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Public Safety Employee Discipline and State Bill of Rights Laws

❖ Introduction

While state public safety employees have a variety of rights protected by U.S. Constitutional provisions including the due process and equal protection guarantees of the Fourteenth Amendment, the Fifth Amendment privilege against self-incrimination, and the freedoms guaranteed by the First Amendment, a number of states, concerned with the fairness of the disciplinary process for law enforcement, correctional, and firefighter personnel, have enacted special "Bill of Rights" laws that detail in some particularity procedural due process rights in connection with disciplinary proceedings and interrogations, as well as codifying some of the already existing constitutional protections.

This two-part article takes a brief look at some of the case law interpreting these statutes. In the first part, this month, we examine statutes in the state of California spelling out such rights for public safety officers. Next month we will look at case law interpreting rights for firefighters in California, and similar public safety officer Bill of Rights statutes in Maryland, Illinois, Nevada, and Wisconsin, as well as listing some useful and relevant resources and references. A good number of other states have similar statutes and, of course, many departments provide specific procedural protections as matters of departmental policy or have negotiated them into collective bargaining agreements. This series of articles does not attempt to be a comprehensive guide to any of these statutes, but rather an introduction to some of their features. The focus here is on discipline, not the right to participate in political activity or other expressive activity off-duty, which is also covered in many such statutes.

❖ General Provisions of Bill of Rights Statutes

The general provisions of many of these statutes usually include the following principles, as summarized by the Grand Lodge of the Fraternal Order of Police, although the details may vary from state to state:

- Law enforcement officers shall, if disciplinary action is expected, be notified of the investigation, the nature of the alleged violation, and be notified of the outcome of the investigation and the recommendations made to superiors by the investigators.
- Questioning of a law enforcement officer should be conducted for a reasonable length of time and preferably while the officer is on duty unless exigent circumstances apply.
- Questioning of the law enforcement officer should take place at the offices of those conducting the investigation or at the place where the officer reports to work, unless the officer consents to another location.
- Law enforcement officers will be questioned by a single investigator, and he or she shall be informed of the name, rank, and command of the officer conducting the investigation.
- Law enforcement officers under investigation are entitled to have counsel or any other individual of their choice present at the interrogation.
- Law enforcement officers cannot be threatened, harassed, or promised rewards to induce the answering of any question.

- Law enforcement officers are entitled to a hearing, with notification in advance of the date, access to transcripts, and other relevant documents and evidence generated by the hearing and to representation by counsel or another non-attorney representative at the hearing.
- Law enforcement officers shall have the opportunity to comment in writing on any adverse materials placed in his or her personnel file.
- Law enforcement officers cannot be subject to retaliation for the exercise of these or any other rights under Federal, or State law.

❖ California Public Safety Officer Statute

In California, there is a Public Safety Officers Procedural Bill of Rights Act which has been in place for a number of decades. Government Code 3300 – 3313.

California courts have carefully interpreted the procedural rights contained in the statute and **they do not apply to non-disciplinary, non-punitive actions or proceedings.**

> "The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California."

In *Perez v. City of Westminster*, #G050718, 5 Cal. App. 5th 358, 2016 Cal. App. Lexis 966, for instance, a police officer received a notice that the department intended to terminate his employment because of an alleged lack of honesty and cooperation in the investigation of a police brutality claim. He appealed the decision, and the police chief decided that the allegations against him could not be sustained. While he wasn't fired, he was removed from both the honor guard and the SWAT team. While he remained a field training officer, no trainees were assigned to him.

He sued alleging a violation of his rights under the California Public Safety Officers Procedural Bill of Rights Act. Upholding the rejection of this claim, an intermediate

state appeals court agreed that the removal of Perez from the SWAT team and the honor guard, and the failure to assign trainees to him as a field training officer did not violate the Act. The chief testified that he lost confidence in the officer's honesty after events that included the officer telling investigators he had not seen an act of excessive force that, video recordings showed, he was in a position to witness,

The challenged actions were not punitive within the meaning of Gov. Code, § 3303; the SWAT team and honor guard were collateral assignments, not formal, full-time assignments, and the non-assignment of a trainee to a training officer was not a disciplinary or punitive action according to the memorandum of understanding between the city and the police bargaining unit..

