



TMHRA

Disciplinary Hearings: Things to Consider

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Internal Investigations

Investigations – Overview



Due Process

- Always interview the employee face-to-face before discipline is rendered
- Loudermill/Predetermination meetings essential
- Outcome should be no surprise to employee
- Don't forget Tex. Gov't Code §§614.021-.023

Ascertaining the Truth

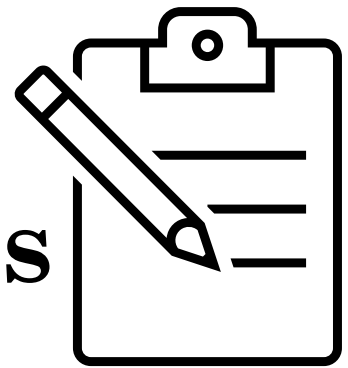
- Follow IA policies always
- Ensure all statements from subject of investigation are verified or rejected
- “Show your work” – don’t skip steps
- Always check for digital/electronic evidence first
- Investigation is judged by thoroughness of what is investigated, as well as what is not investigated

Complaints Against Officers/FF

§614.022 - Complaint must be *in writing* and *signed* by the person making the complaint

§614.023 - Copy of the signed complaint must be given to employee within a *reasonable time*

- Disciplinary action may not be taken unless a copy of signed complaint is given to employee.
- Employee may not be terminated *unless*:
 - Complaint is investigated; and
 - Evidence to prove allegation of misconduct.



Requirements for Formal Complaints

- Complaints must be in writing and signed by the person aggrieved (Texas Local Government Code §614.022).*
- A signed letter of complaint will be sufficient after verifying that it is not a fictitious letter signed with a fictitious name.
- A signed letter from a supervisor, or other employee who is aware of the facts, may fulfill the requirements of a complaint.
- * “Complainant” or “Aggrieved” – not defined in statute



Sections 614.021-.023 Reminders

- Prepare signed written complaint for every investigation—both internally and externally generated.
- Make sure that an investigation is conducted every time, even if it appears that there aren't many disputed facts.
- Always interview the employee face-to-face before discipline is rendered.
- If additional misconduct is discovered during the investigation, *consider issuing a separate signed, written complaint serve it upon the officer / FF*

Weingarten Rights?

- Nope!
- *City of Round Rock, et al., v. Rodriguez*, Austin 3rd Court of Appeals found a right—for *all public employees!*
- Supreme Court, 6-3: no.
- Means: No right to have “representative” during internal investigation or at any point prior to the disciplinary meeting.
- Chief may allow counsel or union representative to be present

What Acts Can An Officer or Firefighter Be Removed Or Suspended?

- §143.051: A commission rule prescribing cause for removal or suspension is not valid unless it involves one or more of the following grounds (12 enumerated criteria):
- The most common is Subsection 12, which states: “Violation of an applicable police department rule or special order.”
- Local Rules add failing to follow requirements/limitations established by medical professionals and City policies

Discipline Causes

- **Section 143.051**

- As enumerated in statute, plus

- Can include additional causes by local rule, so long as consistent with §143.051, such as deferred adjudication or other deferred disposition, or conviction of a felony, State Class A or B misdemeanor, federal misdemeanor, or other crime involving moral turpitude

- Violation of any of the rules and regulations of the General Orders of the Police Department; or of special orders as applicable; or of these Rules and Regulations; or of any of the City Personnel Policies; or of any other City Ordinance or Policy applicable to Police Department employees

Notice of Predisciplinary Meeting



- Also called “Loudermill hearing”
- Chief provides notice of meeting and sets out the findings of the internal investigation
- Outlines proposed discipline and asks for input from the employee
- Reconvene after 24 hours (usually) to mete out discipline
- Follow up on employee statements

What is Appropriate Discipline?

- Chief decides
- Can consider other “similar” misconduct
- Can have matrix
- If newly-hired Chief – may assert “new chief, new rules” if Chief has stated his/her expectations

DISCIPLINE

Appeals/Appeals Hearings

§§143.052, 143.054, 143.036

Only Formal Discipline May be Appealed

- Temporary suspension (1-15 days)
- Indefinite suspension (16+ days)
- Recommended demotion
- Promotional bypass (review)
- Procedures for Appeal for suspensions:
 - Tex. Loc. Gov't Code §143.010, §143.052, §143.053
 - Grounds to appeal: factual insufficiency, legal insufficiency, discipline is excessive, or a combination of the three

