



Webinar



# The Mayor, The Chief and The Law

GOVERNANCE AND BEST PRACTICES

The Mayor

# Purposes of This Webinar

- To end confusion among mayors and members of council regarding who is responsible for establishing policies and procedures for the police department
- To highlight the relationship between the mayor and the police chief as one of the most important relationships in municipal government
- To point out mistakes that mayors and police chiefs have made which resulted in legal liability to their municipalities
- To offer best practices for avoiding municipality liability

# Police Protection in Pennsylvania

- Police protection is one of the primary functions of local government in Pennsylvania
- Police protection in Pennsylvania's municipalities is provided in one of four ways:
  1. A **municipal** police department
  2. A **contract** with a neighboring municipality
  3. A **regional** police department
  4. The **State** Police

# The Municipal Police Department

- The first part of today's webinar focuses on the governance of the municipal police department.
- The governance of a municipal police department depends upon whether the local government is a township or an incorporated municipality.
- There is a significant difference between the "Township Model" and the "Incorporated Municipality Model" of governing a police department.
- Recognizing the difference will serve to end confusion among mayors and members of council regarding who is responsible for establishing policies and procedures for the police department.

# Townships Are the Administrative Units of Counties

- 67 counties subdivide the Commonwealth of Pennsylvania.
- 1,547 townships subdivide the 67 counties covering 95% of Pennsylvania's land area and serving 43% of Pennsylvania's population.
- There are two classifications of township based upon population density.

# Classification of Township

- Townships which have 300 or more inhabitants per square mile are townships of the first class and are governed by a board of commissioners.
- Townships which have less than 300 inhabitants per square mile are townships of the second class and are governed by a board of supervisors.
- There are 93 townships of the first class and 1,454 townships of the second class in the Commonwealth of Pennsylvania.

# What are Incorporated Municipalities?

- There are three types of incorporated municipalities in Pennsylvania: boroughs, cities and an incorporated town.
- To “incorporate” means to unite or combine so as to form one body. In the context of local government, “incorporate” describes the process by which citizens of a distinct locality create a municipality pursuant to state law.
- Incorporated municipalities cover only 5% of Pennsylvania’s land area but serve 57% of Pennsylvania’s population.



# The Origin of Boroughs

- There are 955 boroughs in Pennsylvania.
- A court of common pleas may incorporate, as a borough, any contiguous area from one or more townships within the court's jurisdiction having a population of at least 500 residents.
- One process of creating a borough begins with a petition signed by a majority of the freeholders residing within the limits of the proposed borough followed by: legal advertising, a judicially–created borough advisory committee, a judicial hearing and a referendum.
- Another process starts whenever 10% of the registered electors of any city of the third class petition the court of common pleas to order an election to vote for or against the change of the charter of the city to a borough charter and the adoption of the borough form of government.

# The Origins of Cities

- There are 59 cities in Pennsylvania.
- A single municipal corporation having a population of at least 10,000 according to the last preceding United States census may be incorporated as a city if a majority of the registered voters in the municipal corporation cast an affirmative vote in favor of the referendum question.
- Two or more contiguous municipal corporations having a combined population of at least 10,000 according to the last preceding United States census, may incorporate as a city and determine whether the newly incorporated city shall be governed as a Third-Class City .

# The Origins of the Incorporated Town

- There is only one incorporated town in Pennsylvania and it is the Town of Bloomsburg in Columbia County.
- Bloomsburg was created in 1870 through the merger of a settlement known as Eysenburg and Eyerstown with Bloom Township.

# The Major Differences between Townships and Incorporated Municipalities

- Incorporated municipalities are created out of desire in more urban areas by citizens who are particular about their local government whereas townships are created out of necessity to administer more rural area of a county.
- Incorporated municipalities are governed by an elected legislative council and an elected executive with the title of mayor, whereas townships are governed by a legislative body which undertakes executive functions as a body.
- The office of mayor in boroughs, cities and town is arguably the biggest difference between incorporated municipalities and townships and the function of government which best illustrates this difference is police protection.

# Comparison of Legal Responsibility for Law Enforcement Among Elected Officials

- In townships, the board of commissioners or board of supervisors, as a *three-to-five-member legislative body*, is responsible for enforcing the Pennsylvania Crimes Code, the Pennsylvania Motor Vehicle Code and township ordinances with criminal penalties.
- In incorporated municipalities, a *single elected executive* with the title of mayor is responsible for the enforcement of the same criminal statutes and municipal ordinances. By way of example, the Borough Code reads:

It shall be the duty of the Mayor:

(1) To preserve order in the borough, to enforce the ordinances and regulations, to remove nuisances, and to perform any other duties as shall be vested in the mayor's office by law or ordinance.

## Comparison of Supervisory Responsibility Over the Police Chief and Police Force Between Models

- In townships, the board of commissioners or board of supervisors, as a *three-to-five-member legislative body*, is responsible for supervising the police chief and the police force
- In incorporated municipalities, a *single elected executive* with the title of mayor is responsible for supervising the police chief and the police force. By way of example, the Borough Code reads:

(a) General rule – The Mayor shall have full charge and control of the chief of police and police force.

