

LAW ENFORCEMENT MEMORANDUM

To: All New Hampshire Law Enforcement Agencies
All County Attorneys

From: Gordon J. MacDonald, Attorney General

Re: Additional Guidance Concerning the Exculpatory Evidence Schedule

Date: April 30, 2018

The intention of this memorandum is to clarify some of the procedural matters addressed in the New Hampshire Department of Justice March 21, 2017 Exculpatory Evidence Memorandum, Exculpatory Evidence Protocol, and 2017 Training for Law Enforcement PowerPoint presentation (hereinafter, “Memo,” “Protocol,” and “Training”). Where there is a conflict between this memorandum and the Memo, Protocol, or Training, this memorandum shall control.

Only “Sustained” Findings Shall Entail Placement on the EES

The EES Memo and Protocol contemplate the following basic process with regard to allegations of misconduct against an officer:

- That an investigation will be conducted into the allegations;
- That the investigation will result in a conclusion that the allegation is “sustained,” “not sustained,” or “unfounded,” or that the officer is “exonerated”;
- That if the conclusion is that the allegation is “sustained,” the head of the law enforcement agency will determine whether the conduct at issue is EES conduct;
- That if the head of the law enforcement agency determines that the conduct at issue is EES conduct, the officer will be notified and afforded the opportunity to present evidence which the officer believes demonstrates the conduct is not EES conduct; and
- That if after considering the evidence presented by the officer, the head of the law enforcement agency’s conclusion remains that the sustained allegation of misconduct constitutes EES conduct, he or she shall issue notification causing the officer’s name to be placed on the EES.

See Protocol, p. 4, 7.

Only allegations of misconduct which are sustained after an investigation and which constitute EES conduct will result in an officer's name being placed on the EES.¹ "Sustained" means that the evidence obtained during an investigation was sufficient to prove that the act occurred. *See Memo*, p. 4 n.5. **Mere investigation into EES conduct does not warrant either EES notification or inclusion on the EES.** Accordingly, law enforcement agency heads should not cause an officer's name to be "temporarily" placed on the EES while an investigation into the allegations is pending. Further, investigations into allegations of misconduct against officers who resign or otherwise leave employment prior to the completion of the investigation must be completed nonetheless, upon notice to the officer, with or without the officer's cooperation.

There is a caveat to the directive that mere investigation shall not cause EES notification and inclusion: The fact that an officer is under investigation may constitute evidence which is favorable to the defense in a particular case or cases, and thus must be disclosed to the defense in those cases. *See, e.g., United States v. Wilson*, 605 F.3d 985, 1006 (D.C. Cir. 2010) (per curiam) (evidence that the testifying officer was under suspension due to an investigation might show that she was motivated to testify falsely against the defendants in order to curry favor with the government); *United States v. Bowie*, 198 F.3d 905 (D.C. Cir. 1999). **Consistent with the Memo's directives, officers who are under investigation must notify the prosecutor in any case in which they may be a witness that they are under investigation.** *See Memo*, p. 5. The heads of law enforcement agencies should also provide this information to a prosecutor upon request.

Allegations Which Are Determined to be "Not Sustained" Do Not Entail Placement on the EES

As discussed above, the EES Memo and Protocol contemplate that a sustained allegation of EES misconduct against an officer will cause the officer's name to be placed on the EES.

A finding which is not sustained is one for which there is insufficient evidence to enable the conclusion that the alleged conduct actually occurred. *Memo*, p. 4; *Memo*, p. 4 n.5. In essence, an allegation which is not sustained is nothing more than an allegation, which should not be considered exculpatory.

Thus, allegations which are deemed not sustained after investigation, as with unfounded and exonerated determinations, will not cause an officer's name to be placed on

¹ Written notification concerning sustained allegations which constitute EES conduct must be made to the County Attorney and the Attorney General's Criminal Justice Bureau Chief. *See Protocol*, p. 7. **The notification content shall be limited to the officer's name and date of birth, the name of the law enforcement agency, the date(s) on which the misconduct occurred, and a short description of the type(s) of EES conduct at issue. No other information, and no other records or documents, shall be submitted.** Examples of types of EES conduct include "credibility," "excessive use of force," and "criminal conduct." *See, e.g., Protocol*, p. 2. A sample notification letter is attached to this memorandum.

the list. Accordingly, notification is not required regarding allegations which are deemed not sustained.

