LEGAL DEFENSE TRUST

MICHAEL P. STONE, GENERAL COUNSEL

6215 River Crest Drive, Suite A, Riverside, CA 92507
Phone (951) 653-0130 Fax (951) 656-0854

TRAINING BULLETIN

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POBRA TOLLING APPLIES TO CRIMINAL INVESTIGATIONS CONDUCTED BY EMPLOYER

Statute of Limitations Tolling Provision Applies to Criminal Investigations Whether Conducted by Employer or Outside Agency

***California Department of Corrections and Rehabilitation (CDCR) v. State Personnel Board (SPB), C.A. 4th, No. C073865*, May 24, 2016**

Historically, there are three methods in which administrative and criminal investigations are carried out in California by law enforcement employers. This discussion assumes a situation where the same conduct by a peace officer constitutes both administrative misconduct and criminal law violations. In all three variants, the responsibility for the administrative investigations rests with the employer. The first variant, known as the "single track investigation" features the same investigators conducting both administrative and criminal aspects of the case. The second variant is known as the "dual track investigation," and features isolated, independent investigations for the administrative aspects, and a separate criminal investigation carried out by different teams of investigators. It is also known as the "bifurcated" investigative form. A third variant features an administrative investigation conducted by the employer, and a separate "outside investigation" carried out by another law enforcement agency. The general rules and application prohibit sharing of administrative work product with criminal investigators, because of the "taint" created by compelled interview statements taken in contravention of the right against self-incrimination.

The issue confronted in this case is whether the statutory tolling provisions in the Bill of Rights Act, excuse the employers' failure to wrap-up investigations and issue notice of proposed disciplinary action, all within one year of the discovery of the offense by a person who is authorized to initiate an investigation.

The holding of the case, we will see, is that regardless of whether the criminal investigation is conducted by the employer or an outside agency, the pendency of the criminal investigation tolls the statue of limitations.

Shiekh Iqbal was employed as a Parole Agent with the California Department of Corrections and Rehabilitation (CDCR) - assigned to Alameda County. In the course of that

assignment, he developed a close working relationship with the Union City Police Department (UCPD) and would often contact UCPD with work-related inquiries for criminal history information on subjects through the California Law Enforcement Telecommunications System (CLETS).

On October 29, 2007, Iqbal contacted a UCPD dispatcher and asked her to check criminal history information regarding a third party. The third party was not a parolee - he was a personal acquaintance of Iqbal. The dispatcher accessed CLETS and relayed the results to Iqbal.

In early 2008, CDCR's Office of Internal Affairs (OIA) became aware of allegations that Iqbal had accessed CLETS for personal purposes unrelated to his job. OIA requested information from UCPD, which UCPD provided on April 10, 2008. On October 6, 2008, OIA assigned Senior Special Agent Mark Hoff to conduct a criminal investigation of the matter.

On December 11, 2008, Hoff attempted to conduct an interview with Iqbal. He was told he was being interviewed for possible criminal conduct, and he was read his Miranda rights. Iqbal choose to remain silent. On December 15, 2008, Hoff completed the criminal investigation and submitted a report to the Alameda County District Attorney's Office (DA) for consideration of criminal charges. On December 18, 2008, Hoff met with a Deputy DA. The Deputy DA said there were chargeable misdemeanor offenses (Penal Code §§ 11143, 13304 [unauthorized receipt of state or local criminal history information from state or local records]) but declined to prosecute because the one-year criminal statute of limitations had elapsed. Thus, Hoff "closed" the criminal investigation and "opened" an administrative investigation to determine whether discipline was warranted.

On January 29, 2009, Iqbal appeared for the interview and was advised this was an administrative inquiry for which he did not have the right to refuse to answer questions, and if he did refuse, his refusal would be grounds for adverse personnel action. He was further advised that his answers to questions could not be used against him in any criminal proceedings. In the recorded interview, Iqbal admitted he had signed an employee form setting forth the policy for accessing criminal justice information. He also admitted he violated the policy by having UCPD dispatch run an inquiry on the third party.

