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POLICE DISCIPLINARY PROCEDURES:

A DENIAL OF DUE PROCESS

INTRODUCTION

Procedural due process, the requirement of notice and hearing, has been termed "a developing field of law."¹ This is an understatement.

In the past few years, the United States Supreme Court has decided a plethora of cases symptomatic of a trend toward expanding the application of procedural due process concepts. In *Goldberg v. Kelly*² the constitutional protection was afforded to the status of a welfare recipient. The Court determined that procedural due process required an evidentiary hearing prior to the termination of welfare assistance payments. The need to protect public tax revenues was not found sufficiently overwhelming to justify the possible wrongful deprivation of public aid.

Although the posting of a prohibition against the sale of liquor to a person would result in a characterization considered a mark of serious illness to some, the Court found it to be a badge of disgrace warranting constitutional shelter in *Wisconsin v. Constantineou*,³ and held that before an individual could be labeled a drunk, he is entitled to notice and hearing. In *Bell v. Burson*,⁴ curtailment of driving privileges was at issue. A Georgia law permitted suspension of the driver's license of an uninsured motorist involved in an accident unless a bond was posted. The Court found that the statute was violative of Fifth Amendment protections in failing, prior to suspension of the license, to afford a hearing on the question of fault.

Perhaps the most significant case amplifying due process protections is *Fuentes v. Shevin*.⁵ In *Fuentes*, the Court held that a credit purchaser of chattels has a sufficient property interest in them to warrant prohibiting repossession by the creditor without prior notice and hearing. Thus, even a temporary deprivation of property is enveloped by the constitutional guarantee.

These cases and others have broken new ground in the formulation of constitutional protections and illustrate the move-

¹ *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

² 397 U.S. 254 (1970).

³ 400 U.S. 433 (1971).

⁴ 402 U.S. 535 (1971).

⁵ 407 U.S. 67 (1972). The impact of the *Fuentes* decision is discussed in Note, *Fuentes v. Shevin: New Procedural Safeguards for the Buyer under Conditional Sales Contracts*, 6 JOHN MAR. J. PRAC. & PROC. 139 (1972).

ment toward finding still more unexplored rights buried in the due process provision. One situation stands out as being particularly vulnerable to constitutional attack — police disciplinary procedures. In the past few years, the argument for affording the full panoply of due process protections to a disciplined policeman has begun to crop up. This article will examine the validity of that argument.⁶

THE LAW OF DUE PROCESS

The prohibition against the deprivation of property without due process of law was recognized at least as far back as the Magna Carta.⁷ This insulation of rights from arbitrary government action was engrafted into the United States Constitution by way of the Fifth Amendment,⁸ applying to federal action, and by way of the Fourteenth Amendment,⁹ imposing similar restrictions on the states. Nearly all state constitutions contain a provision using identical language or words of the same import and meaning.¹⁰

Case law interpretations unanimously conclude that the term is not susceptible of precise parameters.¹¹ Early attempts at a judicial definition of the phrase indicate that its meaning was taken for granted and did not need any express definition.¹²

A more recent delineation of due process was phrased "the State owes to each individual that process which, in light of the values of a free society, can be characterized as due."¹³ This elusive quality is tolerable when it is observed that due process is a fundamental principle of justice rather than a specific rule of law.¹⁴ Although courts have been unable to capture the concept in words, the import of the guarantee has developed by

⁶ The discipline procedures implemented by the Chicago Police Department will be scrutinized as representative of police disciplinary practices generally.

⁷ Some writers trace the concept back as far as the edict of Conrad II issued May 28, 1037. R. MOTT, *DUE PROCESS OF LAW* 1 (1926). Mr. Mott's treatise contains a well documented account of the etymology of the phrase and the history of its inclusion as a constitutional right.

⁸ "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

⁹ "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV.

¹⁰ Illinois is no exception: "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws." ILL. CONST. art. 1, § 2.

¹¹ *E.g.*, Federal Communications Comm'n v. WJR, The Goodwill Station, Inc., 337 U.S. 265, 275 (1949); Barnett v. County of Cook, 388 Ill. 251, 255, 57 N.E.2d 873, 875 (1944).

¹² R. MOTT, *DUE PROCESS OF LAW* 192 (1926).

¹³ Boddie v. Connecticut, 401 U.S. 371, 380 (1971).

¹⁴ See Betts v. Brady, 316 U.S. 455, 462 (1942).

¹⁵ The phrase 'due process of law' has, on its face, but a procedural aspect, relating to proceedings before judicial or quasi-judicial tribunals, and in the early cases, appeal to that phrase was made from that standpoint only. It was not until the second half of the 19th century that a

a process of judicial inclusion and exclusion. Through this method, certain features of due process have been established. These attributes pertain to (1) the minimal requirements of due process, (2) the persons and agencies under a duty to observe due process procedures and (3) the persons or property rights within the zone of protection.

Minimal Requirements of Due Process

A discussion of minimal due process requirements necessitates a distinction between its substantive and procedural aspects.¹⁵ Substantively, due process can be said to mean that fundamental fairness which is essential to the very concept of justice. This fundamental fairness is violated when the government deprives a person of property "by an act that has no reasonable relation to any proper governmental purpose, or which is so far beyond the necessity of the case as to be an arbitrary exercise of governmental power."¹⁶ Thus, in substantive law, due process imposes a standard of reasonableness as a limitation upon the exercise of the police power by government.

The central meaning of the procedural aspect of the provision is more easily ascertainable: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified."¹⁷ This general statement is nearly as vague as the due process language of the Constitution itself. However, at least six elements of notice and hearing are identifiable.

First, the notice must be timely and adequate. A notice is timely if it provides sufficient time to enable the accused to prepare his case, affords him an opportunity to be present, and occurs at a time when the deprivation of rights can be prevented.¹⁸ To be adequate the notice must be likely to be received and plain to understand¹⁹ and it must detail the reasons for the proposed action.²⁰

Second, the hearing stage must be effective in affording to

contrary view came definitely to be taken. The doctrine of natural and inherent rights asserted itself. . . . [I]n *Wynehamer v. People*, 1856, 13 N.Y. 378, the court decided that the police power is definitely limited by the constitutional provision for due process, and that that provision has, accordingly, a substantive aspect as well as a procedural one. *State v. Langley*, 53 Wyo. 332, 343, 84 P.2d 767, 770 (1938).

¹⁵ *Albritton v. City of Winona*, 181 Miss. 75, 97, 178 S. 799, 804, *appeal dismissed*, 303 U.S. 627 (1938).

¹⁷ *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863).

¹⁸ *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *In re Gault*, 387 U.S. 1, 29 (1967).

¹⁹ *Griffin v. County of Cook*, 369 Ill. 380, 392, 16 N.E.2d 906, 912 (1938).

