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THE CONSEQUENCES OF WAIVER OF PEACE OFFICERS' PROCEDURAL RIGHTS

Appellate Court Reaffirms Rule That POBRA Rights Can Be Forfeited By Failure To Timely Object

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Since January 1, 1977 when the Public Safety Officers' Procedural Bill of Rights Act ("POBRA" or "Act") became the law of this State, we have seen the rights and remedies established in the Act enhanced and modified in a positive way by legislative amendment, and clarified by appellate cases. Indeed, we have seen the statutory scheme in POBRA evolve from a relatively toothless lion during the first three years (1977-1979), into a potent statutory enforcement mechanism as a result of a 1980 amendment which created *Government Code* § 3309.5 - the "teeth" in the Act. What the Act did not have prior to 1980 was any means to judicially-enforce the rights and protections, and thus to compel respect for the rights inherent in the Act.

Since then, § 3309.5 has been recognized as the "exclusive remedy" (not to be confused with "exclusive jurisdiction") for violations of the Act. But other important enhancements of the Act's protections have also come along since 1980. Probably the most significant of these is the creation in § 3304(d) of a statute of limitations on peace officer discipline of one (1) year from the date the misconduct is discovered by a supervisor, to the date that the officer is informed of the proposed disciplinary action. § 3304(d) contains exceptions and tolling provisions that may apply to individual cases, but the basic rule is that agencies have up to one year to investigate misconduct and propose discipline by way of a "*Skelly* process" or "*Sulier* notice."[1]

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[1] These terms refer to the predisciplinary processes required by the due process clause (*Skelly v. State Personnel Board* (1975) 15 Cal. 3d 533, and by the Act itself (*Sulier v. State Personnel Board* (2004), 125 Cal. App. 4th 21.

Mounger v. Gates (1987) 193 Cal. App. 3d 1248 made it clear that an aggrieved officer can immediately invoke the right to seek judicial intervention under § 3309.5 as soon as his or her rights are violated, and avoid waiting until the administrative process has run its course (loosely called "exhaustion of administrative remedies"). In other words, the officer can seek a temporary restraining order, injunction, or other extraordinary relief without delay because § 3309.5 vests "initial jurisdiction" in the superior court over such claims brought against the employing public safety department.

But an interesting question is presented when the aggrieved officer chooses *not* to pursue an action under § 3309.5 initially, and instead elects to let the administrative process proceed. Now, does that officer then waive or forfeit his or her rights under the Act, and specifically the remedies under § 3309.5? The answer to this is "no, the officer does not waive the rights under the Act," but also "yes, the officer waives the right to seek the speedy judicial remedy available under § 3309.5." Put another way, once the officer elects to exhaust his or her administrative remedies by utilizing the administrative appeal procedure, courts are loathe to interfere in that process by entertaining an untimely lawsuit under § 3309.5. Countless times I have heard the Judges in the Writs and Receivers Departments in the Los Angeles Superior Court tell disappointed lawyers, "No, the petition will be denied. You go finish up that administrative process and come on back if you don't like the result."

Now, let's suppose our hypothetical officer and his counsel have a good case warranting judicial relief – perhaps a *slam dunk* statute of limitations defense, but as often happens, the record has not been filled out sufficiently before the administrative appeal because these "statute issues" are very fact-specific or highly fact-oriented.

So, the question then becomes, " can we raise the statute of limitations defense in superior court after the administrative appeal is completed? The answer is again yes, because the failure to utilize § 3309.5's equitable remedies *before* the administrative appeal, does not waive rights otherwise inherent in the Act.

Judicial review of disciplinary administrative appeals is governed exclusively by *Code of Civil Procedure* § 1094.5 or "administrative mandamus." A party seeking judicial review of an administrative decision after a hearing in which evidence was taken must file a timely petition for the writ. The court generally considers only what appears in the administrative record (transcripts and exhibits) which are lodged with the Court prior to the hearing. It is the rule that the court will not consider matters "outside the record," or that are raised for the first time in superior court. There are exceptions, but these are the general rules.

