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DO "POBRA" PROTECTIONS APPLY TO PROTECT PEACE OFFICERS IN SOLELY CRIMINAL INVESTIGATIONS CONDUCTED BY THEIR EMPLOYERS?

Van Winkle Court Distinguishes Dicta In CCPOA v. State of California, Holding That POBRA Is Inapplicable To "Solely Criminal" Investigations

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What Was At Stake In this Case?

A frequent debate in police discipline matters concerns whether the Public Safety Officers Procedural Bill of Rights Act (POBRA) protections apply in arguably "criminal investigations" carried out by the employing department. Keep in mind that the Section (*Government Code* § 3303) does not apply to "routine, unplanned supervisory contacts," nor to "investigations concerned solely and directly with criminal activities." *See*: *Government Code* § 3303(1).

But four (4) protocol or methodology variants have emerged over the years:

1. The investigation is solely administrative in that there are no criminal aspects;

2. The employer's investigation is solely administrative; but an outside agency is conducting an independent criminal investigation;

3. The employer's investigation is *unified* or "*single track*" and concerns *both* administrative and criminal aspects in one investigation;

4. The employer's investigation is *bifurcated* into independent administrative and criminal investigations (this is the *Van Winkle* situation).

The cases hold that in the first variant, POBRA

will obviously apply because the investigation falls within § 3303 and there is no exception to its applicability. In the second variant, POBRA would apply to the employer's investigation, but not to the outside agency criminal investigation (this is the rule of *People v. Velez* (1983) 144 Cal. App. 3d 558, 564, among others - - city police officer had accidental (horseplay) discharge that killed a young volunteer worker; POBRA inapplicable to Sheriff's homicide team investigation wherein the officer made "incriminating" statements; manslaughter conviction affirmed).

The third variant is a rarity these days, but neither the Fifth Amendment nor POBRA prohibit a "unified" or "single-track" investigation. In the early years (around 1970 until 1982), we would encounter a single investigation, with the same investigators conducting a joint criminal and administrative investigation; when the officer invoked *Miranda*, and/or § 3303(h) rights, the interrogation became solely administrative. Since that time, the so-called "bifurcated" protocol is used overwhelmingly in order to minimize the potential for "taint" of the criminal investigation by compelled statements in the administrative interrogation. So, insofar as the officer's interrogation is concerned in the third variant, POBRA applies, once the officer invokes his right to silence.

The fourth variant (*Van Winkle)* seems to turn on the fact that the criminal investigation was independent, separate and apart from the administrative, and thus "solely a criminal investigation."

It is common today to see departments conduct two, *arguably* separate investigations; one criminal and one administrative. Now let's suppose the criminal investigators employ a "sting call" to gain evidence from the officer for criminal purposes. Does § 3303 apply, such that the "sting call" is in reality an effort to end-run § 3303's requirements of notice to the targeted officer and is therefore prohibited? Does it make any difference if the fruits of the sting call are used in the administrative? Before *Van Winkle*, it was believed that dicta in *California Correctional Peace Officers Association v. State of California* (2002) 82 Cal. App. 4th 294 warranted the conclusion that if the *employer* was conducting the criminal and the administrative investigations, POBRA would apply to both aspects, because the *employer* would of course use what it had developed in the criminal investigation to support administrative discipline. But the *Van Winkle* opinion has disabused us of that notion.

What Happened In Van Winkle?

The Second District Court of Appeal held last month that the Public Officers Safety Procedural Bill of Rights Act ("POBRA") does **not** apply to criminal investigations of law enforcement members involving sting operations by their employer. In ***Van Winkle v. County of Ventura* 158 Cal.App.4th 492 (2007)** a former county deputy sheriff brought an action under POBRA, against the county, county sheriff's department, and county sheriff, seeking injunctive relief to prevent defendants from using, at plaintiff's civil service hearing challenging the termination of his employment, certain statements made by plaintiff during a criminal investigation following his arrest for embezzling property from the department. The superior court granted the injunctive relief sought with respect to the statements made by the plaintiff during an in-custody criminal interrogation. The Court of Appeal reversed.

