



LEGAL DEFENSE TRUST TRAINING BULLETIN

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PITCHESS MOTIONS IN ADMINISTRATIVE APPEAL HEARINGS?

***Court of Appeal Holds That The Motions
May Be Brought In Appeals of Imposed Discipline
To Support The Disparate Treatment Defense***

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For the very first time, the California Court of Appeal (“C.A.”) has ruled that so-called *Pitchess* motions can be brought in administrative appeal hearings in police discipline cases, to discover evidence of excessive or disproportionate (“disparate”) penalties, for the purpose of showing that others who committed substantially similar misconduct were not penalized to the same degree as the appellant. Thus, department rules of conduct are unevenly enforced because consistency is lacking. The case is *Riverside County Sheriff’s Department v. Jan Stiglitz (Kristy Drinkwater, Real Party In Interest)* (September 28, 2012) 4th

Civ. EO52729, __ C.A. 4th __ (2012 WL _____).

The Disparate Penalty Defense

The clearest cases of disparate or uneven penalties usually involve discharge from employment. That is, the fired appellant will attempt to show that others committed the same misconduct as the appellant, but none were discharged, while the appellant was fired.

One of the obligations of appellants’ counsel in these cases is to determine

whether the penalty in the appellant's matter is consistent with penalties in previous cases of the same or substantially similar misconduct. If appellant's counsel believes that the penalty is an abuse of discretion, counsel must diligently pursue evidence to support that argument.

In appeal of a disciplinary penalty, the appellant deserves an opportunity to show that the penalty is excessive as a matter of law. On the other hand, there is no legal requirement that penalties for the same misconduct must all be exactly the same. Mitigating and aggravating facts often result in different penalties that despite their differences, are nonetheless reasonable. (See: *Talmo v. Civil Service Com.* (1991) 231 Cal. App. 3d 210, 229-231; *Pegues v. Civil Service Com.* (1998) 67 Cal. App. 4th 95, 104-106.)

The Due Process Clause requires that appellants have an opportunity to prove that penalties are disparate in the appeal hearing, assuming evidence exists to support that theory of the defense. *Drinkwater*, Slip Op. at 28. Counsel must be particularly mindful of the penalty issue for two principal reasons: (1) effective assistance of counsel may depend for its vitality upon searching out evidence to support a disparate penalty defense. Put another way, it might amount to ineffective assistance of counsel (perhaps even malpractice) to ignore the issue or fail to investigate the defense. Also, (2) a strong showing of excessive penalty can result in reinstatement for even the "guilty" client.

Supporting the Defense in the Appeal Hearing

But how can diligent counsel secure admissible evidence to support a defense of disparate punishment? To begin with, counsel and his or her client must understand that the excessive discipline defense is a particularly difficult one upon which to prevail. First, there is a *presumption* that public employers' decisions in public employee discipline cases are correct, which must be overcome with admissible evidence. *Fukuda v. City of Angels* (1999) 20 Cal. 4th 805. Second, questions of penalty are left to the sound discretion of the agency decisionmaker(s). A court will not "second guess" an agency's decision on penalty, unless the penalty is shown to be a manifest abuse of discretion. Generally, a court cannot substitute its determination of a fair penalty in place of that of the agency. It can only remand the case and direct the agency to reconsider its penalty decision in light of the court's statement of decision. All the agency is required to show is that the penalty is within the bounds of reason, even though reasonable minds would differ over the propriety of the penalty imposed.

There have been many appellate decisions that have considered the question of penalty in police discharge cases. Certain kinds of misconduct nearly always result in discharges, such as dishonesty, violation of the public trust, integrity violations, acts of moral turpitude, domestic violence, and the like. Such offenses resulting in

discharge are almost always upheld in the courts, in large part due to the special mission of police work, and profession-wide standards of behavior. But even in these cases, if the appellant can show that discharges are only rarely invoked on the first offense and that there are no grounds to distinguish the appellant's behavior from the majority of the lesser-penalty cases, the disparate penalty defense is viable.

Judicial Review of Final Administrative Decisions

In the customary application of judicial review following an evidentiary appeal hearing and decision, the reviewing court will look at the findings and decision first, to see if the evidence adduced at the hearing by the party with the burden of proof supports the findings and the decision. Depending on the applicable standard of review ("substantial evidence" or "independent judgment") the court will find that the findings are supported or that they are not. If not, the court is empowered to grant relief to the appellant by ordering the appellate tribunal, commission or hearing officer, to reverse the decision.