# Comparison of Oversight of Policies and Procedures Utilized by the Police Force Between Models

- In townships, the Board of Commissioners or Board of Supervisors, as a *three-to-five-member legislative body*, is responsible for overseeing the manner in which the police chief and the police force are performing their jobs (i.e. policies and procedures).
- In incorporated municipalities, a *single elected executive* with the title of mayor is responsible for overseeing the manner in which the police chief and the police force are performing their jobs as expressed through policies and procedures.

# Statutory Authority of Mayor Over Police Department Policies and Procedures Stated in the Borough Code

(a) Directions – The mayor shall direct the time during which, the place where and **the manner in which** the chief of police and the police force perform the duties of their rank.

It shall be the duty of the mayor: (1)... to exact a faithful performance of the duties of the officers appointed...



# The Advantages of a Single Executive Supervising a Police Department in Incorporated Municipalities

- Executive decision-making in combatting crime
- Accountability to the citizens of the municipality especially in times of crisis
- Leadership and a chain of command similar to the national and state governments
- Greater civilian oversight because of more access to information under the “Criminal History Records Information Act”

# Additional Authority for the Primacy of Mayors Over Police Polices and Procedures

- The Pennsylvania Statutory Construction Act states “When words of a statute are clear and free from all ambiguity the letter of it is not to be disregarded under the pretext of pursuing its spirit.”
- Dillon’s Rule, adopted by the Pennsylvania Supreme Court, provides that municipalities (including their elected officials) have only those powers expressly given to them or necessarily implied.
- In Hoffman v. Borough of Macungie, the Commonwealth Court held that “pursuant to the right and duties in the office of borough mayor by the Code, [the mayor] has the ultimate executive authority over the manner in which the Police Department operates.”



## Key Points

- The General Assembly has expressly given to mayors in boroughs, cities and town the *duty* of enforcing criminal laws as well as *full control* over the police who are the means to carry out their statutory duty. This control includes policies and procedures.
- The “Township Model” of police protection, in which legislative bodies determine the policies and procedures of the police department, does not apply to boroughs, cities and town.
- Recognizing the specialized education and training of police chiefs, mayors should respect and defer to their expertise in matters of police policies and procedures.



# The Mayor, **The Chief** and The Law

GOVERNANCE AND BEST PRACTICES

**The Chief**

# Relationship Between Mayor and Chief

- The relationship between the mayor and the chief must be one of mutual respect.
- The Chief must understand that the mayor is elected by and accountable to the citizens of the municipality for the operation of the police department.
- The mayor must recognize that the chief has specialized education, training and experience that makes the chief an expert on public safety matters which the mayor must respect.
- Whenever there is a new mayor or chief, the incumbent member should assist the new member to the public safety relationship in making the transition to the police department

# The Philosophy of a Police Department

- Every chief should develop and communicate to the members of the police department a philosophy to ensure that the police department will be effective and efficient.
- There are at least four areas where the chief should focus to express this philosophy: culture, policies and procedures, training and discipline.

# The Culture of a Police Department

- The goal of every chief is to create a culture of excellence in which every member strives to be the best police officer that he or she can be.
- The path to excellence is to adhere to professional standards or ethics befitting members of the law enforcement profession involving language behavior, or conduct.
- To continue to be excellent, a police department must always be open to ways of improving and if necessary, evolving.
- The more that members of a police department become problem solvers and critical thinkers, the more likely that the department will achieve excellence.

# Policies and Procedures

- In order to realize excellence, the policies and procedures of the police department must be comprehensive, up-to-date, and reflective of best practices in police departments around the county.
- One simple way to achieve all three of these goals is to subscribe to a service known as Lexipol.
- Here is a link to Lexipol: <https://www.lexipol.com/industries/law-enforcement/>



# Lexipol

- Lexipol policies are:
  - State-Specific;
  - Researched by subject matter experts;
  - Vetted by attorneys;
  - Reflective of nationwide standards and best practices;
  - Adapted whenever state and federal laws change;
  - Updated; and
  - Supplemented with tests

# What Small Police Departments Who Cannot Afford Lexipol Can Do?

- Small police departments should cooperate with one another to obtain resources from Lexipol or a comparable service.
- Small departments who do not have access to a service such as Lexipol should, at a minimum, obtain policies from reliable source in these areas:
  - Use of Force
  - Pursuit
  - Officer Misconduct
  - Social Media
  - Dealing with Mentally Ill
  - Active Shooter Response
  - Stop and Frisk
  - Racial Profiling
  - K9

# Training

- The chief should establish a training schedule to meet the needs of the member of the police department.
- Training instruction should be undertaken by know or vetted vendor.
- The mayor and chief should advocate for a training budget which is necessary to maintain excellence.
- Successful training should result in “more tools for the toolbox” for police officers.

