so that the investigation may proceed to a finding of fact.

Malfeasance: Illegal or dishonest activity; a wrongful act the actor has no legal right to do. Allegations of such require an internal investigation.

Major Violation: A violation of the law, the rules and policies of the department which on a finding that the allegation of which is sustained, could result in termination, suspension, written warning, verbal warning and/or arrest. Major violations require an internal investigation and depending on the nature of the allegation, referral to outside agencies to investigate.

Minor Violation: a violation of the rules and policies of the department, the nature of which, if sustained, could lead to non-disciplinary counseling or remedial training or supervisor's verbal warning. The supervisor will retain these records in their work file to support professional development and subordinate evaluation.

Misconduct: Any act or omission by an employee that is illegal or which violates established policy or practice.

Nonfeasance: Failure to act or do what duty requires to be done.

IV. Professional Assurance

Professional assurance requires that employee performance is documented and reviewed through internal processes and that external reports are acted on. Regulation 1.03 defines standards of conduct and Regulation 1.30 provides a process of awards and recognition for exemplary performance. This order provides the process for inquiry and investigation on allegations of malfeasance, nonfeasance, misconduct., and other complaints or objections to the manner in which police service was delivered.

A flow chart on the process of receiving, investigating, and resolving complaints generated externally and internally is found in the appendix to this policy.

A. Receiving Complaints

1. A complaint may be initiated from any external or internal source and must be acted upon without unreasonable delay. The Police Department will accept complaints made by any person, by any means of communication, at any time. An employee receiving a complaint or allegation will be courteous, responsive and helpful, and shall adhere strictly to the following established procedure:

a. All employees are required to accept a complaint alleging misconduct, nonfeasance or malfeasance of agency personnel. The standardized Citizen Feedback form should be used. There shall be no retaliation in any form by any member of this agency directed at an individual who initiates a complaint, nor during the complaint process shall questions relative to the immigration status of the complainant be asked.

b. All employees must courteously inform an individual that they have a right to make a complaint if the individual objects to an employee's conduct. No employee shall refuse to assist any person who wishes to file a complaint or discourage, interfere with, hinder, delay, or obstruct a person from making a complaint. If a complainant expresses fears of retaliation they should be asked to provide the basis for their concerns, if possible, and the information provided should be noted in the complaint.

c. When questions arise concerning the actions of an employee, the matter shall be referred to an on-duty supervisor, or when unavailable, the next assigned supervisor who will determine if the matter is merely a citizen inquiry that may be handled by providing routine information or if it is a complaint that may require an investigation pursuant to this directive.

d. Upon the receipt of a complaint the receiving employee shall:

1. obtain enough initial information from the complainant to establish the identity, in so far as possible, of the employee(s) against whom the complaint is made,
2. identify the alleged action or in-action of the employee(s),
3. obtain the identity of the complainant and the identity of any witnesses.
4. assist the complainant in filling out the Complaint Form
5. give the complainant a copy of the completed Complaint Form
6. transmit the original Complaint form to the Chief of Police

e. In circumstances where the complainant wishes to remain anonymous the receiving employee shall fill out the Complaint Form in as much detail as possible and shall advise the complainant of the inherent limitation involved with investigating anonymous or 3rd party complaints.

f. Any employee approached by a person seeking to make a complaint will, when possible, notify a supervisor, obtain a brief description of the allegation, and record contact information from the complainant if provided.