²⁰ *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970). It should be noted that the procedural elements cannot be completely isolated from the concept of substantive due process. Thus, the fundamental test for the sufficiency of a notice is whether it is fair and just to the parties involved. See *In re Bergman's Survivorship*, 60 Wyo. 355, 376, 151 P.2d 360, 368 (1944).

the accused an opportunity to defend by confronting adverse witnesses and by presenting his own oral arguments and witnesses. These protections are of particular importance where deprivation of property rests on misleading factual premises or on a misapplication of policies to the facts of the particular case.²¹ The requirement of confrontation and cross-examination has been specifically applied to the situation where a person may be deprived of his livelihood on the testimony of a single witness.²²

Third, the opportunity to be heard must be tailored to the nature of the case and the capacities of those who are to be heard. Oral presentations are more flexible than written submissions, in that they permit the accused to adapt his statements to counter his adversary's arguments as well as overcome the problems encountered when the accused lacks the education necessary to write effectively.²³

Fourth, "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."²⁴ The Court, in *Goldberg v. Kelly*, did not construe this statement to mean that counsel must be provided, but rather that an accused must be allowed to retain an attorney if he so desires. The Court explained that counsel could assist the accused by delineating the issues, presenting factual contentions in an orderly manner, conducting cross-examination and generally safeguarding the interests of the accused.²⁵

Fifth, the decision maker must be impartial.²⁶

Sixth, and finally, the impartial determiner should state the reasons for the decision and indicate the evidence relied on.²⁷ This statement, however, need not amount to a full opinion nor are formal findings of fact and conclusions of law required.²⁸

This list of basic elements is not exhaustive. Other refinements to the essentials of due process have been judicially determined under the overriding qualification that all procedures must conform to the nature of the case and the particular persons and property rights involved. Consequently, the requirements outlined above have been somewhat modified by a consideration of the type of tribunal conducting the hearing.

Persons and Agencies Bound by Due Process Procedures

The Fifth and Fourteenth Amendments expressly bind the

²¹ *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970).

²² See *Willner v. Comm. on Character and Fitness*, 373 U.S. 96, 103 (1963).

²³ *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970).

²⁴ *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

²⁵ 397 U.S. 254, 270-71 (1970).

²⁶ *Johnson v. Mississippi*, 403 U.S. 212 (1971); *In re Murchison*, 349 U.S. 133 (1955); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

²⁷ *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

²⁸ *Id.*

federal government and the states to the restrictions of the due process guarantees. These constitutional mandates, coupled with a desire to preclude arbitrary exercise of power by any form of government, have supported the imposition of the duty to observe due process upon the state and federal governments in every one of their branches, agencies and political subdivisions.

When dealing with a multifarious governmental system, however, litigation to ascertain more precise boundaries for the application of the due process principle is inevitable. In general, the prohibition attaches to municipalities²⁹ and administrative agencies³⁰ and their officers.³¹ But the mere fact that the forum involved is classified as an administrative agency does not raise the status of a hearing to that of a trial. Various circumstances must first be considered to determine the extent to which due process protections will be applied. Among these factors are the function the agency is performing, the opportunity for appeal to a judicial tribunal and the nature of the right involved.

Due process procedures are not invoked unless the agency is performing in a quasi-judicial capacity; an agency which is merely conducting an investigation will not be inhibited by due process. The more closely the agency's role approaches the judicial functions of a court, the more strictly due process requirements are enforced. The duties of a board, as defined by its enabling statute, assist in ascertaining the purpose of the agency. Quasi-judicial functions are those lying midway between judicial acts and purely ministerial ones; quasi-judicial functions require an element of discretion.³² Where discretion is present in the exercise of its power, the agency or board comes within the ambit of those bound by the due process duty.

Investigatory proceedings do not involve discretion, and therefore, do not invoke full due process protections. This point was firmly established in *Hannah v. Larche*,³³ where the United States Supreme Court distinguished adjudicative functions from those which are purely investigatory by listing what an investigatory agency does not do:

It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, [it] does not and cannot take any affirmative

²⁹ *East St. Louis Ry. v. City of East St. Louis*, 13 F.2d 852 (7th Cir. 1926).

³⁰ *Italia America Shipping Corp. v. Nelson*, 323 Ill. 427, 154 N.E. 198 (1926).

³¹ *People v. Belcastro*, 356 Ill. 144, 190 N.E. 301 (1934).

³² See *Parker v. Kirkland*, 298 Ill. App. 340, 348-49, 18 N.E.2d 709, 713-14 (1939).

³³ 363 U.S. 420 (1960).

action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.³⁴ It is reasonable to infer that a non-investigative body, *i.e.*, an adjudicative agency, is one which performs some or all of these tasks. Thus, when a board is empowered to take any affirmative action affecting the legal rights of an individual, hearings before that board should conform to the minimal due process standards.

There is a compelling need for a full and fair hearing where no opportunity for appeal is granted. The right to review itself is not essential to due process, provided the constitutional guarantees have already been afforded by the tribunal of first instance.³⁵ Accordingly, the constitutional requirements are satisfied if due process is afforded at the administrative hearing stage or if there is provision for judicial review.

The right involved in a cause is necessarily an important consideration. Where the proceedings may affect a property right, the opportunity for potential harm commands stringent constitutional protection of that right. Therefore, in an administrative proceeding where the agency functions are quasi-judicial or adjudicative as opposed to investigatory, where there is no provision for judicial review and where property rights are involved, the need for due process protections is imperative.

Persons and Property Rights Protected

The requirement that a property right be involved is not limited to administrative proceedings. The right to a hearing in any case attaches only to the deprivation of an interest encompassed within the constitutional protection.³⁶ The Amendments do not expressly specify the property rights protected, but their general policy is apparent and the rights entitled to the constitutional comforts are broadly defined.³⁷ A person's occupation, labor and the income therefrom are included within this sweeping definition.³⁸ And while there is no constitutional right to govern-

³⁴ *Id.* at 441.

³⁵ *Chicago v. Cohn*, 326 Ill. 372, 158 N.E. 118 (1927).

³⁶ *See Fuentes v. Shevin*, 407 U.S. 67, 84 (1972).

³⁷ 'Property' has been defined to include every interest anyone may have in any and everything that is the subject of ownership by man, together with the right to freely possess, use, enjoy or dispose of the same. . . . The privilege of every citizen to use his property according to his own will is both a liberty and a property right. The 'liberty' guaranteed by the constitution includes not only freedom from servitude or restraint, but also the right of every man to be free in the use of his power and faculties, to pursue such occupation or business as he may choose, and to use his property in his own way and for his own purposes, subject only to the restraint necessary to secure the common welfare. *Father Basil's Lodge, Inc. v. City of Chicago*, 393 Ill. 246, 256, 65 N.E.2d 805, 812 (1946).

³⁸ *People v. Brown*, 407 Ill. 565, 572, 95 N.E.2d 888, 893 (1951); *Du Page County v. Henderson*, 402 Ill. 179, 184, 83 N.E.2d 720, 725 (1949); *Lasdon v. Hallihan*, 377 Ill. 187, 195, 36 N.E.2d 227, 231 (1941).

ment employment, in *Slochower v. Board of Education*³⁹ the Supreme Court recognized that public employees are protected by the Fourteenth Amendment.

