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## TRAINING BULLETIN

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### COURT OF APPEAL AFFIRMS REINSTATEMENT OF DEPUTY FIRED FOR DISHONESTY

*Justices Chide Department Officials For Being  
“Hell-Bent to Fire Smith, No Matter What”*

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and  
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Riverside County Deputy Sheriff Anthony Smith was fired from the Sheriff’s Department over an April 8, 2002 event when he, along with Deputies Raymond Verdugo and Byron Farley engaged in a foot chase of a wanted suspect named David Olivas.

Olivas ran through an apartment parking area toward a six-foot high cinder-block wall, with Verdugo in pursuit on foot. Smith and Farley were close behind and to the right and left of Verdugo. Olivas attempted to go over the wall, when Verdugo reached out with his left hand to grab at Olivas, Verdugo’s gun, in his right hand, discharged unintentionally, probably as the result of a sympathetic contraction of his right hand, as he reached to grab Olivas with his left hand.<sup>1</sup> Verdugo lied about this event, and

claimed he shot in self-defense because Olivas pulled a knife on him at the base of the block wall. Apparently, Verdugo was conflicted over his duty to tell the truth, and decided to try to convince Department investigators that he shot voluntarily in self-defense in order to avoid possible criticism for unsafe handling of his firearm. Neither Farley nor Smith supported Verdugo’s statement or version of the events. In fact, Smith believed the shot was accidental, because he saw no basis for Verdugo to shoot in self-defense. And, an administrative investigator, Lieutenant Tucker, who arrived on-scene shortly after, told Smith, “this is a no-brainer; no big deal – appears to be an accidental discharge” when Smith asked for a Sheriffs’ Association

<sup>1</sup>The sympathetic contraction phenomenon is discussed in detail in the author’s Training Bulletin,

Volume VII, Issue No. 5, “Understanding The Dynamics of Involuntary Firearm Discharges in Tactical Situation,” May 2004, available upon request.

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representative before being interviewed (Slip Op. at 27). In short, both Farley and Smith were unaware that Verdugo intended to, or claimed, that this discharge was intentional and in self-defense.

All of the deputies submitted to interviews or wrote reports about the incident. Smith described how he and Farley pursued Olivas over the wall, and apprehended him in a field. Smith described locating a knife in Olivas' right pants pocket and a car stereo detachment faceplate in his left pants pocket. When Verdugo saw Smith retrieve the knife, Verdugo said something to the effect of "that is what he pulled on me," or "that is what he was going for."

But about one week later, Smith was reinterviewed by another investigator about the incident. Smith did not review anything before this second interview. He incorrectly recalled in the second interview that he recovered the stereo faceplate from Olivas' left hand (as opposed to his left pants pocket). And, by this time, Verdugo's story about shooting in self-defense began to unravel.

Investigator Chad Bianco reviewed Smith's April 8 and April 16, 2002 interviews, and noted some possible discrepancies, including the location of the faceplate when it was found by Smith. He ordered Smith to a third interview on April 25, 2002, which lasted over five (5) hours. Bianco concluded that Smith lied in his interviews in order to "protect" Verdugo, and recommended to Sheriff's Administration that Smith be found guilty of willfully trying to cover up Verdugo's unintended discharge. Bianco reasoned that Smith's innocent misrecollection about the faceplate (pocket vs. hand) was in fact, calculated deceit designed to

support Verdugo's claim that Olivas "pulled the knife" at the wall.<sup>2</sup>

Verdugo was fired (as he should have been) for his willful dishonesty. But Smith was also fired, although there was *no evidence* whatsoever of any collusion between Smith and Verdugo.

The Department also alleged that Smith lied about three other issues: (1) the position of Olivas (sitting up or supine) during the search that produced the faceplate and knife; (2) whether Olivas "hesitated" at the wall for "milliseconds" or "several seconds"; and (3) whether Olivas and Verdugo had any confrontation or "struggle" at the wall. Suffice to say, the trial court and the Court of Appeal disposed of these three (3) items as "non-issues" in the analyses of the two courts. Rather, both courts focused on the faceplate issue. The 33-page slip opinion deals primarily with the facts attending recovery of the stereo faceplate, and quotes extensively from the record to support its conclusion, like that of the trial court, that Smith's misstatement was the product of "innocent misrecollection" and *not* knowing and willful deceit.

Hence, the Court of Appeal and trial court found Smith substantially innocent of any misconduct, and order him reinstated, without prejudice or loss. Reinstated employees are entitled to back pay from the date of discharge, less earnings from substitute employment, plus interest of 7%.

But the Court of Appeal rather bluntly criticized Department officials for being "hell-bent to fire Smith, no matter what". (Slip Op. at 3).

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<sup>2</sup>Indeed, Olivas had a knife in his right pants pocket; but, he did not draw it out at any time before Smith took it from him.

### *The County's Contentions In The Court of Appeal*

As it did in the trial court, the County of Riverside and the Sheriff's Department argued that the trial court applied an incorrect standard of review of the administrative decision.<sup>3</sup>

Since it is true that the trial court must afford such administrative decisions a "strong presumption of correctness," a party (like Smith) who challenges the decision must demonstrate that the decision is "contrary to the weight of the evidence." (Slip Op. at 21.) Both the trial court and the Court of Appeal found that Smith successfully carried this burden. In so doing, the Court of Appeal noted that the presumption of correctness *can be overcome* in a proper case, because the trial court must review the evidence based upon its independent judgment.

The County also contended that the hearing officer's findings on the credibility of Smith's testimony were entitled to great deference in the trial court and should not have been disregarded. (Slip Op. at 22) Again, the Court of Appeal disagreed, noting that the independent judgment test "requires" the trial court to reweigh the evidence by examining the credibility of witnesses.

