

**DISCIPLINE OF VOLUNTEER AND POC FIREFIGHTERS
AND EMERGENCY MEDICAL TECHNICIANS**

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The first decision to be made in the discipline of Volunteer and Paid on Call (POC) Firefighters and Emergency Medical Technicians (EMTs) is whether any formal process needs to be followed. Typically, one need only conduct formalized disciplinary hearings where the individual being disciplined: 1) is guaranteed a specified disciplinary process by virtue of department policies or an employment contract; or, 2) has a property interest in continued employment (i.e. is not a purely at-will employee). Unless your department has adopted some form of contract or operating procedure which entitles your volunteer and POC members to a formal disciplinary process, none is typically required. And while conducting a disciplinary hearing may provide greater formality to the termination of a member, it will also result in your department incurring greater expense, and potentially incurring greater liability than a simple notification of termination.

The material that follows first explores the criteria which should be used to determine if some form of hearing or process is necessary, and then describes the essential criteria for properly conducting a termination review hearing.

Less likely to need a hearing	More likely to need a hearing
Pure volunteer	POC / Employee
At-will	Contractual or quasi-contractual
No SOG or department policy requiring hearing	SOG or department policy specifying disciplinary process
Past department practice is to terminate without hearing	Past department practice is to utilize hearing process
Infraction is clear-cut, well documented, and incontrovertible	Infraction is unclear, poorly documented, or otherwise controversial
Infraction is violation of unwritten, vague, or unknown rule	Infraction is violation of well-stated policy, SOG, or always followed rule
Previous similar infractions handled in similar fashion	Previous similar infractions not disciplined, or disciplined in disparate fashion

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Less likely to need a hearing	More likely to need a hearing
Existence of an officer / group with clearly delegated disciplinary authority	Question as to who has authority to discipline or take action of terminating a member
Absence of questionable basis for discipline	Presence of questionable basis for discipline ¹
No employment contract	Contract for employment for a specified term
No other factors suggesting existence of property right ² in continued employment	Other factors suggesting existence of property right in continued employment

As indicated above, the default rule is that no hearing is necessary, unless the factors applicable to your department, or specific situation, dictate otherwise. “It is well settled that, absent legislative, administrative or contractual provisions to the contrary, a public employee in Illinois holds his office at the pleasure of the appointing power, which may remove him at any time...thus the public employee has no property interest in continued employment so as to trigger Federal or State due process protections.”³

Assuming that no hearing is required, a member can be terminated for *any reason at all, other than an unlawful reason*. Unlawful reasons include termination due to: 1) race; 2) gender; 3) sexual preference; 4) religious affiliation; 5) retaliation; etc. Termination as retaliation can be retaliation in response to: 1) the member supporting a disfavored political position or candidate (e.g. supporting someone running for FPD Trustee); 2) the member making a good faith report of a perceived violation of applicable state or federal law (e.g. OSHA complaint, sexual harassment report, etc.); or 3) the member otherwise exercising his or her lawful rights and being retaliated against for doing the same. With or without a hearing, a member cannot be terminated or disciplined for an unlawful reason.

If, however, the decision to conduct a hearing is made, some basic rules should be followed. First, if your department’s SOGs or rules include a hearing/disciplinary process, follow that process unless a good cause for deviation exists (which you can review with your

¹ Assume that there is a questionable basis for discipline when, in reviewing a situation involving a member potentially subject to discipline, you have concern that it will appear as though the member is being disciplined for an unlawful reason (e.g. member supports other candidate for Trustee and is later disciplined; member reports sexual harassment and is later disciplined). Simply falling into a protected class does not guarantee one greater due process rights, but in a circumstance where there is concern about how a termination or disciplinary action looks, conducting a hearing can provide greater transparency in the process.

² Property rights are not created by the Constitution, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. Property rights are acquired where an individual has a *reasonable expectation* of continued employment for a term; if the employment is terminated before the *reasonable expectation* ends, due process considerations arise. *Loudermill v. Cleveland Board of Education* 470 U.S> 532, 538 (1985)(Internal Citations Omitted).

³ *Willicke v. Bingham*, 278 Ill.App.3d 4, 10 (2nd Dist. 1996).

counsel). Involve your counsel early and often, and seek their specific guidance on how to handle the discrete issue(s) you are facing.

If you have no defined process for hearings, you must decide how and when to hold the hearings. The balance of this memorandum assumes that a disciplinary hearing is being conducted for the purpose of *terminating* a volunteer or POC member.

In an emergency situation, you may terminate a member without any pre-termination process, provided that the post-termination process is adequate. However, it is nearly impossible to find a situation where an emergency would require immediate termination. It generally is a better practice to take some interim disciplinary action, such as suspension of a member, pending the hearings. The best situation would be to have a very brief, informal pre-suspension discussion, and a pre-termination hearing.