(1) If a supervisor is not readily available, the employee will inform the complainant that they will be contacted by a supervisor assigned to conduct an inquiry as soon as is practicable.

g. Employees who receive a complaint about their own conduct shall immediately refer the complaint to a supervisor.

h. All complaints shall be documented to include the date, time, location, and nature of the complaint, complainant's information (name, address, date of birth, telephone number, or other contact information, if provided, date and time the complaint was received, and the name, rank and/or title of the person receiving the complaint.

i. The withdrawal of a complaint does not relieve the department from conducting an internal inquiry.

j. If complaints are received by postal or electronic mail or by other messaging (such as a post on the department Facebook page), all correspondence received containing allegations shall be forwarded to the Chief of Police or the Chief's designee where they will be officially received.

k. Refer walk-in and phoned-in complaints to a supervisor. If a supervisor is not available, have the complainant fill out the complaint form and forward it to the Chief or let them know the form can be downloaded from the PD website.. Should the complainant elect not to do that, obtain their name and contact information and forward that to the Chief.

l. Once the complaint is received and properly documented, request the complainant to sign the complaint, if they have not yet done so. If the complainant refuses to sign the complaint, the complaint will still be accepted and investigated, however the refusal to sign or acknowledge shall be noted.

m. Complaints from the field in which any employee is approached by a complainant expressing allegations of misconduct or malfeasance shall be reported to a supervisor as soon as possible. The complainant shall be requested to await the arrival of the supervisor when one is available. If a supervisor is unavailable, or the complainant is unable to await the arrival of a supervisor, the complainant should be informed that he/she may respond to headquarters to make his/her complaint or provided instructions on downloading the complaint form and transmitting it to the department.

n. In those circumstances where the complainant is unable to read, write, or understand the English language with sufficient proficiency to fill out the complaint form, or to be interviewed regarding their knowledge of the complaint, adequate language assistance to permit them to file their complaint must be provided. Record the name and identifying information of any person providing assistance on the complaint form.

B. Notifications

1. Without unreasonable delay of receipt of the complaint, the complainant will be provided notice by the Chief of Police at their listed contact point advising them:

- (1) Their complaint has been received and is currently pending;
- (2) the assigned I/A number;
- (3) the name of the assigned investigator.

2. Impaired Complainants

a. When a person who is noticeably inebriated or impaired wishes to make a complaint, obtain their information and a means of contact along with a brief synopsis of their complaint. Encourage them to resume the complaint process when they have regained sobriety.

- (1) if the nature of the complaint indicates a major violation on the part of the employee, a supervisor, and if not on duty, the on-call supervisor, is to be notified to initiate an internal inquiry.

3. Delayed or Untimely Complaints:

a. Complaints of misconduct or malfeasance shall be accepted regardless of when the alleged misconduct or malfeasance is alleged to have occurred. However, the timing of a complaint is one of the circumstances that the department may consider in determining whether misconduct or malfeasance can be reliably substantiated and, if so, the nature and extent of discipline to be imposed. Where a delay in reporting alleged misconduct may call into question the veracity of the complainant, or has resulted in the loss or destruction of evidence or the inability to locate witnesses due to the passage of time, the facts and circumstances should be detailed in the report.

b. Although allegations of criminal behavior may be made past the expiration of the applicable statute of limitations and criminal prosecution may no longer be possible, a criminal violator may still be held accountable administratively.

4. Supervisor's responsibility

a. A supervisor is responsible for the conduct and performance of their subordinates and is expected to initiate an internal inquiry or at the very least take action to remediate any sub-par performance and identify misconduct, malfeasance, or nonfeasance by subordinates. In the case of major violations, the supervisor must report to the Chief.

b. In the case of performance issues and minor violations, where the supervisor is the person discovering or being made aware of these issues, the supervisor is vested with the authority to investigate and resolve these issues through counseling, remedial training, and performance notes.

c. At any time the supervisor may refer these issues to the Chief for further action, especially when remediation has failed.

C. Documenting Complaints

1. All complaints will be forwarded to the Chief of Police.
2. On receipt, the complaints will be assigned a sequential Internal Affairs number, the prefix being the year, followed by "IA" and a sequential number. Ex: 2018-IA-1
3. IA complaints are not to be entered into the Valcour CAD system.
4. All active Internal Inquiries and investigation reports will be filed in the office of the Chief of Police. Closed records will be archived in a file in records apart from other files.
5. Sustained complaints and their disposition record will be attached to the subject officer's personnel file. Records of related disciplinary action will be managed per the provisions of the CBA.

