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FOCUS

ISSUE SEVEN

Practical guidance on handling complaints, conduct matters, and death or serious injury matters within the Police Reform Act 2002

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Police Reform Act - compliant decision making at the end of an investigation

Throughout this guidance, where the appropriate authority is referred to for managed and independent investigations, this is the IPCC.

Applying the balance of probabilities

An investigating officer must use the 'balance of probabilities' when drawing conclusions or making findings in an investigation report. This is a simple test where an investigating officer decides whether conduct is more likely than not to have happened. This is a different, although related, question to whether an officer has a case to answer for misconduct or gross misconduct.

There are three common reasons that the balance of probabilities is not being applied properly to complaints:

1. When it is the officer's word against the complainant's word, the officer's account is often automatically preferred.
2. When there is no independent evidence available, there is no assessment of the strength of the other evidence available.
3. There is a mistaken belief that this standard is flexible and more serious matters need more evidence to be upheld.

When using the balance of probabilities, it is important to remember that the relevant threshold of making a finding is low: anything over 50 per cent is enough.

“Innocent until proven guilty” is not the right thinking to apply to complaint investigations. An investigating officer should not approach the complaint expecting that unless the evidence completely undermines the officer’s account, there will be no case to answer. The approach should be to collect all the available evidence that is proportionate to collect and review it all. Then he or she can form an opinion on whether, in his/her opinion, the officer has a case to answer.

Case study one: procedurally incorrect arrest

A police officer claims to have told a complainant that he is under arrest and the offence for which he is being arrested. The complainant says that he was not told what was happening and that the officer simply took hold of him and put him in a police car. There are no witnesses. This therefore appears to be a case of one person’s word against another’s. However, there is no record in the officer’s notebook of an arrest and the incident log records that the officer has said he has put the complainant in the car while he gathers evidence about the incident. The documentary evidence therefore undermines the officer’s account and supports the account of the complainant. The investigator can therefore reasonably conclude that the officer has a case to answer.

The balance of probabilities **always** means finding that something is “more likely than not”.

A common sense approach should be used about whether something is ‘inherently probable’ or not in deciding whether something is more likely than not to have happened. However, the decision about whether or not something is ‘more likely

than not’ to have happened must still be based on the evidence gathered by the investigation and the weight attached to it.

The decision about whether an officer has a case to answer should be based on whether a reasonable tribunal, properly directed, could find that an officer has misconducted themselves. It will therefore be inappropriate for an investigating officer to make a firm decision. Where there are two conflicting accounts and neither can reasonably be dismissed it will usually be appropriate, in an investigation subject to special requirements, for the matter to be left to a tribunal to decide.

Legitimate grievance

It is possible for an investigation to find that the substance of the complaint did happen, but that no officer/member of staff breached the Standards of Professional Behaviour. In these circumstances, there is no case to answer for misconduct but the complainant does still have a legitimate grievance.

In cases that are not subject to special requirements, this means that the complaint will be upheld. Where an investigation is subject to special requirements, the investigating officer is limited to giving an opinion on whether there is a case to answer for misconduct or gross misconduct. However, findings of fact, which are in addition to issues that would properly be decided by the courts or in misconduct proceedings, but which help the complainant to understand the outcome of the investigation, will always be preferred. The report can also include the investigator’s views on whether performance issues have been found by the investigation for the appropriate authority’s consideration.

Case study two: incorrect details held on bail conditions

A man was on bail with conditions not to enter a certain street. He has successfully challenged the restriction and it has been lifted by the courts. The man then walks down the street where he is challenged by a local officer who checks the Police National Computer (PNC). It shows that the man's bail conditions still contain the restriction. The man is arrested for breach of bail. He complains that he should not have been arrested for breach of bail as the condition had been withdrawn.

The complainant is right – he should not have been arrested for breach of bail. But this is not the fault of the officer who arrested him, who was acting in accordance with the information he had. Any investigation will need to find out how and why the PNC was not updated and that explanation given to the complainant, but regardless, there is no case to answer for the officer who arrested him.

Upheld complaints, case to answer and referral to the CPS

If the investigation was not subject to special requirements, then a decision can be made at the end of the investigation whether the complaint is upheld on the balance of probabilities. However, if the investigation was subject to special requirements, then the report can only find whether the officer has a case to answer or not. It is for the misconduct proceedings to decide whether the officer did or did not misconduct himself, not the complaints process.

If the investigation report suggests that a criminal offence may have been committed, in addition to finding whether the officer has a case to answer or not, the appropriate authority must decide whether the case should be sent to the CPS for it to consider, but cannot go further. It is for the courts to decide whether the officer did commit a criminal act, not the complaints process.

Case study three: lost property

A man was booked into custody and his property was removed from him. When he was released, his ipod was missing. The man complained that the ipod had been stolen by the custody staff.

