LEGAL DEFENSE TRUST TRAINING BULLETIN

MICHAEL P. STONE, GENERAL COUNSEL

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

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A RETROSPECTIVE GLANCE AT 2004 CASES SIGNIFICANT TO MEMBERS' RIGHTS UNDER *POBRA*

Each January, we take a look at the past year's developments in decisional law under the *Public Safety Officers Procedural Bill of Rights Act, Government Code* § 3300, *et. seq.* (herein the "Act" or "POBRA") and other equally important developments under other statutes or legal doctrines. 2004 was not a particularly watershed year in terms of appellate decisions favoring law enforcement members, at least compared with some prior years. Many of the 2004 decisions were not certified for publication, or were ordered "decertified" by the Supreme Court. Non-published appellate cases cannot be considered precedents – they cannot even be cited to courts for persuasive reasoning, much less binding precedent. Still it is good to review some of these that represent correct judicial thinking. So here we go....

1. *Hinrichs v. County of Orange* (4th App., Div. 3, Dec. 20, 2004, docket no. G028834 – not certified for publication.) *This one ought to be published.* In fact, on behalf of RSA-LDT, we have joined in a campaign along with the victorious lawyer, James Michael Dorn, in a petition to the Court of Appeal to order this decision to be published under Rule 978, Cal. Rules of Court.

Hinrich appeared for duty as a custodial officer with an alleged "odor of alcoholic beverage on her person", noticed by a co-worker who opened the door for her. Supervision became aware, and re-assigned her to duties with no public contact, and opened a formal investigation. She was written given notice that she was being investigated for violating the Department's rule on "Use of Alcohol", which prohibits being impaired while on duty. Having an "odor" is not prohibited under this rule, but an "odor" is presumptive of impairment, under the rule. Hence, "odor" creates a rebuttable presumption of impairment. Hinrichs received a written reprimand, which specifically admitted that Hinrichs was *not* impaired. It was thus, an "odor only" case.

The important parts of the decision concern (1) changing the theory of the Department's case after investigation to charge misconduct under a totally new rule violation: "bringing discredit" – a standard-of-conduct regulation- - this begs the question of whether Hinrichs was afforded adequate *notice* of the "nature of the investigation" prior to interrogation (§3303[c]) since the "bringing discredit" rule was not cited or mentioned; and (2) disclosures mandated by §3303(g).

Now, in our experience, public safety employers frequently play "dog-in-the-manger" during the initial interrogation when it comes to the statutory requirement that they inform subjects of "the nature of the investigation". A specific, articulated "notice" may, as here, limit the employer's maneuvering room later. A more general or "generic" notice may permit the employer great latitude in deciding what charges to bring after the investigation is concluded. So, while this opinion strikes a blow for employees, it also counsels employers to be "all-inclusive" in explanation of "the nature of the charges" prior to interrogation, while it counsels advocates for the employee to press for a detailed statement of what rule violations are anticipated by the "nature of the investigation".

This is the first appellate decision to hook up a specific notice of "the nature of the investigation" with an overturning of the discipline for the failure to warn of the ultimate rule violation alleged. But it is too highly fact-specific to develop a rule of general application on this point. However, in some ways, in this observer's experience of some 38 years around police agencies all over California, this opinion underemphasizes the realities of police misconduct investigation in the preliminary stages. Very often, investigators are arguably only enabled to "make a stab at the nature of the investigation". The purpose of the statute is to give the officer fair warning of what potential rule violations, policies *and* statutes, he/she is suspected of violating, in order to permit him/her to understand the seriousness and potential consequences of the investigation, as well as what specific acts or omissions are the focus of the investigation. In this way, the subject of the interrogation can relate explanations, observations, perceptions and facts that are ultimately critical to resolution of the issues. If the targeted employee does not fully understand the range of possible rule violations, he/she, and the representative, are disadvantaged in bringing forth relevant information.

Consequently, it is in everyone's best interest to facilitate a thorough explanation of the "nature of the investigation" so that the employer is not limited later on to its expressed "focus" of the investigation; and, the employee is permitted a fair opportunity to offer information helpful to the ultimate resolution. This recognition of the responsibilities of both sides goes a long way to reducing the "gamesmanship factor" that so often pervades these investigations. Both sides need to "lay it all on the table".

This part of the opinion is the most vulnerable, because it breaks new ground on the duty to inform an accused member of the nature of the investigation, and imposes new consequences on the failure of the agency to do so–overturning of the discipline. The employer argued that the change in theory to "bringing discredit" instead of "Use of Alcohol" was harmless. The Court disagreed, noting that the record did not support a finding of a violation of this rule.