# Active Bystandership for Law Enforcement (ABLE)

- The Pennsylvania Chiefs of Police Association have endorsed training known as the ABLE Project
- The ABLE Project “prepares officers to successfully intervene to prevent harm and to create a law enforcement culture that supports peer intervention.”
- ABLE is a national hub for training, technical assistance, and research, all with the aim of creating a police culture in which officers routinely intervene and accept interventions as necessary to:
  - Prevent misconduct,
  - Avoid police mistakes, and
  - Promote officer health and wellness.

# Discipline

- Excellence in a police department can only be maintained if problems are addressed immediately.
- Discipline must be fair and consistent.
- There should be no surprises when discipline is administered.
- Standards by which police personnel are judged should be established and enforced.

# Accreditation

- Accreditation is a public recognition of an excellent police department by a qualified law enforcement agency.
- To become accredited, a police department must commit its policies and procedure to writing,
- During the accreditation process, there is an independent evaluation of a police department's operation for quality assurance.
- Accreditation will enhance the reputation of a police department and promote public confidence in it.



## Key Points

- The mayor and the chief must collaborate with one another to bring excellence to the operations of the police department.
- The road to an excellent police department involves developing a philosophy, culture, policies and procedures, training schedule, and discipline protocol.
- The “gold standard” and goal for all police departments should be accreditation.



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# Types of Police Misconduct Giving Rise to Suit

- **Commissions**

- Use of deadly force
- Use of excessive force
- Use of police dogs
- Reckless indifference during police chase
- Racial profiling
- Stop and frisk
- Strip-searches
- Sexual assault

- **Omissions**

- Failure to provide adequate police protection
- Failure to investigate
- Failure to provide adequate medical care
- Failure to screen applicants
- Failure to discipline
- Failure to train or supervise

# Legal Doctrine Impacting Municipal Liability

- Respondeat Superior
- Sovereign/Governmental Immunity

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- Respondeat Superior
  - “Let the Master Answer”
  - Vicarious Liability
- Sovereign/Governmental Immunity

# Legal Doctrine Impacting Municipal Liability

- Respondeat Superior
- Sovereign/Governmental Immunity
  - Political Subdivision Tort Claims Act
    - 42 Pa.C.S.A. 0167 § 8541 – “Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.”
    - Does not provide immunity for conduct that constitutes a crime, fraud, actual malice, or willful misconduct
    - Exceptions to Governmental Immunity (42 Pa.C.S.A. 0167 § 8542(b))
      - (b)(1) Vehicle Liability;
      - (b)(8) Care/Custody/Control of Animals;
      - (b)(9) Sexual Abuse

# Legal Theories for Finding Municipal Liability

## Deprivation of Constitutional Right, Privilege, or Immunity

- Due Process Clause of 14<sup>th</sup> Amendment (Substantive Due Process)
  - “State-Created Danger” Theory
  - “Special Relationship” Theory
  - “Failure to Train” Theory
- Pennsylvania Constitution

## Tortious Conduct

- Intentional Torts
- Negligence

# § 1983 Claims (Preferred Weapon of Choice)

- Elements of Claim
  - “Person”
  - “Subject” or “Cause”
  - “Under color of law”
- No private rights
- Attorneys’ fees

# Evolutionary Expansion of Municipal Liability Under § 1983 Claims

- Is a Municipality a “Person” (*Monroe v. Pape*, 365 U.S. 167 (1961))
- Is a Municipality a “Person” 2.0 (*Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658 (1978))
- Policy Defined (*City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985))
- Policy-Making Authority (*Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986))
- Failure to Train (*City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989))
- “State-Created Danger” (*Kneipp v. Tedder*, 95 F.3d 1199, 1204 (3d Cir. 1996))
- “Special Relationship” (*City of Philadelphia v. Middleton*, 8 Pa. Cmwlth. 362, 492 A.2d 763 (1985))

## Liability under § 1983

- Municipality can be sued under § 1983, but only on the basis of the municipality's policies or customs
- Three basic avenues to municipal liability:
  - a policy directly promulgated and recorded by the municipality
  - a decision by a policy maker with the requisite "final authority"
  - an inadequate municipal policy such as the failure to train





# Best Practices To Avoid Liability

- Involve mayor and police chief in development of policies
- Ensure that policies require training of police
- Maintain facially constitutional written policies
- Hire competent “decision makers”
- Eliminate patterns/practices that (may) cause unconstitutional deprivations



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**Best Practices**

# Best Practices for Mayors and Chiefs

- Mayors should become members of the Pennsylvania State Mayors' Association and police chiefs should become member of the Pennsylvania Chiefs of Police Association.
- Municipal police department should be accredited or strive to meet Pennsylvania Law Enforcement Accreditation Commission (PLEAC) standards as much as possible when developing policies and procedures.
- Municipal police departments should participate in the Active Bystandership for Law Enforcement (ABLE) Project.

# Best Practices for Mayors and Chiefs

- Members of Council should be informed that policies and procedures which meet the Pennsylvania Law Enforcement Accreditation Commission (PLEAC) standards are in place.
- Smaller police departments should reference the publication of the Pennsylvania Department of Community and Economic Development entitled Administering Police Services in Small Communities.

# The Mayor, The Chief and The Law

Governance and Best practices



## Webinar