The internal affairs unit (IAU) of the Ventura

County Sheriff's Department (Department) started investigating Van Winkle after a citizen complaint of an extramarital affair while on-duty. An IAU supervisor obtained information that Van Winkle was engaged in a criminal offense, embezzlement. However, IAU did not have authority to investigate a criminal matter and the matter was referred to the Department's Major Crimes Bureau (MCB). IAU stopped its investigation pending outcome of the criminal investigation.

The criminal unit conducted a sting operation and a pretext call, which led to Van Winkle's arrest and interview with a criminal detective. During the pretext call, Van Winkle made statements indicating he had engaged in embezzlement. In the interview, Van Winkle was advised it was a criminal matter, not administrative, and after waiving his *Miranda* rights, admitted he engaged in an act of embezzlement (taking home a gun slated for destruction). The District Attorney declined to prosecute Van Winkle.

Van Winkle was terminated and he filed an administrative appeal of that decision. He also filed a petition for injunctive relief alleging that the County violated POBRA by (1) obtaining statements from him without giving him advisements required under the Act; and (2) attempting to use statements from the criminal investigation to support termination. The County claimed that Van Winkle's statements were made during a criminal investigation and therefore, were not covered by POBRA.

The trial court held that the sting operation and pretext call were **not** interrogations under POBRA, but the interview following was an interrogation in a criminal investigation. The language of *Government Code* §3301(I) does not cover criminal investigations, but Van Winkle was granted relief based on dicta in *California Correctional Peace Officers Assn., supra,* which held that criminal investigations of law enforcement officers by employers are within POBRA. *Id.* at 309. Thus, the County was enjoined from using Van Winkle's responses during the interrogation. The matter was appealed.

The Court of Appeal reversed the judgment of the trial court and vacated the injunction. **The Court of Appeal held that POBRA does not apply to officers subject to criminal investigations conducted by their employers.**

How did the Court come to this conclusion?

The Court held that POBRA does not apply, as POBRA is a labor relations statute providing procedural protections to police officers during administrative and disciplinary actions initiated by the employer. There are two exceptions to POBRA, in that it does not apply to: (1) any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer; and (2) an investigation concerned solely and directly with alleged criminal activities. It is this latter exception that the Court finds applicable to Van Winkle.

Van Winkle had claimed that criminal investigations are used a sham for disciplinary investigations, thus bypassing POBRA. The court held that this is a factual issue, which was not proven by Van Winkle.

The Court held that the sting operation was an

exception to POBRA because it was an independent investigation of Van Winkle, i.e., the administrative investigation was separate from the criminal. **The Court found that the Department had taken "significant steps to separate the criminal investigation from the internal administrative inquiry" (based on the suspension of the administrative investigation.** Additionally, Van Winkle was aware of the nature of the investigations, due to the advisements given to him during the investigation and waiver of *Miranda* rights.

The court does not believe that the legislature intended for POBRA to apply to criminal investigations, otherwise it would have applied POBRA to all employer investigations without exception. Furthermore, the legislature foresaw that there could be abuses of employers conducting criminal and administrative investigations of employees, thus, the language of POBRA specifies that criminal investigation exemption requires that the investigation has to be "concerned solely and directly with alleged criminal activities

What is the Rule for you?

Protections of POBRA do **not** apply to officers subject to "solely" criminal investigations, even if these investigations are carried out by the employer, and even though the "fruit" of the criminal investigation is later introduced in the administrative appeal of the discipline against the officer. A key issue in this case appears to be the "separation" of the criminal investigation from the administrative investigation, which the Court found compelling. An exception suggested by the Court might be if plaintiff can prove that the criminal investigation is a sham for the administrative inquiry.

Stay Safe!
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