LEGAL DEFENSE TRUST TRAINING BULLETIN

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Volume III, Issue 12 March 2001

COURT OF APPEALS HOLDS "WAIVERS" OF PEACE OFFICERS' RIGHTS ARE VOID

Act's Protections Cannot Be Signed Away—Court Says Waiver Forms Violate Fundamental Public Policy Embodied In POBRA.

The Court of Appeal for the Fourth Appellate District, Division Two, recently published its decision in County of Riverside v. Superior Court (Madrigal) (January 16, 2001) 86 Cal. App. 4th 211, 103 Cal. Rptr 2d 62. This decision establishes three important protections for California law enforcement officers. Before getting to the legal issues in the case, a brief explanation of the factual setting is necessary to an understanding of what this case means for you.

The Factual Setting

In 1996, the Riverside Sheriff's Department (RSD) and the City of Perris agreed that Perris would disband its police department and contract for police services with the Sheriff. This resulted in a "merger" of the two departments. Along with shouldering responsibility for all customary municipal law enforcement services, the Sheriff voluntarily assumed responsibility for the transition of Perris officers into RSD, where two conditions were met: (1) the Perris officers "applied" to become Sheriff's deputies; and (2) the officers-turned-deputies met all of the high standards required of all other applicants for deputy positions, including passing a rigorous background investigation ("BI").

Now, what made this situation a little unique (at least compared with other "mergers," for example, the mergers of Los Angeles' MTA Police with LAPD and LASD) was that, in an effort to effect a "seamless transition" of responsibility for law enforcement services, the Sheriff hired Perris officers as deputies *before* the background investigations were completed. The Sheriff's position was that although these Perris officers were hired as *Penal Code* Section 830.1 "peace officers," they would be "probationary" for 18 months (as is usual with a newly appointed deputy, regardless of lateral or initial hire entry), and their appointments were "provisional," contingent upon successful completion of the background investigation. Hence, the Sheriff regarded them as "applicants," at least until all required screening processes were successfully completed, particularly the BI.

The other view is that when these Perris

officers were appointed as deputies initially, they were (as they had been in Perris) commissioned "peace officers" of the state, and entitled to all of the benefits and protections afforded every other employed peace officer.

Whichever view ("applicant" or "peace officer") prevailed would have a profound effect upon the Perris officers-turned-deputies, RSD, and ultimately all of California law enforcement members *and* their employers.

Xavier Martin Madrigal was a regularly-employed police officer in good standing with the Perris Police Department when, in April 1996, the "merger" was underway. As with most of his fellow police officers in Perris, Martin "applied" to become a deputy. Martin was accepted for appointment as a Deputy and in that month, he went to work in the first of an eighteen-month probationary period. Martin had about ten years of law enforcement experience with several agencies, without deficiency of any sort. He was, by all accounts, a very reliable and solid police officer. Indeed, he continued in this pattern as a new Deputy, being released from "field training" early, and began working a solo beat car out of Riverside Station.

Meanwhile, some very damaging information surfaced which was included in the background investigation. This information was compiled by Perris well before the merger, but it had never been released to Madrigal. BI Investigators directed Madrigal to take a polygraph examination on this "new" information. Madrigal protested (*see: Government Code* Section 3307—No officer may be compelled to take a polygraph). But, he was told he would not pass his BI and would be removed if he refused. So, he took it under protest. He went back to work and heard nothing more for about six months. Then in November 1996, he was summarily terminated for "failing to meet probationary standards". He requested a review and appeal, but they were denied. He was never told why he was discharged. He was never permitted to see any of the damaging documentation.

He began applying with Southern California police agencies. He always came in at the top of the lists, but each time BI investigators from the ten applied-for agencies visited RSD with Madrigal's waivers to view his records, with RSD, Madrigal was disqualified from future employment consideration.

Curios to know what was happening when the BI people came to Riverside, Madrigal purchased a complete copy of his "personnel record". There was absolutely nothing in that record which would explain either his discharge from RSD, or his disqualification from every other agency to which he applied. Ever more curios now, Madrigal asked several BI people who had visited RSD to explain why he was rejected. Of course, most of them would not speak with him, citing confidentiality of BI records and information; that is, all but one. One sympathetic BI person told Madrigal he had been shown a file at RSD that would keep Madrigal "out of law enforcement forever". Although this investigator did not want to reveal any details, he did offer that the file contained "allegations of moral turpitude". Thus, in the subsequent litigation, those materials came to be referred to as both "the secret file" and " the Perris reports".