The investigation can find that his property has gone missing – on the balance of probabilities, this is the case – he had an ipod when he came in, he handed it over and it was not returned to him and it cannot be found in the property store. Whether this was due to theft by custody staff, mishandling or poor record keeping, is something that the investigation will explore. The appropriate authority will then decide whether or not the staff involved have a case to answer for misconduct or gross misconduct, whether the matter needs to be referred to the CPS and whether there are performance issues that need addressing. However, the investigation cannot find that the staff committed misconduct or committed a criminal act. That would be to act beyond the police complaints system's legislative powers, and would potentially take over the role of the misconduct proceedings or the courts.

Complaints of unlawful arrest

If the investigation has to review whether the legislative requirements for an arrest to be lawful have been met, it is important that all the requirements of the legislation – reasonable suspicion, necessity and the information given on arrest - are looked at. An officer must also not have acted unreasonably or irrationally in making a decision to arrest.

The grounds for considering an arrest necessary are outlined by PACE section 24(5). If the officer did not hold a reasonable belief that an arrest was necessary under one of these grounds, then the arrest was not necessary and decisions will need to be made about whether the officer has a case to answer

for misconduct. The officer also needs to show that genuine consideration was given to other ways of handling the situation, such as grant street bail, report the person for summons, issue a fixed penalty notice etc (Code G, paragraph 2.4). That consideration does not have to be lengthy – the alternatives can be thought of and then rejected, but it must happen.

One of the common necessity grounds given is section 24(5)(e), often without any suggestion that practical alternatives were considered:

‘ to allow the prompt and effective investigation of the offence or of the conduct of the person in question.’

Although it will often be relevant, this ground cannot be relied on as a ‘catch-all’. For example, if someone is attending an interview by appointment, it should not always be assumed that they will leave halfway through the interview, as is their right under Section 29 of PACE, and therefore the only way to investigate the offence is to arrest them before the interview. The Notes to Code G specifically state

that “The possibility that the person might decide to leave during the interview is... not a valid reason for arresting them before the interview has commenced”. The circumstances will need to be looked at, as well as the likelihood that someone will attend and co-operate without an arrest. It may also be that an arrest is necessary for other reasons (such as carrying out a search, questioning under a ‘special caution’, preventing contact with others, and making sure the protection of evidence).

This ground will generally be more difficult to justify if there were significant delays by the investigating officer in progressing the investigation, and speaking to the person at an earlier stage.

Case study four: necessity for arrest

A man was reported for assault by his daughter. He went to an interview voluntarily, fully engaging with all the questions asked and providing the investigation with additional material. The investigation decided that they needed to re-interview him and arranged another interview with him and his solicitor. Upon arrival, he was arrested on the basis that it was necessary for the prompt and effective investigation of the offence. When this was explored during the investigation, the officer said it was possible that he could have left during the interview and that was why it was necessary.

It appears that this arrest was not necessary. Nothing about the man’s conduct would suggest that the prompt and effective investigation of the allegation would not be possible unless he was arrested – he had attended voluntarily, co-operated fully up to that date, and had given no sign that he intended to behave any differently in the second interview. The Notes to PACE Code G state that the possibility that a person might decide to leave during the interview is not a valid reason to arrest him/her before the interview. In addition, there do not appear to have been any other reasons for the arrest.

Considering referral to the CPS

Given that any complaint/conduct matter that might result in criminal proceedings should always be investigated under special requirements, it follows that there should not be a situation in which a non-special requirements investigation results in a decision to refer the matter to the CPS to consider. It is vital that the “special requirements status” of an investigation is continuously reviewed to avoid this happening. If there is an indication that a criminal offence may have been committed, the investigation must be formally put into special requirements and a severity assessment made. The officer must be put on formal notice that he/she is being investigated for misconduct/gross misconduct. If the investigating officer considers that there are reasonable grounds to suspect the officer of a criminal offence and intends to interview the officer about that offence, this must be under criminal caution.

¹ To date, no offences have been specified for this condition.

A referral to the CPS must be made:

1. If there is an indication that a criminal offence may have been committed and either;
 - 2a. the appropriate authority considers that it is something that the CPS should see or;
 - 2b. the potential criminal offence is one that must always be referred to the CPS¹

Condition 1, an indication, is a very low threshold. This threshold would be passed, for example, by any use of excessive force, however technical.

The CPS's threshold for deciding whether to prosecute a criminal matter is "whether there is a realistic prospect of conviction" and whether the prosecution is in the public interest. This is a much higher standard than condition 2a and it is a decision for the CPS to make. Appropriate authorities should not try and second guess that decision, form their own opinion about whether the CPS will prosecute the case, and only refer those matters that they think the CPS would prosecute. Condition 2a exists to make sure that the matters that do not warrant consideration by the CPS are removed from the system, not to allow appropriate authorities to make a preliminary assessment for the CPS on whether the case will be prosecuted.

Case study five: technical assault

A woman is brought into custody after being arrested for being drunk and disorderly. While at the custody suite, she calms down, apologises for her behaviour, and asks for her handcuffs to be taken off. Ten minutes pass and then she asks again. She has to ask another time before they are finally removed. The investigation finds that there was no good reason for the handcuffs not to be removed the first time that she asked - the officers were not busy and there was no need for them to remain on.