Assume a member is accused of significant misconduct which would merit termination if proven. An officer of the department, who is *not involved in the alleged misconduct*, can have a discussion with the member, inform her of the charges, and give the member an immediate opportunity to respond. The member can then be suspended (if appropriate) and advised that the member will have a hearing at which her discipline, up to and including further suspension or termination will be considered. This pre-suspension ‘discussion’ gives the member an immediate opportunity to respond to the charges in a less formal setting. It makes certain that the member is aware of the reason(s) for her suspension, and also: 1) creates the potential that the situation will be immediately resolved, if it is a mistake; 2) creates the potential that the member will voluntarily resign, if the issue is significant⁴; or, 3) creates a circumstance where the member involved may respond to the charges and admit some/all of the alleged misconduct.

Regardless of whether the hearing is pre-termination or post termination, if the decision is made that a hearing is necessary, it must satisfy a few fundamental tenets of due process. Those include:

- Notice of the charges (written is preferable)
- An opportunity to respond and be heard
- The opportunity to have counsel present
- An impartial hearing officer
- Some basic evidentiary rules (to ensure that the testimony/evidence received is reliable)

In the ideal circumstance, the pre-suspension ‘discussion’ is followed by a pre-termination ‘formal disciplinary hearing’. If the pre-termination hearing is a complete process, the pre-

⁴ While it seems as though a resignation resolves all issues, in controversial cases, a department may be advised to proceed with a disciplinary hearing, even after the resignation, to avoid a circumstance where the member later claims to have been wrongly forced to resign.

suspension hearing can be relatively informal.⁵ If a department wishes, it could terminate the member and conduct a ‘post-termination’ hearing, but there is not significant advantage to this, as the member can simply be suspended pending the ‘pre-termination’ hearing.

Hearings can be conducted by department officers or by third parties. In the case of a member termination, where a hearing is necessary, having an impartial third party conduct the hearing as a hearing officer can be useful. In such circumstances, the department would hire an attorney other than the attorney representing the District, to serve as the hearing officer. The hearing officer would conduct the hearing, and make a recommendation to the ultimate decision-maker (the Chief or Board of Trustees), with a description of the hearing and all of the evidence received.

An ideal disciplinary process, where a hearing is required, might look like this:

1. FD Officer is notified of alleged misconduct by a member.
2. Some initial investigation is conducted; Officer determines that a sound basis for discipline appears to exist.
3. Officer speaks to accused member and informs member that member is immediately on suspension because of alleged misconduct. Officer describes alleged misconduct and permits member to respond, if desired. Officer informs member that she will receive written notice of charges, and a hearing will be conducted on potential further disciplinary action, up to and potentially including termination.
4. FD conducts further investigation, interviews witnesses, gathers evidence.
5. Member is provided with written statement indicating:
 - a. Charges against member
 - b. Date and time of pre-termination hearing
 - c. Member has right to have counsel present, and to present testimony and hear testimony against Member.
 - d. Format of hearing (e.g. hearing will be conducted before impartial third party hearing officer, who will report to Board of Trustees).
6. Hearing is conducted before impartial hearing officer (consider hiring outside attorney to conduct hearing).⁶

⁵ There is always the possibility that, at the pre-termination hearing, the department will realize that it has made an error. Thus, the possibility exists that the earlier decision to suspend will be overruled.

⁶ It is also possible to conduct the hearing directly before the decisionmaker. If this occurs, it is recommended to

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- a. Witnesses and evidence is presented.
 - b. Member has (limited, reasonable) opportunity to cross-examine witnesses/testimony.
 - c. Limited ability to administer oaths.⁷
 - d. Member has opportunity, but not obligation, to testify or present evidence.⁸
 - e. Member has opportunity, but not obligation, to have attorney present.
 - f. Any rules contained in SOG / SOP are followed, if possible. If any deviations are made, they should be explained.
 - g. A record of the hearing should be made (transcript? Court reporter?)
7. Hearing officer prepares report from hearing, along with recommendation, and submits to decisionmaker (Board of Trustees or Chief).
 8. Decisionmaker deliberates and makes decision.
 9. Letter is sent to Member, advising her of decision made (and possibly providing explanation of why the decision was made).

The Member then has the option of pursuing judicial review and/or relief, if she believes it is appropriate.

If a slightly less formal process is sought, the hearing can be conducted directly before the decisionmaker, as indicated above, and not all of the formalities described above need to be followed in every case. It is *always* necessary to: a) give the Member a notice of the charges and an opportunity to be heard; b) have a neutral decisionmaker; c) present evidence (testimonial or otherwise) of the charges at the hearing; d) give the Member an opportunity to respond; and, e) deliberate and render a decision based on the evidence presented.

The following scenarios demonstrate what to do, and what not to do, when conducting disciplinary hearings.

have the decisionmaker deliberate for a period (at least 24 hours) before releasing a final decision.

⁷ Some departments include provisions in their SOGs indicating that Members who provide false testimony or make false accusations are subject to discipline for the same.

⁸ Occasionally, alleged misconduct can give rise to civil liability and/or criminal charges. Departments are not obligated to suspend disciplinary processes pending resolution of civil/criminal cases, but may do so if they wish.

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