APPEAL

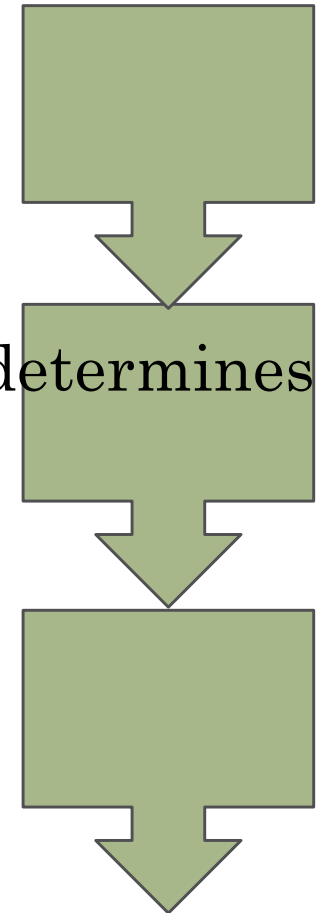
Discipline – Appeals



- Appeal to Commission or outside hearing examiner – employee's choice
- Formal hearing – like a trial
- Procedural requirements are very strict – employees often use slight flaws in Notice to get discipline overturned
- Employee may appeal final Commission decision to district court
- Very limited right of appeal of hearing examiner decision (§143.057(j))

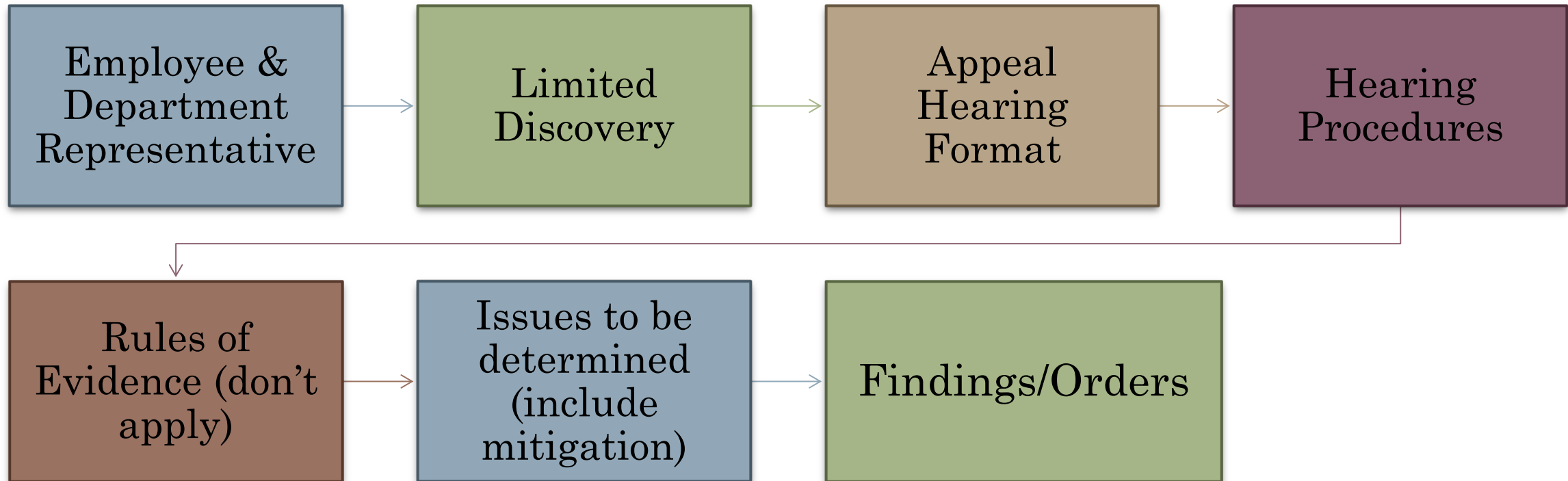
Hearing Process

- Issues subpoenas –Tex. Loc. Gov't Code §143.010
- Conduct of hearing – Tex. Loc. Gov't Code §143.053
- Can adopt local rules to formalize process
- If appealed to the Commission, the Commission hears and determines the appeal
- Commission may deliberate in closed session (§143.053(d))
- Vote must be in public and must find truth of the charges
 - Subject to the Open Meetings Act*



Hearing Process

LOCAL RULES CAN OUTLINE



Informal Discipline

- Written reprimands and verbal counselings
 - By law – maintained in Confidential Department file
 - 180-day rule does not apply
 - No appeal under statute



JC-0257 (2000)

- Attorney General concluded that officers/FF do not have a right to appeal a reprimand or any other “informal” discipline
- They can appeal only “formal” discipline, which are suspensions, demotions, promotional pass overs

JC-0257 (2000)

- Because they cannot appeal informal discipline, those documents may not be maintained in the director's "A" file
- Reprimands and other informal discipline must be kept in the confidential departmental "G" file

City of Corpus Christi v. Abbott,

109 S.W.3d 113 (Tex.App.—Austin 2003, no pet.)

- It is required by § 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under § 143.089 (a).