In addition to these three factors — the minimal requirements, the agencies bound and the property rights protected — there is one other aspect of due process which deserves attention. Although due process is a two-pronged concept, its substantive and procedural aspects often overlap.⁴⁰ The balancing of interest test earmarking substantive due process is applicable to procedural due process as well. Since the procedures to be employed in any given situation are not inflexible, the assessment of constitutional satisfaction is a balancing of the competing interests of the governmental entity with those of the individual involved.⁴¹ If the interests of the government outweigh those of the individual, a lesser standard of due process protection is tolerated.

With this survey of due process in mind, the disciplinary procedures employed by the Chicago Police Department may be examined.

POLICE DISCIPLINARY PROCEDURES

An analysis of the rules used in disciplinary procedures⁴² applicable to the Chicago policeman demands an examination of the statutory authority to promulgate these rules. The superintendent of police derives his power from statute:

The superintendent of police shall be the chief executive officer of the police department The superintendent shall be responsible for the general management and control of the police department and shall have full and complete authority to administer the department in a manner consistent with the ordinances of the city, the laws of the state, and the rules and regulations of the police board.⁴³

Illinois statutes also authorize the selection of a Police Board and vest in it the power to hear disciplinary actions involving police officers.⁴⁴ By these provisions the Board is empowered to adopt rules and regulations for the governance of the police

³⁹ 350 U.S. 551 (1956).

⁴⁰ See note 20 *supra*.

⁴¹ *Boulware v. Battaglia*, 344 F. Supp. 889 (D. Del. 1972), *aff'd* 478 F.2d 1398 (3d Cir. 1973).

⁴² A statistical survey of the types of charges brought against policemen in another large city and the disposition of the actions may be found at: Cohen, *Criminology: The Police Internal System of Justice in New York City*, 63 J. CRIM. L.C. & P.S. 54 (1972).

⁴³ ILL. REV. STAT. ch. 24, § 3-7-3.2 (1971).

⁴⁴ ILL. REV. STAT. ch. 24, § 3-7-3.1 (1971). The grant of authority contained in §§ 3-7-3.1 and 3-7-3.2 is amplified by the Municipal Code of Chicago, § 11-5 (designating the superintendent of police as chief administrator of the police department) and § 11-3 (setting forth the powers of the Police Board).

department, while the authority to administer its operations is reserved to the superintendent of police. The Police Board may direct police department operations only within the confines of section 10-1-18.1.⁴⁵

The application of section 10-1-18.1 is limited to those situations where a policeman may be discharged or suspended for *more than* thirty days. In this event, the accused officer is entitled to a hearing before the Police Board which carries with it the full panoply of procedural due process protections: the officer must receive written notice, he may be represented by counsel, he has the right of confrontation, he may cross-examine witnesses and present evidence in his defense, and he is entitled without charge to a record of any hearing, interrogation or examination. After the hearing, the decision of the Board is certified to and enforced by the superintendent of police.

The last sentence of the section is of particular note: "Nothing in this Section limits the power of the superintendent to suspend a subordinate for a reasonable period *not exceeding* 30 days."⁴⁶ The import of the statute is to mandate a Police Board hearing with full rights where discharge or a thirty-one day suspension is recommended. But where a suspension of thirty days or less is advocated, the Police Board is not empowered to take any action, rather, disciplinary action is at the discretion of the superintendent.

An exercise of discretion by the Chicago superintendent of police may be manifest in a "general order." A "general order" is an internal directive issued by the superintendent which affects the entire department. General Order No. 67-21 and the subsequent amendments thereto set forth the disciplinary and summary punishment procedures presently in use by the Chicago Police Department.⁴⁷ This order provides for the investigating and the processing of all complaints alleging police misconduct regardless of whether the source is a citizen, a supervising officer, or any other member of the Department.⁴⁸ An

⁴⁵ The board's power to adopt rules and regulations for the governance of the police department does not include the authority to administer or direct the operations of the police department or the superintendent of police, except as provided in Section 10-1-18.1.
ILL. REV. STAT. ch. 24, § 3-7-3.1 (1971).

⁴⁶ ILL. REV. STAT. ch. 24, § 10-1-18.1 (1971) (emphasis added).

⁴⁷ The order applies only to violations of the Department Rules and Regulations. However, these rules are far reaching and include "sustained violations of the law and other irregularities which are wilful, devious or serious in nature or involve the integrity of the Department." General Order No. 67-21H, § 3-S-3 (Oct. 23, 1972), *amending* General Order No. 67-21 (June 28, 1967). Thus, the order contains provisions for procedures where a violation of the Illinois Criminal Code is alleged. General Order No. 67-21, § IV-G; General Order No. 67-21E, § II-E-R (May 1, 1970), *amending* General Order No. 67-21.

⁴⁸ General Order No. 67-21, § II.

investigator is assigned to conduct the probe and, when warranted, he may seek assistance from other members of his unit or from the staff of the Internal Investigation Division.⁴⁹ The investigation is required to be "complete and expeditious" and must conform to the elaborate directions detailed in the order.⁵⁰ The procedures to be employed include taking written statements from the accused, witnesses and the complainant;⁵¹ administering a breathalyzer test when drinking has been alleged;⁵² ordering the accused to submit to a polygraph test when an alleged crime has occurred;⁵³ and complying with complex reporting and approval procedures.⁵⁴

Upon completion of the inquiry, the investigating officer classifies the original complaint as either "unfounded" (allegation is false or not factual), "exonerated" (incident occurred but was lawful and proper), "not sustained" (insufficient evidence either to prove or disprove allegation), or "sustained" (allegation is supported by sufficient evidence to justify disciplinary action.)⁵⁵ When classified as "sustained," the investigator may further recommend a reprimand, suspension for a specific number of days or separation.⁵⁶

It should be noted that this determination is made *after* the investigation has been completed. Only then is it known whether or not a Police Board hearing is mandated. If the recommended action is a thirty day or less suspension, there is no right to a full hearing before the Police Board. General Order No. 67-21 sets forth the procedure to be employed in this event by creating a Complaint Review Panel.⁵⁷

The Police Board consists of five persons appointed by the mayor with the consent of the city council.⁵⁸ The Complaint Review Panel, on the other hand, consists of three persons who are members of the force.⁵⁹ The rank of these presiding officers is dependent upon the rank of the accused. When the accused is of the rank of sergeant or above, two of the three panel members must be of "exempt" rank.⁶⁰ "Exempt" rank is accorded to high-ranking officers who obtained their positions by executive appointment rather than through the civil service procedure. Appointment is accorded to those "persons whom he [the super-

⁴⁹ General Order No. 67-21, §§ III-B-2g(1), IV-A.