Mental Health & Exculpatory Evidence

Evidence of mental illness may be exculpatory because it may call into question the witness's reliability and therefore his or her credibility. *See, e.g., State v. Fichera*, 153 N.H. 588, 599-600 (2006) (cross-examination on the issue is permissible if the defendant is able to show that a "mental impairment" affects the witness's perception of events to which she is testifying); *State v. Shepherd*, 159 N.H. 163, 171 (2009) (reversing an AFSA conviction, in part because evidence of the victim's history of depression was "sufficiently favorable to require disclosure"); *United States v. Butt*, 955 F.2d 77, 82-83 (1st Cir. 1992) (noting that federal courts have found mental instability relevant to credibility only where the witness suffered from a severe illness that dramatically impaired her ability to perceive and tell the truth); *United States v. Smith*, 77 F.3d 511, 516 (D.C. Cir. 1996) (reversing conviction, in part because the government failed to disclose that a key prosecution witness had been hospitalized for chronic depression for more than a year).

The EES Protocol requires that an officer's name be placed on the EES due to an "instance[] of mental illness or instability that caused [the officer's] law enforcement agency to take some affirmative action *to suspend the officer as a disciplinary matter.*" *Protocol*, p. 1 n.2 (emphasis added); *Protocol*, p. 2. This language differs from that in the 2004 Heed Memo, which required placement on the *Laurie* list for an "instance of mental instability that caused the police department to take some affirmative action to suspend the officer for evaluation or treatment ... for which no disciplinary action was taken." *Heed Memo*, p. 2.

The emphasis on the prerequisites of suspension and discipline in the Protocol is consistent with the approach taken by some courts that only severe, protracted mental illness will constitute favorable evidence for constitutional purposes. In other words, if the mental health issue is so significant that it not only compromises an officer's discharge of his or her duties but also results in the officer's suspension as a disciplinary matter, then it ought to be presumptively significant enough to constitute impeachment evidence. The Protocol makes clear that other mental health events, such as "a directive to an officer to seek mental health treatment following a traumatic incident" wherein no affirmative action was taken to suspend the officer as a disciplinary matter, are categorically excluded from the EES. *Protocol*, p. 1 n.2.

The Protocol's requirement of the nexus between "the instance of mental illness or instability" and the "suspension] as disciplinary matter" also means that documentation of such incidents should be found in personnel files other than the officer's medical and mental health files. Assuming that is the case, the Protocol does not require the head of a law enforcement agency to review officers' medical and mental health records to discover such information, since this information will already be known due to other administrative action.

Protocols for Removal from the EES

In *Gantert v. City of Rochester*, 168 N.H. 640 (2016), the New Hampshire Supreme Court observed that “the interest of individual officers in their reputations and careers is such that there must be some *post-placement* mechanism available to an officer to seek removal from the “Laurie List” if the grounds are thereafter found to be lacking in substance....” *Gantert*, 168 N.H. at 650 (emphasis in original). The Court noted that after an officer is placed on an exculpatory evidence list, he or she “may have grounds for judicial relief if the circumstances that gave rise to the placement are clearly shown to be without basis.” *Id.* (citing *Duchesne v. Hillsborough County Attorney*, 167 N.H. 774, 784-85 (2015)). Other avenues of post-placement process include grievance procedures identified in employment terms and collective bargaining agreements.

Because sustained findings of conduct warranting inclusion on the EES may be overturned through these processes, the Memo and Protocol permit an officer’s name to be removed from the EES “with the approval of the Attorney General or designee.” *Protocol*, p. 5. This removal process does not involve a substantive review. NHDOJ is not an adjudicatory body and the protocol described herein is not one which entails reconsideration of the facts underlying the investigation. Instead, the removal protocol requires removal when a sustained finding has been overturned.²

The removal protocol is as follows:

1. The Attorney General’s designees for the purpose of EES removal are the Director of the Division of Public Protection and the Criminal Justice Bureau Chief. The Attorney General may designate other Senior Assistant Attorneys General for this purpose.
2. The request for removal must be made in writing by the head of the law enforcement agency at which the officer was or is employed, or by the officer or his or her designee. If the request is made by the officer or his or her designee, the Attorney General’s Designee shall provide notice thereof to the head of the law enforcement agency at which the officer was or is employed. The request must:
 - a. State the allegations against the officer; and
 - b. State that an investigation into the allegations was conducted; and

² If an officer’s name was included on the EES before the investigation into his or her alleged misconduct was completed, the officer’s name will be removed by the Attorney General or Designee upon written notification that the outcome of the investigation is that the allegations were unfounded or not sustained, or that the officer was exonerated.

- c. State the disciplinary finding which resulted in the officer's placement on the EES, and the fact that the finding has been overturned; and
 - d. Provide a copy of the order or other determination overturning the disciplinary finding.
3. If a sustained finding was overturned, the Attorney General's Designee shall cause the removal of the officer's name from the EES.
4. The Attorney General's Designee shall notify the head of the law enforcement agency, and the law enforcement officer or his or her designee, in writing regarding the removal decision. A copy of this notification shall be sent to each county attorney.