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# Chief Deputies' Leadership Institute

## Burning Questions

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# Rap Back

## 1. Deadlines

When do law enforcement officers, detention officers and telecommunicators have to be in full compliance with the Rap Back requirements?

**ANSWER:** All personnel certified by either the Sheriffs' Standards Commission or the Criminal Justice Standards Commission must have their fingerprints electronically submitted to the North Carolina State Bureau of Investigation (SBI) by June 30, 2023. However, to allow time for processing, the SBI requested that fingerprints be submitted prior to May 31, 2023, as opposed to June 30th.

This requirement does apply to personnel in an "inactive" status.

## 2. **What happens if a law enforcement officer, detention officer or telecommunicator fails to complete the fingerprint process or fails to complete the required paperwork for Rap Back?**

**ANSWER:** Failure to comply with the law could result in the suspension or revocation of an individual's certification. This also applies to individuals in inactive status where certification is being held by a sheriff's office.

## 3. Dealing With Rap Back and Personnel in Inactive Status

A sheriff may have inactive law enforcement officers, detention officers and telecommunicators with whom they have had trouble contacting to ensure the inactive personnel get fingerprinted to maintain compliance with Rap Back.

Sheriff's certified personnel, whether active or inactive, are required to maintain their own certification and to ensure they are compliant with the Rap Back requirements under State law. Therefore, while the sheriff may send a courtesy letter to the last known address of personnel held in inactive status, the sheriff is under no legal obligation to "track down" inactive personnel and could instead notify the Sheriffs' Standards Division that the individual's certification will no longer be held by the sheriff.

## 4. Inactive Status and ACADIS Accounts

Another related issue is that many inactive sheriff's personnel do not have an account with ACADIS. An ACADIS account is needed to submit the required Rap Back form. Inactive personnel will either need to create a new account on ACADIS, or the in-service training coordinator for the sheriff can submit the form on the inactive person's behalf.

Aside from the in-service training coordinator, no one should submit a Rap Back form on behalf of inactive personnel who do not have an account with ACADIS. As noted above, the sheriff is under no legal obligation to "track down" certified personnel on inactive status

to encourage them to obtain an ACADIS account and to submit the appropriate Rap Back form.

**5. Hiring Process**

How does Rap Back fit into the hiring process?

**ANSWER:** Newly hired personnel will have to be fingerprinted twice during the hiring process to comply with Rap Back. The first set of fingerprints shall be taken at a Live Scan device and electronically submitted as part of the hiring process. The fingerprint results (fulfilment letter/criminal history) will be returned to the sheriff. When the individual applies for certification, the sheriff will submit the fulfilment letter with the application packet to the Sheriffs' Standards Division.

Once the application packet has been submitted to the Sheriffs' Standards Division, the sheriff will then be required to have the applicant fingerprinted again. These fingerprint results will be sent to the Sheriffs' Standards Division and will be placed in the applicant's certification file.

**6. High Volume of Requests**

Where can a sheriff's office refer individuals from other agencies looking to be fingerprinted for Rap Back if the sheriff has received too many requests to handle at one time?

**ANSWER:** The sheriff can refer individuals to neighboring sheriffs' offices or police departments for fingerprinting to comply with Rap Back.

**7. ORI Number**

When fingerprinting personnel from other agencies, who do sheriff's personnel call to get an ORI number for an agency if the agency is not already in the sheriff's office Live Scan device?

**ANSWER:** Contact the following people at the North Carolina State Bureau of Investigation:

1. Jenni Apilli  
Service Coordinator  
[japilli@ncsbi.gov](mailto:japilli@ncsbi.gov)  
(919) 582-8620
  
2. SBI Agent Cindy Coats  
(919) 582-8661  
[ccoats@ncsbi.gov](mailto:ccoats@ncsbi.gov)

**8. Getting ORI Number Installed On Scanning Device**

How do sheriff's office personnel get an ORI number for a different agency added onto their Live Scan device?

**ANSWER:** Each Live Scan device has a serial number unique to the device and a contact number to call for issues concerning the device. Sheriff's office personnel should call the telephone number on the device and request that the needed ORI number be added to the device. The company will remotely add the ORI number through an electronic update. This process can be accomplished in 24 hours.

**9. Additional Rap Back Assistance**

A FAQ about Rap Back from the North Carolina Sheriffs' Education and Training Standards Commission can be found on the following North Carolina Department of Justice webpage: <https://ncdoj.gov/law-enforcement-training/criminal-justice/>

Questions about the SBI's receiving, processing, and storing of fingerprints can be directed to Jenni Apilli, SBI ID Services Coordinator, at [japilli@ncsbi.gov](mailto:japilli@ncsbi.gov) or 919-582-8620.

### **Jail Supervision**

**10. Does the law allow a person (including a sworn law enforcement officer) to work in the jail supervising inmates prior to them obtaining detention officer certification?**

**Similarly, does the law allow a person (including a sworn law enforcement officer) to work in the jail supervising inmates prior to that person taking the detention officer certification course (DOCC)?**

**ANSWER:** The North Carolina Administrative Code requires sheriffs to ensure that any person engaging in the control, care or supervision of inmates meets all of the following criteria:

1. the person must meet the minimum requirements of a detention officer;
2. the person must be appointed by the sheriff as a detention officer prior to engaging in the control, care or supervision of inmates;
3. a report of appointment must be sent by the sheriff to the Sheriffs' Standards Division in Raleigh no later than 10 days after the appointment of the person as a detention officer; and
4. the person must complete a commission-accredited detention officer training course within one year from the date of their original appointment as a detention officer to receive general certification as a detention officer to continue to engage in the control, care or supervision of inmates.