⁵⁰ General Order No. 67-21, § IV-A-2.

⁵¹ General Order No. 67-21, § IV-H.

⁵² General Order No. 67-21, § IV-E.

⁵³ General Order No. 67-21, § VI-D.

⁵⁴ General Order No. 67-21, § V.

⁵⁵ General Order No. 67-21, § IV-J.

⁵⁶ General Order No. 67-21, § IV-M.

⁵⁷ General Order Nos. 67-21H, § 1-1 and 67-21E, § II.

⁵⁸ ILL. REV. STAT. ch. 24, § 3-7-3.1 (1971).

⁵⁹ General Order No. 67-21H, § 1-1.

⁶⁰ *Id.*

intendent of police] feels will carry out his policies."⁶¹ Furthermore, these persons "serve in such capacity at the pleasure of the chief executive."⁶²

The opportunity for a hearing before the Complaint Review Panel is not automatic. When the recommended action is thirty days suspension or less, the accused's commanding officer is notified by telephone that the accused officer has twenty-four hours in which to exercise or waive his right to a Complaint Review Panel hearing.⁶³ The request for a hearing must be in the form of written notice. The accused is also advised that "no legal protection applies."⁶⁴

Although the accused officer may not bring counsel to the hearing, he may bring with him any other active officer who does not out-rank the Panel members.⁶⁵ It is possible for this accompanying officer to be an attorney, but even so, the right to counsel is not complete. The accompanying officer may assist the accused only at the hearing itself and not, for example, at a polygraph test. Furthermore, although the order permits the accompanying officer to review the reports involved in the case and remind the accused of factors which could affect his case, the order specifically prohibits him from cross-examining or addressing the Department's prosecutor or any member of the Panel.⁶⁶

The Complaint Review Panel itself is not empowered to impose any punishment. Its authority is limited to a recommendation of action to the superintendent.⁶⁷ General Order No. 67-21 makes it clear that the entire discretion for the imposition of any punishment rests with the superintendent.⁶⁸

From this review of General Order No. 67-21 several pertinent observations may be made: (1) An extensive investigation is conducted prior to the Complaint Review Panel hearing. (2) Some Panel members are of exempt rank, *i.e.*, they are chosen because of their support of the superintendent. (3) The accused officer is afforded a hearing only if he so requests in writing. (4) The full panoply of rights does not attach to the hearing, *i.e.*, as a substitute for counsel the accused may be accompanied by another policeman and even this right is severely limited. (5) The final imposition of a penalty is at the discretion of the superintendent.

⁶¹ O. W. WILSON, *POLICE ADMINISTRATION* 280 (3d ed. 1972).

⁶² *Id.*

⁶³ General Order No. 67-21, § III-B-3(b).

⁶⁴ General Order No. 67-21E, § II-E-P.

⁶⁵ General Order No. 67-21H, § 2-5.

⁶⁶ *Id.*

⁶⁷ General Order No. 67-21, § III-C-4.

⁶⁸ General Order No. 67-21, § III-D.

Based on the premise that Complaint Review findings are merely advisory, any recommendations made are not subject to judicial review. General Order No. 67-21⁶⁹ provides for review by the superintendent and any action he takes in approving and effecting these recommendations is subject to the appeal process of the Administrative Review Act.⁷⁰ The effectiveness of this review procedure as it concerns disciplined Chicago policemen will be discussed in the next section.

DUE PROCESS AND GENERAL ORDER NO. 67-21

Entitlement to the Protections

In order to establish that the due process guarantees extend to Complaint Review Panel hearings, several hurdles must be surmounted. The first inquiry is whether the situation of the rebuked officer comes within the zone of the due process protections. Entitlement to the prophylactic procedures requires not only that a property right within the scope of the provisions be involved, but also that the body conducting the proceedings be one that is bound by the constitutional prohibition.

The existence of a property right in discipline situations is easy enough to establish. Chicago policemen are public employees and are therefore clearly entitled to the protections of the Fourteenth Amendment.⁷¹ Fitting the Complaint Review Panel within the framework of agencies bound to observe the due process policies, however, presents a greater challenge.

The "enabling statute" creating the Complaint Review Panel is, in effect, General Order No. 67-21. Although that document claims to reserve all discretion to the superintendent of police, it in fact not only authorizes but requires the Panel to make a determination and recommendation of action to the superintendent.⁷² The suggestion that the Panel is devoid of discretion appears to be false.

It has been argued, and successfully, that the Panel is merely investigatory⁷³ and this contention has found support in

⁶⁹ *Id.*

⁷⁰ *People ex rel. Dever v. Wilson*, 107 Ill. App. 2d 223, 246 N.E.2d 863 (1969).

⁷¹ *Slochower v. Bd. of Education*, 350 U.S. 551 (1956).

⁷² The Complaint Review Panel *will* determine whether the charges should result in a finding of unfounded, exonerated, not sustained or sustained and *will* recommend one of the following actions to the Superintendent:

- a. Further investigation with specific recommendations.
- b. Dismissal of the charges.
- c. A written reprimand.
- d. A suspension for a period not to exceed 30 days.

General Order No. 67-21, § III-C-4 as modified by General Order Nos. 67-21B (July 23, 1968) and 67-21E, § II-C (emphasis added).

⁷³ See discussion in text accompanying notes 98 and 104 *infra*.

Hannah v. Larche.⁷⁴ However, a comparison of the activities of the Complaint Review Panel with those considered characteristic of an investigative body in *Hannah*, illustrates that the Complaint Review Panel is far more than an inquirer. Although it does not issue orders, the Panel does issue "determinations" which are instrumental in causing an order to be rendered by the superintendent. Thus, it is capable of making a determination which may potentially deprive an individual of property. Although it cannot take affirmative action affecting legal rights, the Panel does issue "recommendations" of affirmative action affecting legal rights.

Additionally, in view of the elaborate investigation preceding the determination of entitlement to a hearing, it is difficult to comprehend how the Panel hearing can also be classified as "investigatory." The Complaint Review Panel session is the only hearing afforded the officer who may be disciplined for thirty days or less. In *Willner v. Committee on Character and Fitness*,⁷⁵ the Supreme Court indicated that where the determiner has no hearing of his own, the role of the "advisor" is more than that of a mere investigator.⁷⁶

Furthermore, the review of the Complaint Review Panel's conclusions by the superintendent is conducted in a sterile atmosphere. The superintendent cannot attend all Panel hearings and must make his final determination from the record, reports and recommendations supplied to him. He hears no evidence upon which to base factual decisions. The Panel findings must necessarily be heavily relied upon in ordering a suspension.

