International Association of Chiefs of Police
Smaller Police Department Program

Managing Personnel Through Corrective Discipline

November, 2008
San Diego, California

By: Martin J. Mayer
Jones & Mayer

A. Procedural Due Process

"Due process" is defined as "Notice" and "an opportunity to be heard." Although due process does not require a full scale pre-termination adversary hearing in all situations, at a minimum the employee must be given notice of the charges against him/her, an explanation of the employer's evidence, and a meaningful opportunity to respond and present his/her side of the story*.

A pre-discipline procedure to guarantee the protection of constitutional due process is necessary in public employment, even when an appeal procedure including a post-discharge evidentiary hearing is available**. The purpose of a pre-discipline procedure is to "minimize the risk of error" in the manager's initial decision. This procedure is intended to enable the employee to intelligently respond to the charges before the decision is made final. Ideally, that procedure will provide the manager with the employee's version of the facts and will give the manager an opportunity to reevaluate the proposed decision in light of those facts.

1. Pre-Discipline Procedures

Following the United States Supreme Court's mandate*** the California Supreme Court mandated the following****:

A. A written notice of charges must be prepared:

(1) The notice must include:

(a) The charges brought against the employee;
(b) A description of the acts or omissions and past performances that have led to the possible imposition of discipline;
(c) A statement indicating that the charges may result in some type of disciplinary action.

(2) A copy of the materials upon which the action is based must be attached to the notice. These materials must include all information necessary to enable the employee to prepare a response as well as all information on which the department intends to rely.

(3) The notice must be given to the employee prior to imposing discipline.

(4) It is not necessary that the Chief of Police, Sheriff or other disciplinary authority personally deliver the "Notice of Charges" to the employee and no requirement exists that the Chief of Police or Sheriff meet with the employee prior to hearing a response to the charges.

B. The employee must be given the opportunity to respond to the authority imposing the discipline:

(1) The response may be made orally and/or in writing;

(2) The employee has no right to an evidentiary hearing at this state of the disciplinary process;

(3) There is no requirement for the employee to be allowed to present evidence, call witnesses, or question witnesses against him/her.

C. Imposition of discipline:

(1) After having heard the employee's response to the charges, discipline may be imposed immediately.

(2) To be effective the discipline must be in writing and served upon the employee.

The "Notice of Discipline" will be similar to the "Notice of Charges" except that it will contain the employees "Appeal" rights, or a statement that the employee waives such rights, if the matter has been settled at the pre-discipline conference.

These procedures take place after all other preliminary investigation has been completed and all reports have been submitted to the discipline authority. It is not necessary that this procedure be utilized in matters that will not result in suspension, demotion, or termination.

* Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487 (1985).
** Arnett v. Kennedy, 416 U.S. 134 (1974).
*** Arnett v. Kennedy, supra.
**** Skelly v. State Personnel Board, 15 Cal.3d 194 (1975).

B. Administrative Investigations - Peace Officer Admonishment of Rights

It is well established that a public employee has no absolute right to refuse to answer potentially incriminating questions posed by his employer. Instead, his/her self-incrimination rights are deemed adequately protected, when given the appropriate admonishments, by precluding any use of his/her statements at a subsequent criminal proceeding.*

The California Supreme Court stated that a peace officer, in addition to the admonishments required by the United States Supreme Court, must be given "Miranda" rights when it is apparent that he may be charged with a criminal offense.**

Once the "Miranda" rights have been given, the modifications of Lefkowitz-Garrity, supra, are applied and the officer must be informed that:

- Although he has a right to remain silent and not incriminate himself;
- his silence can be deemed insubordination and;
- result in administrative discipline;
- any statement he makes under compulsion of the threat of such discipline cannot be used against him in a later criminal proceeding; and
- no statement made during the interrogation under duress, coercion, or threat of punitive action shall be admissible in any subsequent civil proceeding, except under specific conditions

* Garrity v. State of New Jersey, 385 U.S. 493, 500 (1967); Lefkowitz v. Turley 414 U.S. 70, 77-79 (1973).

** Lybarger v. City of Los Angeles, (1985) 40 Cal.3d 822. Chief Justice Rose Bird pointed out that 3303(e) should be construed to permit sanctions against an officer only when there is a refusal to answer questions designed to elicit statements relating to official duties or fitness to be a police officer.

C. Administrative Investigations

Black v. Stephens
662 F.2d 181 (3rd Cir. 1981)

A police chief's promulgating and implementing a policy delaying the conducting of an administrative, disciplinary investigation of a police officer's conduct until the criminal prosecution of the arrested suspect was completed could create liability for the police chief. The court held that the delaying of the disciplinary investigation encourages the use of excessive force and the filing of unwarranted charges against the criminal suspect and, therefore, is in violation of constitutional protections.

Tomer v. Gates
811 F.2nd 1240 (9th Cir. 1987)

A police officer who reasonably believed that his conduct was lawful should be allowed to claim the defense of qualified immunity at trial. (Ultimately, at trial, the qualified immunity was rejected by the court since the internal affairs investigator did not follow proper procedures in conducting the investigation.)

O'Connor v. Ortega
480 U.S. 709 (1987)

A public employer's work-related search of an employee's office must be reviewed pursuant to a reasonableness standard.

Ward v. City of Portland
857 F.2d 1373 (9th Cir. 1988) [Case withdrawn by plaintiff]

A city may require police officers involved in fatal shootings to write incident reports before consulting with legal counsel of their police association. The city has a strong, compelling interest in obtaining prompt, accurate and "unvarnished" reports of fatal shootings in order to be better equipped to train its officers in the prevention of such shootings. (This decision was predicated on the First Amendment Right of Association. In the State of California, additional protections have been afforded officers and they are therefore permitted, sometimes, to confer with counsel prior to completing the crime report.)

Los Angeles Police Protective League v. Gates
995 F.2d 1469 (9th Cir. 1990)

A police officer cannot be discharged for refusing to permit investigating officers with "an administrative search warrant" to search his home. "It is not proper to discharge an officer from duty in order to punish that officer for exercising rights guaranteed to him under the constitution." "A police officer's home cannot be invaded upon facts that would not permit the like invasion of the home of persons who are not police officers. Therefore, the administrative search warrant was improper and enforcement of the warrant would violate Gibson's rights."

Siegert v. Gilley
500 U.S. 226 (1991)

Injury to reputation by itself is not a protected "liberty" interest.

U.S. v. Taketa
923 F.2d 665 (9th Cir. 1991)

The warrantless videotaping by the Drug Enforcement Administration, of one of their agents in his office, violated the Fourth Amendment since he was under DEA investigation. The videotaping was not an investigation of work related employee misconduct, which is permitted under O'Connor v. Ortega, but rather was a search for evidence of criminal conduct. "While the burden of showing probable cause and obtaining a warrant may be intolerable for public employers . . . it is the "de rigueur" for law enforcement officials."

Rattray v. National City
36 F3d 1480 (9th Cir. 1994), cert. denied.

California constitution and Penal Code Section 632 protect the right of Californians of surreptitious eavesdropping and/or recordings of confidential communications. The "law enforcement exception" contained in PC Section 633 protects only electronic recording and eavesdropping in the course of criminal investigations or in the apprehension of law breakers. It cannot be utilized by law enforcement while conducting an administrative internal affairs investigation.

Kinamon v. United States
45 F 3d 343 (9th Cir. 1995)

"As a general principle, the Fifth Amendment provides that an individual may not be compelled to answer a question unless, at a minimum, he is shielded from the use of his compelled answers and any evidence derived there from in any subsequent criminal case in which he is a defendant," arising out of the circumstances.

LaChance v. Erickson
118 S. Ct. 753 (1998)

A government agency can take adverse action against an employee who makes false statements during an internal affairs investigation, in response to an underlying charge of misconduct, in addition to adverse action for the underlying charge itself.

Massachusetts Parole Board v. Civil Service Commission
716 N.E. 2d 155 (1999)

An employee was properly terminated for failing to appear at an administrative investigative investigation on the advice of his attorney. Good faith reliance on the advice of an attorney does not prevent an employer from terminating the employee.

Goodman v. Department of Corrections
844 A. 2d 543 (N.J. App. Div. 2004)

A corrections officer's dismissal is upheld in the absence of explicit legislative provisions requiring the dismissal of disciplinary charges if an appointing authority failed to conduct a departmental hearing within thirty (30) days. Absent prejudice to the officers, the law does not require dismissal of the charges.