These provisions are contained in 12 NCAC 10B .0103(13), which defines a “detention officer,” as well as in 12 NCAC 10B .0403, which requires the submission of the report of appointment.

Therefore, a violation occurs when any person, including a deputy sheriff, engages in the control, care or supervision of an inmate prior to meeting the minimum requirements noted above.

- 11. Does the law provide any distinction between bringing a deputy (who is not certified as a detention officer) into the jail to supervise inmates on a “short shift” or bringing the deputy (who is not certified as a detention officer) in on “weekends” to supervise inmates?**

**Similarly, does the law provide any amount of hours that can be worked by a deputy (who is not certified as a detention officer) supervising inmates in the jail?**

**ANSWER:** No, there is no distinction or exceptions made under current law for the requirements that must be met prior to engaging in the control, care or supervision of inmates in the jail. The minimum standards, appointment, and probationary certification requirements as a detention officer discussed in the analysis above for Question No. 10 apply regardless of the amount of time spent supervising inmates or when that supervision takes place (such as only on weekends or during short shifts).

- 12. Does current law require inmate transport officers to be certified as detention officers?**

**ANSWER:** Yes. Under current law, there is no exception to the mandatory appointment and certification requirements as a detention officer discussed in the analysis above for Question No. 10. This applies even if the person supervising the inmate is just a transport officer with no additional control, care or supervision duties.

- 13. Does the law allow a person to immediately go back to work in the jail if they are certified as both a law enforcement officer and detention officer but allowed their detention officer certification to become inactive?**

**ANSWER:** Yes. However, prior to engaging in the control, care or supervision of inmates, the sheriff must complete a Form F-9 (Change in Status) for the deputy to notify the Sheriffs’ Standards Division that the detention officer certification is being re-activated.

Note: There is no need for the deputy to “make up” any in-service training on the detention officer certification being re-activated. 12 NCAC 10B .2006 authorizes the sheriff to designate the officer’s primary duties for purposes of “selecting which one of the in-service training programs the officer shall complete for a calendar year.” Therefore, the law enforcement officer’s mandatory in-service training would suffice.

**14. Does the law require a sheriff to do inmate transport for inmates confined in a regional jail?**

**ANSWER:** No. G.S. 162-22 provides that the sheriff is the keeper of the jail in that sheriff's county and of the inmates confined within that sheriff's jail. There is no State law that requires a sheriff to have any involvement whatsoever with the control, care or supervision of inmates in a regional jail that is established pursuant to G.S. 153A-219.

Note: If a sheriff is considering voluntarily providing inmate transport for a regional jail, the sheriff must take into account their jurisdiction when doing so. If the regional jail is located in another county, the sheriff's personnel will not have jurisdiction unless the sheriff's county is one of the counties that contracted to establish the district confinement facility (regional jail). If the sheriff's county is one of the units of local government that established the regional jail, then the sheriff will have authority to transport prisoners to and from the facility. G.S. 153A-219. The sheriff's personnel making the transport under the authority of G.S. 153A-219 and G.S. 160A-461 (discussed below) must be sworn law enforcement officers. Personnel certified only as a detention officer may not make these transports.

If the sheriff's county is not one of the units of local government that contracted to establish the district confinement facility, the sheriff and the head of district confinement facility may enter into an interlocal agreement to provide for transportation from that county. G.S. 160A-461. Any "unit of local government" may enter into an agreement with any other unit of local government to execute any undertaking. G.S. 160A-461. "Unit of local government" is defined under the statutes in this context as any "local political subdivision, authority, or agency of local government." G.S. 160A-460.

**15. Does the law allow a detention officer to use force on an inmate that is verbally disruptive alone (such as one who is yelling all the time)?**

**ANSWER:** No. Use of force is not lawful where an inmate is only verbally disruptive. A detention officer's ability to use force lawfully against an inmate is dependent upon that inmate:

1. presenting an active safety threat against another individual (be it the responding detention officer, another detention officer, or an inmate); or
2. engaging in behavior that contributes to an active threat to the security of the detention facility.

Absent these factors, use of force against inmates will be unlawful. Even when these factors are present, the responding detention officer will still need to carefully calibrate their use of force to the level of the security or safety threat posed by the inmate.

Note: Jail personnel are authorized by law to use other disciplinary measures to deal with a verbally disruptive inmate. This could include the loss of privileges upon engaging in prohibited behavior (ex. disruptive behavior), administrative segregation, or the forfeiture of any sentence credits the sheriff has awarded to a sentenced inmate, if applicable.

**16. Does the law require a sheriff to have females working as detention officers in the jail if there is a female inmate in the jail?**

**ANSWER:** There is no requirement that dressed female inmates be exclusively supervised by female detention officers.

However, State law requires that female inmates (including pre-trial detainees) in a “**state-of-undress**” be supervised/inspected by female detention officers unless a female jail facility employee is not available within a reasonable period of time. G.S. 153A-229.3.

“State of undress” is defined under State law as “partially or fully naked, either in the shower, toilet areas, a medical examination room, or while having a body cavity search conducted.”