CDCR determined discipline was warranted and served Iqbal with Notice of Adverse Action to reduce his salary. The Notice was signed on April 16, 2009, and stated the penalty would go into effect on April 30, 2009.

Iqbal appealed to SPB and had a hearing before an administrative law judge. Iqbal argued that his discipline was barred under the POBRA, Government Code section 3304 (d)(1), because the investigation of the allegation was not completed within one year of CDRC's discovery of his possible misconduct. The CDRC argued that under section 3304 (2)(A), the time period was tolled during the time the criminal investigation was pending. The SPB found as factual matters that (1) the one-year limitations period began to run no later than April 10, 2008, when OIA requested information about the incident from the UCPD, and (2) CDCR served the Notice of Adverse Action "on or after April 16, 2009, at least one year and six days" after the statute of limitations began to run.

The SPB adopted the ALJ's proposed decision in favor of Iqbal and adopted the reasoning of the ALJ that the tolling provision for criminal investigations applies only when the investigation is one being conducted by an independent law enforcement agency. To interpret the tolling provision otherwise, the SPB suggested, would allow an agency to circumvent the one-year period by simply designating all investigations as criminal investigations, and would defeat the purpose of the

statute. The SPB concluded the one-year period was tolled for three days (December 15 to 18, 2008) while the DA office considered whether it would file criminal charges. Accordingly, the SPD concluded CDCR missed the deadline by three days, and dismissed the Notice of Adverse Action.

The Court of Appeal, noting that "POBRA itself deals only with law enforcement employers, which are presumably capable of conducting criminal investigations, held that the plain language of section 3304 imposed no restriction on which agency conducts the criminal investigation." To add a requirement to the statute that allows tolling only when the investigation is being conducted by an outside agency, assumes that law enforcement employers would routinely violate POBRA, and that trial courts could not distinguish between the types of investigations law enforcement employers conduct.

The Court noted POBRA allows officers to bring actions so trial courts can make such determinations, and trial courts do in fact decide whether employer investigations fall within POBRA as disciplinary interrogations, or are exempt as routine inquires. Trial courts also decide whether investigations are partly criminal, and within POBRA, or solely criminal and exempt.

Iqbal argued that the CDRC's use of the same investigator to conduct, first the criminal investigation, and then the administrative investigation, the latter of which used the information acquired during the former, proves the SPB was right about employers using criminal investigations as a subterfuge to avoid the statute of limitations for disciplinary action. The Court rejected that argument, stating this was actually a factual allegation of a sham investigation unsupported by evidence, not a "legal" argument. The Court of Appeal noted that trial courts are able to decide if there is evidence to support a conclusion whether an investigation was a sham.

The Court affirmed the trial court's judgment granting the writ petition and ordering a writ of mandate directing SPB to vacate its decision that the limitations period had expired, reinstate the Notice of Adverse Action, and conduct further proceedings on the merits of the administrative appeal.

Editorial Commentary:

With just a couple of keystrokes a peace officer can go from being curious to being a criminal. The California DOJ statistics about such misconduct by officers indicates such conduct is soaring - doubling from 2010 to 2014. Other studies across the U.S. confirm those results. Almost every day, somewhere in the U.S., there is a news article about a law enforcement employee abusing a local or national database. Following a scandal in the Denver Police Department, a study recommended that such misuse of computer databases should result in increased punishment for officers.

CLETS is not the Department's version of Facebook. Do not be tempted by such easy accessibility - even for a "good" reason.

Stay safe!

Robert Rabe is an associate attorney in the firm. He has been a member of the California Bar for almost 40 years, specializing in criminal law, appellate practice and police administrative matters.

Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced exclusively in police law and litigation for 37 years, following 13 years as a police officer, supervisor and police attorney. He is an "A-V Preeminent" rated trial lawyer, by the National Martindale-Hubbell Law Directory, which is the highest lawyer rating attainable in the Directory, reflecting the confidential opinions of lawyers and judges collected by the Law Directory.