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NEW APPELLATE RULING STRENGTHENS POBRA STATUTE OF LIMITATIONS

by Michael P. Stone and Marc J. Berger

Last July we wrote about a new appellate precedent, *Sanchez v. City of Los Angeles*, 140 Cal. App. 4th 1069 (filed May 26, 2006), which clarified the operation of the POBRA statute of limitations for completing disciplinary investigations. The *Sanchez* decision reversed a punitive action as untimely, even though within the applicable time frame, the officer had been ordered to answer misconduct charges before a "Board of Rights," the LAPD internal tribunal that holds evidentiary hearings on misconduct charges and recommends disciplinary penalties.

Although the *Sanchez* decision found that the timely order to answer charges before a Board of Rights was insufficient to satisfy the statute of limitations for the disciplinary penalty that was imposed, the disciplinary penalty that was imposed in that case, a "downgrade" in rank (from Officer III to Officer II), was one that was not among the disciplinary penalties the Board of Rights was authorized to recommend. Thus it was not entirely clear from the opinion whether the *Sanchez* decision clearly established a rule that an order to answer charges before a Board of Rights could never satisfy the POBRA statute of limitations, or to the contrary, whether such an order would perhaps be sufficient to satisfy the statute for a penalty that *is* within the Board's authority to recommend.

The Court put that lingering uncertainty to rest this past December by publishing its Opinion in another case, *Mays v. City of Los Angeles*, 51 Cal. Rptr. 3d 917 (filed December 15, 2006) where a written reprimand was reversed as untimely. The Court in *Mays* thus held unequivocally that the POBRA statute of limitations is satisfied only by giving the officer timely notice of the specific penalty

that may be imposed.

In *Mays*, the Second District Court of Appeal held that a written reprimand is a sufficient punitive measure to be subject to the time requirements of the POBRA statute of limitations, and confirmed that ordering an officer to answer misconduct charges in an internal tribunal does not satisfy the requirements of the statute of limitations unless within the applicable time frame, the officer is notified of the particular disciplinary penalty that may be imposed. The *Mays* decision foreclosed an argument that was still available to the Department after *Sanchez*: that while an order to answer charges before a Board of Rights was not sufficient to satisfy the statute for a penalty that the Board could not impose, it was sufficient to satisfy the statute for any penalty that was within the Board's jurisdiction. After *Mays*, it is clear that an order to answer charges in an internal tribunal is not enough to satisfy the POBRA statute of limitations. Instead, the officer must be given timely notice of the particular penalty that may be imposed.

POBRA Statute of Limitations

A statute of limitations exists within the Public Safety Officers' Procedural Bill of Rights Act (POBRA). Subject to certain exceptions, the statute generally prohibits departments from taking punitive action against an officer unless it notifies the officer of the proposed penalty within one year of the discovery of the misconduct.

The statute, codified as *Government Code*, section 3304(d), requires the employer to "complete its investigation and notify the public safety officer of its proposed disciplinary action within" one year of the time of the discovery of the misconduct "by a person authorized to initiate an investigation of the allegation...." The one-year time frame does not include time that a criminal investigation into the underlying misconduct is pending.

The statute has given rise to a legal issue as to what point in disciplinary proceedings the employer must reach within the one-year period. In *Sanchez v. City of Los Angeles,* an LAPD officer was charged with conducting personal business while on duty and falsifying his daily logs. 140 Cal. App. 4th at 1071. Within the applicable one-year period (as extended by the criminal investigation tolling exception), the Department notified Sanchez he could face a 20-day suspension.

The Chief of Police rejected the recommendation of the 20-day suspension, and referred the matter to a Board of Rights, which usually indicates that the Chief favors a more serious penalty. Following the Chief's decision to order Sanchez before the Board of Rights to answer the misconduct

charges, Sanchez was served with an administrative transfer to another geographical area, and a notice of downgrade in rank from Officer III to Officer II, with a corresponding reduction in pay. As support for the downgrade, the notice cited two prior suspensions suffered by Sanchez.

The LAPD manual provides for such a "downgrade," and does not treat it strictly as discipline. A downgrade is not among the penalties that can be imposed by a Board of Rights. To comply with POBRA section 3304(b), the Department does provide a somewhat perfunctory administrative appeal from a downgrade. But this notice of downgrade came 13 months after the discovery of the alleged misconduct. *Id.* at 1073.

The Board of Rights found Sanchez "guilty" of some counts, and "not guilty" of others. It ordered a 22-day suspension, which Chief Bernard Parks executed. In the internal administrative appeal from the "downgrades," the captain who served as hearing officer recommended that Sanchez be *reinstated* to his Police Officer III position, but the new Chief, William Bratton, rejected the captain's recommendation and left the downgrade in effect.

The Court of Appeal was thus constrained to confront the "statute of limitations" issue. The Court found that the first mention of "downgrade" occurred more than one year after discovery of the alleged misconduct. While § 3304(d) lists a number of reasons that extend the one-year time period, such as the pendency of a criminal investigation (*see*: § 3304(d), [1]-[8] for the enumerated exceptions), the appellate court observed that "a change of mind regarding the recommended punishment is not one of those reasons." 140 Cal. App. 4th at 1083. The Court held that the Department is required by § 3304(d) to "notify the officer of the *specific* disciplinary action that is being proposed, not merely to advise the officer that some disciplinary action is being contemplated." *Id.* at 1081. Nor did Sanchez' election to administratively appeal the downgrade, "cure" the time-barred downgrade, as the trial court found. *Id.* at 1083.