Appeal of the superintendent's orders under the Administrative Review Act⁷⁷ is equally unsatisfactory. Section 274 of that Act provides: "The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." Supplementing this legislative restriction is a hesitancy on the part of the courts to substitute their discretion for that of the administrative officer. In *Charles v. Wilson*,⁷⁸ the Illinois appellate court stated that:

[T]he Superintendent of Police has the responsibility to the community of securing maximum efficiency from the police force at all rank levels, and his actions should not be subject to review by the courts, except to determine whether there was or was not good faith and a reasonable exercise of discretion.⁷⁹

This judicial reluctance to overturn a decision of the superin-

⁷⁴ 363 U.S. 420 (1960).

⁷⁵ 373 U.S. 96 (1963).

⁷⁶ *Id.* at 104.

⁷⁷ ILL. REV. STAT. ch. 110, §§ 264 *et seq.* (1971).

⁷⁸ 52 Ill. App. 2d 14, 201 N.E.2d 627 (1964).

⁷⁹ *Id.* at 25-26, 201 N.E.2d at 633.

tendent strips the appeal process of its effectiveness in preserving the rights of an accused officer.

That the Chicago policeman facing a Complaint Review Panel has a property right at stake is obvious. That the investigative nature of the Panel is at best questionable and that the provisions for judicial review are ineffective has been demonstrated. Accordingly, the admonished officer's need for due process protections in proceedings before the Complaint Review Panel is pressing.

Compliance with Minimal Standards

Assuming this conclusion, that the policeman's situation is one entitling him to due process protections, it remains to be determined whether or not the minimal requirements of due process are satisfied by the present procedures.

Notice to the disciplined Chicago policeman is effected by informing his commanding officer of the pending action by telephone twenty-four hours before the accused must exercise his option to have a Review Panel hearing. Apparently, although General Order No. 67-21 does not so state, the supervising officer is then to notify the accused. Nowhere in the order is it unequivocally stated how, when or where the accused is to be advised of the possible action against him if the complaint is classified as "sustained" with a recommended suspension of thirty days or less. Nor is provision made for informing the accused of the reasons for the action. The inadequacy of this notice procedure is compounded by the requirement that the accused policeman submit a written request within twenty-four hours to obtain a hearing before the Complaint Review Panel. The police administration appears to be more concerned with notification to the disciplining board than with notification to the disciplined policeman.

Upon exercising his option to appear before the Panel, the admonished officer becomes entitled to present his "plea."⁸⁰ This would seem to include presenting witnesses and oral arguments as well as confronting and cross-examining witnesses against him. But the order does not guarantee these rights.⁸¹ The presentation of a plea merely affords a rudimentary opportunity to be heard at which the accused is not limited to written submissions, but may present his case orally.

The opportunity for assistance of counsel is not flatly denied by the order, but neither is it assured. The order speaks only of the right to bring another officer to the hearing. In

⁸⁰ General Order No. 67-21, § III-C-3.

⁸¹ In *Allen v. City of Greensboro*, 322 F. Supp. 873 (M.D.N.C. 1971), *aff'd* 452 F.2d 489 (4th Cir. 1971), similarly worded procedures were at issue. They were applied so as to deny the accused the right of confrontation.

practice, an attorney may accompany the accused only at the grace of the Panel.⁸² This discretionary practice contravenes the principle, clearly established in *Goldberg*, that while counsel does not have to be provided, the accused should have the right to obtain counsel of his own. Moreover, in *Powell v. Alabama*⁸³ the Supreme Court observed that:

If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.⁸⁴

The argument raised to support denial of the presence of counsel is the inconvenience of making the proceeding more cumbersome. Just how the attendance of an attorney would bring about this result is not explained by the proponents of the position. And the United States Supreme Court, itself, does "not anticipate that this assistance will unduly prolong or otherwise encumber the hearing."⁸⁵

Due process also requires an impartial decision-maker. The procedures outlined in General Order No. 67-21 do provide this right. The prohibition that neither the accused nor the officer accompanying him may outrank any of the Panel members assures that no pressure will be exerted on the hearing officers. Additionally, no officer may be designated a member of a panel if the accused is serving under his command.⁸⁶

The last requirement for minimal due process protections is a final statement particularizing the reasons for the ultimate decision and the evidence relied on. Although the order specifies procedures for reporting nearly every action to the superintendent, the policeman, who is personally affected by the admonishment, is ignored.

The Balancing Test

Even if the present procedures fail to meet the minimum standards of due process, this failure will be tolerated if the interests of police administration outweigh those of the rebuked officer. The arguments supporting the contention that the administration's interests should prevail, may be placed into three categories: (1) the convenience argument, (2) the military-discipline argument and (3) the insignificant penalty argument.

The proponents of the convenience view anticipate a dis-

⁸² See *Grabinger v. Conlisk*, 320 F. Supp. 1213, (N.D. Ill. 1970), *aff'd* 455 F.2d 490 (7th Cir. 1972).

⁸³ 287 U.S. 45 (1932).

⁸⁴ *Id.* at 69.

⁸⁵ *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

⁸⁶ General Order No. 67-21, § III-C-3.

ruption of disciplinary procedures if every officer were entitled to due process. This result would not necessarily follow. For full due process protections to be afforded the Chicago policeman, General Order No. 67-21 would have to be amended to provide for notice to the accused before the hearing and after a determination has been made, assure the right of confrontation and cross-examination and allow the presence of counsel. The additional step of notifying the accused would not seem to place an intolerable burden on police administration especially in view of the already complex reporting process. Furthermore, the right of confrontation and cross-examination should be part of the accused's plea. It is difficult to understand how fulfillment of this right could impair the disciplinary process. Finally, the benefits to the accused of having a skilled and knowledgeable attorney speak for him heavily outweigh the minute inconvenience of having one more person in the hearing room.

The military-discipline argument is premised on the nature of the governmental function of enforcing police regulations and maintaining discipline. This position will be examined later in this article.

The weakest of the arguments contending that the interests of efficient police administration outweigh those of the accused policeman is that a potential suspension of thirty days has relatively little impact on the recipient. It is true that a thirty day suspension without pay is the maximum penalty which can be imposed without providing the due process protections afforded at a Police Board hearing. But even a suspension of a few days without pay may place a serious burden on the salaried police officer. It can hardly be contended that the uninterrupted pursuit of one's livelihood is less important than the opportunity to purchase liquor (*Wisconsin v. Constantineau*),⁸⁷ the continued possession of a stereo purchased on credit (*Fuentes v. Shevin*)⁸⁸ or the retention of a driver's license (*Bell v. Burson*).⁸⁹

Although some due process protections are afforded by the police disciplinary procedures, many others are not, and the interests of the administration in supervising police activities are not sufficient to justify withholding the full panoply of due process. Thus, it would seem from this analysis that the constitutional rights of disciplined policemen are being violated by the Chicago rules. But the only case to have considered the point did not so hold.

⁸⁷ 400 U.S. 433 (1971).

⁸⁸ 407 U.S. 67 (1972).

⁸⁹ 402 U.S. 535 (1971).