Similarly in *L.A. Police Protective League v. City of L.A.*, #B250922, 232 Cal. App. 4th 136, 2014 Cal. App. Lexis 1116, Los Angeles public safety officers were involuntarily transferred and claimed that this would cause them to suffer negative employment consequences even though no specified right or their pay was affected.

An intermediate California appeals court ruled that the plaintiffs were not entitled to relief as the Public Safety Officers Procedural Bill of Rights Act (Gov. Code section 3300 et seq.) did not allow them the right to an administrative appeal of a transfer of assignment made for a non-punishment purpose.

In *Quezada v. City of Los Angeles*, #B245879, 232 Cal. App. 4th 136, 2014 Cal. App. Lexis 8, police officers claimed that they had been mistreated during an internal investigation of the discharge of one of three officer's weapons while they were off duty and drinking at a bar in close proximity to a police station. The plaintiffs failed to show that their administrative interrogations about the incident violated the Public Safety Officers Bill of Rights Act or their Fourth Amendment rights or a state civil rights act. They failed to show physical or mental hardships.

Rights given to current employees may not apply to former employees after a time. In *Barber v. California Dep't of Corrections and Rehabilitation*, #E052296, 203 Cal. App. 4th 638m 2012 Cal. App. Lexis 134 (2nd Dist.), a former parole agent for the California Department of Corrections and Rehabilitation appealed the denial of his request to see and review his personnel and internal affairs files. An intermediate California appeals court ruled that former employees have no right under the state Public Safety Officers Procedural Bill of Rights Act, Gov. Code, § 3300 et seq to review their records.

The plaintiff had been terminated six months earlier, and only had the right under the statute to review his records up until the effective date of his termination. He was given notice of the intent to terminate him, advised of his right to contest the termination, and given copies of all documents relied on in making the decision. He did not show that any relevant documents were withheld from that prior disclosure.

In appropriate cases, however, the courts have been diligent about enforcing the rights guaranteed by the statute. In *Robinson v. City of Chowchilla*, #F059608, 202 Cal. App. 4th 382, 2011 Cal. App. Lexis 1636, for example, a California police chief showed that he had been removed from office in violation of his rights under the state's Public Safety Officers Procedural Bill of Rights Act (POBRA), Gov.Code, §3300 et seq. He was not provided with the required notice, statement of reasons, or opportunity for an administrative appeal guaranteed by the statute. The municipality also breached the automatic three-year renewal provisions of the chief's contract, and the contract did not allow for an oral notice of non-renewal. Under the agreement, he was also entitled to six months of severance pay.

Similarly, in *Jaramillo v. County of Orange*, #G043142, 200 Cal. App. 4th 811, 133 Cal.Rptr.3d 751, 2011 Cal. App. Lexis 1397 (Cal. App.), an assistant sheriff was ruled entitled to an award of back pay for the period of time between his summary firing for alleged disloyalty and his subsequent no contest pleas to two state felony charges (for misappropriation of public resources and perjury before a grand jury), which made it impossible for him to continue to be employed as a law enforcement officer. Firing him without any kind of hearing violated his rights under California's Public Safety Officers Procedural Bill of Rights Act (POBRA), Government Code, § 3300 et seq., and purported waivers of POBRA rights that he purportedly signed on two occasions did not alter the result.

Rights under the statute may, however, be waived. In *Lanigan v. City of Los Angeles*, #B228686, 199 Cal.App.4th 1020, 132 Cal.Rptr.3d 156, 2011 Cal. App. Lexis 1262 (2nd Dist.), a trial court reinstated a police officer to his prior employment, based on a finding that a settlement of pending disciplinary charges under which he agreed to resign if similar misconduct charges were upheld in the future, giving up his right to pursue an administrative appeal, violated his rights under the Public Safety Officers Procedural Bill of Rights Act (POBRA).

An intermediate California appeals court reversed, holding that a waiver of POBRA's protections is permissible in the context of a settlement of a pending disciplinary action.

Courts have rejected efforts to concoct schemes to circumvent the protections of the statute. In *Paterson v. City of Los Angeles*, #B208682, 174 Cal.App.4th 1393, 95 Cal.Rptr.3d 333, 2009 Cal. App. Lexis 963 (2nd Dist.), a California appellate panel rejected a city's claim that the LEOBOR does not apply if accused police officers ultimately are exonerated by a Board of Rights. "Under the City's theory, it could

choose to violate the Act if it was confident that it would not ultimately prevail in its attempt to impose discipline, an absurd result."

