

NJ Discipline Directive Ignores Racism In Law Enforcement

By **Ayesha Hamilton** (July 17, 2020)

In response to the tragic killing of George Floyd by a police officer in Minneapolis, New Jersey Attorney General Gurbir Grewal issued Directive 2020-5 requiring law enforcement agencies to identify the names of law enforcement officers that have suffered a major disciplinary infraction or termination, and provide a summary of their transgressions and the final sanction imposed.



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This directive fails to consider the drastic effects of such a blacklist upon officers of color and those who have been wrongfully terminated.

Claims under New Jersey's employment laws, such as the Conscientious Employee Protection Act and the Law Against Discrimination, require that the employee has suffered some negative treatment at work and proof that they have tried to mitigate their damages.

The negative employment action usually comes in the form of a negative performance evaluation resulting in a demotion, suspension or termination and, in the case where the state is the employer, follows the same minor/major/suspension and termination model described in *State Troopers Fraternal Association of New Jersey v. State of New Jersey*,^[1] a case brought by the police unions against the New Jersey Attorney General's Office in the Superior Court of New Jersey, Mercer County.

This case, filed on June 25, focuses on the union's argument that Grewal's Directives 2020-5 and 6^[2] specifically violate the confidentiality provisions contained in settlement agreements entered into by state police officers charged with violations of disciplinary rules in the commission of their jobs.

However, there is another category of employees who will be severely impacted by the directive, with significant legal implications for the state of New Jersey as well. Employees who have suffered negative employment treatment in retaliation for a whistleblower complaint, for filing suit against the state or other protected activities, will be caught in the disclosure required by the directive.

These employees, who were suspended or terminated through no fault of their own, but rather in retaliation for their protected activities, are now guaranteed to never find another job in their chosen profession of law enforcement.

There are many cases of law enforcement officers who have suffered numerous levels of retaliation in the form of demotions, suspensions and, ultimately, termination.^[3] The attorney general's directive would require that these employees who have suffered a major disciplinary infraction — suspension of more than five days — or termination would be blacklisted.

In their lawsuits, these former law enforcement officers detail the disparate treatment that officers of color face, such as days of suspension issued to them. Officers of color consistently received more days of suspension than did Caucasian officers.

The practical implications of the attorney general's directive are twofold.

First, it will have a disparate impact upon officers of color who were issued higher penalties just because of the color of their skin. Notably missing from the attorney general's directives is an acknowledgement of systemic racism behind the blue wall. The directive will only serve to reinforce the negative effects of systemic racism that officers of color face on the job without any recourse and with permanent and disastrous effects.

Second, having created this list, how can the state argue that the plaintiff has failed to mitigate its damages in trying to find a new job, when the state itself has blacklisted the plaintiff. In fact, isn't this continued retaliation against the employee and whistleblower who engaged in protected activity and was fired for it?

While Grewal's efforts are honorable, the practical application and implications of his directive will have disastrous effects on officers of color and the state itself. It is not sufficiently narrowly tailored to address the actual bad actors.

Further, it does nothing to address the systemic and institutional racism rampant behind the blue wall. The end result: continued retaliation and damages to good officers who were fired as a result of their complaints about internal policy violations.

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[1] State Troopers Fraternal Assoc. of N.J. v. State of New Jersey.

[2] Attorney General Grewal's Directive 2020-5 and 6.

[3] Zappasodi v. State, Dept. of Corrections 335 N.J. Super. 83 (App. Div. 2000); Schiavone v. State, Dept. of Corrections, 2019 N.J. Super. Unpub. LEXIS 2633; Yatauro v. State, 2019 N.J. Super. Unpub. LEXIS 2430; Fleming v. Corr. Healthcare Solutions, 164 N.J. 90; Carchia v. Green, 2016 N.J. Super. Unpub. LEXIS 2213.