City of Corpus Christi v. Abbott,

109 S.W.3d 113 (Tex.App.—Austin 2003, no pet.)

- All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or are in the possession of the department because of its investigation into a police officer's/FF's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. Such records may not be withheld under §552.101 of the Gov't Code in conjunction with TLGC §143.089.

What Happens If A Discipline is Overturned?

“Information relating to alleged misconduct or disciplinary action taken must be removed from the police officer’s civil service file if the police department determines that there is insufficient evidence to sustain the charge of misconduct or that the disciplinary action was taken without just cause.”

--OR2007-00054, OR2007-01083,
OR2007-00272

Demotions

TLGC § 143.054

- Chief may only recommend a demotion
- Recommendation goes to CSC for “probable cause” hearing
- If CSC agrees that probable cause exists, then employee has a right to appeal to CSC or to outside hearing examiner
- Demotion only occurs after full evidentiary hearing and a decision of CSC or hearing examiner
- 180-Day?

THE 180-DAY RULE §143.052(h):

- In order to suspend an officer/FF, the Department Head cannot complain of an act that occurred more than 180 days before the Department Head suspends the officer.
- What about Involuntary Demotion?

THE 180-DAY RULE §143.052(h):

- A Department Head may investigate any alleged misconduct by an officer/FF regardless of when it occurred.
- The only limitation is what disciplinary action can be imposed if misconduct is sustained – limited to suspensions.

THE 180-DAY RULE §143.052(h):

If the conduct is allegedly related to a criminal violation of a federal, state or local law and the officer is still subject to a criminal penalty (*i.e.*, the criminal statute of limitations has not expired), the 180 days clock begins on the day the act is discovered.

When is the Discipline Imposed for 180-Day Purposes?

- Is it the day the suspension letter is reducing to writing and signed by the Department Head?
- Is it the day the officer/FF is verbally told of the discipline?
- Is it the day the officer/FF receives his copy of the letter?
- Is it the day the suspension actually begins?
- **NOTE:** These may or may not occur on the same day.

The Disciplinary Process

The Charging Instrument

§143.052(c): “If the department head suspends a police officer or firefighter, the department head *shall*, within 120 hours after the hour of suspension, file a written notice with the commission giving the reasons for the suspension.

Mandatory!

Can You Cite Just The Rule Or Special Order That Was Violated?

NO!

§143.052(e): “The written statement filed by the department head with the commission must point out each civil service rule alleged to have been violated and must describe the alleged acts of the person that the department head contends are in violation of the civil service rules. *It is not sufficient for the department head merely to refer to the provisions of the rules alleged to have been violated.*”

How Detailed Must The Factual Recitation Be?

Civil Service Commission of the City of Fort Worth v. Lockhart, 626 S.W.2d 492 (Tex. 1981):

“The courts recognize that this is a civil action administered by laymen and the charges need not meet the precision or technicality of a criminal indictment”

“Substantial compliance is had with the requirement of Article 1269m (now §143.052(h)) where the letter of suspension sufficiently apprises the officer of the charges against him and the facts relied upon to prove those charges.”

Can the suspension letter refer to acts outside the 180; and if so, for what purpose can they be considered by the Department Head?

➤ YES!

- *Lockhart*: “The import of the Chief’s reference to consideration of Lockhart’s record over the past six months was in connection with the assessment of the proper penalty. It is established that an officer’s/FF’s prior record may be taken into consideration for the purpose of assessing punishment.”
- *Vick v. City of Waco*, 614 S.W.2d 861 (Ct. App. Waco 1981, writ ref’d): “Consideration of plaintiff’s record covering the period prior to 6 months before suspension for purposes of assessing punishment, but not for the purpose of determining the truth of the offense, is not a violation of the statute.”