D. Initial Inquiry

1. The purpose of the Initial Inquiry is to review a complaint or allegation to determine whether or not further investigation is warranted, and whether or not the complaint is one that alleges malfeasance, misconduct, non-feasance or simply displeasure over a department practice or policy.
2. In the case of alleged minor violations, the complaint is to be forwarded to the Chief. The internal inquiry and any corrective action – evaluation performance notes, remedial training, counseling, are vested in the employee's supervisor.

E. Internal Investigation

1. The purpose of an internal investigation is to determine the truth and facts of an action or inaction as it relates to an allegation of misconduct, malfeasance or nonfeasance by the department or any of its employees, whether reported from an external or internal source.
2. A department internal investigation will normally be conducted by an employee of superior rank over the subject of the investigation.
3. In the event of personnel or other conflicts, the Chief may request an outside agency conduct the internal investigation.
4. In cases that indicate criminal conduct, where deadly force has been applied, where an employee is involved in an event that results in serious bodily injury to others, the office of the State's Attorney will be requested to conduct or oversee the investigation. In these cases the department will conduct a parallel, but separate internal investigation.

5. Internal investigations will be conducted as completely as possible until all investigative leads are exhausted, including the collection and preservation of evidence and subsequent analysis of same if applicable; interviews and statements of all involved parties, and any other follow up to assist in reconstructing the event and coming to a resolution.
6. The internal investigation will proceed to conclusion in the event the employee(s) subject to the investigation resign(s).
7. Investigatory Interviews – the subject of the interview must be on-duty, that is, receiving compensation per the provisions of the CBA during the course of the interview.
8. Garrity Warning – Employee Compelled to Submit To Interview and to Answer Truthfully.

On interviewing employees during an internal investigation, the investigator is to preface any interview with the “Garrity Warning”, compelling employees to provide the truth to the investigator or face termination, as follows:

You are hereby ordered to fully cooperate with the investigating official(s). Your failure to cooperate will create an objective and subjective fear of termination. You have the following rights and responsibilities during this investigation:

- a. You have the right to be informed of the allegations involved.
- b. You will be asked questions specifically directed and narrowly related to the performance of your official duties.
- c. Statements made during any interviews may be used as evidence of misconduct or as the basis for seeking disciplinary action against you.
- d. Any statements made by you during these interviews cannot be used against you in any subsequent criminal proceeding, nor can the fruits of any of your statements be used against you in any subsequent criminal proceeding.
- e. If you so request, a person of your choice may be present to serve as a witness during the interviews.
- f. If you refuse to answer questions relating to the performance of your official duties, you will be subject to dismissal.

The interviewer should provide these warnings in print to the subject of the interview and have them and any witness they choose to accompany them sign them acknowledging receipt of same.

9. Weingarten Rights – Employee Right To Union Rep Presence During Investigatory Interview
Weingarten rights guarantee an employee the right to Union representation during an investigatory interview. These rights, established by the Supreme Court in 1975 in the case of J'. Weingarten Inc., must be claimed by the employee. The supervisor has no obligation to inform an employee that they are entitled to Union representation. The application of Weingarten rules in an investigatory interview are as follows:

Rule 1 - The employee must make a clear request for Union representation before or during the interview. The employee can't be punished for making this request.

Rule 2 - After the employee makes the request, the supervisor has 3 options:

- a. Grant the request and delay the interview until the Union representative arrives and has a chance to consult privately with the employee: or
- b. Deny the request and end the interview immediately; or
- c. Give the employee a choice of: 1)submit to the interview without representation or 2) ending the interview

Rule 3 - If the supervisor denies the request and continues to ask questions, this is an unfair labor practice and the employee has a right to refuse to answer. The employee cannot be disciplined for such refusal but is required to sit there until the supervisor terminates the interview. Leaving before this happens may constitute punishable insubordination.