State v. Meredith
96 P. 3d 342 (2004)

The Oregon Supreme Court upheld the use of an electronic tracking device which was used to monitor an employee's movement during the workday. The court held that attaching such a transmitter to a department vehicle did not invade an employee's right of privacy with respect to the vehicle's location.

Franklin v. City of Evanston
384 F. 3d 838 (2004)

The city violated an employee's procedural due process rights by failing to advise the employee of his Garrity rights during an administrative investigation while a criminal case for the same violation was pending.

Roorda v. City of Arnold
142 S. W. 3d 786 (Mo App. 2004)

A police chief's dislike of an employee is not relevant evidence, and its exclusion does not violate the employee's due process rights, since it did not cooperate or dispute any other evidence presented to the personnel board.

Bizzarro v. Miranda
394 F. 3d 82 (2nd Cir. 2004)

Initiating disciplinary charges against officers for refusing to assist in an internal investigation was not arbitrary. The discipline was imposed to punish the officer for refusing to assist in the investigation and to deter other officers from similarly refusing to assist in investigations.

Mckinley v. City of Mansfield

404 F. 3d 418 (6th Cir. 2005)

An officer's civil rights lawsuit against his superiors was reinstated after a prosecutor used his Garrity protective statements against him in subsequent criminal prosecution.

D. Administrative Investigations: Employee Statements

Gwillim v. City of San Jose
929 F.2d 465 (9th Cir. 1991)

A Police Department does not violate a police officer's constitutional right against self-incrimination when his coerced statement is given to the prosecutor for use in determining whether criminal charges should be filed against the officer. Court held that it is not the responsibility of the department to ensure that deputy district attorneys do not misuse the information provided to them.

In Re Grand Jury Subpoena Issued to Custodian of Records, St. Louis Metropolitan Police Dept.
89 Misc. 492 (E.D. Mo. 1990)

A U.S. District Judge quashed the Subpoenas Duces Tecum issued by a Federal Grand Jury of the St. Louis Police Department seeking the coerced statements of officers under investigation by Internal Affairs regarding a complaint of unnecessary force. The Court held that since the officers were challenging the discovery of their statement and they had not waived their Fifth Amendment right during the Internal Affairs interrogation and since the City had advised them that their IAD statements could not be used against them in criminal proceedings, the subpoena must be quashed and discovery denied.

(Note: Along these same lines, a review of the dismissal of the case against Lieutenant Colonel Oliver L. North shows that the Court took that action because the special prosecutor had failed to meet the "heavy burden" of proving that nothing North said when he was compelled to testify to congress was used against him. The court stated that prosecutors have an affirmative duty to prove that all evidence used in a trial is totally independent of what may have been disclosed by a reluctant witness. North had been told prior to his compelled testimony at congressional hearings that his statements would not be used against him in subsequent criminal proceedings. Since the independent prosecutor was unable to prove to the court that none of North's congressional testimony influenced the Grand Jury indictment or subsequent conviction, the charges were ultimately dismissed.)

United States of America v. Koon
34 F.3d 1416 (9th Cir. 1994)

Neither the law enforcement agency nor its officers can keep the prosecution from obtaining compelled statements made by peace officers pursuant to internal affairs investigations regarding allegedly criminal misconduct. Where, during the internal affairs interrogation police officers invoke their Fifth Amendment rights and make statements under threat of removal from

office, the statements are compelled and the government is precluded from using either the statement or information derived there from as evidence in a criminal trial. The government has the burden of proving at a Kastigar hearing by a preponderance of the evidence that the evidence it intends to introduce in criminal proceedings was not tainted by exposure to the officer's compelled statements.

In Re Grand Jury Subpoenas, etc. v. United States of America
40 F.3d 1096 (10th Cir.1994)

The mere disclosure of a police officer's potentially incriminating compelled statement made to internal affairs, to a grand jury, was not a per se violation of the officer's Fifth Amendment privilege against self-incrimination.

Kinamon v. United States
45 F3d 343 (9th Cir. 1995)

Reno Police Department conducted an IA investigation and ordered the plaintiff to answer all questions or face dismissal. He was informed that as a result of that compelled statement, nothing he said could be used against him in criminal proceedings. "As a general principle, the Fifth Amendment provides that an individual may not be compelled to answer a question unless, at a minimum, he is shielded from the use of his compelled answers and any evidence derived there from in any subsequent criminal case in which he is a defendant." In addition, in accordance with numerous cases, the Reno Police Department could grant use immunity to its officer and the prohibition against the use of immunized testimony under l8 USC Section 6002 covers grand jury proceedings as well as trials.

In Re Grand Jury Subpoena, Huntington Beach Police Dept.
75 F3d 446 (9th Cir. 1996)

The Fifth Amendment does not protect against the production of internal affairs documents containing police officers' compelled statements but does protect against the improper use of those statements by prosecutors. The employee if indicted would be entitled to a hearing pursuant to Kastigar v. United States where the government would have to establish there was no Fifth Amendment violation by the use of the officer's compelled statement.

U.S. v. Herring
83 F3d 1120 (9th Cir. 1996)

Prosecutors have a duty to learn of evidence obtained by police which could be favorable to the defendant and thereafter must turn it over to the defense. There is nothing however that requires the prosecutor to personally review the files of federal agents testifying - that responsibility can be delegated to someone other than the attorney actually prosecuting the case.

LaChance v. Erickson
118 S.Ct. 753 (1998)

A government agency can take adverse action against an employee who makes false statements to an internal affairs investigator in responding to an underlying charge of misconduct, in addition to adverse action for the underlying charge itself.

Los Angeles Police Department v. United Reporting Publishing
120 S. Ct. 483 (1999)

A state statute which places conditions on the use of public access of names and addresses of arrested individuals did not violate the First or Fourteenth Amendment. The purpose of the statute was simply to regulate access to information that was in the hands of local law enforcement agencies and did not prohibit a speaker from conveying information that the speaker already possessed.

People v. Mooc
26 Cal. 4th 1216 (2001)

The California Supreme Court held that it was improper to require the production of a peace officer's entire personnel record when the state statute allows a criminal defendant to compel discovery of evidence in the arresting officer's personnel file which is relevant to the defendant's ability to defend against a criminal charge.

The Baltimore Sun Company v. Ehrlich
356 F. Supp. 2d 577 (2005)

A governor's direction that no one in the executive department or state agencies was to speak with a reporter from the Baltimore Sun was justified since the plaintiff's demands were far beyond a citizen's reasonable expectations of access to government representatives. The plaintiff's motion for preliminary injunction was therefore denied and the governor's motion to dismiss was granted.

E. At Will Employees

McQuirk v. Donnelley
189 F. 3rd 793 (1999)

Despite a release from liability for intentional torts signed by a former employee, statements made by a sheriff which were not truthful subjected the county and the sheriff to liability for defamatory statements. A release from future liabilities for all intentional torts is against public policy and not enforceable in California.

Matter of Swinton v. Safir
697 NYS 2d 869 (1999)

A probationary employee can be terminated without a hearing absent of showing that the termination was in bad faith or for an impermissible reason.

Hobler v. Brueher
325 F. 3d 1145 (2003)

An at will public employee may be terminated if political loyalty is an appropriate requirement for the effective performance of the public office. A confidential employee to a policy maker may be replaced by the successor for political reasons.

Budd v. Kelly
788 NYS 2d 114 (2005)

When unrefuted evidence revealed that a probationary employee was absent from duty and dishonestly charged it to his annual leave thereby extending his probationary period, he can be terminated without a hearing. Since he did not admit the essential findings, however, he was entitled to a name clearing hearing.

Graham v. City of Philadelphia
402 F. 3d 139 (3d Cir. 2005)

A probationary police officer was terminated after being arrested and charged with having sex with a minor. Following acquittal at trial, the employee requested a "name clearing hearing" which was denied. The court ruled that the employee had the opportunity to protect his reputation at the criminal trial and that negated his entitlement to a name clearing hearing.

F. Drug Testing

Mc Donnell v. Hunter
809 F.2d 1302 (1987)

Urinalyses may be performed uniformly or by systematic random selection of those employees who have regular contact with prisoners on a day-to-day basis in medium or maximum security prisons. Selection must not be arbitrary or discriminatory.

Note: Addressing the use of consent forms the court stated: "(a)dvance consent to future unreasonable searches is not a reasonable condition of employment."

Lovvorn v. City of Chattanooga
647 F.Supp. 875; aff'd (1986); 846 F.2d 1539 (1988)

A police department or fire department may not, consistent with the Fourth Amendment, subject an employee to urinalysis drug testing without reasonable suspicion that the individual has used drugs.