Reference to Acts Outside the 180 and their Purpose

- *City of San Antonio v. Longoria*, 2004 WL 2098047, *3 (Tex. App - San Antonio 2004, no writ): “Acts or events outside the six-month period may be used to explain or evaluate the propriety and gravity of acts within the six-month period.”
- *City of Houston v. Plaster*, 721 S.W.2d 421 (Tex. App.--Houston [1st Dist] 1986, no writ). “Section 16 [now, §143.052(h)] does not preclude the Chief or commission from considering acts outside the six-month period to explain the acts complained of.”

What Must The Notice Include Regarding The Officer's Right To Appeal And His Choices?

MUST HAVE APPEAL RIGHTS!

§143.052(d); §143.057

City of DeSoto v. White, 288 S.W.3d 389 (Tex. 2009) gave cities *some* breaks concerning the Notice.

The Supreme Court concluded that the §143.057 language (waive rights to appeal to district court as stated in §143.057(j)) was mandatory, but *not* jurisdictional. Remedy here: abatement for officer/FF to reconsider appeal choice.

Who May Sign Notice?

The CHIEF

City of Houston v. Clark, 197
S.W.3d 314 (Tex. 2006):

Must the Officer/FF Sign the Notice?

NO: There is no statutory requirement that the employee sign the letter.

Must the Department Head Personally Deliver a Copy of the Notice?

- *City of Laredo v. Almazan*
- NO – § 143.052(c) does not require the department head to personally deliver the written statement to the suspended officer/FF.
- The Chief caused the Internal Affairs office to serve it on the officer, which was deemed sufficient.

What Happens to the Notice?

- Must be filed with the Civil Service Commission.
- However, we recommend that the Chief file it with the Director, which suffices to serve it with the Commission
- §143.010(g)
- § 143.052(c): “. . . within 120 hours after the hour of suspension.”

Can the Suspension Notice be Amended?

NEVER – §143.053(c)

Bichsel v. Carver, 321 S.W.2d 284 (Tex.1959)

During the civil service hearing, the city attorney realized the charges were legally insufficient, and withdrew them. The Chief later issued another set of charges, which were the same facts.

The Supreme Court ruled that this was an impermissible amendment of the original written charges.

THE LETTER OF APPEAL

§ 143.010(B)

What Statutory Language is Required?

- Must include basis for appeal and request a hearing
- Must contain statement denying truth of charges
- Must take exception to legal sufficiency of charge
- Must allege that the recommended discipline does not fit the offense, or;
- A combination of these statements

When Must the Appeal Letter be Filed?

- *City of Lubbock v. Elkins*, 896 S.W.2d 346 (Tex.App.—Amarillo, 1995, no pet.)
- Within 10 calendar days/240 hours after date of action complained of occurred.
- *City of Temple Firemen's and Policemen's Civil Service Commission v. Bender*, 787 S.W.2d 951 (Tex. 1990)-The Supreme Court held that failure to file a proper notice of appeal within the 10-day statutory period will result in the Commission/HE lacking jurisdiction to hear the appeal.
- But, see *Talley v. City of Killeen*, 418 S.W.3d 205 (Tex.App.—Austin, 2013, pet. denied).

Choosing the CSC or HE

- It is the officer's/FF's choice
- It can be the most critical decision in the entire appeal
- Election must be contained in the original letter of appeal

Criminal Charges §143.056

- When formal criminal charges are filed, a department head may suspend within 30 days after final disposition
- May suspend without pay only when formal criminal charges have been filed
- If criminal charges are present, don't "step" on criminal
- §143.056(h) – write the Attorney General for extension of 180-day period.

Criminal Charges §143.056

- *Rough v. Ojeda*, 954 S.W.2d 127 (Tex.App.-San Antonio 1997, no pet.)-when formal criminal charges, §143.056 timelines apply, not §143.052(h)
- *Gracia v. City of Killeen*, 285 S.W.3d 94 (Tex.App.-Austin 2009, no pet.)—formal criminal charges must be filed to place FF/officer on unpaid leave
- See also *City of Cedar Park v. Jenkins*, 2014 Tex. Appl. LEXIS 7952 (Tex. App.—Austin 2014, pet. denied)

Scheduling the Appeal

- §143.053(b) – must occur within 30 calendar days
- §143.057(e) – shall begin as soon as the HE can schedule it
- §143.056(d) – if the officer/FF has pending criminal charges, appeal can be delayed, *City of Amarillo v. Fenwick*, 19 S.W.3d 499 (Tex.App.—Amarillo 2000, no pet.)