If a male detention officer or other male jail facility employee (i.e. medical personnel) performs an inspection or supervises a female inmate in a state of undress, the male detention officer or other male jail facility employee must submit a written report to the sheriff within 5 days of the inspection or supervision containing the reasons why the inspection or supervision of the female inmate was performed. G.S. 153A-229.3

Additionally, the Prison Rape Elimination Act (PREA) requires jail facilities to implement policies and procedures to allow “inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks.” The policy must also require staff of the opposite gender to announce their presence when entering an inmate housing unit. 28 C.F.R. 115.15

PREA also prohibits cross-gender strip searches or cross-gender visual body cavity searches, except in exigent circumstances or when performed by medical practitioners. 28 C.F.R. 115.15.

Finally, the Fourth Amendment also prohibits the involuntary exposure of an inmate’s genitals to members of the opposite sex, except when “reasonably necessary.” See *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981); *Azariah v. McCurry*, 2007 U.S. Dist. LEXIS 2802 (W.D.N.C., Jan. 12, 2007).

## **Employment**

**17. What legal repercussions does a sheriff have if a deputy intentionally fails the Detention Officer Certification Course or continues to fail the course for whatever reason?**

**ANSWER:** This could form the basis to terminate the deputy’s employment, in the discretion of the sheriff. G.S. 153A-103 provides the sheriff has “the exclusive right to hire, discharge, and supervise the employees” in the Office of Sheriff.

A sheriff’s exclusive authority to supervise and discharge employees, as well as the exclusive authority to establish policy within the sheriff’s office, is also discussed in the Fourth Circuit Court of Appeals case of *Little v. Smith*, 114 F. Supp. 2d 437 (2000).

Finally, North Carolina is an at-will employment state. This means the sheriff can end the employment relationship at any time, with or without cause, so long as the termination is not based on some federally protected grounds (such as race or sex). Any employee that is not able to meet the sheriff's job requirements, such as completing the Detention Officer Certification Course, may be terminated at-will.

**18. Truthfulness is an issue with an employee that will be terminated. Does the law require that the terminated employee be given a name clearing hearing and what is a name clearing hearing?**

**What is a name clearing hearing?**

**ANSWER:** A name clearing hearing is not a formal hearing and it is not a trial. The name clearing hearing is an informal process where the employee is given the opportunity to appear before the sheriff to clear their name. While this informal process includes the right to have witnesses provide statements to the sheriff, there is no requirement for sworn testimony and the sheriff is not required to have a judge or hearing officer hear the case. Also, the sheriff is not required to change the sheriff's decision if the sheriff is not persuaded by the information provided by the employee. See *Scott v. Town of Taylortown*, 2014 U.S. Dist. LEXIS 11532, at 17. Finally, there is currently no right for the employee to appeal following a name clearing hearing.

**When is a name clearing hearing required?**

**ANSWER:** A name clearing hearing is required only when a government employer, such as a sheriff:

1. makes public a statement regarding the termination or demotion of an employee;
2. that stigmatizes the employee's reputation; and (3) the employee asserts that the statement is false.

Otherwise, a name hearing clearing is not required.

A statement is stigmatizing if it involves allegations of **dishonesty**, immorality or other conduct that may damage the employee's reputation among associates and impair his or her ability to obtain other employment. Examples of stigmatizing statements include a statement that the employee falsified records, misappropriated property or funds, is untruthful, untrustworthy, unethical, or has committed a crime or other immoral act (such as having sex while on duty).

A statement is made public if the sheriff includes the statement on a notice of separation that is provided to the North Carolina Sheriffs' Education and Training Standards Commission or to the North Carolina Criminal Justice Education and Training Standards Commission. This form is commonly referred to as the Report of Separation Form, or F-



5B Form. See *Scott v. Town of Taylortown*, 2014 U.S. Dist. LEXIS 11532 (M.D.N.C. August 20, 2014).

Finally, G.S. 153A-98(b)(11) provides that termination letters are a matter of public record. **Note:** Sheriffs are not required to create or issue termination letters.

## **School Resource Officers**

### **19. What are the legal requirements for School Resource Officers (SROs)?**

**ANSWER:** A school resource officer (SRO) is defined as any law enforcement officer assigned to one or more public schools within a local school administrative unit who works in a school at least 20 hours per week for more than 12 weeks per calendar year to assist with all of the following: school safety, school security, emergency preparedness, emergency response, and additional responsibilities. See 12 NCAC 10B .0510; 12 NCAC 09B .0313;.

Any deputy sheriff or police officer assigned as an SRO on January 1, 2020 or later must:

1. have a general (not probationary) certification as a deputy sheriff from the North Carolina Sheriffs' Education and Training Standards Commission or a general (not probationary) certification as a law enforcement officer from the North Carolina Criminal Justice Education and Training Standards Commission; and
2. complete the Basic School Resource Officer Training Course authored by the North Carolina Justice Academy within one (1) year of being assigned as a school resource officer. See 12 NCAC 10B .0510; 12 NCAC 09B .0313. Deputy sheriffs or other law enforcement officers who have previously completed the Basic School Resource Officer Training Course and who have since been continuously assigned as an SRO are credited with completion of the course for certification purposes.

The agency employing the SRO must submit to the appropriate Commission a Form F-20 Commission School Resource Officer Assignment Form with documentation. If the application is properly submitted and the deputy or the officer meets the qualifications above, the deputy or the officer will be certified as an SRO. The term of the SRO certification is indefinite, provided the SRO completes an online one-hour basic school resource officer refresher training course each calendar year. 12 NCAC 09B .0313(e); 12 NCAC 10B .0510(e).

