

ARE YOU A “GIGLIO-IMPAIRED” LAW ENFORCEMENT OFFICER?

As a law enforcement officer, one small misstep at work or in off-duty life could put your entire career at risk. Law enforcement officers are held to a high standard of honesty and credibility because of the need for public trust and confidence attendant to their job responsibilities, including testifying at criminal trials. See *Hernandez v. Department of Homeland Security*, 324 F. App'x 908, 911 (Fed. Cir. 2009). Officers must therefore be especially careful not to engage in any conduct that could even slightly damage their credibility. If an officer's credibility is compromised, her ability to testify at trial is damaged, and her job is put at risk.

When an officer testifies at a criminal trial, her agency is required to turn over to the prosecution any information that reflects on her credibility:

Under *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), investigative agencies must turn over to prosecutors, as early as possible in a case, potential impeachment evidence with respect to the agents involved in the case. The prosecutor then exercises his discretion as to whether the impeachment evidence must be turned over to the defense. A “Giglio-impaired” agent is one against whom there is potential impeachment evidence that would render the agent's testimony of marginal value in a case, which means, of course, that a case that depends primarily on the testimony of a *Giglio*-impaired witness, is at risk.

Cameron v. Department of Justice, 100 M.S.P.R. 477, 482 n. 1 (2005), *review dismissed*, 165 F. App'x 856 (Fed. Cir. 2006).

So what is impeachment evidence? Potential impeachment evidence has been generally defined as impeaching information that is material to the defense as well as information that either casts a substantial doubt upon the accuracy of any evidence the prosecutor intends to rely on to prove an element of any crime, or that may have a significant bearing on the admissibility of the prosecution's evidence. This includes (but is not limited to!): specific instances of the officer's conduct that may be used to attack her credibility or character for truthfulness; evidence in the form of opinion or reputation as to the officer's character for truthfulness; prior inconsistent statements; and, information that may be used to suggest that an officer is biased. *United States Attorney's Manual*, Chapter 9-5.100 (“Giglio Policy”) (2008). For example, the Merit Systems Protection Board (MSPB) has upheld removal for falsification of government documents because such falsification goes to the employee's reliability, veracity, trustworthiness, and ethical conduct. See, e.g. *Ensinger v. Department of the Air Force*, 36 M.S.P.R. 430 (1988). As such, an officer found to have falsified documents would likely be impeachable and thus, *Giglio*-impaired.

Additionally, off-duty misconduct, which may not warrant removal for other federal employees, could justify an agency's removal of a law enforcement officer because of its impact on the officer's credibility. See *Austin v. Department of Justice*, 10 M.S.P.B. 221, 223 (1982) (the dishonesty attendant to shoplifting, regardless of the final criminal charges or plea, has a serious impact on a law enforcement officer's reputation for honesty and integrity). This type of behavior would likely be impeachable, even though it was off-duty, thus rendering the officer *Giglio*-impaired.

When an agency disciplines an officer for any reason, **the most important factor the agency considers in assessing the penalty is the nature and seriousness of the charge and its relation to the employee's duties, position, and responsibilities.** See *Luciano v. Department of the Treasury*, 88 M.S.P.R. 335, 343 (2001), *aff'd* 30 F. App'x 973 (Fed. Cir. 2002). Any conduct or statement that affects an officer's reputation for honesty and credibility has a direct relation to that officer's ability to testify at trial, giving an agency substantial justification for imposing a heavy penalty - often removal.

Honesty is the best *Giglio* policy. Everyone makes mistakes, but honesty in acknowledging any misconduct, and honesty in turning over any potential impeachment information to prosecutors, is the best way to keep both your credibility and your federal career.

If you have any concerns that your honesty on a government document, or your conduct during the course of your employment might negatively impact your chances for securing or keeping a law enforcement position, contact Mahoney & Jeffrey, PLLC at 202-312-7100 or www.MahoneyJeffrey.com.

Kathleen Kibler Mahoney, Esq.

Member & Managing Director

Mahoney & Jeffrey, PLLC, *The Federal Employee's Law Firm*®

The information contained in this article is of a general nature and is subject to change; it is not meant to serve as legal advice in any particular situation. For specific legal advice, the author recommends you consult a licensed attorney who is knowledgeable about the area of law in question.