Practitioners have been heard to say in regard to seeking judicial review of appeal decisions that upheld terminations of police members, "If the only thing you have going in the reviewing court in discharge cases is that the penalty is excessive, they (the cases) are losers!" This sentiment is widespread and well-known in the police defense arena. It

refers to making the relatively weak argument that the penalty is simply too harsh, given the employee's good record, years of service, numbers of commendations and other "good guy evidence." But in cases that involve failures of truth, honesty, veracity and moral turpitude, this kind of "excessive penalty" argument is not likely to result in reinstatement. Also, if the "good guy evidence" is in the record, the hearing officer will already have considered it. If it's not in the record, it can't be raised in court (waiver).

But "disparate penalty" connotes arbitrariness on the part of the decisionmakers. That is, based upon penalties in previous cases with the same level of blameworthiness and no distinguishing features, the imposition of the maximum penalty may be arbitrary, discriminatory, or retaliatory. These are the kinds of penalties that are worth investigating and litigating, because a career hangs in the balance.

Making The Case For Disparate Penalty

Returning then to the question of how counsel should approach a case of disparate penalty, the focus will be on obtaining *evidence* of penalty decisions in other cases within the same agency that will demonstrate that the penalty in *this case* is out of step with similar cases, *for no good reasons*.

If one could just persuade the agency to produce the records of every comparable disciplinary action, the appellant's burden

would be greatly simplified. The problem is however, that the vast majority of agencies will resist such “wholesale invasions of confidential personnel records,” and rightly so. Depending on the state where the case arises, there may be specific statutes that restrict access to the records, and “to information from the records.”

Some states have codified motion procedures that litigants must follow in order to have even a judge consider whether to order production of peace officer personnel records.

Pitchess Motions in California

For example, in California, *Penal Code* § 832.7 declares that “peace officer personnel records are confidential” and not subject to disclosure in official proceedings except by the noticed motion procedure authorized by *Evidence Code* §§ 1043 and 1045, including provision for an *in camera* review of the records sought to be disclosed. The court makes decisions about the relevancy and materiality of the evidence sought, the moving party’s need for the evidence, alternative sources for the information, and whether the motion and supporting evidence show “good cause” for production. These statutes came into effect in 1978, after the landmark California Supreme Court case of *Pitchess v. Superior Court* (1974) 11 Cal. 3d 531, where the Court decided that a criminal defendant had a due process right to discover evidence tending to show that the officers who arrested the

defendant for resisting, delaying and obstructing had used excessive force against other persons in the past, and were the aggressors in the confrontation with the defendant. Hence, the defendant acted in self-defense when he fought back. In each of these cases, the courts must “balance” the due process rights of the accused to an effective defense, with the privacy rights and privileges against public disclosure for the officers and the agency.

The motions have been expanded in scope over time in all manner of litigation wherever the moving party seeks to gain evidence of prior misconduct of the officers to show that their conduct in the instant case was in conformity with traits of character established by the records of prior misconduct; for example, use of excessive force, brutality, perjury, false reports, racial discrimination, planting evidence, and so on. Such evidence may also show employer negligence in selection, training, discipline, assignment and retention of an incompetent or unfit officer. Although all of these motions are now based on statute, and should be more properly called “1043 motions:” after *Evidence Code* § 1043, they are all loosely referred to as “*Pitchess* Motions” in California. Counsel and litigants should refer to procedural statutes within their resident states for local procedure. Safe to say, in most jurisdictions, governmental agencies mightily resist such motions according to local procedures. In federal litigation, United States district judges follow federal common law and the *Federal Rules of Evidence*. State

procedural statutes are ignored, but federal trial judges are very sensitive to the privilege and privacy issues, which are handled by way of protective orders.