Along with their application, deputy sheriffs who have prior experience as an SRO with a police department should send the Sheriffs' Standards Division a memo from their former employer containing the dates of that service and a copy of their completion certificate for any Basic School Resource Officer Training Course.

For more information please see the [FAQ's for SRO](#) from the North Carolina Sheriffs' Education and Training Standards Commission and the North Carolina Criminal Justice Education and Training Standards Commission.

**20. Who can fill in for absent School Resource Officers?**

**ANSWER:** Any sworn law enforcement officer can fill in for a School Resource Officer for less than 20 hours a week and less than 12 weeks in a calendar year.

## **Finance**

**21. Who has the authority to tell the sheriff how to spend federal equitable sharing and asset forfeiture funds?**

**ANSWER:** The funds must be spent in the manner described in the sheriff's formal request for sharing that is submitted to the federal agency. This stated purpose is determined by the sheriff and not the county.

All money received by local government units must be expended only in accordance with a budget ordinance adopted by the board of county commissioners. See G.S. 159-8. However, the county must include equitable sharing and asset forfeiture funds in the budget ordinance for use in the manner specified in the agency's formal request for sharing. This legal authority is thoroughly discussed in a memorandum from W. Dale Talbert, Special Deputy Attorney General, dated July 28, 2008, which provides "because federal law and regulation require proceeds from federal forfeitures that are transferred to a local law enforcement agency to be used for the purposes specified in the agency's formal request for sharing, the governing board must budget the cash proceeds and permit use of the tangible property for the stated purposes or return the asset to the federal government."

This Attorney General memo is included in the Association's 2023 Finance Reference Manual, which will be distributed to all sheriffs in July, 2023.

**22. What can the money from unauthorized substance use tax collection resulting from a law enforcement investigation be used for and who makes the decision on how those funds are spent?**

**ANSWER:** The share of the proceeds collected that is allocated to the law enforcement agency or agencies must be used for a law enforcement purpose and not for general operations or activities of the county. The North Carolina Department of Revenue must remit 75% of the part of the unencumbered tax proceeds that were collected by assessment to the law enforcement agency or agencies that conducted the investigation that led to the assessment. If more than one law enforcement agency conducted the investigation, then each agency shall receive an equitable share based upon its contribution to the investigation. See G.S. 105-113.113.

Like the analysis to Question No. 21 discussed above, all of these funds received by a local government unit must be expended only in accordance with a budget ordinance adopted by

the board of county commissioners. The sheriff must work with the board of county commissioners to ensure the budget accurately reflects that the funds will be used by the sheriff's office for a law enforcement purpose as required by G.S. 105-113.113.

This legal authority is thoroughly analyzed in a memorandum from the North Carolina Department of the State Treasurer to Local Government Officials and Certified Public Accountants dated June 25, 2010. This memorandum is included in the Association's 2023 Finance Reference Manual, which will be distributed to all sheriffs in July, 2023.

**23. Can a county have procedures for the disbursement of funds that must be followed by the sheriff's office?**

**ANSWER:** Yes. The Local Government Budget and Fiscal Control Act allows the county to establish internal fiscal controls. For example, G.S. 159-24 requires that each county and city government have a finance officer who is legally responsible for establishing the accounting system under which the county will operate.

However, while the board of county commissioners and the county finance officer may require an agency (i.e. sheriff's office) to follow county fiscal procedures to receive budgeted funds, such as by the submission of required accounting forms, neither the board of county commissioners nor the county finance officer have the legal authority to make a judgment call as to how or when funds that are already budgeted through the budget ordinance are to be spent.

G.S. 159-28 also provides that the county finance officer is required to carry out preaudit obligations and disbursements. This means that the county finance officer only confirms that:

1. the purchase is a line item from the enacted budget ordinance; and
2. there is an unencumbered balance of funds in that line item for the current fiscal year available to complete the purchase.

### **Access to Giglio Letters / Internal Affairs Files / Other Personnel Records**

**24. Giglio letters – A sheriff completes an internal affairs investigation which results in a Giglio letter being issued against a deputy and that letter being sent by the sheriff to the District Attorney.**

**Should that letter go in the internal affairs file, personnel file, both files, or neither?**

**ANSWER:** This is not a legal question, but an internal administrative one. The sheriff may store the Giglio letter under whichever organizational method the sheriff believes is best for retaining the information, easily retrieving it, and keeping the process uniform. Any internal affairs file is legally part of the employee's personnel file and is subject to the same rules on access and confidentiality as the employee's personnel file.

An employee's personnel file consists of "any information in any form gathered by the county with respect to that employee and, by way of illustration but not limitation, relating to his application, selection or non-selection, performance, promotions, demotions, transfers, suspension and other disciplinary actions, evaluation forms, leave, salary, and termination of employment." This broad definition includes an internal affairs file concerning the employee.

G.S. 153A-98 governs the privacy of employees' personnel files and applies to internal affairs records as well. Regardless as to whether the Giglio letter is stored in the employee's "general" personnel file, stored in a separate internal affairs file, or in another place entirely, the same rules apply to access and disclosure of the letter.

**25. Who has the authority to see internal affairs file information?**

**ANSWER:** The internal affairs file is treated legally just like a personnel record. G.S. 153A-98 controls access to this information. There is no separate statute governing internal affairs files. Most if not all information in any internal affairs file will not be deemed public record pursuant to G.S. 153A-98(b) but will be "other information" that is deemed confidential under law.