In *Perez v. City of Los Angeles*, #B199810, 167 Cal.App.4th 118, 2008 Cal. App. Lexis 1469 (2nd Dist.), the court noted that although verbal statements must be suppressed for not complying with the state's Bill of Rights law, evidence of an officer's act of pointing her loaded firearm at a sergeant during her interrogation would not be excluded. "Although this action occurred during an interrogation which was conducted in a questionable manner, the remedy of suppression protects statements, not actions ..."

The statute does not apply to criminal investigations. Rights granted law enforcement officers under the California Public Safety Officers Procedural Bill of Rights Act do not apply to officers that are subjected to criminal investigations conducted by their employers. *Van Winkle v. County of Ventura*, #B194395, 69 Cal.Rptr.3d 809, 158 Cal.App. 4th 492, 2007 Cal. App. Lexis 2086 (2nd Dist.).

See also *Alhambra Police Officers Assn. v. City of Alhambra*, #B160896, 113 Cal. App. 4th 1413, 7 Cal.Rptr.3d 432 (2003); review denied, 2004 Cal. Lexis 2852 (2004), in which a California appellate court held that the state's Public Safety Officers Procedural Bill of Rights Act does not apply to a criminal investigation conducted by an outside agency. Moreover, where a police officer avoids the severe penalty of dismissal by entering into a settlement agreement and accepts lesser discipline, he cannot seek a remedy under the Public Safety Officers Procedural Bill of Rights Act to avoid that discipline.

But in *Calif. Correctional POA v. St. of Calif.,* #A085064, 82 Cal.App.4th 294, 2000 Cal. App. Lexis 566, 98 Cal.Rptr.2d 302, a California appeals court upheld and tightened an injunction against management attempts to deny the constitutional and statutory rights of corrections officers being interviewed as witnesses and targets in a criminal investigation. Management cannot recast an internal inquiry as an independent or outside investigation when it enlists that investigation.

Nor do the statutory protections apply to interviews that are not part of any investigation at all. The California Public Safety Officers Procedural Bill of Rights Act, Cal. Gov't Code §3303 did not apply to an interview of an officer because neither that officer nor the former employee were under investigation at the time. *Eaton v. Siemens*, #2:07-cv-0315, 2007 U.S. Dist. Lexis 58621, 2007 WL 2318531 (E.D. Cal.).

When disciplinary punishment is not at issue, courts will also not bring the statute into play. Where ***at most*** a reprimand could have resulted, an officer's

conversation with her sergeant about report classifying procedures did not implicate the state's Bill of Rights Act, Calif. Govt. Code §3300. *Steinert v. City of Covina*, #B187940, 53 Cal.Rptr.3d 1, 146 Cal.App.4th 458, 2006 Cal. App. Lexis 2097 (2d App. Dist. 2006).

What about less formal discussions? In *Correa v. County of Riverside*, #E036581, 2005 Cal. App. Unpub. Lexis 11319 (4th App. Dist. 2005), a California appellate court rejected a claim by a terminated officer that informal or self-initiated conversations with his superiors triggered protections afforded under the state's Procedural Bill of Rights Act.

In this case, a deputy sheriff was fired for repeatedly missing court appearances. An arbitrator affirmed the termination, and the deputy sought judicial review. California Government Code§ 3303 regulates internal interrogations that can result in disciplinary actions. He claimed he was questioned in violation of the Act.

The trial court denied his claims, holding that none of the six conversations that the deputy labels as "interrogations" implicated the Act because either:

1. The statements were made in the normal course of duty, or
2. The statements were part of non-disciplinary counseling, or
3. The conversations were initiated by the deputy.

A three-judge appellate panel affirmed. California is not unique in holding that informal conversations and statements made in the normal course of duty are exempt from the procedural protections found in the Bill of Rights Act.

They agreed with the trial court that such protections do not apply when the interrogation takes place "in the normal course of duty." They also do not apply to counseling or verbal admonishments, or to **unplanned contact** with a supervisor or fellow officer.