We should now make some general observations about *Pitchess* motions that are important to remember when considering disparate penalty evidence:

1. In a true *Pitchess* motion, the movant (or moving party) is seeking personnel record information about an officer who is *a witness, an affiant, or a party in the underlying dispute.*

2. The information will be used as a sword rather than a shield, to *attack the officer's credibility, to impeach his or her testimony, or as character evidence to show behavior or conduct consistent with the traits of character, or to show negligence of the employer* in turning the officer loose on the community with badge and gun. *Note well:* The *identity* of the officer and his/her role in the case are *key features.*

Discovery in Disparate Penalty Cases

So when the object of the discovery motion is evidence of disparate penalty, the *identity* of the officer whose records are sought is *irrelevant.* Thus,

(1) He or she is *not* a party or a witness, so there is no need to expose the officer's identity. Any relevant records can and should be *redacted* to remove all identifiers.

(2) The invasion of privacy, if any, is minimal.

(3) In balancing the interests of the

agency and the officers whose records are sought, with the interests of the appellant, the "minimal invasion" is a factor favoring disclosure of (redacted) records.

(4) The evidence obtained will be used as a shield rather than a sword, to defend against imposition of the disparate penalty.

It is necessary to obtain *enough* information from the records in order to show that the cases *are* indeed the same or very similar, and that there are no aggravating factors warranting a departure from the pattern of previous penalties.

Privacy concerns can be handled by protective orders that limit disclosure and use of the information, prohibit copying or dissemination, require the return of all records at the conclusion of the matter, and that require sealing the transcripts wherever the information is discussed or disclosed on the record. Provisions for *in-camera* review by the hearing officer before any records are turned over further serve to protect against unwarranted disclosure.

Motions for personnel records in administrative appeal hearings in support of disparate penalty defenses have been brought, litigated, denied and granted for years, at least as long as the author has been representing Los Angeles Police members of all ranks (32 years) and members of other departments in Southern California. No problems . . .

The Drinkwater Case

The *Drinkwater* case triggered the first one (problem) to reach an appellate court. Certainly, there has been no published case in California that featured this controversy. Kristy Drinkwater (“Drinkwater”) was a correctional deputy employed by Riverside County Sheriff’s Department (“RCSD”). She was investigated for timecard irregularities. Timecard irregularities occur from time to time in RCSD as elsewhere. But the question is, “theft of public funds by obtaining salary to which (you) were not entitled,” or “failure to accurately account for (your) hours actually worked resulting in the payment of salary to which you were not entitled, in the amount of \$ _____”? One is willful fraud; the other, negligence. Theft of public funds is an administrative “capital” offense; negligence is usually not, but can be aggravated if there are multiple occurrences after corrective action. So Drinkwater’s defense was two-pronged: (1) it was mistaken, not intentional; and (2) discharge is disparate in this case, because eight (8) other deputies had been disciplined for timecard irregularities, and none were terminated.

Muna Busailah (“Busailah”) represented Drinkwater in her appeal hearing after discharge. Law Professor Jan Stiglitz (“Stiglitz”) was selected as hearing officer. Busailah brought a noticed prehearing motion for discovery of personnel records pertaining to others who had been disciplined, but not fired, for arguably similar failures. Importantly, she sought *redacted* records with all identifying information removed. Remember, for

these purposes identities are irrelevant. RCSD’s lawyers complained that it was too burdensome to search for the records. They would need *names*. That objection could have ended the inquiry right there. But Busailah’s further investigation produced eight names.

RCSD’S Petition for Writ of Mandate

Stiglitz ordered the records produced for his *in-camera* review, finding that Busailah had shown “plausible justification” for the discovery. But instead of producing the records, RCSD petitioned the superior court for a peremptory writ of mandate on the grounds that the motion was insufficient to warrant the invasion of privacy. *In the petition, RCSD did not assert that Stiglitz had no jurisdiction to hear the motion. Indeed, RCSD never objected to the motion procedure nor when Stiglitz exercised his power to hear the motion.*

The *Drinkwater* appeal languished as RCSD’s petition crawled forward in court. Just before the case was argued and submitted, the California Court of Appeal decided *Brown v. Valverde* (2010) 183 Cal. App. 4th 1531, holding that a DMV hearing officer in a “administrative *per se*” hearing (license suspension upon being arrested for DUI; hearing limited to whether officers had probable cause to stop and arrest) had no power to hear a *Pitchess* motion, which is normally addressed to judges. RCSD seized upon this new case to argue that *only* judges could decide these motions, and therefore

Stiglitz had no jurisdiction to entertain Busailah's motion.