The statute sets out three categories of information in the personnel file (and therefore also in the internal affairs file) regarding disclosure:

- (A) information that is public record;
- (B) information that is confidential and that cannot be disclosed to the general public but that must be disclosed to certain individuals upon request; and
- (C) information that is confidential and that may be kept from all persons.

**A. Information that is public record**

Under the statute, the following information in a personnel file is public record and must be disclosed upon request, even if contained in the internal affairs file:

1. An employee's name;
2. An employee's age;
3. The date of original employment of the employee;
4. The terms of any contract by which the employee is employed;
5. The employee's current position;
6. The employee's current title;

7. The employee's current salary;
8. The date and amount of each increase or decrease in salary of the employee;
9. The date and type of each promotion, demotion, transfer, suspension, separation or other change in position classification of the employee;
10. The date and general description of the reasons for each promotion of the employee;
11. The date and type of each dismissal, suspension, or demotion for disciplinary reasons taken by the county. If the disciplinary action was a dismissal and a written notice of dismissal was created, a copy of the written notice is also public record. Note: sheriffs are not required to create or issue termination letters; and
12. The office to which the employee is currently assigned.

**B. Information that is confidential and that cannot be disclosed to the general public but that must be disclosed to certain individuals upon request (such as the employee or the employee's attorney)**

"All information contained in a county employee's personnel file, [other than those pieces of information explicitly designated as public record above], is confidential and shall be open to inspection only" as provided by G.S. 153A-98(c).

G.S. 153A-98(c) states that the following confidential information that is not public record must be disclosed, in the manner described below, to the following persons:

1. The employee or their duly authorized agent (except for letters of reference);
2. A licensed physician designated in writing by the employee to review the employee's medical record;
3. A county employee having supervisory authority over the employee;
4. A person in possession of a court order granting access to examine the confidential portions of a personnel file;
5. An official or agency of the State or federal government, or any political subdivision of the State, may inspect any portion of a personnel file when such inspection is deemed by the official having custody of such records to be necessary and essential to the proper function of the inspecting agency; and
6. Any person for whom the employee has signed a written release to receive information. The written release must be placed in the employee's personnel file. G.S. 153A-98(c).

Therefore, an employee or their duly authorized agent (such as their attorney), must be given access to the employee's internal affairs file so long as the internal affairs investigation is complete and no criminal actions were taken or the criminal action has concluded.

### **C. Information that is confidential and that may be kept from all persons**

A sheriff or any other law enforcement agency head may refuse to disclose the following information to the employee or any of the other individuals listed above:

1. Investigative reports or memos and other information concerning the investigation of possible criminal actions of an employee, until the investigation is completed and no criminal action taken, or until the criminal action is concluded (i.e. an active internal affairs investigation concerning possible criminal action);
2. Information that might identify an undercover law enforcement officer or a law enforcement informant; and
3. Notes, preliminary drafts, and internal communications concerning an employee. In the event such materials are used for any official personnel decision, then the employee or his duly authorized agent shall have a right to inspect such materials after the personnel decision is taken. G.S. 153A-98(c1).

**26. Does the law allow the sheriff to disclose an internal affairs file to the Sheriffs' Standards Division, and if so under what circumstances?**

**ANSWER:** Yes, the sheriff may allow the Sheriffs' Standards Division (Division) to inspect an internal affairs file if the sheriff believes that allowing an inspection of the file by the Division is necessary and essential to the proper function of the Division. The sheriff may also disclose information in the internal affairs file if the employee signs a written release allowing the disclosure of the employee's records to the Division. The sheriff must also disclose the file if ordered by a court. See G.S. 153A-98(c).

**27. Can other law enforcement agencies see the internal affairs file of a sheriff's employee and under what circumstances?**

**ANSWER:** Yes. Under G.S. 153A-98, an official having custody of the record (i.e. the sheriff) can allow inspection of the record when that official deems its inspection necessary and essential to the proper functioning of the inspecting agency. This would allow the custodial agency to provide another law enforcement agency access to the internal affairs file in a variety of situations. However, the most frequent situation where other law enforcement agencies may seek access to and inspect an internal affairs file concerning an employee (or former employee) is when that other agency is considering hiring that employee.

Another common way access is allowed to the confidential parts of an employee's file to a prospective employer is by the prospective employer requiring the applicant to sign a release allowing the prospective employer to receive any and all information within the applicant's personnel files with past employers. Once the agency having custody of the personnel file, including the internal affairs file, receives a copy of the release and places a copy in the custodial agency's personnel file, it may release the file to the entity or persons authorized by the release.

Even if the custodial agency releases the internal affairs file upon receiving a copy of the written release, the custodial agency can still withhold information that might identify an undercover officer or law enforcement informant, or notes, preliminary drafts and internal communications concerning the employee as discussed above in Question No. 25. G.S. 153A-98(c1).

**28. Is there any reason why an internal affairs investigation involving a personnel matter should not be disclosed to either or both the sheriff and chief deputy?**

**ANSWER:** An internal affairs investigation regarding an employee subordinate to both the chief deputy and the sheriff can be examined by the sheriff or chief deputy. A chief deputy may be prohibited from examining the contents of an internal affairs investigation if the investigation is active and pertains to the chief deputy's own conduct.