CASE LAW APPLICATION IN DISCIPLINE PROCEEDINGS

The leading decision construing the Chicago police disciplinary procedures is the 1970 case of *Grabinger v. Conlisk*.⁹⁰ The action was brought by two police officers against the superintendent of police and other defendants, seeking money damages and the expunging of certain official records pertaining to plaintiffs. An investigation was initiated based upon a citizen's complaint charging plaintiff Grabinger with use of excessive force while plaintiff Tovar looked on. The investigation and Complaint Review Panel hearing resulted in the imposition on each of the plaintiffs of a fifteen day suspension without salary.

Grabinger and Tovar alleged violations of constitutional rights in that they were refused the opportunity of having an attorney present at the hearing and that a suspension, based in part upon their refusal to submit to a polygraph test without benefit of counsel was arbitrary. The district court quickly dismissed plaintiffs' Fifth Amendment self-incrimination and Sixth Amendment right to counsel contentions. But the court had to struggle to dismiss the contention that due process was not observed.

The opinion avoided classifying the Complaint Review Panel hearing as either "administrative," as urged by the plaintiff policemen, or as "departmental," as urged by defendant Conlisk. In doing so the opinion relied on language from *Hannah* and stated that the "precise nature of the governmental function involved, the nature of the proceedings, and the potential burden on those proceedings of the claimed due process rights" must be the primary considerations in determining the contours of plaintiffs' due process rights.⁹¹ The characteristics of an investigative hearing enumerated in *Hannah* were ignored.

In deciding that plaintiffs' due process rights were not violated, five factors were found to control. The first of these dealt with the severity of the penalty imposed. The *Grabinger* court found the proceedings to have "a relatively limited impact on any police officer"⁹² and that the situation was one "where, at most, some mild form of disciplinary action may occur"⁹³ and where "the maximum punishment is relatively so little."⁹⁴ Thus, the court concluded that a potential suspension of thirty days without pay placed a negligible burden on due process rights.

The second factor concerned the military-discipline argument. The court stated that:

⁹⁰ 320 F. Supp. 1213 (N.D. Ill. 1970), *aff'd* 455 F.2d 490 (7th Cir. 1972).

⁹¹ *Id.* at 1219.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 1220.

[A] law enforcement officer is in a peculiar and unusual position of public trust and responsibility, and by virtue thereof, the public body has an important interest in expecting the officer to give frank and honest replies to questions relevant to his fitness to hold public office.⁹⁵

And that:

The high obligation owed by a policeman to his employer and his peculiar position in our society certainly must be taken into account in considering the nature and effect of disciplinary proceedings instituted by the employer.⁹⁶

Nowhere did the court explain how a denial of a full hearing would diminish the policeman's public trust or high obligation.

The third factor relied on was the convenience contention. While the court acknowledged that the plaintiffs would benefit from the presence of counsel, it stated that granting this privilege would seriously disrupt the disciplinary procedures.⁹⁷ Again, the finding was unsubstantiated.

The fourth factor related to the fact that plaintiffs were given notice and were afforded a hearing. It cannot be denied that General Order No. 67-21 provides for notice and a rudimentary hearing. But the primary issue was whether *that* notice and hearing complied with the requirements of due process, not whether *some* notice and *some* hearing was provided for.

The fifth factor involved the finding that the Complaint Review Panel function was investigatory in nature, rather than adjudicative, since the Panel merely made a recommendation while the superintendent took the final action.⁹⁸ The court arrived at this conclusion while entirely overlooking the fact that a complete investigation was conducted prior to the hearing.

Finally, the court also dismissed the contention that basing the suspension in part upon plaintiffs' refusal to submit to a polygraph test without the presence of counsel violated due process. The court employed the same five factors in concluding that the requirement of submission to a polygraph test did not violate procedural due process. In view of the fact that plaintiffs had never taken the test, the court refused to decide whether the use of the test results themselves as the basis for suspension would constitute an infringement upon due process protections.⁹⁹

While the *Grabinger* case was pending appeal,¹⁰⁰ a district court in North Carolina decided the case of *Allen v. City of*

⁹⁵ *Id.* at 1219.

⁹⁶ *Id.* at 1220.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1219.

⁹⁹ *Id.* at 1221-22.

¹⁰⁰ The Court of Appeals for the Seventh Circuit adopted the district

Greensboro.¹⁰¹ Detective Allen had been removed from the Youth Division and demoted to the position of patrolman with a resultant salary decrease. This action was the result of a finding by the General Board of Inquiry that plaintiff Allen had made improper advances toward a young woman while he was conducting an official investigation.

The organization and procedures for discipline described in the *Allen* case are not unlike the situation found in Chicago. The Greensboro Chief of Police also dictated the procedures by way of a general order¹⁰² unbound by any statutory restrictions. The pertinent differences between the Greensboro procedures and those used in Chicago are (1) while the accused Greensboro police officer may present witnesses and testimony, he is specifically prohibited from bringing legal counsel, personal advisors, and family members to the hearing and (2) although the Board made recommendations to the Greensboro chief of police, the latter's action was appealable to the city manager, the administrative head of the municipal government, who had final approval.

Although Allen alleged a denial of the right of confrontation in that the complainant was not available for cross-examination at the hearing, the court pointed out that he could have called her as a witness.

In concluding that Allen was not denied due process, the court relied heavily on the Illinois *Grabinger* decision decided less than two months previously. Again, the *Allen* court found that the public interest in proper police protection by a competent and properly disciplined police force outweighed the private interests of the individual policeman.¹⁰³ And again, this decision was arrived at by citing language from *Grabinger* without any explanation of how the affording of due process protections would inhibit the discipline of the force. The *Allen* court further relied on *Grabinger* by applying the same five factors. Although the *Allen* court did not enumerate the fifth factor, the investigative nature of the hearing, as one of the bases for its determination, the finding that the General Board of Inquiry was an investigatory body and not judicial or quasi-judicial, was central to the disposition of the case.¹⁰⁴

court opinion in *Grabinger* with little discussion. 455 F.2d 490 (7th Cir. 1972).

¹⁰¹ 322 F. Supp. 873 (M.D.N.C. 1971), *aff'd* 452 F.2d 489 (4th Cir. 1971).

¹⁰² Greensboro Police Force Departmental General Order No. 69-2.

¹⁰³ 322 F. Supp. at 876-77.

¹⁰⁴ Both *Grabinger v. Conlisk* and *Allen v. City of Greensboro* were cited with approval by a Delaware district court in *Boulevard v. Battaglia*, 344 F. Supp. 889, 907 (D.C. Del. 1972), *aff'd* 478 F.2d 1398 (3d Cir. 1973).

Allen appealed to the Fourth Circuit Court of Appeals¹⁰⁵ which affirmed the lower court decision. However, the court of appeals was less definite in its holding that due process was not violated and disagreed with the lower court on one very important aspect. The reviewing court found that the hearing procedure was not strictly investigatory. Rather, the appellate court found that it served adjudicative functions as well. This finding was not enough to reverse the decision, however, upon examination of the specific factual situation before the *Allen* court.

