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TRAINING BULLETIN

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A Retrospective Look at 2009 POBRA Decisions

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Each year at this season, we recap the year's major court decisions interpreting the California Public Safety Officers' Procedural Bill of Rights Act ["POBRA"], along with other key rulings affecting law enforcement. This past year again brought few decisions interpreting POBRA, confirming our impression from last year that this body of legislation is gradually attaining a more settled state where both labor and management increasingly understand its boundaries and act accordingly.

There were two major POBRA decisions this year. The first decision, *Melkonians v. Los Angeles County Civil Service Commission* (2009) 174 Cal. App. 4th 1159, affirmed the termination of a Los Angeles County Deputy Sheriff for off-duty domestic violence, where the Deputy argued the charge was barred by the one-year POBRA statute of limitations set by *Government Code*, section 3304(d). The second, *Wences v. City of Los Angeles* (2009) 177 Cal. App. 4th 305, vacated and remanded an appeal from an official written reprimand issued by the Department for firing a warning shot to scare off some intruders at his house. *Id*. at 310-311.

Independent Judgment review on mandamus recognized as applicable to all discipline.

The primary enforcement mechanism for POBRA rights is to file a writ petition in the Superior Court. When the petition seeks judicial review of a disciplinary decision, the proceeding is known as a petition for a writ of "administrative mandamus," which is

authorized and defined by *Code of Civil Procedure*, section 1094.5. Each of the two key POBRA decisions this year touched on the "standard of review" to be applied by superior courts in deciding factual issues raised by a petition for writ of administrative mandamus.

The term "standard of review" means the degree of deference that a court will give to the administrative body's decision. Whenever a writ or appeal is filed to review the decision of a lower court or an administrative body, the first step the reviewing court must take in its analysis is to determine the proper standard of review for questions of law and for questions of fact. The issues that were resolved in the year's two major POBRA decisions involve the standard of review to be applied in the superior court for questions of fact initially decided by the administrative body.

When a petition for administrative mandamus is filed in a superior court, there are two different standards of review that may apply to the facts. These standards are known as "substantial evidence," and "independent judgment." A provision of the administrative mandamus statute, *Code of Civil Procedure*, section 1094.5(c), defines these two standards, but the statute does not dictate which standard applies in any given case, that determination is left to case precedent. Translating the statute's technical language, the substantial evidence standard means that the court will examine the fact findings of the administrative body to determine whether they are supported by substantial evidence, and if so, the fact findings will be upheld. The independent judgment standard means that the court will examine the fact findings of the administrative body to determine whether they are supported by the "weight of the evidence." (Section 1094.5(c)).

The outcome can often depend on the difference between "substantial" evidence and "weight of the evidence." Under the "independent judgment" standard, the fact findings of the administrative body can be reversed even if they are supported by substantial evidence, if the court finds that the record contains more persuasive evidence contradicting the fact than supporting it. Another way to view this situation is to recognize that under the "substantial evidence" standard, once the reviewing court determines that there is indeed substantial evidence supporting the fact findings, the factual analysis is over. Under the "independent judgment" standard, even when the reviewing court has identified substantial evidence supporting the fact finding, it still must review the whole record to determine whether that evidence is outweighed by evidence contrary to the administrative fact finding, and if so, the fact finding will be reversed. As a practical matter, a court applying the "substantial evidence" standard will rarely reverse the

administrative fact findings. Therefore, it is highly important to a petitioner to convince the court that the independent judgment standard is applicable to the case.

The independent judgment standard indeed applies to almost all appeals from discipline imposed by a law enforcement agency. The primary significance of the Wences decision is that it may have finally established that all disciplinary decisions receive this higher standard of review. The only test to determine which of the two standards applies to a particular case is whether the decision under review involves or affects a "fundamental vested right." *Wences*, 177 Cal. App. 4th at 313.

It has long been settled that decisions such as termination, demotion, or a long unpaid suspension of a law enforcement officer deprives the officer of a fundamental vested right. The issue in *Wences* was whether the same could be said about an official written reprimand, and the court said yes to that question.

The involvement of a fundamental vested right is tested on a case-by-case basis. *Id*. The *Wences* opinion sums up all the existing precedent bearing on the test for a "fundamental vested right," in two sentences quoted here without their extensive internal punctuation and citations to case precedent: "The ultimate question in each case is whether the affected right is deemed to be of sufficient significance to preclude its extinction or abridgement by a body lacking judicial power. In determining whether the right is fundamental the courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation." Id. at 313-314.