**29. When can and when must the sheriff disclose a Giglio letter to the Sheriffs' Standards Division, and if so under what circumstances?**

**ANSWER:** The sheriff must disclose the fact that a Giglio letter has been issued against any law enforcement officer, detention officer or telecommunicator in the sheriff's employ to the Sheriffs' Standards Division. If the sheriff has issued a letter notifying his/her employee that they may not be called to testify at trial based on bias, interest, or lack of credibility ("Giglio letter"), this letter falls under the provisions of G.S. 17E-16. That statute applies to any notifications made "in writing by . . . the person's agency head."

"An agency head who receives a report that a person in the agency has been notified that they may not be called to testify at trial shall also report the notification to the [Sheriffs' Standards] Division in writing within 30 days of the agency head's receipt of that report." G.S. 17E-16.

**30. Does the law allow or require a sheriff to disclose a written letter of termination?**

**ANSWER:** First, there is no obligation that a sheriff write a termination letter. If the sheriff decides to write a termination letter to the terminated employee, that letter will be part of the employee's personnel file but is considered a matter of public record pursuant to G.S. 153A-98(b)(11). Therefore, a termination letter, if written, must be disclosed to any person requesting a copy of that public record.

Also, whether or not a sheriff writes a termination letter, a Form F-5 Report of Separation must be filed with Sheriffs' Standards Division. 12 N.C.A.C. 10B .0405. This will also be a part of the employee's confidential personnel file and subject to disclosure only as allowed under G.S. 153A-98.

## **Family and Medical Leave Act (FMLA)**

**31. Is there such a thing as intermittent FMLA?**

**ANSWER:** Yes, employees have the right to take FMLA leave all at once, or, when medically necessary, in separate blocks of time or by reducing the time they work each day or week. An example would be an employee who is undergoing chemotherapy and has to use 8 hours of FMLA leave every Friday when the employee receives his/her chemotherapy infusion. For more specific information about intermittent FMLA and other relevant topics, see the United States Department of Labor's publication: The Employer's Guide to The Family and Medical Leave Act. This guide is located on the US Department of Labor website at the following link:

<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf>

**32. How does the FMLA work in relation to the employee's accrued sick leave?**

**ANSWER:** FMLA only provides the employee with unpaid leave and job protection during the time the employee is on FMLA. In order for an employee to be paid during FMLA leave, the employee would need to use employer-provided paid leave (such as sick leave) during the time he/she is on FMLA leave.

An employer can require an employee to use his/her paid leave time simultaneously while the employee is on FMLA leave, so long as the use of paid leave is consistent with the employer's normal leave rules and/or policy. For more specific information about paid leave in conjunction with FMLA leave and other relevant topics, see the United States Department of Labor's publication: The Employer's Guide to The Family and Medical Leave Act at the link noted above.

**33. Does the employee have to specifically request FMLA leave?**

**ANSWER:** No. Employees do not have to specifically ask for FMLA leave (no need to use "magic words") but do need to provide enough information so the employer is aware the leave may be covered by the FMLA. Additional information on this topic can be found on the Wage and Hour Division of the United States Department of Labor's Fact Sheet #28: The Family and Medical Leave Act. This information can be located at the following link:

<https://www.dol.gov/agencies/whd/fact-sheets/28-fmla>

**34. Can the sheriff require an employee to use FMLA leave?**

**ANSWER:** Yes, the sheriff may require an employee to take FMLA leave once the employee communicates a need to take leave for an FMLA-qualifying reason. Additionally, the sheriff cannot delay the designation of FMLA-qualifying leave. Neither the employee nor the employer can decline FMLA protection for FMLA-qualifying leave.



For additional information and a discussion on this topic and other FMLA issues, see the UNC School of Government Blog Post: Leave under the FMLA: What Department Heads and Supervisors Need to Know, at the following link:

<https://www.sog.unc.edu/blogs/coates-canons/leave-under-fmla-what-department-heads-and-supervisors-need-know>

This information is also provided in the US Department of Labor guidebook that can be found at the following link:

<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf>

**35. Is the sheriff required to continue to employ someone who is out on FMLA if the employee is to be terminated for cause?**

**ANSWER:** No. While an employee cannot be terminated because the employee exercised their rights under the Family and Medical Leave Act and took leave, FMLA does not protect bad employees. The law does not require an employer to continue to employ the employee if the employee is being terminated for a reason unrelated to why they took FMLA leave, such as being terminated for bad conduct. *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 547 (4th Cir. 2006); 29 C.F.R. 825.216. “An employer can avoid liability under the FMLA if it can **prove that ‘it would not have retained an employee had the employee not been on FMLA leave.’**” *Yashenko*, at 547. However, before terminating an employee on FMLA leave, any agency considering doing so should consult with their own legal counsel to review all pertinent employee information, as this termination could result in litigation.

If a lawsuit results, the terminated employee must prove as an initial matter that:

1. they engaged in protected activity (ex. taking FMLA to which they were eligible);
2. that the employer took adverse action against the employee (ex. termination); and
3. that the adverse action was because the employee exercised their rights under FMLA (i.e. took the leave).

The employer can defend themselves from liability if the employer “offers a non-discriminatory explanation” for the adverse employment action (i.e. the termination). Whether a particular employer can successfully mount this defense if a lawsuit is filed is a question best answered by the employer’s legal counsel.

