LEGAL DEFENSE TRUST
TRAINING BULLETIN

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A RETROSPECTIVE LOOK AT 2007 POBRA DECISIONS

Each year around this time we take a retrospective look at the year's appellate precedents arising from law enforcement agencies around the state that affect the California Public Safety Officers' Procedural Bill of Rights Act ["POBRA"]. This year we have identified three published POBRA precedents from other law enforcement agencies. In all three of these published decisions, the employer prevailed and POBRA protections were correspondingly weakened. But all the issues decided in these cases remain open for further clarification under different facts that are likely to arise in future cases.

***Steinert v. City of Covina* (2006) 146 Cal. App. 4th 458**

Government Code, section 3303 establishes procedural rules for conducting an interrogation of an officer "that could lead to punitive action." The rights include generally, notification of the identity of the interrogators; a limit of two interrogators asking questions at one time (section 3303(b)); notification of the nature of the investigation (section 3303©)), protections against duress, intimidation and coercion (section 3303(d), (e) and (f)); a right to record the interrogation and have access to any tape recording, stenographer's notes, and non-confidential reports and complaints after the interrogation (section 3303(g)); a right to be informed of constitutional rights if it is deemed that a criminal charge may be made (section 3303(h)); and a right to an employee representative (section 3303(i)).

Section 3303(i) makes these protections expressly inapplicable to contacts that occur "in the normal course of duty," and to "counseling, instruction, or informal verbal admonishment" and to "other routine or unplanned contact" with a supervisor or other officer. It can be somewhat difficult to draw a clear line between an interrogation "that could lead to punitive action," and a "routine or unplanned contact" in the "normal course of duty."

When a misconduct charge results from a contact that could fall on either side of the line, an employer that has not granted the employee the section 3303 procedural rights will not prevail in imposing a disciplinary penalty unless the employer can establish that the contact fell within the "normal course of duty" as a "routine or unplanned contact." If the employee in that situation can establish that the contact constituted an interrogation "that could lead to punitive action," and the employee was not granted the full procedural rights under section 3303, the statements made in such a contact may be held inadmissible (section 3303(f)), and, under the broad POBRA remedial provision of section 3309.5(d)(1), a

disciplinary penalty would generally not be upheld.

The case of *Steinert v. City of Covina* (2006) 146 Cal. App. 4th 458 (publication ordered January 3, 2007), exemplifies the distinction between formal interrogation and routine unplanned contact in the normal course of duty. Finding the contact at issue to be a routine unplanned contact in the normal course of duty, the Second District Court of Appeal upheld a termination for dishonesty. The case stands as an object lesson to any officer who remains naive enough to fall into the trap that cost this young officer her job.

The case arose when Covina Police Officer Stephanie Steinert received a vandalism report, and conducted a criminal records search on a person mentioned by the victim. *Id.* at 460. In accessing the report, Officer Steinert erroneously coded the computer records search as training, rather than identifying the vandalism case. The California Department of Justice informed the department of the fact that the search had been coded as training, which would have been technically improper, though the search itself would be entirely proper if connected to a criminal investigation.

A support services manager at the department told Steinert's commanding officer that the records search had been conducted at the same time as the vandalism report, and that a location on the vandalism report was identified with the named suspect whose records had been searched. From this information, the commanding officer concluded that the search was probably proper, but that Officer Steinert had mis-coded the request. *Id.* at 460-461.

The commanding officer asked Steinert about the search, and Steinert confirmed that the name of the suspect whose records had been searched had been mentioned by the vandalism victim in making the crime report. The commanding officer advised Steinert that she should have included the suspect's name in the report as a "mentioned person" and should have used the case number of the vandalism investigation in coding the records search, rather than coding it as training. *Id.* at 461.

The commanding officer testified that he did not intend to use the conversation for anything more than a "training moment" *(id.* at 462), but, not suspecting anything and just wanting to be thorough (*id.* at 464-465), asked Officer Steinert if she had shared any confidential information from the records search with the vandalism victim. Officer Steinert denied that she had shared any confidential information with the victim. *Id.* at 462.

As a supervisor, the commanding officer was required to randomly audit two crime reports per week. Since he had already acquired some background on this report, he decided to use it as one of his two weekly audits, and proceeded to contact the crime victim, who stated that at the time she had made her vandalism report, Officer Steinert had indeed disclosed confidential information about the suspect whose records had been searched.