Under this test, the appellate court observed that "It repeatedly has been held that discipline imposed on public employees affects their fundamental vested right in employment...." *Id*. at 314. But in this case, Superior Court Judge David P. Yaffe had ruled that the independent judgment standard of review did not apply because the official reprimand "does not deprive petitioner of any property or employment right, does not affect him financially, and therefore does not authorize the court to exercise its independent judgment on the evidence...." *Id*. at 312-313. The Court of Appeal observed that the trial court "focused its analysis on the amount of harm that actually resulted from the reprimand and found that there was no immediate financial impact on Wences. However, the California Supreme Court has made clear that, in considering whether a right is fundamental for purposes of ascertaining the appropriate standard of review, the focus must not be on the 'actual amount of harm or damage in the particular case,' but on the 'nature of the right' itself. *Id*. at 314-315, quoted from *Dickey v. Retirement Board* (1976) 16 Cal. 3d 745, 751.

In the cited *Dickey v. Retirement Board* case, the Supreme Court had held that the independent judgment standard applied on appeal from the denial of disability benefits, despite the fact that the financial consequences at stake amounted to the difference between full salary and workers compensation for a three-week period. The Court found "the right to full salary disability benefits was indeed fundamental as it directly affects an employee's ability to continue to support his family while incapable of working due to an injury received as a result of his employment. *Dickey*, 16 Cal. 3d at 751.

Similarly, in *Estes v. Grover City* (1978) 82 Cal. App. 3d 509, the independent judgment standard was applied on review of a 3-day suspension based on the human terms and importance to the individual in the life situation of a "modestly compensated public employee," and because the suspension "could adversely impact his future earnings." 82 Cal. App. 3d at 514-515.

Applying these precedents, the *Wences* opinion held that "we must focus on the nature of the right itself. The nature of the right at issue here is Wences' right to employment as a non-probationary peace officer. As numerous cases have held, that right is both vested and fundamental...." *Id*. at 316. The court noted that the reprimand, "based on a finding of administrative disapproval by the Board of Police Commissioners, is a part of Wences' employment record as a police officer. The reprimand may be considered by the Department in future personnel and disciplinary decisions, and based on its content, may adversely affect Wences' future opportunities for career advancement." *Id*. at 316.

The court also found support for its ruling from the fact that the POBRA definition of punitive action, in *Government Code*, section 3303, includes written reprimand. *Id*. at 317. The opinion cites the extensive body of POBRA precedent finding punitive action giving rise to an opportunity for administrative appeal from informal departmental actions short of suspension or demotion, because of the potential impact on the officer's career, including *Otto v. LAUSD* (2001) 89 Cal. App. 4th 985. 996 (counseling memo); *Gordon v. Horsley* (2001) 86 Cal. App. 4th 336 (written reprimand); *Caloca v. County of San Diego* (1999) 72 Cal. App. 4th 1209, 1222 (civilian review board shooting report); and *Hopson v. City of Los Angeles* (1983) 139 Cal. App. 3d 347 (police commission shooting report).

Based on the ruling that Judge Yaffe should have applied the independent judgment standard, the Court of Appeal was unable to reach the merits, and remanded the case to enable the trial court to apply the independent judgment standard to the justification for the reprimand. *Wences*, id. at 318. Before *Wences*, the 3-day suspension in *Estes* was the lowest level of discipline

that had been held subject to the independent judgment standard of review. Because *Wences* reversed a trial court decision that the independent judgment standard was inapplicable, it now squarely stands for the proposition that all discipline down to the level of a written reprimand must be reviewed under the independent judgment standard.

The *Wences* decision therefore benefits all California peace officers, as it guarantees meaningful judicial review of administrative fact findings in all disciplinary actions by law enforcement agencies. The only cautionary note about this decision at this time is that we have several cases pending appeal in which law enforcement agencies are attempting to impose new limits on the independent judgment standard on various grounds, and we will consequently need to carefully monitor and report on those actions.