## Other Burning Questions

- 36. What does jail staff do if the 48-hour hold for domestic violence has expired, the magistrate refuses to issue a release order or set a bond, and court will not be held for a few hours?**

**ANSWER:** The magistrate is not in compliance with State law. State law specifies that “[a] defendant may be retained in custody not more than 48 hours from the time of arrest without a determination being made under this section [bail and pretrial release for crimes of domestic violence] by a judge. If a judge has not acted pursuant to this section within 48 hours of arrest, **the magistrate shall act** under the provisions of this section.” G.S. 15A-534.1.

The language in the statute is mandatory and does not give the magistrate any discretion whatsoever to refuse to act after the 48 hours have elapsed.

**Solution:** The sheriff should immediately consult with the elected District Attorney and the chief district court judge to require all magistrates to comply with the law. Any refusal by a magistrate to comply with the law could be dealt with by the initiation of suspension and/or removal proceedings against the magistrate pursuant to G.S. 7A-173, that will be decided by a judge.

- 37. Who is responsible for transporting involuntarily committed persons between counties, who pays, and what options are there?**

**ANSWER:** Transportation of an involuntarily committed person (respondent) within the county is the duty of the city or county where the respondent resides or is taken into custody. G.S. 122C-251. The city has the duty to provide transportation for a respondent who resides in the city or is taken into custody within city limits. The county has the duty to provide transportation when the respondent resides in the county outside city limits or is taken into custody outside city limits.

Transportation between counties for a first examination is the duty of the county where the respondent was taken into custody. If a respondent is being discharged from a 24-hour facility, transportation is the responsibility of the respondent’s county of residence. If a respondent is discharged, they can choose to provide their own transportation at their own expense. G.S. 122C-251(b).

A county or city that provides for the transport of a respondent is entitled to be reimbursed by the respondent’s county of residence for the costs of transportation, to the extent they are not reimbursed by a third-party insurer. G.S. 122C-251(h).

**Working Around the IVC Transport Statutes:** A sheriff can work with other sheriffs, police agencies, and other local governing authorities to enter into agreements which take precedence over the current statutory scheme for IVC transports. G.S. 122C-251(g).

**38. How long do you have to keep personnel files after someone leaves the sheriff's office?**

**ANSWER:** Disposition of all records in a sheriff's office must be handled in accordance with the records retention schedules established by the North Carolina Department of Natural and Cultural Resources (DNCR), Division of Archives and Records. Official copies of personnel records must be retained until 30 years after the date of separation. Details as to what counts as personnel files can be found at the following link under Section 4.28, <https://archives.ncdcr.gov/2021localgeneralstandardspdf/open>.

Note: Sheriffs' personnel responsible for records retention should contact DNCR to obtain copies of the records retention schedules applicable to sheriffs' offices. There are 2 records retention schedules applicable to sheriffs: (1) General Records Schedule: Local Government Agencies; and (2) Records Retention and Disposition Schedule: County Sheriff's Office. Copies of these schedules may be obtained by contacting DNCR at (919) 814-6900, or via email at [records@ncdcr.gov](mailto:records@ncdcr.gov).

**39. If a new applicant does not pass their psychological screening, how long do you keep their background file?**

**ANSWER:** An applicant's background file is classified as "Employment Selection Records," under Section 4.16 of the General Records Schedule for Local Government Agencies, found here: <https://archives.ncdcr.gov/2021localgeneralstandardspdf/open>. The psychological screening should be retained for five years. All remaining employment selection records may be destroyed two years after the hiring decision is made.

**40. When a sheriff is hiring, which positions need to get a psychological screening?**

**ANSWER:** G.S. 17E-7(c) requires that all "justice officers" undergo a psychological screening. The term "justice officer" includes all deputy sheriffs, reserve deputy sheriffs, special deputy sheriffs, detention personnel appointed by the Sheriff, and telecommunicators. Clerical and support personnel not required to take an oath of office are not required to be administered a psychological screening.

The North Carolina Sheriffs' Education and Training Standards Commission has required that sheriffs send all written reports of psychological screening along with confirmation of exam completion. Note that applicants must have signed a release form which allows the Commission to view this information. See 12 NCAC 10B .0305(d). If an applicant fails his or her psychological screening and is rejected for employment, there is no need to notify the Commission of the failure or the rejection.

**41. Can a County Commissioner also work as a Deputy Sheriff?**

**ANSWER:** Yes. A person can hold at most one elective and one appointive office at the same time. See G.S. 128-1.1.

A seat on a board of county commissioners is an elective office, and a position as a deputy sheriff is an appointive office. 40 Op. N.C. Att’y Gen. 585, 586 (1969). A county commissioner can work as a deputy sheriff so long as he or she holds no other elective or appointive offices.

Any county commissioner that is also a deputy sheriff must be aware of potential conflicts of interest while serving on the board of county commissioners and may need to recuse themselves if the board of county commissioners is deciding a matter that involves the sheriff’s office (such as considering the budget for the sheriff’s office).

**42. What is the procedure for filling a vacancy in the Office of Sheriff in a county which is covered by G.S. 162-5.1 when the outgoing sheriff was unaffiliated with a political party?**

**ANSWER:** The board of county commissioners shall appoint an individual to fill the remainder of the sheriff’s term. Because the outgoing sheriff was not elected as a nominee of a political party, the board of county commissioners does not need to consult with the county executive committee of a political party before filling the vacancy. “If the sheriff were elected as a nominee of a political party, the board of county commissioners shall consult the county executive committee of that political party before filling the vacancy . . .” G.S. 162-5.1.