The commanding officer thereupon initiated an internal affairs investigation, and Officer Steinert was terminated for lying. *Id.* She filed a petition for administrative mandamus, arguing that her statements to the commanding officer should be suppressed because they were elicited in violation of the interrogation protections of section 3303.
The writ petition was denied and the denial was affirmed on appeal. The appellate opinion contrasted the facts with the landmark case on

routine contacts, *City of Los Angeles v. Superior Court* (1997) 57 Cal. App. 4th 1506 (*Labio*). In the *Labio* case, the LAPD received a report that a male Filipino officer had passed by the scene of a fatal accident, and without rendering aid, proceeded to a donut shop. The donut shop confirmed that a male Filipino officer had been there around the time of the accident. Officer Merinio Labio, the only male Filipino officer on duty in the area that night, was called into his commander's office and asked where he was at that time.

The court held the question violated section 3303 interrogation rights because when it was asked, the commander knew the alleged conduct amounted to a serious offense, and already had enough information to arrest Labio for a felony. In Steinert's case, the court accepted the department's testimony that it had no intention to impose discipline. The department's information at the time of the questioning did not indicate Steinert had committed a crime, or punishable misconduct, nor did it have any information that she had disclosed confidential information to the victim.

The opinion goes into painstaking detail over the commanding officer's knowledge at the time of the questioning of Steinert. The commanding officer considered the conversation solely as an opportunity to impress the correct search coding procedure on Steinert. He acknowledged that mis-coding a records search could result in a written reprimand, but testified that he was not required to impose punishment for every violation of this kind, and did not intend to discipline Steinert. *Id.* at 463. The support services manager testified that the mis-coding "did not jeopardize Covina's access to the state database...." *Id.* at 463, fn. 2. The commanding officer did not intend to make a written record of his instruction regarding the mis-coding of the search. *Id.* at 464.

The appellate court concluded "this was a remedial interaction and not the attempt to tighten the metaphorical noose around an investigated officer's neck that Steinert posits." *Id.* at 466. The court held that the section 3303(i) exception for routine contacts "is designed to avoid claims that almost any communication is elevated to an investigation." *Id.*, citation omitted.

The *Steinert* case generally shows that the line between formal interrogation and routine contact depends on the employer's knowledge and belief at the time. It is somewhat curious that the opinion details the department's knowledge and belief about the mis-coding of the search. A different case could perhaps have been made from the perspective of the question about disclosing confidential information.

If the Department actually suspected Steinert had disclosed the confidential information, or had any information to that effect, the encounter could have crossed the line into formal interrogation. In that connection, it would have been interesting to know what the possible penalty would have been for Steinert's disclosure of confidential information from the records search. Assuming such disclosure would be far more serious than the mere mis-coding of the search, the question to Steinert meant she could be penalized if she admitted the disclosure, and, as it turned out, could be terminated if she was caught falsely denying it.

Of course, if Steinert had argued successfully that the question about the disclosure was a formal interrogation that could lead to punitive action, that would mean that the commanding officer could not properly ask her the question out of the blue as it were. He would need to tell her, I want to ask you another question. And, because your answer to this question could lead to punitive action, I cannot ask the question now, but must give you time to line up an employee representative, then schedule a time during your on-duty hours to ask it, and you are entitled to bring a tape recorder.

Obviously, Steinert would have been better off telling the truth about the confidential disclosure. Section 3303 could have been construed to protect her from the consequences of her deception, but such a holding could easily hamstring supervisors from managing routine department affairs. While section 3303 interrogation rights furnish an important protection against abuse of supervisorial power, this foregoing hypothetical, showing the strictly proper way for the supervisor to ask his question, dramatizes how an overly strict interpretation of these interrogation rights could disrupt orderly and efficient functioning of a law enforcement agency.

***Benach v. County of Los Angeles* (2007) 149 Cal. App. 4th 836**

The case of *Benach v. City of Los Angeles* (2007) 149 Cal. App. 4th 836 revisits the issue as to when a transfer of assignment will constitute punitive action within the meaning of POBRA. The *Benach* opinion also resolves civil rights claims arising from a prior settlement agreement between the parties, but this survey will be confined to the POBRA ruling in the case.

The term "punitive action" appears in sections 3303 and 3304 of POBRA in several different contexts. The term is defined in section 3303 to include "any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment." As discussed above, the question whether a contact with a supervisor constitutes a formal interrogation giving rise to the rights set forth in section 3303 depends on whether it can lead to "punitive action." Under section 3304(a), no punitive action can be taken or threatened in retaliation for th exercise of a POBRA right. Under section 3304(b), no punitive action can be taken without providing an opportunity for an administrative appeal.

As seen in the new *Benach* decision, whether the one-year statute of limitations established by section 3304(d) applies to a transfer of assignment similarly depends on whether the transfer is deemed to constitute "punitive action."

Deputy Francisco Benach was a helicopter pilot with the Los Angeles County Sheriff's Department, operating out of Long Beach Airport. He was involuntarily transferred to a detective assignment at a different station. Benach's claim under POBRA was that the transfer was a punitive action that was barred by the section 3304(d) statute of limitations. The Second District Court of Appeal affirmed the ruling of the superior court, that the transfer was not for purposes of punishment, and therefore was not "punitive action" that had to be taken, if at all, within one year of the inception of the investigation.