The second, more definitive aspect of the opinion concerns the entitlement to disclosure of materials described in §3303(g).[1] In

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[1] §3303(g) states that members who are under investigation and subject to interrogation shall be entitled to "...copies of any reports or complaints made by investigators or other persons, except those

Pasadena POA v. City of Pasadena, (1990) 51 Cal.3d 564, the Supreme Court declared that the rights enumerated in §3303(g) do not include a *right* to "pre-interrogation discovery", but do include the right to disclosure after the interrogation is complete. In other words, the *Pasadena POA* case only referenced the *timing* of disclosures, and placed no limits on the content of §3303(g) disclosures except as stated in that subsection (*see*: fn. 1 – "confidential").

In relation to the disclosures under §3303(g) the employer argued that such mandatory disclosures were not mandated, because "*Skelly* rights" do not apply to reprimands. Again the Court disagreed. The mandatory disclosures are required by §3303(g) independent of *Skelly* protections.

So, what can we learn from this case? (1) We should make written request for all disclosures described in §3303(g) promptly after interrogation is completed; and (2) We should press for a *thorough* explanation of the "nature of the investigation" before interrogation commences, including what alleged acts or omissions are being investigated, and what rule violations are implicated. Expect resistance. This is a change in the way investigations are handled, which is why it is important that this decision gets published.

2. *Alameida v. State Personnel Board* (2004) 120 Cal.App.4th 46. *This one is a* ***doozy***[2]. §3309.5, the enforcement mechanism which provides remedies for sustained violations of POBRA ("Bill of Rights Act") states that "the Superior Court shall have initial jurisdiction" over claims of alleged violations of POBRA. *Mounger v. Gates* (1987) 193 Cal.App.3d 1248 established that the effect of this language is prevent public safety agencies from raising the defense of "failure to exhaust administrative remedies" in actions brought under §3309.5. That is, the aggrieved officer does not have to wait to exhaust whatever administrative procedures or remedies he has: he can go directly to Superior Court under §3309.5 (*Mounger*, at 1254-57). And, *Mounger* held at 1256-1257 that the officer could simultaneously pursue *both* administrative *and* judicial remedies (§3309.5); no binding election is inferred by the commencement of one, or the other first in isolation. (*Ibid.*) The administrative remedy might be a grievance, an arbitration, or a Board of Rights. Importantly, nothing in *Mounger* indicates that the superior court has EXCLUSIVE jurisdiction; nothing in §3309.5 indicates that either.

Yet, agencies have continued since 1980, to assert that "initial" means "exclusive", whenever a member asked an arbitrator, commission, hearing officer or Board of Rights to find a violation of POBRA, and order a remedy. And, by and large, these adjudicatory bodies unfortunately took the bait, and refused

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which are deemed confidential...".

[2] Doozy - - *slang*; associated with the Duesenberg automobile as a standard of excellence; anything outstanding of its kind. *Webster's New World Dictionary*, Third College Ed., Prentice-Hall, 1994.

to entertain motions. This happened in two of our RSA-LDT arbitrations, when the arbitrators declined to rule on POBRA claims we brought, because the Sheriff's counsel argued only the superior court could decide these.

State Correctional Officer Lomeli was terminated from CDC on charges of misconduct related to off-duty sexual offenses in September 1988. After the District Attorney dropped the criminal charges, CDC moved against Lomeli on November 15, 2000, but still outside the one-year statute of limitations under §3304(d), as extended by the pendency of the criminal case. CDC also alleged that Lomeli lied at a July 12, 2000 interview, when he denied the charges.[3] The Administrative Law Judge ("ALJ") took jurisdiction over the POBRA statute claims, and determined that *all* charges were time-barred by 3304(d). The ALJ ruled that the "dishonesty" charge amounted to bare denials of the underlying misconduct, and

> it flowed directly from the investigation of the September 1998 sex offenses, and it would defeat the purpose of the Act to allow the employer to circumvent the one-year limitations period by allowing the agency to prove the underlying charges in order to demonstrate the employee was dishonest in denying the charges. *Alameida*, at page 51-52.

SPB adopted the ALJ's decision. CDC petitioned for a writ of administrative mandamus to set aside the SPB order reinstating Lomeli. The trial court affirmed the SPB by denying the petition. The Court of Appeal affirmed the trial court.

Citing *Mounger* and §3309.5, the Court determined that "initial" and "exclusive" are entirely different types of jurisdiction, for the reasons stated above. Nothing in §3309.5 or its legislative history confers *exclusive* jurisdiction on the court to hear and decide §3309.5 claims. (*Ibid.* at 6. and 9.)

It may at first blush seem reasonable to charge an officer with dishonesty or false statements during an interrogation within the year prior, even thought the underlying misconduct is outside the one-year period and thus charges are time-barred. After all, the false statements (bare denials) are "discovered by the supervisor or investigator" at the time they are made, or even later, when they are actually shown to be false.