National Treasury Employees Union v. Van Rabb
489 U.S. 656 (1989)

The United States Supreme Court upheld a drug testing program of the U.S.Custom Service that required the taking of urine samples from candidates for positions involving drug interdiction or the carrying of firearms. The tests were to be mandatory for positions that met one or more of three criteria:

[1] Direct involvement in the enforcement of drug-related laws;
[2] The employee was required to carry a firearm;
[3] The employee was required to handle "classified" material.

Finding that the purpose of the testing program was to deter drug use among employees in sensitive jobs who had access to illegal drugs or who were in positions vulnerable to blackmail or violence, the Court found that those governmental interests presented a special need that justified departure from the ordinary warrant and probable cause requirements for searches and seizures.

Skinner v. Railway Labor Executives' Association
489 U.S. 602 (1989)

The need to curb substance abuse outweighed the employees' legitimate interest in their own bodily integrity. It would be "most impracticable" to require individualized suspicion of substance abuse in the aftermath of a train accident when conditions are chaotic at best. The tests, the Court observed, pose only a limited threat to privacy interests in contrast to the government's compelling need for [railroad] safety.

International Brotherhood of Electrical Workers, Local 1245 v. Skinner
913 F.2d 1454 (9th Cir. 1990)

Extensive drug testing for pipe line employees before employment, after an accident, randomly, based on reasonable cause and after rehabilitation is appropriate. While random testing without individual suspicion intrudes on an employee's privacy there is a diminished expectation of privacy in working in an industry with strong safety needs.

Railway Labor Executives' Assoc. v. Skinner
934 F. 2d 1096 (9th Cir. 1991)

Random drug testing for "safety sensitive positions" does not violate the Fourth Amendment.

Jackson v. Gates
975 F.2d 648 (9th Cir. 1992)

A police department cannot terminate an officer for refusing to comply with an order to provide a urine sample for drug testing absent an articulable reasonable basis for suspecting him or her of drug use. It is improper to discharge an officer from duty as punishment for exercising rights (in this case, the Fourth Amendment) guaranteed under the Constitution.

Loder v. City of Glendale
14 Cal.4th 846, cert. denied, 118 S.Ct. 44 (1997)

Across-the-board drug testing is invalid for employees seeking promotion in non-safety classifications, but is valid for all job applicants regardless of classification..

Gonzales v. Metropolitan Transportation Authority
174 F. 3rd. 1006 (1999)

The right to require random drug testing of employees can be justified if the employee performs "safety sensitive functions." Since case law requires particularized facts to justify urine testing of employees, the employer must prove that the employee's jobs would have placed the public at risk if they were impaired as a result of utilizing drugs.

Garrido v. Cook County Sheriffs Merit Board
811 N.E. 2d 312 (2004)

The Illinois Court of Appeal ordered the reinstatement of a deputy sheriff who had been terminated after testing positive for the presence of cocaine metabolites. The court found that a review of the facts proved that the employee tested positive due to her innocent consumption of tea which had been purchased in Peru when she and her husband traveled there.

Coweta County v. Henderson
606 S.E. 2d 87 (2004)

The Georgia Appellate Court upheld the termination of a firefighter after two random urine sample tests indicated the presence of drugs. The trial court improperly discounted the evidence supporting the personnel board's decision to upheld the termination.

United Auto Workers v. Winters
385 F. 3d 1005 (6th Cir. 2004)

A random drug testing program for specific civil service employees, including probation and parole officers, non-custodial employees in prisons and medical personnel who delivered medical or psychological services to persons in state custody, did not violate the 4th Amendment. Due to the nature of those jobs, the state did not need to establish any record of any drug use or other basis for individualized suspicion.

Law Enforcement Labor Services, Inc. Local 158 v. Sherburne County
695 N.W. 2d 630 (2005)

The Court of Appeals of Minnesota ruled that the establishment of a random drug testing policy by the county in accordance with the Minnesota Drug and Alcohol Testing in the Workplace Act did not constitute an unfair labor practice that further held that the county had to negotiate the implementation of the policy with the employee union.

Ross v. Ragingwire Telecommunication, Inc.
42 Cal. 4th 920 (2008)

Despite California's medical marijuana law, it does not violate one's right of privacy, nor is it discriminatory, to fire an employee who uses marijuana for medical reasons.

G. Due Process: Procedural

Arnett v. Kennedy
416 U.S. 134 (1974)

Same issues as Skelly on the Federal level and which the California Supreme Court relied heavily upon in its decision.

Gulden v. Mc Corkle
680 F.2d 1070 (9th Cir. 1982) cert. denied

No constitutional bar to use of the polygraph. (See: Long Beach City Employee Association v. City of Long Beach, 41 Cal.3d 937)

Cleveland Board of Education v. Loudermill
470 U.S. 532 (1985)

While due process does not require a full scale pretermination adversary hearing in all situations, at a minimum the employee must be given notice of the charges, an explanation of the employer's evidence, and a meaningful opportunity to respond and present his/her side of the story.

Leventhal v. U.S. Department of Labor
766 F.2d 1351 (1985)

A pre-termination hearing is not required in emergency situations where a valid government interest justifies postponing the hearing until after the termination.

Alexander v. City of Menlo Park
787 F.2d 1371 (9th Cir. 1986)

An employee was denied due process when he was terminated without being advised of bumping rights which would have entitled him to another position.

Matthews v. Harney County
819 F.2d 889 (9th Cir. 1987)

Employee must be notified of proposed dismissal as well as the charges and evidence supporting it before a pre-termination hearing is held.

Beckwith v. County of Clark
827 F.2d 595 (9th Cir. 1987)

A (county) employee is entitled to constructive or actual notice that his civil service status, which gave him due process rights, was lost when he transferred to another position within the county.

Garraghty v. Jordan
830 F.2d 1295 (1987)

Due process principles do not require that a neutral decision maker make the decision to suspend an employee. It is not expected that the pre-deprivation proceeding will be conducted before a neutral decision maker. "Even in termination cases most courts have not required that pre-termination hearings be conducted by a neutral party, so long as grievance procedures provide for a post-termination hearing before a neutral body."

Duchesne v. Williams
849 F.2d 1004 (1988)

The limited right of reply at a pre-disciplinary hearing is designed "to invoke the employers discretion, his sense of fairness and mutual respect, and his willingness to reconsider. It is not designed or well adapted to uncover the employer's bias or corrupt motivation."

Sanchez v. City of Santa Ana
915 F.2d 424 (9th Cir. 1990)

The removal of a police officer's merit pay without a hearing violates due process. Sanchez had a property interest in the merit pay and section 3304 (b) provides that no punitive action may be taken against a police officer without providing the officer with an opportunity for an administrative appeal.

Los Angeles Police Protective League v. Gates
907 F.2d 879 (9th Cir. 1990)

In a police officers' suit for wrongful termination, it was error for a trial court, on remand from the appellate court, to engage in fact finding which was contrary to the findings of the jury in reaching its verdict.

Rothstein v. City of Dallas
901 F.2d 61 (5th Cir. 1990)

Probationary police officer in Dallas was fired for allegedly making obscene telephone calls. He requested an appeal and although he did not ask for a "name clearing hearing" he did deny the charge against him and asked for administrative review of his termination. The Fifth Circuit in an en banc decision affirmed the award against the city stating that it was not necessary to "say the magic words" when requesting a name clearing hearing.

Panozzo v. Rhoads

905 F.2d 135 (7th Cir. 1990)

Preparing the charges against an officer did not render the Chief of Police incapable of judging a controversy on the basis of its own circumstances. (The issue of whether the pre-disciplinary hearing officer must be unbiased and impartial is now being raised on a fairly constant basis. Federal case decisions have held that no such requirement exists at the pre-disciplinary opportunity to respond.)

Walker v. City of Berkeley
951 F.2d 182 (9th Cir. 1991)

Since Walker had a property interest in her employment, she had a due process right to a ruling by an unbiased decision maker at her post-termination hearing. Although there is no support for her to have an impartial decision maker at the pre-termination hearing case law dictates that she possessed such a right subsequent to her termination.

Hoesterey v. City of Cathedral City
945 F.2d 317 (9th Cir. 1991)

A discharged employee who was not provided with a pretermination hearing may bring suit within one year from the date employment ceased.