10. Union Representative's Rights Under Weingarten Rules During Investigatory Interview

The Union Representative is not required to merely be 'silent witness'. The Rep has the right to:

1. be informed by the supervisor of the subject matter of the interview
2. take the employee aside for a private conference before questioning begins
3. speak during the interview
4. request that the supervisor clarify a question so that what is being asked is understood
5. give employee advice on how to answer a question
6. provide additional information to the supervisor at the end of the questioning.

The Rep does not have the right to tell the employee not to answer nor to give false answers. An employee can be disciplined for refusing to answer questions.

11. An employee has NO right to the presence of a Union representative where:

1. The meeting is merely for the purpose of conveying work instructions, training, or communicating needed corrections in the employee's work techniques.

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2. The employee is assured by the employer prior to the interview that no discipline or employment consequences can result from the interview.
3. The employer has reached a final decision to impose certain discipline on the employee prior to the interview, and the purpose of the interview is to inform the employee of the discipline or to impose it.
4. Any conversation or discussion about the previously determined discipline which is initiated by the employee and without employer encouragement or instigation after the employee is informed of the action.

Even in the above four (4) circumstances, the employee may still ask for representation. The interviewer may permit a representative to attend at the interviewer's discretion.

F. Disposition and Notification at the Conclusion of the Internal Investigation

1. All complaints and reports will have a final disposition, based on a preponderance of the evidence, as follows:
 - a. Sustained: The investigation determined by a preponderance of the evidence that the allegations occurred and that it was committed by the subject of the investigation.
 - b. Exonerated: The investigation determined by a preponderance of the evidence that the allegation did occur, but the actions of the officer were justified, lawful, and/or within the scope of policy. This may require an examination of policy to ascertain if the policy requires updating or amendment.
 - c. Not Sustained: The investigation was unable to determine by a preponderance of the evidence whether or not the allegation occurred, or whether or not it was committed by the subject of the investigation.
 - d. Unfounded: The investigation determined by a preponderance of the evidence that the action/inaction described in the allegation did not occur.
 - e. Withdrawn: At some point prior to the completion of the investigation the complainant notified the department that they wished to withdraw their complaint and wished for the investigation to be discontinued.

2. Pre-disciplinary Loudermill Hearing

Prior to implementation of any disciplinary action or sanction, the employee will be provided an opportunity to rebut the findings in the investigation or provide mitigating circumstances with the Chief of Police to take into consideration before implementation.

3. Disciplinary Action

a. Any disciplinary action following a disposition of a sustained complaint will be in accordance with the CBA.

b. In the case of minor violations reconciled at the supervisory level, per Part IV, B. 4. of this order, these actions are not considered disciplinary and are intended for remedial purposes.

G. VT Criminal Justice Training Council notification/ Selectboard Notification

1. Per Title 20, VSA 2401, subsequent to the finding in an internal investigation that the allegations against an officer for Category A or B conduct have been sustained, the Chief of Police will notify the Civilian Review Board when any disciplinary action is taken. The Civilian Review Board will conduct a review of the disciplinary action.

2. Per Title 20 VSA 2403 the Chief of Police will notify the Vermont Criminal Justice Training Council within ten (1) days of:

a. a finding of probable cause that a sworn officer has committed Category A conduct;

b. Any decision or findings of fact or verdict regrading allegations that the sworn officer committed category A conduct, including a judicial decision and any appeal therefrom;

c. a finding subsequent to an internal investigation that a sworn officer, by preponderance of the evidence, has committed Category B conduct, including any decision, finding of fact, arbitration, hearing officer decision, administrative decision, and any appeal therefrom;

d. the termination of an officer for Category A or B conduct;

e. the resignation of an officer

3. As part of the report to the Council, the Chief shall provide the Council relevant documents associated with the report, including findings, decision, and the investigation report.

H. Complainant Notification

On conclusion of the investigation, the complainant will be notified, without unreasonable delay, in writing of the result and disposition of the investigation. Should disciplinary action be taken, with the exception of termination, the complainant will be informed that internal disciplinary action has been taken. In cases of termination the complainant will be notified of the termination.