But the vice of this approach becomes apparent when, in seeking to demonstrate that the statements (denials) are false, the agency proves the case by showing the time-barred charges are true; therefore, the denials are false. Consequently the officer is forced to litigate time-barred misconduct because of the

[3] Even though the statute had expired on the underlying misconduct charges, CDC sought to sustain Lomeli's removal on this basis of this dishonesty charge, which occurred four (4) months before the November 12, 2000 Notice of Adverse Action; thus within one year.

agency's administrative end-run on the statute . Part of the Court's determination in this regard rests upon the nature of compelled interrogations of peace officers:

> *It is unseemly to force a person to answer an allegation of misconduct and then punish him for denying the allegation.* (Id. at page 62)

Here, the Court arguably makes a distinction between bare denials of accusations on the one hand, and affirmative misrepresentations designed to mislead investigators, on the other. While the purported distinction is admittedly a murky one, it is clear that bare denials cannot be charged as dishonesty to resurrect out-of-statute charges.

3. *Seligsohn v. Day* (2004) 121 Cal.App.4th 518. In this case, the First Appellate District relied heavily on RSA's Supreme Court case in *County of Riverside v. Superior Court (Madrigal)* to establish officers' rights to access "informal charges of discrimination and harassment...based on race and color" that were documented in papers filed with the agency's Office of Affirmative Action. The officers named in the complaint were interrogated, and requested access to copies of the complaint. They were denied access.

Thereafter, the claimant withdrew the complaint and the investigation ceased. The officers insisted they had the right to disclosure of the complaint, to no avail. The agency closed its investigation with no adverse findings based on no evidence of misconduct.

This is a familiar mistake. Many Departments think that if a complaint or other material result in no misconduct findings, the employees have no right of access. Not so.

§§3305, 3306 and 3306.5 grant officers the right to disclosure of adverse comments, and to records that have been considered in personnel decisions, even if the decision is to take *no action.*

Relying heavily on our *Madrigal* case, and another which also relied heavily on *Madrigal, Sacramento POA v. Venegas* (2002) 101 Cal.App.4th 916, this Court had no difficulty concluding the officers were entitled to access ot the complaint and all materials related thereto. Quoting from *Madrigal*, the Court reasoned:

> [t]he label placed on the investigation file is irrelevant. The determinative factor if the potential relevance of the materials in those files to possible future actions 'affecting the status of the employee's employment.'" *Riverside, supra*, 27 Cal.4th at 802.

So the rule is, if it could affect your employment status, you have the right to see it; perhaps not before interrogation, but in all cases afterward.

4. *Mullican v. City of Ontario* (4th App.Div.2, April 22, 2004, docket no. E033931- not certified for publication.)
This case upheld the suppression of evidence seized during a search of Detective Mulligan's desk, which evidence was the only support for terminating him from employment for making false statements.

In 2000, Mullican's supervisor, Sergeant Mendez, was looking into a certain case that was assigned to Mullican in 1999 for follow-up investigation. He opened Mullican's desk, and took out Mullican's 1999 case log, looked at it, and made a copy of the log. He returned the log to the drawer. Later that day, the Sergeant asked Mullican for a copy of his 1999 case log. Mullican said he would look for it. Mendez again asked for the log. Mullican said it might be at his house. Mendez saw Mullican leave the station at the end of the day with papers in hand. A few days later, Mendez again looked in Mullican's drawer–the 1999 log was not there.

Mendez required Mullican to respond to two series of written questions in a memorandum to Mendez. The questions were designed to trap Mullican into lying about the existence and whereabouts of the log. And, Mullican did not disappoint Mendez – he offered various explanations for why he no longer had the log, including "shredding" it early in 2000. Mendez referred the matter to internal investigations, where Mullican was interrogated. He steadfastly maintained that all of his answers in the two memos to Mendez were correct. He did not have his 1999 case log, and assumed it was destroyed early in 2000. The interrogator then produced the copy of the 1999 log. Mullican, dancing as fast as he then could, wondered aloud, "how did that get in my drawer?" He was fired for dishonesty.

The trial court found that Mullican was effectively "under investigation", after Mendez recovered the 1999 case log from Mullican's desk, and that any further questions, by memorandum or otherwise, should have been conducted according to §3303's requirements, including advisement of the nature of the investigation. So, the answers to the two series of questions were obtained in violation of the Act. But, Mendez also violated §3309, because the seizure of the 1999 log violated restrictions specified in that section. The Court affirmed the trial court's order suppressing both the log and the answers to the Mendez questions. There being no evidence left to sustain the termination, it was reversed. But the Court opined that Mullican did lie, to cover up his own "perfidy", or betrayal of trust. *But for the violations, his firing would have been supportable.*