Erickson v. Pierce County
960 F.2d 801 (9th Cir. 1992)

Addressing the allegation that an employee was terminated from employment solely because of her political support of the incumbent's opponent, the court held that the evidence failed to show that Erickson was terminated for that reason. "Terminations that allegedly violate the 1st and 14th Amendments are subjected to a three-part test to determine whether constitutional rights have been violated." The employee must first establish that 1) the conduct at issue was subject to constitutional protection, and 2) that the constitutionally protected conduct was a substantial or motivating factor behind the termination. Once the terminated employee has established the first two elements, the employer must prove that it would have made the same decision to terminate, even if the employee had not engaged in the protected conduct.

Miller v. County of Santa Cruz
796 F.Supp. 1316 (1992)

The court stated that since the plaintiff failed to seek judicial review of her termination pursuant to Civil Procedure Code Section 1094.5, she is precluded from bringing an action for damages arising out of the same termination pursuant to federal civil rights statutes, since it involved the same primary rights.

Miller v. County of Santa Cruz
39 F.3d 1030 (9th Cir. 1994)

The failure of a sheriff's department's employee to seek judicial review in the Superior Court of California regarding his dismissal from public service precludes him from seeking redress through the federal court. As a matter of federal common law, federal courts give preclusive effect to the findings of state administrative tribunals in subsequent actions under Section l983.

Stiesberg v. State of California
80 F3d 353 (9th Cir. 1996)

The lateral transfer of a CHP captain which involved no change in rank, pay, or privileges, did not violate the employee's constitutionally protected property or liberty interest even though it was done without prior notice and the captain believed it was punitive in nature.

Campanelli v. Bockrath
100 F.3d 1476 (9th Cir. 1996)

After a coach was fired from the University of California at Berkeley, and filed a civil rights action against two university officials, the officials were subsequently quoted in newspaper articles making derogatory comments about the reasons behind the coach's termination. The court, in citing a United States Supreme Court decision, Board of Regents v. Roth, stated that a public employer could be held liable for a procedural due process violation for terminating an employee if the employer made a charge "that might seriously damage (the terminated employee's) standing and associations in the community or imposed on (a terminated employee) a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." Although the statements were made after Campanelli had been terminated and not "in the course of termination," the "defamatory statements are so closely related to discharge from employment that the discharge itself may become stigmatizing in the public eye."

Roe v. City and County of San Francisco
109 F. 3rd 578 (1997)

Prosecutors are entitled to absolute immunity from civil liability for their decisions to not prosecute a police officer's cases without independent corroborating evidence. Prosecutors concluded that the officer was neither a credible nor reliable witness and their decision is entitled to absolute immunity from civil damages sought after the officer was removed from contact with members of the public.

Nunez v. City of Los Angeles (LAPD)
147 F.3d 867 (1998)

Police officers do not have a constitutionally protected property or liberty interests in promotion. An expectation is not an entitlement or property interest. While there is a long established liberty interest in engaging in one's chosen profession, there is no liberty interest in holding a particular position within an occupation.

Honey v. Distelrath

195 F. 3rd 531 (1999)

Normally, a Section 1983 action is barred when due process could have been satisfied by a deprivation remedy. However, if the deprivation (failure to provide all documents to an employee which were the basis for the termination action) is the result of an official's "abuse of his position" and therefore not "random and authorized" the employee's action for wrongful discharge under Section 1983 was not prohibited.

Vanderwalker v. King County
2004 U.S. App. Lexis 2989 (9th Cir. 2004)

An employee is not entitled to an unbiased Loudermill decision maker because the post-termination hearing decision maker was impartial. Additionally, the fact that the Sheriff signed of on an internal affairs investigation memo prior to the Loudermill hearing did not demonstrate the Sheriff's pre-conceived desire to terminate the employee. The Sheriff's signature was a necessary prerequisite to initiating the Laudermill process.

Huemiller v. Ogden Civil Service Commission
101 P. 3d 394 (Utah 2004)

The Utah Court of Appeals held that an officer's untruthfulness during an administrative investigation justified his termination from employment despite his previous length and quality of service.

Copley Press, Inc. v. Superior Court
39 Cal. 4th 1272 (2006)

The name of a deputy sheriff, who appealed his termination from employment, was protected under California law from disclosure to the public.

Levine v. City of Alameda
525 F. 3d 903 (2008)

City and city manager are not liable for constitutional violations where employee is deprived of a pre-termination hearing when a full evidentiary post-termination hearing is provided.

H. Insubordination

Berry v. Bailey
726 F. 2d 670 (11th Cir. 1984)

First Amendment does not give an officer the right to disobey an order, no matter how wrongful.
Note: An illegal order is a different matter.

De Soto v. Yellow Freight Systems, Inc.

811 F.2d 1333 (9th Cir. 1987)

An employee who was fired for refusal to perform an act, erroneously thought to be illegal, was not entitled to relief under federal or state law.

Perkins v. City of West Covina
113 F.3d 1004 (9th Cir. 1997)

Detailed notice of means to retrieve property seized under warrant must be given to owner.

I. Privacy

Shawgo v. Spradlin
701 F.2d 470 (5th Cir. 1983)

Police officers can be disciplined for cohabitating.

Briggs v. North Muskegon Police Department
563 F.Supp. 585, aff'd (1983); 746 F.2d 1475, cert. denied, 105 S.Ct. 3535 (1984)

Officer could not be terminated for lascivious cohabitation where activities not prohibited by statute.

Collins v. Bender
195 F. 3rd, 1076, (1999) WL 976807

The warrantless search of the home of a former law enforcement agent was not considered a "personnel action" under the Civil Service Reform Act. Personnel actions cannot be so broadly defined as to allow government supervisors to invade the private lives of federal employees under the guise of administrative oversight.

Flaskamp v. Dearborn Public Schools
385 F. 3d 935 (6th Cir. 2004)

Suspension and denial of tenure of a high school teacher was neither irrational nor arbitrary when the principal learned of an intimate association between a high school teacher and a student who had recently graduated. In light of the importance of prohibiting teachers and students from beginning romantic relationships, a school board could prohibit such relationships even within a year or two of graduation. It was therefore not a violation of the teacher's due process rights or her right of privacy to deny her tenure for maintaining a close personal relationship with a student.

Francies v. Kapla
127 Cal. App. 4th 1381 (2005)

A doctor was held liable for disclosing a patient's HIV status to his employer in violation of the California Confidentiality of Medical Information Act.

J. Search of Employees

Kirkpatrick v. City of Los Angeles
803 F.2d 485 (9th Cir. 1986)

In spite of the government's interest in police integrity, strip searches of police officers for investigative purposes must be supported by a reasonable suspicion that evidence will be uncovered.

Ortega v. O'Connor
146 F.3d 1149 (1998)

Although an employee's office might be subject to a search by the employer if it is motivated by a legitimate work related need, it can not be part of an investigative "fishing expedition" in an effort to find evidence to be used against the employee.

Quon v. Arch Wireless Operating Co.
529 F.3D 892 (2008)

Disclosing private text messages to the employer, sent on the employer's equipment, is considered an invasion of the employee's right of privacy, unless policy has informed the employee that those messages are not confidential.

K. Speech

1. On Duty: Unprotected Speech

Connick v. Myers
461 U.S. 138 (1983)

Upheld dismissal of an assistant district attorney who had circulated a questionnaire concerning working conditions after she had been transferred within the office. No constitutional protection for matters which are not of great public concern.

Wilson v. City of Littleton
732 F.2d 765 (10th Cir. 1984)

Dismissal for failure to remove black shroud from badge upheld due to officer being on-duty; his speech was personal.

Murray v. Gardner
741 F. 2d 434 (5th Cir. 1984)

FBI agent not protected when he engaged in on-duty criticism of a management decision because it adversely affected his personal interests.

Gearhart v. Thorne
768 F.2d 1072 (9th Cir. 1985)

The First Amendment guarantees the right of public employees to speak out on public issues. It does not, however, protect a public right to speak on internal matters of no public interest.

Nelson v. Pima Community College
83 F3d 1075 (9th Cir. 1996)

A college's affirmative action officer failed to prove that her termination from employment was based upon her criticism of the college's affirmative action plan. The college, on the other hand, provided evidence that she had "refused to perform her duties in accord with her instructions, did things she was prohibited from doing, and threw the whole college into turmoil." Additionally, her unauthorized orders given to other employees were not protected speech since they were not her personal opinion but were the purported exercise of her authority as a college official.

Weisbuch v. County of Los Angeles
119 F3d 778 (9th Cir. 1997)

Demotion for criticizing supervisor's decision-making method does not support First Amendment violation claim.