In affirming, the court of appeals relied on three peculiar facts not present in the *Grabinger* case. First, Allen admitted to the charges. The complainant was not present at the hearing and her statement was admitted as hearsay — her version of the incident was read by an investigation officer. The accused agreed that these statements were “basically true,” and accordingly, the reviewing court found that confrontation would have been of little help. Second, Allen never made his desire to be represented by counsel known until he appealed his demotion to the city manager. Allen felt that the request would have been unavailing in the face of the specific prohibition against the presence of counsel found in the governing order. The appellate court noted that “[w]hile courts should not require futile gestures for the sake of form, we might have a different case had Allen requested that counsel be allowed to be present.”¹⁰⁶ Thus, the fact that Allen failed to protest the regulation denied the police administration the opportunity to reconsider its procedure. Third, in a footnote,¹⁰⁷ the reviewing court found the Greensboro procedures to be distinguishable from those in *Grabinger* where the most formidable action the reviewing panel could recommend was a thirty day suspension, while the Greensboro Board could recommend complete dismissal. This observation seems to be misguided. At the time *Grabinger* was decided, the Complaint Review Panel could recommend Police Board action; the Police Board in turn could take action resulting in dismissal.¹⁰⁸

The procedures upheld in the *Boulware* case provided substantially greater protections than were afforded the plaintiffs in either *Grabinger* or *Allen*.

¹⁰⁵ *Allen v. City of Greensboro*, 452 F.2d 489 (4th Cir. 1971).

¹⁰⁶ *Id.* at 490-91.

¹⁰⁷ *Id.* at 491.

¹⁰⁸ General Order No. 67-21, § III-C-4 has since been amended by General Order No. 67-21E, § II-C to strike the words “Charges before the Police Board” as one of the possible actions of the Complaint Review Panel. But in view of other language in the order, it is not clear whether this deletion prohibits such a recommendation by the Panel. Since the Police Board hearings do provide all of the due process protections, it would appear that an officer is in a better position constitutionally if more serious action is recommended.

Two other cases dealing with this due process issue challenged the discipline procedures of the United States Military Academy. In *White v. Knowlton*¹⁰⁹ six cadets sought to enjoin the Superintendent of the Academy and the Commandant of Cadets from separating them from the Academy. White and the other plaintiffs were threatened with dismissal for violating the Cadet Honor Code which mandates: "A cadet will not lie, cheat or steal nor tolerate those who do." The allegation of cheating¹¹⁰ was referred to a self-policing body, the Cadet Honor Committee. Upon the Committee's adverse finding, a *de novo* hearing was held before a Board of Officers, which affirmed the finding.

The plaintiffs contended that both the hearing before the Honor Committee and that before the Board of Officers were conducted in a manner which denied them due process of law. While the *Regulations for the United States Military Academy* provide for the convening of a Board of Officers, they do not mention the formulation of the student Honor Committee. Apparently this step of the procedure developed by tradition and appears in a memorandum issued by a commanding officer.¹¹¹ In part, the cadets alleged a denial of their right to procedural due process during the hearing before the Honor Committee in that they were given inadequate notice of Committee proceedings and of the specific charges and evidence against them, they were not advised of their right to remain silent, they were not provided with the assistance of counsel while preparing for their appearances before the Committee, and they had no opportunity to confront or cross-examine adverse witnesses nor to present witnesses on their own behalf. The cadets challenged the adequacy of the Board of Officers hearing in that the Board was composed of graduates of military academies and was thus biased against plaintiffs, and that a "beyond a reasonable doubt" standard of proof was not applied nor was a unanimous decision of the Board required.

The New York district court first noted a basic flaw in the plaintiffs' allegation that unconstitutional procedures were employed by the Honor Committee. The cadets failed to show that the Committee's determination played an integral part in the manner in which the Board of Officers conducted the case or in

¹⁰⁹ 361 F. Supp. 445 (S.D.N.Y. 1973).

¹¹⁰ The plaintiffs were scheduled to take a physics exam consisting of short-answer questions. The questions were identical to those given to another group of students earlier in the day, but the order in which the questions appeared was scrambled. Each of the plaintiffs' exam papers showed a high correlation to the correct answers for the earlier exam so as to suggest advance knowledge of the questions.

¹¹¹ The various documents setting forth the procedure are fully outlined in the opinion.

the determination of whether plaintiffs would be allowed to continue their military careers. In acting upon the plaintiffs' premise that Academy tradition established the Committee as a necessary part of the separation process, the court analogized the situation to that of a grand jury. The court noted that, except for the right to remain silent, none of the rights allegedly denied plaintiffs are available at a grand jury hearing. The claimed right to remain silent was disposed of by pointing out that there was no suggestion that anything said by any of the plaintiffs before the Honor Committee was used, or even referred to, at the Board of Officers hearing.

The court likewise found no due process violations in the manner in which the Board of Officers hearing was conducted. The contention that the Board, made up of Academy graduates, was biased was dismissed as being frivolous. The court construed the various regulations as requiring only substantial evidence, and not evidence beyond a reasonable doubt, to support a finding of an Honor Code violation. And, since the proceedings were not criminal, neither the criminal standard of proof, nor the requirement of a unanimous verdict, were applicable.

Thus, the procedures employed in separating White and the other cadets from the Academy did not constitute a denial of due process. A year earlier the same district court came to an opposite conclusion in *Hagopian v. Knowlton*.¹¹²

Joachim Hagopian, a third-year cadet at the United States Military Academy, sought a preliminary injunction preventing his expulsion from the Academy for amassing an excess number of demerits. The cadet alleged that the procedures employed in the separation proceedings violated his Fifth Amendment right to due process.

The court was concerned with demerits classified as Class III Delinquencies. These represented offenses at the lowest level of culpability such as being in need of a haircut and wearing an uncleaned uniform. The court found it significant that the Company Tactical Officer, Hagopian's immediate supervisor, not only was in a position to report these rule infractions, but also acted upon the report and reviewed his own action. The decision for expulsion was made by an Academic Board based on the Tactical Officer's recommendation and a written statement submitted by Hagopian. Nothing in this procedure provided for the taking of evidence or testimony from witnesses, nor was legal counseling available.

Another important consideration was the introduction of the subjective questions of "potential" and "attitude." The plain-

¹¹² 346 F. Supp. 29 (S.D.N.Y. 1972), *aff'd* 470 F.2d 201 (2d Cir. 1972).

tiff's written submissions and hearsay statements from others were held insufficient — interjection of these subjective factors required an evidentiary hearing. This merger of prosecutorial and judicial functions in the Tactical Officer and the absence of an evidentiary hearing was found to fall short of the due process standard where the cadet faced the prospect of expulsion. Significantly, the court supported the constitutional right to procedural due process and the availability of a fair hearing.¹¹³

Although both the *White* and *Hagopian* decisions examined the rights of United States Military Academy cadets, neither opinion mentioned the military-discipline argument so heavily relied on in *Grabinger* and *Allen*. The theories on which these cases were decided vary in other respects as well. The district court in *Allen* rejected claims of Fifth Amendment violations on the basis that due process rights did not attach to the situation before the court. The appellate court, however, found that due process rights were applicable but that the requirements of the protection were afforded the plaintiff in *Allen*. Furthermore, the appellate court specifically disagreed with the holding that the hearing was merely investigatory. Rather, they found it to be both investigatory and judicial in nature noting the significance of the fact that the final discretion rested with the city manager.