On October 25, 2000, sixteen Department employees met with Sheriff Lee Baca to present a memorandum signed by more than thirty employees, complaining that Benach created an unsafe and hostile working environment because of reckless flying, physical violence, and threatening behavior toward other deputies and their families. Sheriff Baca ordered an internal investigation and temporarily transferred Benach out of his airport assignment, but without loss of pay or other benefits of the assignment, other than the obvious fact that he could no longer be assigned to flight duty. *Id.* at 841-842.

On October 25, 2001, Benach was notified that his transfer had been made permanent. The Department maintained that the transfer was not punitive, but based on "overwhelming evidence" that his presence at Long Beach "coincided with a less-than-harmonious working environment." *Id.* at 842. The evidence also showed that the working environment at Long Beach Airport "became noticeably more harmonious, civil and respectful" after Benach's temporary transfer. *Id.* at 843. The Department insisted the decision was "not based on a determination of fault or a finding Benach had violated any policy." *Id.* at 842.

Benach filed a civil action including a claim under POBRA for an injunction to reverse the transfer on the ground that it was based on an investigation that was not completed within the one-year statute of limitations. *Id.* at 842-843. The superior court granted summary adjudication of the POBRA claim against Benach, finding the transfer was not punitive. *Id.* at 843.

Affirming the decision, the Court of Appeal differentiated between "a transfer intended to punish for a deficiency in performance versus one that is intended to compensate for deficient performance." *Id.* at 844-845. While the appellate court recognized that Benach's detective assignment was "less heroic than his job as a pilot," the court noted that Benach's presence at the airport "was not conducive to a cooperative, productive working relationship with approximately 30 other members of the bureau," and deferred to the "supervisorial discretion to make a change to address that unique circumstance to best serve the Department's needs." *Id.* at 844-845.

The term "punitive action" has previously been given an extremely broad definition in POBRA cases involving the right to an administrative appeal. For example, in *Hopson v. City of Los Angeles* (1983) 139 Cal. App. 3d 347, the placement of a critical police commission report in an officer's personnel file was deemed sufficient to constitute punitive action entitling the officer to an administrative appeal, because the action could have an adverse impact on the officer's future career opportunities. *Id.* at 353.

Although Benach contended that his new assignment was less "heroic" than his pilot assignment, it does not appear that Benach developed a record showing that the transfer would adversely affect his future career opportunities. Raising that issue could possibly have altered the outcome of the case, especially since flying a helicopter is a highly specialized skill that cannot be demonstrated to the officer's career advantage unless he is given that assignment. As matters stand, however, the *Benach* decision may give employers a foot in

the door to start eroding the administrative appeal and statute of limitations rights of officers subjected to punitive transfers and other borderline punitive actions.

***Moore v. City of Los Angeles* (2007) 156 Cal. App. 4th 373**

In *Moore v. City of Los Angeles* (2007) 156 Cal. App. 4th 373, the Court of Appeal held that a section 3304(d) statute of limitations defense is waived unless it is raised at the time of the administrative hearing. LAPD Officer Tyrone Moore was accused of using unnecessary force on a juvenile truancy suspect, unjustifiably moving the juvenile out of the sight of other officers, and making misleading statements to investigators about the incident. He was terminated after a hearing before the Department's Board of Rights. But the Board of Rights did not complete its hearings and notify Moore of its decision until 15 months after the misconduct allegations were reported. *Id.* at 378.

In his superior court mandamus action, Moore raised the section 3304(d) statute of limitations. In response, the Department contended that the order to appear before a Board of Rights, given within the one-year time frame, adequately satisfied the section 3304(d) statute of limitations, and that Moore had waived the issue by failing to raise it with the Board of Rights. *Id.* at 378-379.

The appellate court affirmed the termination, on the ground that failure to raise the statute of limitations with the Board of Rights, or by a separate action under *Government Code*, section 3309.5, waived the issue. Moore argued for an exception based on futility, since the Board would inevitably have agreed with the Department's position that the order to submit to a Board of Rights hearing provided adequate notice within the statutory period. But the appellate court rejected the futility argument, largely because the statute of limitations issue entailed the development of factual evidence, and the failure to raise the issue with the Board deprived the courts of an evidentiary record sufficient for review. *Id.* at 383.

The lesson of this case is clear: an officer must raise the statute of limitations at the administrative level, or by a separate action under section 3309.5, or it is waived. Courts hearing writ petitions and appeals only review rulings based on the written record. They do not receive testimony and conduct full trials, so issues requiring evidentiary development must be presented at the earliest opportunity.

Stay Safe!
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