Cochran v. City of Los Angeles
222 F. 3rd 1195 (2000)

A police officer's speech is not protected by the First Amendment to the Constitution if it involves internal office matter, promotes tension, impairs discipline, and is not directed to the public. In the instant case the nature of the speech challenged a superior's ability to make decisions and undermined his authority. The government, as an employer, must have some power to restrain the speech of its employees when it detracts from effective operation.

Weeks v. Bayer
246 F. 3rd 123 (2001)

"To state a claim for unlawful retaliation in violation of the First Amendment, an employee must first demonstrate that the speech was on a matter of public concern. The determination turns on the content, form and context of the speech."

Ober v. Evanko
2003 U. S. App. Lexis 23040 (3d Cir. 2003)

A state police officer's speech was not protected under the First Amendment because he violated an established state police department regulation requiring all department members to inform their immediate supervisor of any suspected wrongdoing by other department members.

Kirby v. City Of Elizabeth
380 F. 3d 777 (2004)

A police officer's testimony at a co-worker's grievance hearing was not evasive for First Amendment retaliation because his testimony did not involve a matter of public concern.

2. On-Duty: Protected Speech

Gillette v. Delmore
886 F.2d 1194 (9th Cir. 1989)

Material issues of fact precluded summary judgment in an action alleging improper termination for disparaging remarks made by a fireman as to excessive force used by police on an overdose victim.

Burgess v. Pierce County
918 F.2d 104 (9th Cir. 1990)

Terminating a county fire marshal in retaliation for speaking out against enforcement of local fire hazard ordinances violates the marshal's clearly established constitutional right under the First Amendment. Discharging the public employee in retaliation for protected speech violates clearly established laws of which a reasonable person would have known.

Hyland v. Wonder
972 F.2d 1129 (9th Cir. 1992)

"The First Amendment constrained the ability of state officials to deprive (the volunteer employee) of a valuable governmental benefit as punishment for speaking out on a matter of public concern." The fact that the individual, as a volunteer employee, could have been terminated at will did not diminish his rights pursuant to the First Amendment.

Nunez v. Davis
169 F. 3rd 1222 (1999)

When a court administrator was fired because she allowed employees to attend training seminars after being told by the supervising judge that the seminars were limited to employees who had assisted him in his reelection campaign, the court held her constitutional free speech rights were violated. "Non verbal conduct implicates the First Amendment when it is intended to convey a particularized message and the likelihood is so great that the message would be so understood." The administrator's actions were "symbolic speech" and therefore implicated the First Amendment.

Blair v. City of Pomona
223 F. 3rd 1074 (2000)

After an officer reported official corruption to a Lieutenant, he was subjected to a series of acts that a reasonable fact finder could infer were inflicted by members of the department with the knowledge and approval of those running the department. As such, a jury could determine that the Police Department had a custom of chastising whistle blowers and the City will face liability.

Hufford v. McEnaney
249 F. 3rd 1142 (2001)

The fact that Hufford engaged in truthful whistle blowing, regarding firefighters downloading pornographic material onto fire department computers, reduces the significance of any work place disruption that may have been caused by his disclosure.

Marable v. Nitchman
511 F.3d 924 (9th Cir. 2007)

A public employee's complaints alleging corruption among his supervisors is protected by the First Amendment because his speech was not related to his job duties ... he was speaking as a private citizen, not an employee.

3. Off-Duty Speech in Public Forum

Mc Kinley v. City of Eloy
705 F.2d 1110 (9th Cir. 1983)

An officer's off-duty publicly expressed criticism of a management decision is protected.

Leonard v. City of Columbus
705 F.2d 1299 (11th Cir. 1983)

Black officers' deliberate removal of American flag decal from their uniforms held protected speech on grounds they were off-duty and the message was of great public importance.

Note: The officers had to report to work the next day with the flags on.

Kotwica v. City of Tucson
801 F.2d 1182 (9th Cir. 1986)

While public employees retain a First Amendment right to speak on matters of public concern, there is a balance between that privilege and the state's interest in a responsible governmental system. Official misrepresentation interferes with a governmental ability to govern in a responsible manner.

Johnston v. Koppes
850 F.2d 594 (9th Cir. 1988)

Government attorney may exercise her constitutional rights outside the context of her government employment. Under the First Amendment the public employee has the right to peacefully assemble and to petition the Government for a redress of grievances. Abortion rights are a matter of great public concern and public employees have a right to make their opinions known to their legislators. Government cannot punish its employees for exercising rights guaranteed them by the Federal Constitution.

Manhattan Beach Police Officers Association, Inc. v. City of Manhattan Beach
881 F.2d 816 (9th Cir. 1989)

A public official cannot withhold a substantial benefit from an employee because of activities protected by the First Amendment without affecting the employee's freedom of expression. This is true whether that benefit is economic, such as a higher salary, or some other condition of employment, such as location or job assignment.

Defendants (city, police chief and city manager) may be able to show at trial that the administrative sergeant position was of such a confidential, supervisory nature that they reasonably could have taken union loyalties into account in assessing the plaintiffs' qualification for it.

Thomas v. Carpenter
881 F.2d 828(9th Cir. 1989) (quoting Rankin v. McPherson, 483 U.S. 378 (1987))

A complaint alleging state action motivated by an intent to retaliate for the exercise of constitutionally protected rights of free speech satisfies the requirements of 42 U.S.C. Section 1983. Whether a public employees conduct is constitutionally protected necessarily involves balancing "the interests of the [employee] as a citizen in commenting on matters of public concern and the interest of the state, an employer, in promoting the efficiency of the public services it performs through its employees."

Finkelstein v. Bergna
881 F.2d 702 (9th Cir. 1989)

A District Attorney is not entitled to qualified immunity from claims asserted by a deputy district attorney who allegedly was disciplined for exercising his First Amendment rights. The District Attorney was not entitled to qualified immunity because the law was clearly established that assistant prosecutors may not be disciplined for exercising First Amendment rights.

Voigt v. Savell
70 F.3d 1552 (9th Cir. 1995) (quoting Connick v. Myers, 461 U.S. 138 (1983))

Comments made by a state employee which undermined his supervisor's authority and was not matters of public concern was not protected by the First Amendment. "The limited First

Amendment interest involved here does not require that the defendants tolerate actions which they reasonably believe cause disruption in the work place and undermined the authority of Voight's supervisors."

Lambert v. Richard
59 F.3d 134 (9th Cir. 1995)

An employee of the library, acting as a union representative, made statements at a City Council meeting regarding the poor management practices of a library director. That speech was a matter of public concern and protected pursuant to various statutory and constitutional protections since Lambert was functioning as a union representative.

Moran v. State of Washington
147 F.3d 839 (1998)

The State has an interest in having its high level policy making employees assist in the implementation of its programs and not criticize them or refuse to carry out official policy. Such action on the part of the policy making official justifies termination

Gilbrook v. City of Westminster
177 F. 3rd 839 (1999)

Disciplining firefighters who were politically active and attempted to have the mayor recalled, violated their First Amendment protected rights. The fact that there may have been justification for the disciplinary action may be considered. However, "the Supreme Court has formulated a two part burden-shifting inquiry for cases involving mixed motives for discharge. First, the plaintiff must show that his or her conduct was constitutionally protected and was a "substantial" or "motivating" factor in the employer's decision." Despite the fact that the last person in the disciplinary process had a legitimate reason for discharging the employees, the disciplinary process began with a retaliatory motive and therefore the earlier non-legitimate reasons created liability for city officials based upon civil conspiracy for retaliation.

Diruzza v. County of Tehama
206 F. 3rd 1304 (2000)

A deputy sheriff who was disciplined because she publicly supported the incumbent sheriff, who subsequently lost the election, was protected from retaliatory action under the First Amendment. A deputy sheriff is neither a policy maker nor confidential employee and therefore could not be disciplined for such political activity which occurred off duty.

Dible v. City of Chandler
515 F. 3d 918 (2007)

Police officer's First Amendment rights were not violated when he was fired for maintaining sexually explicit website with his wife. "Dible may have the constitutional right to run his sex

oriented business, but he has no constitutional right to be a policeman for the City at the same time."

Appendix

The Impact of "Brady" on Police Personnel Records

By: Martin J. Mayer, Esq.