Now thoroughly in the dark and overwhelmed, Madrigal obtained legal help from the

Riverside Sheriff's Association, Legal Defense Trust ("LDT") and PORAC's Legal Defense Fund ("LDF"). Field Representative Darryl Drott and LDT's General Counsel, Michael P. Stone and Muna Busailah teamed up to take on Madrigal's cause. LDF Trustees voted to support Madrigal's request for affirmative relief in the form of a combined civil rights damages lawsuit and petition for writ of mandate and other extraordinary relief. This action assailed the Department's discharge of Madrigal without a hearing; the maintenance of the "secret file"; the disclosure of the "secret file" to outside agencies, while denying Madrigal access to the same file; the "compelled polygraph"; and the withholding of documents "used for personnel purposes", in violation of *Government Code* Section 3305 and 3306. During the course of discovery, Madrigal's lawyers moved for production of all records and documents maintained by the RSD on Madrigal. The County's lawyers opposed this, citing the "confidentiality" of BI materials, various privileges alleged to apply, and to bar disclosure to Madrigal, and "waivers" executed by Madrigal to the effect that he "waived" any opportunity to inspect records developed in RSD's BI protocol.

The trial judge ordered the County to produce identified records, whereupon the County declined and petitioned the Court of Appeal to issue a writ of mandate to the trial court to vacate its order, and enter a new order, denying Madrigal's motion for discovery. The Court of Appeal denied the petition without comment. The County filed a petition for review with the Supreme Court. This Court granted the petition and transferred the case to the Court of Appeal with directions to decide the writ petition on the merits (rather than summary denial, as before).

Well, the case was argued and submitted in December 2000, then more than four years after Madrigal's discharge. The Court of Appeal's decision was published at our request, meaning that it may be referred to or cited as controlling authority for the points of law found therein.

Applicant or Employee?

The pivotal finding in the Court of Appeal opinion is that Madrigal was far more than an "applicant". He was, after all, a working peace officer, regularly appointed under *Penal Code* Section 830.1. Again referring to the entities' desire to effect a "seamless transition", the County (RSD) chose to appoint these Perris officers, including Madrigal, prior to completion of the BI protocol. The Court noted that while there was benefit to the County to be had by such an arrangement, there were also burdens and obligations imposed as a result. One of these was to treat Madrigal and similarly-situated Perris officers-turned-deputies as regularly appointed, albeit probationary, peace officers, fully protected by the Public Safety Officers Procedural Bill of Rights ("POBRA"), *Government Code* 3300, et seq. Madrigal was therefore, not an "applicant".

Once it decided that POBRA applied fully to Madrigal, the Court then turned to the County's three claims of privilege. First, said the County, production of BI materials would violate the Department's privilege to refuse to disclose "informant information", "official information" and "deliberative process information". To the extent these privileges applied at all, Madrigal's demonstrated need for the information outweighed County's showing of the need for confidentiality.

Finally, and most importantly, the Court found that to the extent Madrigal signed "waivers" that purported to give away his rights to access to "personnel records or records used for personnel purposes" (*Government Code* Section 3305-3306); the waivers are "void as against fundamental public policy", according to the Court of Appeal opinion.

What the case means for you

The absolute right to see, comment upon and challenge documents and entries in your "personnel records" is as important as any other right you have. Adverse information about you, regardless of *where* it is maintained in your agency, can emerge to prejudice you in a variety of contexts.

Here, in the *Madrigal* case, a "secret file" was published to Madrigal's potential employers, extinguishing his changes of regaining a police career. Similarly, secreted writings might support a discharge, or a demotion, or an administrative transfer. But the Bill of Rights Act's §§3305 and 3306 are designed precisely for this purpose–to keep agencies from generating and utilizing adverse writings in ways that cause the member loss, disadvantage or hardship.

§3305 guarantees you access to any writing or comment to be placed in your personnel record or other record used for personnel purposes. You must be permitted to initial the entry *before* it goes into the record. Under §3306, you have 30 days to attach a rebuttal to the entry, which must accompany the adverse comment so long as it exists.

The *Madrigal* opinion reinforces these important rights. It rejects the Department's claims of "confidentiality" of BI records, by making it clear that if the documents are either generated or come into the Department's possession during your employ as a peace officer, you have the absolute right to see them, initial them and challenge them. It makes no difference whether the documents are part of a BI file, personnel file, or "watch commanders" file, or, as the *Madrigal* Court observed, *"no file at all"*.

Additionally, you cannot "waive" these rights. Any such "waiver"is void, because in enacting POBRA, the Legislature declared the Act's rights and protections to be a matter of statewide concern (§3301). Statutes enacted for public purposes constitute fundamental public policy, and cannot be contracted away by private agreement. Hence, any purported "waiver" is simply invalid, because it would violate public policy.

You should also take note of (new) §3306.5 (added 2001), which expands these rights. It requires every agency to permit peace officers to inspect such files that "are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action". For any entry the officer believes to be mistaken or unlawful, the officer may request in writing, to have the entry deleted or corrected. The agency then has 30 days to respond in writing, with the reasons it will grant or deny the request. All of these writings become part of the personnel record. Notice §3306.5 makes no distinction for the characterization of employment files as "BI" or otherwise. Again

what your agency chooses to call the file is irrelevant–what is important is what the file *may* be used for.

And now, nearly five years after Madrigal was discharged, he may finally get to see the documentation that ruined his career.

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