The next part of the analysis might be whether the aggrieved officer, after eschewing the opportunity to seek immediate judicial relief under § 3309.5, may raise violations of the Act in superior court within a § 1094.5 petition for writ of mandate? The answer is yes, *but not for the first time.* That is, the rights under POBRA such as the statute of limitations defense under § 3304(d), are *personal* defenses that must be asserted at the *appeal hearing*, or they are waived. Consequently, a superior court judge will decline to entertain claims of violations of the Act, including statute of limitations defenses, *unless those matters were raised and litigated in the appeal, and are thus a part of the record on review in the superior court.*

Put another way, the failure to raise any applicable POBRA violations in the appeal, precludes consideration of those violations later in superior court. Consequently, the

rights have been *forfeited* by the failure to raise them.

This rule of law can create particularly harsh consequences when a lawyer representing a peace officer in an appeal fails to raise a viable statute of limitations defense, perhaps because he/she doesn't see or notice it, or because the lawyer believes the administrative body has no jurisdiction to entertain the defense, or because the lawyer believes he/she has to await superior court review to seek a remedy for violations that come under the superior court's grant of "initial jurisdiction." Indeed, I have seen counsel for the agencies argue that the administrative hearing officer or body (arbitrator, civil service commission, personnel board, administrative law judge) has "no jurisdiction" to hear and rule on violations of the Act "because only the superior court has that power." This argument is an effort to sow seeds of confusion at the administrative appeal level, by trying to persuade the trier of fact in the appeal that because the officer did not seek immediate judicial enforcement under § 3309.5, the issue must await judicial review *after* the appeal is completed, under § 1094.5. The argument confuses "initial jurisdiction" with "exclusive jurisdiction" - - the latter *does not* appear in § 3309.5, while the former does appear. So, this is a huge trap for the unwary lawyer representing the officer. But whatever the *reason* why the lawyer failed to raise the defense at the appeal level, it is quite irrelevant. The fact is, it is waived, period.

If hypothetically, the officer has the aforementioned *slam-dunk* statute of limitations defense, but a lousy defense or "no defense" to the charges on the merits, the failure to raise the "statute issues" may result in a termination being upheld in court, when a timely tender of the statute of limitations defense would have resulted in a complete bar against *any* discipline at all.

These issues were recently explored in *Moore v. City of Los Angeles* (C.A. 2d No. B195412), certified for publication October 24, 2007. Much like our hypothetical discussion above, the officer's statute of limitations defense was neither the subject of a pre-appeal action under § 3309.5 in court, nor was the defense raised at the administrative appeal. The officer was terminated on the merits. The trial court declined to consider for the first time on a § 1094.5 petition, a statute defense that wasn't raised below, and found that the evidence otherwise supported termination.[2]

A final observation is in order. A meritorious statute of limitations defense *is a bar to administrative discipline.* Logic dictates that it must be raised at the earliest possible time in the appeal, because if the agency is barred from disciplining the officer, the charges should be dismissed forthwith, and the officer reinstated without prejudice, instead of enduring a difficult and drawn-out appeal hearing.

Typically, the appeal tribunals politely listen to the defense, and permit the lawyer to make a record, but usually do not grant motions to dismiss outright, especially where there is a complicated "tolling" argument launched by the opposition. But the point is, the record has to be made carefully, even in the face of a hostile hearing officer, or in the chill of a frosty reception to the defense on the part of the opposition.

I have found it helpful in these cases to prepare a formal " motion in limine re statute of limitations bar," with a memorandum of points and authorities (brief of argument), exhibits and perhaps an admissible

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[2] Truth be told, the particular statute of limitations defense in this case is peculiar to the LAPD disciplinary system, and at the time of the appeal in 2005, had not been clearly defined as a viable defense, but which did find support in 2006 in *Sanchez v. City of Los Angeles* (2006) 140 C.A. 4th 1069.

declaration or two. I try to insist that the appellate body take up the motion, permit testimony and argument, and make a ruling *before* the evidence is started. In this way, your statute of limitations defense is argued and litigated apart form the underlying case, promoting a clearer record for judicial review if the motion is denied.

STAY SAFE!

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