The issue of whether a local prosecutor has a responsibility to review personnel files of police officers, before prosecuting their cases, is becoming a subject of discussion within law enforcement circles. Thirty five years ago the United States Supreme Court, in the case of Brady v. Maryland (1963) 373 U.S. 83, ruled that a prosecutor has a duty to disclose evidence to a criminal defendant which impacts on issues of culpability and/or penalty. Brady and a companion were found guilty of murder in the first degree and sentenced to death. The trials had been separate with Brady being tried first. Subsequent to his conviction, it was discovered that his crime partner had, prior to the trial, admitted to law enforcement that he had committed the homicide. That information was withheld by the prosecution and did not come to Brady's attention until after he had been tried, convicted, sentenced and his conviction had been affirmed. The Court held that evidence favorable to an accused which was requested by the defendant and withheld by the prosecution violates the defendant's due process rights where that evidence is material either to guilty or to punishment regardless of good or bad faith on the part of the prosecutor. The fact that a prosecutor inadvertently withholds that type of information from a criminal defendant can, nonetheless, cause a conviction to be overturned.

The Supreme Court also ruled that information known to any of the government agents involved in the investigation and prosecution of the criminal defendant, including local police, is known by all of the government's agents. Giglio v. United States (1972) 405 U.S. 150. In Giglio, the Supreme Court ruled that information known to any of the government agents involved in the investigation and prosecution of the criminal defendant, including local police is known by all government agents. Giglio and his crime partner were convicted of passing forged money orders and sentenced to five years imprisonment. During the appeal it was discovered that the prosecution failed to disclose that a promise had been made to the crime partner, that he would not be prosecuted if he testified against Giglo.

The Court stated that "a finding of materiality of the evidence is required under Brady..." and, furthermore, "a new trial is required if the false testimony...in any reasonable likelihood could have affected the judgment of the jury...." The Court stated that "...the government's case depended almost entirely on Taliento's (Giglio's crime partner) testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to the future prosecution would be relevant to his credibility and the jury was entitled to know of it."

In the case of United States v. Agurs (1976) 427 US 97 the defendant was charged with murder. At trial he claimed self-defense but was ultimately convicted. Following the conviction the defense learned that the alleged victim had a criminal record which would have assisted the defense theory of self defense. There had been no request made by the defense prior to trial for this type of information. In the Agurs' case the Supreme Court stated that "even if no request for Brady material had been made, the prosecution might in fact have a duty to disclose exculpatory evidence or material favorable to the defense. The court opined that the failure of the defense to request favorable evidence did not relieve the government of its duty pursuant to Brady v. Maryland to disclose such evidence.

In 1985 the Supreme Court ruled in the case of United States v. Bagley, 473 US 667 that evidence withheld by the government would be considered material only if there was a reasonable probability that had the evidence been disclosed to the defense the result of the proceeding would have been different. Therefore if the evidence withheld is considered material it would require reversal of a conviction. Prior to trial on charges of violating federal narcotics and firearm statutes, Bagley demanded among other things "any deals, promises or inducements made to (government) witnesses in exchange for their testimony." Subsequent to his conviction Bagley determined, pursuant to the Freedom of Information Act, that in fact government witnesses had been offered money commensurate with the quality and nature of the information furnished to the prosecution. The Supreme Court held that "the prosecutors' failure to disclose evidence that could have been used effectively to impeach important government witnesses requires automatic reversal. Such non-disclosure constitutes constitutional error and requires reversal of the conviction if the evidence is material in the sense that its suppression might have affected the outcome of the trial."

In a fairly recent decision the United States Supreme Court decided the case of Kyles v. Whitley (1995) 514 US 419. Kyles had been convicted of first degree murder and sentenced to death. Following his appeal it was revealed that the state had withheld certain evidence which was favorable to him. Among other things, the evidence included contemporaneous eye witness statements, statements made to the police by an informant who was never called to testify and the computer printout of license numbers of cars parked at the crime scene on the night of the murder which did not include the license number of Kyles' car. The Court stated that "...favorable evidence is material, and constitutional error results from its suppression by the government, if there is a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." The court went on to state that "...the state's disclosure obligation turns on the cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item by item. Thus the prosecutor ...must be assigned the responsibility to gage the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. Moreover, that responsibility remains regardless of any failure by the police to bring favorable evidence to the prosecutor's attention."

The court held that the prosecutor has an additional obligation to search the files of the prosecutor's offices, the investigative files of the agency which investigated the case against the defendant, and the files of any agency or personnel employed by either of those two entities to determine if there is exculpatory information or evidence regarding material prosecution

witnesses. Obviously, arresting officers and investigating officers are considered material prosecution witnesses.

It is the opinion of many that this burden applies to local, as well as federal prosecutors, since the right being protected is the constitutional right of due process. Accessing such records in the State of California, however, is not a simple task since the Government, Evidence and Penal Codes create rights of privacy of information contained in personnel files of peace officers. Additionally, the Evidence Code specifies procedural steps which must be followed by virtually any individual or entity attempting to access such material.

The law imposes upon the prosecutor a duty or obligation to proactively seek out Brady material which might exist. As such, it appears that the district attorney would not only want to, but must, conduct such a search or risk a conviction being overturned if is subsequently discovered that Brady material, in fact, existed. Remember, even good faith, unintentional, withholding of such information can result in the reversal of a conviction.

The question which must be answered, therefore, is what action should a law enforcement agency take, if and when a prosecutor asks to review personnel files of a peace officer who is a material prosecution witness?

It appears, based upon the reading of relevant cases, along with Cal. Penal Code § 832.7(a), that all obligations can be fulfilled and all rights protected through the establishment of an appropriate procedure to be followed by all. Since this matter has not been tested by the courts, it is impossible to determine whether challenges will arise nor the conclusions of the courts. It is our belief, however, that if the following type of process were implemented it would pass muster at all levels:

* In all cases where an officer is a material prosecution witness, the law enforcement agency should review the officer's personnel records to determine if Brady material exists. (Some prosecutors might object to delegating this responsibility since the prosecutor must assure the court that no Brady material exists. If the police agency, and not the D.A., did the search, can the prosecutor give such an assurance?)

* If the agency believes Brady material exists, the agency should so notify the District Attorney and allow the District Attorney to review the questionable material. (PC §832.7(a) exempts, among others, a District Attorney's office from the requirements of proceeding by a *Pitchess Motion* in accordance with Evidence Code §1043. The law specifically states that the section "shall not apply to . . . proceedings concerning the conduct of police officers or a police agency. . . .")

* If Brady material does exist, copies should be provided to the prosecutor. State and Federal laws require the prosecutor to disclose that information to the criminal defendant. However, once the District Attorney is provided copies of the impeachment or exculpatory information or evidence from the personnel file of the peace officer, the District Attorney must then comply with Evidence Code §1043 before disclosing the material to the defense.

* The filing of a *Pitchess Motion* by the prosecutor compels the court to review the material in camera and determine if it is Brady material. The officer must be afforded the opportunity to object (pursuant to State law) and the court will make its decision following an in camera review.

Although this may appear to be a cumbersome process, in reality it is not. Even if it were, however, the fact remains that there are conflicting obligations created involving this subject. The Federal law imposes upon all prosecutors the duty to seek out and provide to a criminal defendant Brady material. In the State of California, however, peace officer personnel records are confidential and can only be disclosed in accordance with state mandated procedures. As such, the application of a process, such as the one set forth above, would provide a vehicle by which the prosecutor can comply with federal mandate and a law enforcement agency can continue to protect the disclosure and/or dissemination of protected personnel information regarding their officers.

This is potentially a difficult and somewhat confusing area of the law. As such we urge that chiefs and sheriffs confer with the district attorney in their respective counties in an effort to arrive at a mutually agreed upon process. Since the withholding of this information, even in good faith, can substantially impact upon the prosecutor's ability to complete the prosecution cycle, which was initiated by the peace officer's arrest of the suspect, it is imperative that all participants in the "prosecution team" be aware of this issue and develop a reasonable approach to comply with the requirements of the law while at the same time respecting the rights of all parties involved.

General Order

Subject: Sample Brady Materials Policy

I. Purpose

A. The Department recognizes that, in a long line of cases beginning with Brady v. State of Maryland, 373 U.S. 83 (1963) and including Kyles v. Whitley, 514 U.S. 419 (1995),the United States Supreme has Court held that the prosecutor has an affirmative duty to disclose to the defendant evidence which is favorable to the defendant and which is material to the guilt and/or punishment of the defendant. Evidence which is either exculpatory or can be used for impeachment is Brady material. Such evidence may sometimes be found in the personnel files of involved peace officers.

B. The Department also recognizes that, under Penal Code § 832.7, peace officer personnel records are confidential and generally not discoverable except by noticed motion under Evidence Code § 1043 (i.e. a Pitchess motion). However, Penal Code § 832.7 is not applicable to investigations or proceedings concerning the conduct of police officers or a police agency conducted by a District Attorney's office.