Busailah and Marc Berger, Esq. argued to Judge Mac Fisher that *Brown v. Valverde* was expressly limited to its own facts and could not stand for the proposition advanced, that Professor Stiglitz, a highly-regarded appellate lawyer and Director of the California Innocence Project, had no jurisdiction. After all, DMV "hearing officers" are normally DMV employees with no legal training or expertise. Besides, the author testified (by declaration) to at least 13 years of handling appeals in the RCSD and that the established "past practice" had been to litigate these motions before the hearing officers - - RCSD had *never* objected to the "hearing officer's jurisdiction to decide *Pitchess* motions."

Unfortunately, the trial court read a lot into *Brown v. Valverde* that isn't there, and *relied* upon it to grant RCSD's petition. He ordered Stiglitz to *deny* Busailah's motion. Busailah and the author appealed to the Court of Appeal, Fourth Appellate District ("C.A. 4th").

At oral argument, it seemed the Justices all agreed that Drinkwater was entitled by due process to raise the disparate penalty defense and have a *meaningful* hearing on the merits of that defense, including the right to reasonable discovery of other members' discipline cases. But they were troubled by some of the statutory language in §§ 832.7, 1043 and 1045, *supra*, which seems to focus on the duties of "the court,"

which *might* suggest a legislative intent that only courts should decide these motions. And they were cognizant of the fact that this was, indeed, a case of first impression. The Los Angeles Police Protective League and the Peace Officers Research Association of California Legal Defense Fund ("PORAC-LDF") filed *Amicus Curiae* briefs in support of Drinkwater. The California Police Chiefs and Sheriffs Association appeared as *Amici* in support of RCSD.

They also acknowledged that their holding either way, would impact tens of thousands of police officers in California who might, some time in their careers, face serious disciplinary actions.

The closely-watched and anxiously-awaited decision was filed on September 28, 2012. It was ordered to be "published in the Official Reports" meaning it is binding on trial courts unless the Supreme Court grants review or orders that the opinion be "de-published."

Counsel and appellants in police disciplinary appeals will want to give their attention to the *Drinkwater* case in several respects:

- (1) The Court of Appeal recognizes that the disparate penalty and uneven enforcement defenses are important parts of due process guarantees in public employee administrative appeals and in *Government Code* § 3304(b) appeals for peace officers protected by the *Public Safety Officers Procedural Bill of Rights Act*, *Government Code* § 3300, *et. seq.*

(“POBRA”).

(2) Evidence in support of the disparate penalty defense consists of showing that other employees in the same or similar circumstances have been treated differently (i.e., *not* fired);

(3) The statutes which codified the *Pitchess* motion procedures (*Penal Code* § 832.7 and *Evidence Code* §§ 1043 and 1045) do not limit use of the procedures only to courts and to judicial officers;

(4) *Brown v. Valverde*, *supra*, does not hold to the contrary and is expressly limited to its own facts (DMV administrative *per se* hearings);

(5) Hearing Officer Jan Stiglitz had jurisdiction to entertain Drinkwater’s motion as he did; and

(6) The Superior Court is directed to deny RCSD’s petition on remand.

The Disciplinary Matrix

Sometimes, another helpful source of evidence to show disparate penalty and uneven enforcement is the department’s disciplinary matrix. The matrix, sometimes called a “bail schedule,” contains a catalog of common disciplinary infractions together with specified factors in aggravation, and the corresponding penalty for each type of infraction, based on first, second and third offenses. These are guidelines only and usually are non-binding. But when an agency appears to have ignored its own disciplinary policy embodied in its matrix, counsel should highlight that fact on the record in the appeal hearing with the matrix included as an exhibit, preserving the argument for

later judicial review.

Conclusion

The *Drinkwater* opinion has statewide impact, and reaches disciplinary appeals wherever peace officers exercise their rights under the *Bill of Rights Act* (“POBRA”), *supra*, specifically *Government Code* § 3304(b). But the driving force behind judicial recognition of the disparate penalty defense is based in constitutional due process. Appellants and their counsel should not overlook the defense or fail to raise it at the administrative appeal stage, or fail to preserve it for later judicial review.

Public employers should be careful to maintain consistency in disciplinary enforcement and penalty decisions, so that all employees are treated fairly and equally, and disciplinary decisions are not vulnerable to attack based on disparity of punishment, arbitrariness, discrimination or retaliation.

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