Finally, conversations which are initiated by the concerned officer are exempt from the Act. In one of these situations the deputy initiated the contact by going into a superior's office to tell him that he had been untruthful. Although his superior encouraged him to be truthful," he did not attempt to obtain information from [him] that was relevant to the investigation."

What about the right to a lawyer at a disciplinary interview? In *Upland POA v. City of Upland*, #E032607, 111 Cal. App. 4 h 1294, 2003 Cal. App. Lexis 1407 (Cal. App.4th Dist. 2003), a California appeals court upheld a compelled disciplinary interview, without the officer's lawyer present, when his counsel was unable to appear for a rescheduled interview.

In this case, California police officer was summoned for an internal affairs interrogation. He requested that his attorney be present and the interrogation was rescheduled. When the attorney was unable to attend the rescheduled interrogation because of a conflict, the interrogation went forward.

The officer and the POA sued for injunctive relief. The Superior Court found that under Cal. Gov't Code §3303(i) -- the Public Safety Officers Procedural Bill of Rights Act -- management was prevented from interrogating any officer if his representative was not available.

A three-judge appeals panel reversed. They wrote:

> "We first observe that literal application of the judgment leads to the conclusion that an officer could prevent any interrogation by simply choosing a representative who would never be available. ... an officer cannot say 'I want Antonin Scalia for my representative and, since he is unavailable, you cannot interrogate me.' ...
>
> "We are confident that the Legislature did not intend to allow the officer to so easily escape all interrogations. As noted above, our Supreme Court has emphasized the need for prompt investigations of allegations of officer misconduct. Pasadena Police Officers Assn. v. City of Pasadena, #S007915, 51 Cal.3d 564 at 572."

They noted that nothing in the statute suggests that an interrogation may be repeatedly postponed, or that the time chosen for the interrogation is subject to the schedule of the chosen representative, particularly when, as in this case, the interrogation of the officer in this case was set at a mutually agreeable time. They added:

> "Infusion of a reasonableness requirement, avoids the absurd result postulated above and allows the Department to carry out interrogations which could lead to punitive actions or criminal charges in a timely manner. ...
>
> "We agree [that] law enforcement needs to conduct interrogations in a reasonably prompt manner, so that subjects can be interviewed and evidence gathered while memories are still fresh. Without the ability to conduct expeditious investigations, law enforcement will be unable to investigate allegations of misconduct by officers who may compromise the Department's reputation for integrity. Although the Legislature clearly intended to give police officers procedural rights in interrogations, it equally clearly did not intend to allow the officers to dictate, by their choice of representative, whether an interrogation would occur at all."

There is a right to access and review records. Under the state's Public Safety Officers Procedural Bill of Rights law, a California appeals court affirmed a writ of mandate compelling a police dept. to provide, to officers that undergo investigatory interrogation, copies of tape-recorded witness interviews and rough notes taken by investigators. *San Diego P.O.A. v. San Diego (Bejarano),* #D037812, 98 Cal.App.4th 779, 120 Cal.Rptr.2d 609, 2002 Cal. App. Lexis 4145 (Cal. App. 4th Dist. 2002).

See also *Sacramento P.O.A. v. Venegas*, #C030428, 124 Cal.Rptr.2d 666, 2002 Cal. App. Lexis 4584 (Cal. App. 3d Dist. 2002), ruling that a police agency internal affairs index card listing all complaints made against a named officer, is a file "used for personnel purposes" under the state's Public Safety Officers Procedural Bill of Rights Act, for purposes of the officer's right to read and respond**.**

In *Riverside v. Superior Court (Madrigal),* #S094675, 27 Cal.4th 793, 42 P.2d 1034, 2002 Cal. Lexis 1878, 02 CDOS 2783 (Cal. 2002), law enforcement agencies in California won a limited right to conceal from probationary peace officers information gathered about them during employment background investigations. Although the Officers' Procedural Bill of Rights Act guarantees the right to view adverse comments in their personnel files, a divided California Supreme Court held that an employee may waive the protections of the law for pre-employment conduct, but not on-the-job complaints.

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- The law sometimes differs between federal circuits, between states, and sometimes between appellate districts in the same state. AELE Law Journal articles should not be considered as "legal advice." Lawyers often disagree as to the meaning of a case or its application to a set of facts.

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