C. The purpose of this policy is to establish the conditions under which the District attorney will be advised about Brady material located in peace officer personnel files and/or permitted to inspect peace officer personnel files for Brady materials.

II. Procedure

A. The District Attorney will be advised of Brady materials in peace officer personnel files and/or permitted to inspect peace officer personnel files for Brady materials on the following conditions:

B. If an officer is a material witness in a criminal case, a person or persons designated by the Chief of Police may examine the subject officer's personnel file to determine whether there are Brady materials contained therein (i.e., evidence which is favorable to the defendant and which is material to the guilt and/or punishment of the defendant).

[In the alternative, the Department may make the file(s) available for review by the District Attorney as set forth in Section II.C. below].

1. In conducting said review, it must be remembered that the Department member of the prosecution team. If there is any question whether there is something in the personnel file which constitutes Brady materials, it is best to err on the side of caution and consult with the District Attorney and/or the Departments' Legal Advisor.

2. If there are no Brady materials in the personnel file, then the District Attorney's Office shall be advised of that fact. However, if there are Brady materials in the personnel file, then the District Attorney's Office shall be advised of that fact. The records believed to constitute Brady materials shall be made available for inspection by the District Attorney's Office as set forth below in Section II.C.

C. If the District Attorney asks to inspect peace officer personnel files for Brady materials, the District Attorney, or his or her designee, shall be permitted to inspect the records on the following conditions.

1. A member of the District Attorney's office seeking to review peace officer personnel records shall be required to fill out and sign a request form indicating the name of the person or persons who will review the records, the purpose of the review, the name of the case and case number, if applicable, and the name of the peace officer(s) whose records the District Attorney seeks to review.

a. The request form shall state, and the signature of the person making the request shall indicate the agreement of the District Attorney, that no formation contained therein shall be released to any third parties, including the defendant and/or his or her attorney, in the absence of a motion by the District Attorney under Evidence Code § 1043 and an appropriate court order.

b. The request form shall state, and the signature of the person making the request shall indicate the agreement of the District Attorney, that, if any portion of the records, or any

information contained therein, is released to any third party, the District Attorney shall notify the Department in writing of that fact as well as the circumstances of the disclosure. Any such notification shall be kept in the subject officer's personnel file.

c. A copy of the request form shall be placed in the personnel files of the subject officer(s).

2. Prior to any review of the files by the District Attorney's Office, the subject officer(s) shall be notified in writing that the District Attorney is conducting a review of the files.

3. The review of the files by the District Attorney shall take place within the Department. Files shall not be removed from the Department by the District Attorney's Office.

4. Copies of relevant portions of the personnel files shall not be made by the District Attorney's Office except with the express permission of the Chief of Police.

5. The personnel files shall not be marked upon by the District Attorney's Office nor shall any change be made in the manner in which the records are filed.

Brady v. State of Maryland

The California Attorney General recently issued a memo to all California District Attorneys stating that prosecutors do not have a duty to learn of exculpatory information which might be in the personnel file of an officer who is a material witness in a prosecution. This is, obviously, of great significance to all law enforcement in the state and, therefore, we are attaching it to this Client Alert Memo along with our comments.

First and foremost we must note that the opinion of the Attorney General, even though, it is not an "official" opinion (one which is published and able to be cited in cases), is still extremely important when issued, as was this one, to all District Attorneys. At the same time we have an obligation to our clients to inform you that we are confused with the opinion and, respectfully, disagree with its conclusion. We are providing this input for your information but, as we have stated continuously, all agencies must seek, and be guided by, advice from their own elected county District Attorneys as to the process they want law enforcement to follow regarding "Brady" material.

As you will note the Attorney General states, at the very start of his memo, that both the United States and California Supreme Courts have held that, pursuant to the cases of Kyles v. Whitley (1995) 514 U.S. 419 and In re Brown (1998) 17 Cal. 4th 873, "...the prosecution had a duty to learn of any favorable evidence known to others acting as part of the prosecution team (e.g., police agencies)." Nonetheless, the A.G. goes on to conclude that such a duty does not extend to include a duty on the prosecutor "...to search the personnel files of any material-witness peace officer for potential exculpatory evidence." This conclusion is based upon the A.G.'s determination that (1) the prosecutor cannot access the personnel files of a peace officer, as a

result of restrictions in Penal Code section 832.7 and (2) the defendant can bring a "Pitchess" motion, pursuant to Evidence Code section 1043 to obtain potentially exculpatory material.

Our confusion is based upon two things: first, in a formal Opinion of the Attorney General from 1983, 66 Ops. Atty. Gen. 128, the A.G. opined that "...as long as the investigation of (the officer's) conduct is part of the (prosecutor's) duties ... a district attorney need not follow the provisions of Evidence Code Section 1043 in obtaining access to the personnel records in question." That formal opinion appears to contradict the conclusion in the current memo that a district attorney cannot access the officers' files to look for exculpatory material.

Secondly, the Supreme Courts have ruled, unequivocally, that a defendant need not even ask for "Brady" material; if it exists, the prosecutor has an obligation to provide it to the defendant. Since the defendant need not even make a "request" for such evidence, how can the defendant be required to prepare, submit and argue a formal motion to secure this material? Furthermore, the Courts have held that the burden to produce such evidence is on the prosecution and the responsibility cannot be delegated to any other entity ... which would include the defendant. Since this is the holding of both Supreme Courts, the existence of a "Pitchess" motion would not appear to relieve the prosecutor of the duty to provide "Brady" material. United States v. Agurs (1976) 427 U.S. 97; In re Brown (1998) 17 Cal. 4th 873; Strickler v. Greene (1999) 119 S. Ct. 1936.

It must also be pointed out that a "Pitchess" motion is narrow in scope and the requirements under "Brady" are not. A defendant must be able to meet specific requirements to succeed under "Pitchess" (we are frequently able to defeat such motions for discovery) which do not apply to the mandate on the prosecution to disclose "Brady" material.

How Does This Affect Your Agency?

The memo from the Attorney General states that there is no duty on the part of the California District Attorneys "...to establish any expanded protocol for prosecutorial review of the personnel files of material-witness peace officers for exculpatory evidence." It is not that such a protocol cannot be established between a law enforcement agency and the District Attorney - just that the D.A. has no duty to establish one. The D.A. acts as the advocate for law enforcement once it decides to prosecute cases brought to it by an agency. As such, the attorney (prosecutor) needs access to all relevant information held by the law enforcement agency which will assist it in deciding whether to prosecute and, if so, to successfully prosecute a case.

As we have stated in the past, we believe that law enforcement agencies should make error on the side of caution in order to avoid being the inadvertent cause of a conviction being reversed if a court ultimately determines that "Brady" material was withheld. This can be accomplished by consulting with the elected District Attorney of your county and securing guidance from him or her as to how you should handle "Brady" material, if it exists.

This is, obviously, a very sensitive and significant area of the law. In prior documents we set forth examples of procedures which would protect the right of privacy of the peace officers, the constitutional rights of the accused (as set forth by the United States and California Supreme

Courts) and the obligations of the prosecution. The ultimate burden and responsibility, however, rests with the prosecutor and, therefore, direction must come from that source.

Brady Rift Between Prosecutors and Law Enforcement Agencies

The Conflict

A significant impact has been caused by the United States Supreme Court decision of Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, upon law enforcement agencies and prosecutors offices. In Brady, the Court held that evidence favorable to the accused which was "specifically requested" by the defendant and withheld by the prosecution vio1ated the defendant's constitutional due process rights to a fair trial. In 1976, the Supreme Court ruled, in United States v. Agurs, 427 U.S. 97, that "even if no request for Brady material had been made," the prosecution might have a duty to disclose such evidence to the defendant.

In 1995 the matter became more significant when the Supreme Court stated, in Kyles v. Whitley, 514 U.S. 419, that the prosecution had the duty to affirmatively seek out such material, even if it is not in the prosecutor's immediate possession but is possessed by anyone assisting in the prosecution of the case. The Court stated that the prosecutor's "...responsibility remains regardless of any failure by the police to bring favorable evidence to the prosecutor's attention." The Court declared that, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police."

A substantial number of court decisions, including a recent decision by the California Court of Appeal, People v. Superior Court (Barrett) (2000) 80 Cal. App. 4th 1305, continue to impose upon prosecutors the constitutional duty to seek out such evidence from any member of the "prosecution team." The "prosecution team" has been defined to include any person or entity utilized by the investigator and/or the prosecutor in the preparation of the case. The Barrett court stated that, "...a prosecutor has a duty to learn of favorable evidence known to...investigative agencies acting on the prosecution's behalf, including police agencies." Barrett supra.