The *Melkonians* case also cited the applicability of the independent judgment standard of review for the administrative mandamus petition in that case, although the issue was not controversial in that case because there has never been any doubt that termination of a non-probationary law enforcement officer calls for this standard. 174 Cal. App. 4th at 1167. The court in that case also pointed out the well-established rule that the independent judgment standard applies only at the Superior Court level, and that once the Superior Court has exercised independent judgment, the Court of Appeal only reviews the fact findings for substantial evidence. *Id*. at 1168. Because of this rule, an employee's best chance to reverse discipline is at the Superior Court level, and the probability of reversal decreases at the higher appellate levels.

The primary focus of the *Melkonians* case was the statute of limitations under *Government Code*, section 3304(d), under which a Department must serve notice of proposed discipline within one year after the underlying facts came to the attention of a supervisor authorized to initiate an investigation. The statute contains eight enumerated exceptions. One of these exceptions, section 3304(d)(5), provides that the statute does not run during a period of time in which the employee "is incapacitated or otherwise unavailable." In Melkonians' case, the notice of proposed discipline was served two months beyond the one-year statute of limitations. *Id*. at 1173. However, the appellate court affirmed the ruling of the Superior Court that during much of the one-year period, Melkonians was "unavailable" within the meaning of the section 3304(d)(5) exception. *Id*. at 1174.

Melkonians had been terminated for prior misconduct, and was in the process of appealing the termination when the Department entered into a settlement reducing the penalty to a one-

month suspension, and giving Melkonians back pay for the additional eight months that had elapsed. *Id*. at 1165-1166. It was during the interval that Melkonians was terminated that the statute of limitations expired for the subsequent misconduct charges at issue in the case. One week after the settlement, the Department served Melkonians with the notice of proposed termination for the subsequent misconduct charges. *Id*. at 1173.

The Department argued that the section 3304(d)(5) exception applied because Melkonians was "unavailable" during the time he was off work because of the prior termination. Melkonians argued that since the settlement retroactively restored his employment, there was no actual break in his service, and the unavailability exception could not properly be applied. *Id*.

The Court of Appeal ruled that Melkonians could properly be found unavailable under the section 3304(d)(5) exception. *Id*. at 1174. First, the court recognized that "the rights and protections of the Act only apply to public safety officers." *Id*. Melkonians "was not a public safety officer between the dates" of his earlier termination and the settlement. *Id*. He was therefore "not entitled to the protection afforded by the Act during that interval. *Id*. The appellate court also pointed out that the record showed that during the time the earlier termination was in effect, and during the investigation of the domestic violence incident that resulted in the subsequent termination, he had "refused to participate in an interview and his counsel advised the Department it could consider him unavailable." *Id.*

Courts regularly refuse to allow a litigant who has derived an advantage from taking a certain position to change to the opposite position when it later becomes convenient to do so. Melkonians' decision to make himself unavailable for a requested interview came back to haunt him when it later became advantageous to attempt to deny that he was subject to the unavailability exception to the statute of limitations. Although the court in this case did not use the technical term, this history illustrates a doctrine called judicial estoppel, which generally precludes a party from changing position after having derived a benefit from taking the opposite position in prior proceedings.

The *Melkonians* case resolved numerous other issues specific to the facts of the case, but aside from its rejection of the statute of limitations defense, does not break significant new ground for POBRA purposes. Aside from the procedural issues, the termination was supported by evidence of serious domestic violence with a long record of prior discipline.

<u>Officer faces liability for using Taser without sufficient proof of danger</u>.

In another decision of interest to the law enforcement community, an

officer has recently been denied the protection of the doctrine of qualified immunity where he used a Taser on a suspect who was not clearly posing sufficient immediate harm. That case, *Bryan v. McPherson*, docket no. 08-55622 (9th Cir., December 28, 2009), contains sufficiently interesting application of the leading precedents on excessive force to warrant a full training bulletin in the near future.

The *Bryan* case demonstrates the benefit to the public and the profession that can flow from allowing courts to address questions such as excessive force by law enforcement officials in a case-by-case inquiry, with each case building on the collective knowledge and wisdom gained from the growing body of existing precedent. The result of the case is not surprising, as the officer tased a seat-belt violator who engaged in somewhat bizarre, but non-threatening, behavior. But the opinion provides useful insight into factors that are gradually becoming more clearly defined within the excessive force analysis. Stay tuned for that report, and STAY SAFE.

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