These cases constitute the essence of decisional law concerning the extent to which due process protections impact disciplinary proceedings held in a military-like atmosphere. The opinions are based on different theories and disagree on major points.

The disparity between the holdings of *Grabinger* and *Allen* as to the nature of the hearing does not appear to create a conflict of sufficient magnitude to move the Supreme Court to decide the due process question. A federal court of appeals case squarely in conflict with these decisions may induce a grant of certiorari. Until the issue is thus brought into focus and a definitive ruling is rendered by the Supreme Court, the onus of change lies elsewhere.

CONCLUSION

The Illinois legislature has the power to effect a change in the thirty day language of the present statute.¹¹⁴ As the statute now reads, full due process protections are afforded only where a policeman may be discharged or suspended for a period of more

¹¹³ *Id.* at 34. The Second Circuit Court of Appeals affirmed the decision, though on somewhat different reasoning, referring to the Academic Board as the body which makes the "fateful recommendation." *Hagopian v. Knowlton*, 470 F.2d 201, 206 (2d Cir. 1972).

¹¹⁴ ILL. REV. STAT. ch. 24, § 10-1-18.1 (1971).

than thirty days. Where the suspension is for thirty days or less, an officer is bound to the limited protections afforded at a hearing before the Complaint Review Panel. Action by the General Assembly could extend the coverage of the statute to encompass all suspensions regardless of their length.

In view of the apparent influence exerted by the Chicago superintendent of police over the legislature, it is unlikely that the law-making body will be so moved. This influence is illustrated by legislative action taken during the reign of O. W. Wilson as superintendent of police. For example, it has been suggested that Wilson desired the title of "superintendent of police" as opposed to "chief of police."¹¹⁵ O. W. Wilson took over the administration of the Chicago Police Department in 1960. Prior to that time, the administrative head of the city's force was called the "chief of police."¹¹⁶ The statute denominating him as such was repealed on May 29, 1961. The present vesting provision, using the term "superintendent of police," was enacted on the same date, less than one year after Wilson took office.

It would seem that legislative action will await the approval of the superintendent. An alternative and more expeditious way of eradicating the inequities in the present disciplinary procedures is direct action by the superintendent. Through his legally sanctioned general order power, he controls the discipline procedures of the Chicago Police Force. His primary ground for denial of full due process rights can only be the military-discipline argument. Interestingly, in the two United States Military Academy cases discussed, this argument was not advanced to sustain the courts' holdings. Moreover, the argument has been expressly rejected in at least one other military academy case.¹¹⁷

As noticeable as ex-Superintendent Wilson's influence is in the statutes, it is even more pronounced in the present general order. General Order No. 67-21, issued by Wilson, states:

The purpose of this order is to establish procedures for handling complaints and disciplinary actions against members of the Department under the following policies:

- A. Discipline is a function of command.
- B. Prompt and thorough investigation of allegations of misconduct must be made so that the facts may be established and appropriate action taken either to clear the innocent or discipline the guilty. Corrective action must be timely to be effective.
- C. A well disciplined force is one that voluntarily and ungrudgingly conforms to all Department rules and orders. It follows

¹¹⁵ W. TURNER, *THE POLICE ESTABLISHMENT* 110 (1968).

¹¹⁶ ILL. REV. STAT. ch. 24, § 14-4 (1959).

¹¹⁷ *O'Neill v. Dent*, 364 F. Supp. 565 (E.D.N.Y. 1973), holding that a Merchant Marine Academy regulation prohibiting cadets from marrying violated due process guarantees.

that the best disciplined force is least in need of correction and is, therefore, the least punished.

- D. While violations of rules, regulations, or orders require disciplinary action, the motive of the offender will be taken into consideration in fixing an appropriate punishment. Was there an evil, dishonest, immoral, or selfish motive or did the violation result inadvertently from a nonvenal human frailty such as ignorance, forgetfulness, oversight, or the pressures of domestic life complicated by the misfortune to which we are all heir? Justice will be tempered with mercy when the heart of the offender is right.¹¹⁸

In the second edition of Wilson's book on the administration of a police force, the following language can be found: "Discipline is a function of command" and "[t]he best-disciplined forces are the best trained and therefore the least punished."¹¹⁹ Other parts of General Order No. 67-21 are also excerpts from the published works of O. W. Wilson.¹²⁰

These excerpts are illustrative of the military-discipline doctrine. In these same books, Wilson propounds additional principles which contravene the military-discipline position:

The wise leader wins the support of his force to his policies, plans, and procedures before placing them into effect. The imposition on operating personnel of procedures not understood and approved by them nearly always results in failure. Even the most excellent plan will not be operated satisfactorily by unsympathetic policemen.

The [superintendent], therefore, should not inflict on his force policies and procedures which the members are not prepared to approve and accept. He should first win their approval. When his proposals are sound, the approval is usually gained without difficulty; resistance to the plan may be evidence of its unsuitability and indicates the need for a reassessment or modification of it.¹²¹

The police administrator is understandably reluctant to give up his wide discretion. It is a natural tendency to guard it jealously.¹²² But it is just as reasonable to conclude that if he relinquishes it voluntarily, he will come closer to attaining his objectives of high morale and good discipline, than if he is forced to give it up.

In the absence of a judicial ruling or legislative action, the superintendent is free to continue denying due process protections to certain admonished policemen. The influence of O. W. Wilson's theories predominate in the present disciplinary pro-

¹¹⁸ General Order No. 67-21, § I.

¹¹⁹ O. W. WILSON, *POLICE ADMINISTRATION* 173 (2d ed. 1963).

¹²⁰ *E.g.*, "He should not be represented by an attorney but he should be permitted to obtain the services of any member of the force to represent him." O. W. WILSON, *POLICE PLANNING* 242 (1952).

¹²¹ *Supra* note 119 at 14-15.

¹²² Wilson agrees. See O. W. WILSON, *POLICE PLANNING* 227-28 (1952); O. W. WILSON, *POLICE ADMINISTRATION* 212 (3d ed. 1972).

cedures and these practices have been continued by Wilson's successor, James Conlisk, in his amendments to the general order.

On November 1, 1973, Superintendent Conlisk resigned and James Rochford has been named as his replacement. Perhaps the new superintendent of police will loosen the bounds of tradition by exerting his influence over the legislature or, preferably, by taking direct action in revising General Order No. 67-21 to afford full due process protections at all disciplinary proceedings.

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