It has been held that "Brady" material includes, among other things, evidence which could be used to attack the credibility of a material witness. One example of such evidence would be findings of misconduct based upon dishonesty, since such findings could be used to attack — whether successfully or not — the credibility of such a witness if his or her veracity is an element in the prosecution's case.

In California, Penal Code sec. 832.7 creates confidentiality of peace officer personnel records and information contained therein. Additionally, Evidence Code sec. 1043-1045 ("Pitchess" motions) require that certain formal procedures be followed before such personnel information can be released from the officer's file. Other code sections require that information regarding the discipline of a public sector employee be maintained for specified periods of time (e.g. G.C. 34090). Nonetheless, such records could still be subject to disclosure, pursuant to Brady v. Maryland, although state statutory protections must be adhered to before disclosure of a peace officer's file could be made.

It is this conflict - the prosecutor's constitutional duty to seek out and disclose "Brady" material versus law enforcement's statutory obligation to protect the confidentiality and privacy of officerś personnel files — which appears to have caused a rift between some prosecutors and law enforcement agencies. The primary conflict surrounds the process to be followed for both parties to fulfill their obligations.

The Prosecutor's Obligation

There have been a significant number of cases, both California and United States Supreme Court decisions, as well as California Courts of Appeal decisions, which impose a duty upon the prosecutor to provide "Brady" material to a defendant, even if it is not requested.

As recently as 1999, in Strickler v. Greene, 527 U.S. 263, the Supreme Court reaffirmed that, "...the duty to disclose such evidence is applicable even though there has been no request by the accused (citation omitted), and the duty encompasses impeachment evidence as well as exculpatory evidence (citation omitted)."

The California Court of Appeal, just last year, stated that the prosecutor's constitutional obligation to seek out and disclose" Brady" material stands by itself. Barrett, supra. Even if a state has a statutory scheme of discovery, it does not and cannot supplant the federal constitutional right addressed under Brady - - that the defendant is entitled to a fair trial and the prosecution cannot withhold evidence, either intentionally or inadvertently, which could assist the defendant in obtaining that fair trial. Citing to the California Supreme Court decision, Izazaga v. Superior Court (1991) 54 Cal.3d 356, the Barrett court stated that, "(t)he prosecutor is obligated to disclose such evidence voluntarily, whether or not the defendant makes a request for discovery."

As stated above, there is no doubt that our state statute (P.C. 832.7), creating confidentiality of peace officer personnel files, must be acknowledged in order to accomplish that task. The question is whether the requirement that one utilize the "Pitchess motion" process (Evidence Code 1043 - 1045) in order to disclose such material, applies to prosecutors when the officer, whose files are at issue, is to testify as a material witness as a part of the People's case. This is the area of the law that remains in dispute and unsettled but requires resolution, for a variety of reasons.

Personal Liability for Brady Violation

It appears that a relatively new concern must be addressed as to whether or not any liability arises if there is a deliberate or intentional withholding of "Brady" material from the prosecutor by law enforcement. The law is abundantly clear that no civil liability lies with the prosecutor in the exercise of his or her discretion as to whether or not evidence is "Brady" material and whether it needs to be disclosed. This is true under both state law, as well as the federal court decision Imbler v. Pachtman (1976) 424 U.S. 409.

The next question which arises (and causes great concern) is what, if any, liability falls upon a law enforcement agency and/or its personnel if "Brady" material is deliberately withheld from the prosecutor by the agency or its officers. Approximately one year ago the Fourth Circuit U.S. Court of Appeal held that an individual peace officer may be liable under 42 U.S.C. §1983 for damages to a defendant who was denied a fair trial as a result of an officer's failure to provide "Brady" material to the prosecutor. Jean v. Collins (2000) 221 F.3d 656.

In the Jean case the court stated that "(t)he Supreme Court decisions establishing the Brady duty on the part of prosecutors do not address whether a police officer independently violates the Constitution by withholding from the prosecutor evidence acquired during the course of an investigation. (Citations) Recent cases...have pointed toward such a duty. This court has noted that, "[a] police officer who withholds exculpatory information from the prosecutor can be liable under...section 1983"...where 'the officer's failure to disclose the exculpatory information deprived the section 1983 plaintiffs of their right to a fair trial.' "

The Jean court cites to approximately six other court of appeal decisions, from a variety of circuits throughout the United States, all of which have made similar types of holdings. If this reasoning is adopted by the Ninth Circuit U.S. Court of Appeal it would directly impact upon California law enforcement. Considering the history of the Ninth Circuit, and the fact that at least six other circuits have already adopted this approach, it would not be unlikely that we may see a new and very different impact precipitated by Brady. For those of us who dedicate our practice to representing law enforcement officials, this creates significant concern.

Now, for the first time, a chief of police, sheriff or other official who fails to inform the prosecutor of material which is subsequently determined to be Brady material, potentially faces personal liability for money damages. As already stated, this has not yet been ruled upon by the Ninth Circuit and, therefore, is not yet binding in the State of California. It would be naive, however, and perhaps even malpractice on our part, if we did not bring this to your attention for your consideration.

Historically, we have always urged that law enforcement executives meet with their elected district attorney to discuss with him or her all the relevant issues arising out of Brady v. Maryland and obtain direction from the D.A. regarding the Brady process to be followed. Although the responsibility rests upon the shoulders of the prosecutor, it appears now that there is potential liability which may fall on the shoulders of individual members of law enforcement. If a court ultimately determines that Brady material was deliberately withheld, the prosecutors have absolute immunity from civil liability - but law enforcement personnel do not. This is a problem which must be solved in order for the key elements in the criminal justice system, law enforcement and prosecutors, to be able to function in the manner mandated by law.

Possible Solution

In 1987, the U.S. Supreme Court addressed the issue of such a conflict between the constitutional mandate on the prosecutor to disclose information and a state right of privacy in the case of Pennsylvania v. Ritchie, 480 U.S. 39. In Ritchie, a minor's right of privacy regarding mental health treatment, following her alleged sexual molestation by her father, conflicted with

the prosecutor's obligation under Brady to provide exculpatory evidence to the defendant which might have arisen during the treatment (e.g. if she told the therapist it was not her father who molested her). The Supreme Court ruled that the defendant was entitled to have the file reviewed by the trial court to determine whether it contained information that probably would have changed the outcome of the trial. Defense counsel was not entitled to personally examine the confidential material until, and unless, the court determined it was "Brady" material.

This office has contended for several years that, although we believe the prosecutor can access information in an officer's personnel file without filing a "Pitchess" motion, the prosecutor cannot disclose that information to any third person, including the defendant, without first having the court conduct an in camera review pursuant to Evidence Code 1043 - that procedure would follow the logic of the U.S. Supreme Court's decision in Ritchie, supra. Remember, none of these obligations call for law enforcement to provide any material to the defendant. The issue is whether law enforcement should provide such material to the prosecutor - the person presenting a case brought forth by law enforcement.

"Brady" Letters

We have also been informed of late, of a practice by prosecutors of sending letters to the heads of law enforcement agencies stating that, in their opinion, a particular officer has a problem which will require the prosecutor to disclose the problem in all future cases involving that officer pursuant to *Brady v. Maryland*. Some of these letters are based on the D.A.'s belief that an officer has engaged in a relevant form of misconduct, without any formal finding having been made. Such letters could destroy an officer's ability to function since it could permanently damage his or her credibility. In many of these cases the letters are written without any prior communication with the chief or sheriff.

It would seem to us that no harm is created if, prior to sending such a letter, the prosecutor met with the chief or sheriff to discuss the matter. It is possible that the prosecutor's decision could be altered based upon that discussion. In any event, the opportunity to discuss the problem seems to be reasonable and appropriate since so much is at stake.

Conclusion

This issue impacts upon many within the criminal justice system: the arresting officer, the head of the law enforcement agency, the municipality and/or county government, and the accused as well. It would be highly inappropriate to even presume that there is only one approach which can be utilized to solve this problem. Because of that, we urge, as we always do, that you consult with the department's legal advisor to determine what, if any, obligations and responsibilities fall upon your organization, irrespective of the burden imposed upon the prosecutor. And then, as stated above, meet with your elected district attorney and arrive at a process which will protect the statutory as well as constitutional rights of all of those set forth above.