Because "downgrades" are not one of the possible penalties that could be ordered by a Board of Rights, the Chief's referral of Sanchez to the Board did not put Sanchez on notice of the potential for a downgrade. This was probably the key fact in the Court of Appeal decision in *Sanchez.*

Because the *Sanchez* holding arguably rested on the fact that the Department attempted to impose a punishment that was not within the jurisdiction of the Board of Rights, the decision still left room for the Department to argue in a future case that an order to face a Board of Rights was sufficient to satisfy the statute of limitations for any penalty that could be imposed by a Board of Rights. The *Mays* decision puts that argument to rest, because it finds that even a written reprimand cannot be imposed unless the

officer was notified of the possibility within the applicable POBRA time frame.

Uncertainty over the *Sanchez* holding is resolved in *Mays*

In the *Mays* case, an LAPD sergeant, John Mays, suffered a burglary of his personal car, in which confidential police documents were taken, then allegedly made inconsistent statements to internal investigators about the incident. The Department ordered Mays to answer misconduct charges before a Board of Rights. But after the one-year period since discovery of the incident passed without the Department giving Mays notice of a specific proposed disciplinary action, Chief Bratton issued Mays a written reprimand for "serious misconduct" in the incident, specifying four misconduct charges arising from the incident. The reprimand stated, "if it were not for the expiration of the statutes of limitations ... a substantial penalty would have been imposed on you." 51 Cal. Rptr. 3d at 920. Chief Bratton described the reprimand as the "maximum allowable penalty" that could be imposed for the misconduct at the time it was issued. *Id.*

After Mays requested an administrative appeal, the Department reclassified the findings reflected in the written reprimand, dropping one count as "out of statute" and holding one of the falsification charges in reserve as an unresolved charge that could theoretically be considered in the future. Mays then filed a petition for administrative mandamus, seeking to remove the reprimand from his personnel file. *Id.* at 921.

The Court of Appeal disagreed with the Chief's implication that the reprimand was allowable at the time it was issued. The Court found that ordering the employee to answer charges before a Board of Rights was not sufficient to satisfy section 3304(d), as section 3304(d) requires timely notice of the specific disciplinary action that is being proposed. *Id.* at 924-925. Finding the reprimand subject to the limitation period established by section 3304(d), the Court confirmed that "a reprimand is a punitive action." *Id.* at 925.

The *Sanchez* and *Mays* cases indicate that a notice of a proposed disciplinary action will satisfy the statute of limitations in § 3304(d) if served within one year of discovery, but only as to the *specific* penalties that are proposed; not as to other penalties not contemplated in the notice. Both cases referred to the reality that "the nature of the proposed disciplinary action will have some bearing on how the officer responds. Presumably, a proposed penalty of termination will be resisted more vigorously than a proposed reprimand." *Sanchez*, 140 Cal. App. 4th at 1081; *Mays*, 51 Cal. Rptr. 3d at 925. Future cases addressing the issue whether notice of discipline was sufficiently specific to satisfy the POBRA statute of limitations will probably focus on whether the officer was put on "fair notice" of the potential

outcome.

The *Sanchez* decision also implies that it *may* violate § 3304(d) for an agency to enhance a current penalty by reference to years-old disciplinary penalties. This question was *not decided* in either *Sanchez* or *Mays*, but *Sanchez* contains a footnote to the effect that under section 3304(d), "it is debatable whether the Department had the authority to utilize the prior suspensions ... as part of its justification for downgrading Sanchez.... It is self-evident that ... the facts underlying those earlier suspensions had been known to the Department for years." 140 Cal. App. 4th at 1084, fn. 11. The fact that the Court threw the issue open all but guarantees the question will be litigated somewhere, because agencies routinely *aggravate* penalties where there is prior sustained misconduct. We anticipate this issue will arise soon, perhaps this year.

For law enforcement professionals, the enactment of the POBRA statute of limitations makes it more important than ever to keep track of time intervals whenever a misconduct investigation is conducted. As any cursory reading of section 3304(d) will reveal, the calculation of the permissible one-year period is complicated by a complex web of exceptions based on pendency of criminal and civil actions, on whether the investigation involves more than one officer or more than one Department. In addition to these extension provisions, issues can arise over the sufficiency and formality of notification that is given, and over the service of the notice. For example, in *Sulier v. State Personnel Board*, 125 Cal. App. 4th 21, 28-29 (2004), the court held that an informal notification within the permissible time frame, to the effect that formal notice of a proposed demotion would follow in 30 days, was sufficient to satisfy the statute, even though the additional 30-day period extended the total applicable 3304(d) time interval beyond one year. We can envision that a future appellate court may re-examine the rule adopted in *Sulier* when confronted with one of several anomalies created by that decision, such as a case exploring what would happen in the event of an employer's failure to follow through with the formal notice when promised.

As with other POBRA provisions, the section 3304(d) statute of limitations is designed to foster stable public employment relationships, in which all parties can easily understand their rights and obligations. But the statute must be observed to be effective. The statute encourages management to act expeditiously and efficiently in investigating misconduct. The existence of the statute also means that as an officer, you should keep track of the dates when you are notified of misconduct accusations, investigations, interviews, and investigative findings, and should remind your union representative or attorney to pay attention to whether the POBRA statute of limitations may furnish a defense in your case.

Stay safe!