Condition 1 of the CPS referral test has been fulfilled – leaving handcuffs on people without good cause is technically an excessive use of force, and therefore an indication that there has been an assault.

Case study six: speeding during a police pursuit

A police pursuit ended in tragedy when the driver of the stolen vehicle crashed into a family walking along the pavement, killing the grandmother and injuring the mother and her two children. The IPCC's independent investigation found that there was nothing that the pursuing officer could have done to prevent the tragedy, there was nothing wrong with the manner in which he made the pursuit and there was no case to answer for the officer. The "black box recorder" in the pursuing car recorded speeds of more than 30mph in areas of the town where there was a 30mph zone in force.

The officer has technically committed a criminal offence, but this is clearly an example of a matter that would not be something that the CPS would want to see – section 87 of the Road Traffic Regulation Act 1984 allows officers to exceed the speed limit if sticking to it would hinder the purpose of the pursuit, providing that they have had the appropriate training. Condition 2a is not fulfilled and this matter would not be referred to the CPS.

NB this case occurred before the legislation was changed and condition 2 was introduced. Accordingly, the IPCC had no discretion and had to refer the officer's speeding to the CPS, despite the investigation passing comment on just how safely and professionally the pursuit had been conducted. The CPS's decision to take no further action was fully expected and the decision expressly said that it was not in the public interest to be prosecuting an officer for doing his job.

Misconduct decisions with associated criminal proceedings

There are relatively few occasions where the fact that a criminal prosecution has not resulted in a conviction will mean that, despite finding there was a case to answer for misconduct or gross misconduct during the investigation, there is now no case to answer.

The decision as to whether an officer has a case to answer for misconduct or gross misconduct, is a separate assessment to whether the CPS considers that there is a reasonable prospect of conviction or whether a jury considers that an officer is guilty of a crime beyond all reasonable doubt.

While the substance of the CPS's decision not to prosecute, or a jury's rationale for not convicting the officer, may form part of the consideration about whether misconduct proceedings should be pursued, it does not determine that decision, other than in exceptional circumstances. Indeed, it would seem strange for there to be a finding of no case to answer where a criminal prosecution had been pursued, particularly if the matter had gone to trial.

Case study seven: acquittal at court

A group of off-duty officers went out for a few drinks and the male members of the party got into an argument with a group of women. This led to an argument, during which one of the women suffered a fractured arm.

The woman complained about the level of force used, as well as the attitude of the officer beforehand. She said that he had started the argument, and complained about his attitude after her arm was broken, including laughing at her, leaving before the police arrived and failing to report the matter upon his return to duty.

A full investigation was done and the officer stood trial for assault occasioning grievous bodily harm. The first jury could not reach a verdict and he was acquitted during a second trial.

The police force considered that the issues that misconduct proceedings would rule on would be the same as those considered within the criminal prosecution. They decided that the acquittal and comments of the judge, combined with the lack of further evidence regarding misconduct, make the progression of misconduct proceedings unnecessary and potentially an abuse of process.

Both the statement that proceedings were unnecessary and that they might constitute an abuse of process are incorrect. The appropriate authority has three distinct considerations to make: whether or not the officer has a case to answer for misconduct or gross misconduct; whether or not the officer's performance has been unsatisfactory; and then what action, if any, it is required to, or will take. In the case of a finding that an officer has a case to answer for gross misconduct, a misconduct hearing must always result. It would then be for the officer to make the case in the proceedings that they were an abuse of process. In this case, the evidence was such that the officer clearly had a case to answer for gross misconduct and the facts of the gross misconduct were not the same as those considered within the criminal prosecution, which was solely concerned with whether the officer had committed the criminal offence of assault occasioning grievous bodily harm. In addition, the standard of proof at misconduct proceedings is different to those in criminal proceedings.

In this instance, misconduct proceedings would have considered whether or not there had been a breach of the professional standards through (i) his behaviour in initiating an argument; (ii) bringing the force into disrepute and (iii) his subsequent conduct.

Case study eight: misconduct in public office

A detainee was taken seriously ill in custody. During the following investigation, it was found that a number of false entries had been made on the custody record that appropriate checks had been carried out, when they had not.

Charges of misconduct in a public office were brought but the CPS offered no evidence at trial. The force then put the officer before a gross misconduct hearing and he was dismissed without notice.

Case study nine: football hooliganism

An off-duty officer was removed from the stands at a football match and escorted from the grounds by stewards because of the way he was behaving towards the opposition fans. As he was escorted from the grounds he made a number of racially offensive remarks to the stewards. It was the second time in two years that he had been arrested for football-related offences of a similar nature. The officer gave a no comment interview and the CPS decided that there was not a realistic prospect of convicting the officer and took no further action.

Regardless of the fact that the officer will not be facing prosecution for the incident, this does not mean that there is no case to answer for misconduct or gross misconduct. When considering the officer's previous behaviour and the available evidence the investigator may form the view that the officer has a case to answer for making racist and derogatory comments while being escorted from the grounds. The fact that the officer will not receive a conviction for his behaviour does not mean that disciplinary proceedings are not appropriate.

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