**43. If someone is being appointed to the Office of Sheriff mid-term, must the appointee have lived in the county for 30 days prior to the appointment?**

**ANSWER:** No, but to be appointed as sheriff the person must have been registered to vote in the county in which the person is to be appointed sheriff by the time of appointment.

An appointed sheriff must “possess the same qualifications, enter into the same bond, and be subject to removal, as the sheriff regularly elected.” G.S. 162-5; G.S. 162-5.1. G.S. 162-2 identifies certain conditions which would render an individual ineligible for election or appointment to the Office of Sheriff. One of the disqualifiers is that the “person is not a qualified voter in the county in which the candidate is chosen.” G.S. 162-2(a)(3). Therefore, the appointee must be a qualified voter at the time of appointment to the Office of Sheriff.

The county board of elections for the county in which the appointee is to be appointed sheriff determines whether the appointee meets the statutory and constitutional requirements to be a qualified voter in that county. *See* G.S. 163-82.7. Once the county board of elections has registered the appointee to vote in the county in which he or she is to be appointed, the person will at that time be a qualified voter in that county. If the person had already been registered to vote in the county and never moved from the county, they remain a qualified voter.

Note: If a person to be appointed sheriff is not yet registered to vote in the county but is in the process of registering to vote, any appointment by the board of county commissioners prior to registration will be invalid. The registration process may take up to several weeks as the county board of elections is required to verify the in-county address of the applicant for registration by United States Mail. G.S. 163-82.7(c). Therefore, verification of proper registration to vote with the county board of elections should be made prior to appointment by the board of county commissioners.

We have consulted with attorney Paul Cox, General Counsel to the North Carolina State Board of Elections, and he agrees with this analysis.

**44. Do you have to be a resident of North Carolina to serve as a Deputy Sheriff?**

**ANSWER:** No. There is no law that requires deputy sheriffs to be residents of North Carolina.

However, 12 NCAC 09B .0101 does require a deputy to be a citizen of the United States.

**45. Can someone who is sworn in as a North Carolina deputy also hold a public office in another state (such as appointment as a deputy)?**

**ANSWER:** No. A person may not simultaneously hold an appointive office in two states (deputy in NC – deputy in GA, SC, etc.) under current State law. “No person who shall hold any office or place of trust or profit under the United States . . . or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this State . . . except as provided in G.S. 128-1.1, or by other General Statute.” G.S. 128-1.

G.S. 128-1.1 allows a person who holds an appointive office “in State or local government” to hold one other appointive office “in either State or local government.” Although there is no case law interpreting whether the legislature is only referring to the State of North Carolina or is referring to any state when it uses the phrase “State or local government” in G.S. 128-1.1, the fact that the legislature capitalizes “State” in G.S. 128-1.1 and does not capitalize the word when it is explicitly used to refer to any state in G.S. 128-1 indicates the phrase “State or local government” in G.S. 128.1.1 is meant to refer only to North Carolina state and local government public office.

It is therefore our interpretation of the law that G.S. 128-1 would prohibit a person from simultaneously holding an office, elective or appointive, in this State and a public office in another state. We have consulted with Professor Robert P. Joyce, Charles Edwin Hinsdale Professor of Public Law and Government at the UNC School of Government, who specializes in the laws of public office holding and he agrees with this analysis.

**46. If a deputy is part of a federal task force, can they also hold a North Carolina public office?**

**ANSWER:** Yes, if the position on the federal task force is not a public office. A person cannot hold any State public office if they hold a federal public office unless the federal office or position is with the federal postal system, the United States Bureau of Indian Affairs or for the purpose of immigration enforcement, provided there is a memorandum of understanding or memorandum of agreement in place for the purpose of immigration enforcement. G.S. 128-1; G.S. 128-1.1. The State statute does not encompass other federal law enforcement appointments beyond the federal postal system, the United States Bureau of Indian Affairs or immigration enforcement.

**47. Can the board of county commissioners accept a cash bond instead of a bond from a bonding company for the sheriff's bond?**

**ANSWER:** We do not believe a cash bond can be accepted. The statute that requires the sheriff to furnish a bond, G.S. 162-8, does not explicitly state that the bond cannot be a cash bond. However, the statute states that the bond be "payable to the State of North Carolina."

Additionally, the statute requires that the bond be conditioned (i.e. include) by specific language, which is included in the statute. Since cash cannot be "payable to the State of North Carolina," and cannot include the specific conditional language required by G.S. 162-8, a cash bond would not satisfy the statutory requirements. We have consulted with Professor Kara Millonzi, Robert W. Bradshaw Jr. Distinguished Professor of Public Law and Government at the UNC School of Government, and she agrees with this analysis.

**48. Are employment age limits for law enforcement agencies legal?**

**ANSWER:** Yes, upon a showing of a bona fide qualification for the age requirement that is reasonably necessary for the employer to operate.

Under Federal law, employers cannot enforce an upper age limit on new hires (such as "no applicants above the age of 39 will be considered," etc.). "It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." 29 U.S.C. 623(a). However, it is not unlawful for an employer to discriminate based on age with respect to a position if age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business. . . ." 29 U.S.C. 623(f).

Some agencies may be able to enforce this kind of limit if they can prove that their chosen age limit is necessary to the performance of the duties of the position. Any agency considering instituting an age limit on new hires should discuss this with their own legal counsel. This is an area of law that has seen litigation and challenges to such age limits.