Pre-Trial Discovery

- Chapter 143 does not provide for pre-trial discovery process
- A Public Information Act Request (PIA/ORR) is a pre-trial discovery tool that can be used by appellant
- The Texas Rules of Court do not apply
- The Texas Administrative Procedures Act does not apply

Television/Media Coverage

- Can the media be excluded from the hearing? NO
- §143.010(c): All Commission meetings are open to the public.
- CSC or HE can restrict television coverage to protect enforcement of The Rule.



Transcripts of the Hearing

- §143.010(h) requires Commission to maintain a public record of the proceeding but that can be a tape recording, video, or audio.

THE HEARING

- The CSC or HE is asked to answer:
 - Are the charges true? § 143.053(g)
 - Was the discipline appropriate?

The Process §143.053

- City has the burden of proving the charges by a preponderance of the evidence, which means a fact is more likely than not to have occurred.
- Hearing is conducted just like a trial.
- Officer/FF has the right to be represented by counsel or a person of his/her choosing.
- Witnesses may be placed under The Rule.
- Only evidence presented at hearing may be considered.
§143.010(g)

The Process §143.053

- Usually, the HE and CSC will only consider evidence that the Department Head had before him at the time he made the decision to suspend the officer/FF.
- Usually, the HE and CSC will exclude decisions by other governmental bodies (*i.e.*, EEOC, TWC) as being irrelevant.
- Hearing to be conducted “fairly and impartially.”

Most Common Legal Challenges/Arguments on Appeal

- › Suspension letter factually insufficient
- › Acts complained of occurred outside the 180 days
- › Evidence does not support the charges
- › Disparate treatment: disproportionate treatment for similar or worse acts.
- › Failure to receive §614.021-.023 Notice/inadequate 614 Notice

Can A Department Use The “G” File In A Hearing?

- Yes!
- Subject to a sealed protective order
- AG has ruled (informal opinions) that if a hearing examiner admits exhibits pursuant to a protective order, and the documents are sealed, *they are not subject to public release!* OR2007-10948, OR2007-07166



REMEDIES

§143.053

The CSC or Hearing Examiner May, in the Award:

- Permanently dismiss the officer/FF from the Department
- Temporarily suspend the officer/FF from the Department
- Restore the officer/FF to their former position in the Department
- If suspension is reduced, then award back pay and restoration of employee benefits
- Local Rules may state final order must include mitigation of damages

Award Issues

- ISSUE: Is an officer/FF that is suspended without pay entitled to credit in the pension system for that period of time if he is not contributing to the pension system?
- ISSUE: “Make whole” remedies?
- ISSUE: Authority to award attorney’s fees to prevailing party or costs?

Court Punts on Suspension in Lieu of Demotion

Kuykendall v. City of Grand Prairie, 257
S.W.3d 515 (Tex.App.—Dallas 2008, no
pet.)

- “Regardless of whether suspension could be imposed when the department head recommended demotion, the hearing examiner had to find appellant committed the charged misconduct before he could impose either form of discipline.”
- Also, 180-day rule

Offset of Back Pay Owed

- Question: Does §143.053(f) permit a city to an off-set for wages earned by the officer/FF during the period of suspension?
- Answer: Yes.

Duty to Mitigate?

- Question: What if the officer/FF did not seek other sources of income?
- General employment law principles require the employee to use reasonable diligence to mitigate his damages, so what should the remedy be?

Appeals of CSC Decisions

- § 143.015(a): Officer must file suit within 10 calendar days of the date of the final Commission decision being challenged calculated from
 - (1) date the Commission decision is sent to the officer/FF by certified mail or;
 - (2) is personally received by the officer/FF or designee.

- Note: Same deadlines apply to the City.

Appeal of CSC Decision

- Substantial Evidence Review:
 - A de novo review –does not mean “do over” or new trial

City of Houston v. Brinkmeyer

- Trial to determine only the issues of whether the agency’s rule is free of the taint of any illegality and is reasonably supported by the substantial evidence.
- If substantial evidence to support the CSC’s decision, the courts are bound to follow the discretion of the administrative body.
- Because the agency itself is the primary fact-finding body, the question to be determined by the trial court is strictly one of law.
- Court may overturn CSC/HE’s decision and award back pay, attorney’s fees, and any other equitable relief.

Appeal of Hearing Examiner Decisions

- Section 143.057(j):

“A district court may hear an appeal of a hearing examiner's award only on the grounds that the arbitration panel was without jurisdiction or exceeded its jurisdiction or that the order was procured by fraud, collusion, or other unlawful means. An appeal must be brought in the district court having jurisdiction in the municipality in which the fire or police department is located.”

- What if city straddles two counties?
- What is exceeding jurisdiction?



Thank You!

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