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<sup>3</sup>Arbitrator William Daugherty as a hearing officer under the MOU, *sustained* Smith's discharge and sided with the Department finding that Smith had been dishonest in the four (4) particulars cited. Smith's counsel sought mandamus review of that decision in the Superior Court before Hon. Judge Robert G. Spitzer under *Code of Civil Procedure* § 1094.5. Judge Spitzer reversed the hearing officer, finding Smith substantially innocent of misconduct utilizing the court's *independent* judgment on the evidence. He ordered Smith reinstated in the writ. The County then appealed.

### *Is An Intent To Deceive A Necessary Element of Dishonesty?*

The County contended at the administrative hearing, and in the two reviewing courts, that Smith "intended to deceive" investigators. While the hearing officer was apparently persuaded, the judge and justices were not. But the County floated an even more stunning argument as a fall-back position, based on Riverside County Sheriff's General Order § 202.02 - "Department members shall speak the truth at all times...." The County and Department argued "that they are entitled to fire Smith simply for saying something untrue, regardless of his intent in doing so." (Slip Op at 2.)

Of course, Smith could not lawfully be fired for an innocent misrecollection. (Slip Op. at 22-24.) But the Court of Appeal also noted that "Investigator Bianco badgered Smith about the supposed discrepancy...." "This," said the Court, "is typical of the way Investigator Bianco appeared, throughout the interview, to have prejudged Smith's guilt." (Slip Op. at 29-30, fn.2.)

Moreover, the Court was critical of the County's position in the case, evident in the following passage from page 31 and 32 of the Slip Opinion:

*On April 25, Smith promptly and frankly volunteered that there were "discrepancies" between the two earlier interviews.<sup>3</sup> {AR 691}*

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<sup>3</sup> The County seems to think it was not enough for Smith to admit that there were discrepancies; it faults him for not adding immediately that there was a discrepancy specifically concerning the faceplate, and

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*He also admitted that, in fact, he found the faceplate in the suspect's pants pocket. {AR 698, 782, 804} He explained: "I think the whole searching [- -] my left hand, [his] left side. I was just securing his left, and ...my memory got a little distorted, ...and I just got left side...on the brain." {AR 783} He added that he was "tired," {AR796} he had not taken any notes he could review,<sup>4</sup> {AR 796, 804} and he*

even for not describing how he felt when he discovered the discrepancy. (AOB 32-33; ARB 4)

At the administrative hearing, Smith explained that he "wasn't asked" about these matters. {AR 559-560} And, as the transcript of the April 25 interview confirms, he was not. Yet the County concludes, "That comment alone would be sufficient for [the arbitrator] to thereafter completely distrust any testimony provided by Smith." {ARB 4} We disagree. In fact, we consider **the County's** comment sufficient to show that **the County** is determined to find fault with everything Smith did.

<sup>4</sup>Investigator Bianco's reaction to this gives some of the flavor of the interview:

"INVESTIGATOR BIANCO: Does it take notes and a notepad to help you remember a factual object or a factual situation that is the truth?

"ANTHONY SMITH: It could.

"INVESTIGATOR BIANCO: You need something to remind you of what's truth and what's not the truth?

"ANTHONY SMITH: Well, it's two different interview and I'm trying to remember how it happened - -[¶]...[¶]

"INVESTIGATOR BIANCO: Okay. Do you need a notepad to tell the truth?

"ANTHONY SMITH: No."

"didn't take the time necessary to really recount exactly in my memory all my steps." {AR 783} He concluded that he just "forgot." {AR 796, 799} This constituted substantial evidence that his misstatement concerning the location of the faceplate was, at worst, negligent rather than intentional. (See: *Kolender v. San Diego Co. Civil Service Com.* (Salenko)(2005)\_\_\_ Cal.App. 4<sup>th</sup> \_\_\_, \_\_\_ [2005 Daily Journal D.A.R. 11, 605] [trier of fact could believe officer's claim that his notes were disorganized, and he "lost track" of which witness said what].)

## CONCLUSION

There are some obvious and important points in the *Smith* case that require reiteration. The first three of these are legal in nature. The remaining learning points are practical: *how to avoid being victimized by your Department for an "innocent misrecollection."* On the legal side, *Smith* establishes that (1) dishonesty or false statements charges require proof of an intent to deceive and knowledge of the falsity of the statements; that is, being mistaken, even as a result of negligence, is not to be confused with untruthfulness—culpable untruthfulness requires a knowing intent to mislead; (2) although administrative adjudications come into court bearing a "strong presumption of correctness," that presumption can be overcome, i.e., thus entitled to no weight; if the petitioner (as Smith did, for example) persuades the court that the decision is contrary to the weight of the evidence; and (3) although credibility findings rest initially with the hearing officer who

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watched and listened to the parties and witnesses while testifying, a reviewing court is still required to reweigh the evidence, and may disregard the hearing officer's assessment of credibility (as Judge Spitzer did in *Smith*).

### LEARNING POINTS

As for the learning points, what could or should Smith have done to protect himself against such a disastrous consequence of "innocent misrecollection"—discharge and three (3) years of unemployment or underemployment?

First, Smith initially asked Lieutenant Tucker for a representative before being interviewed. But, he allowed Tucker to talk him out of this protection, by Tucker's characterization that the discharge was "an accidental - a no-brainer, no big deal." A competent representative would have ensured that Smith retained a recording of his first interview on April 8, 2002 and reviewed it before his second interview on April 16, 2002, which would also have been self-recorded. It is highly unlikely had these minimal precautions been taken, Smith would have suffered failed recollection. Also, a competent representative would have not permitted Smith to be whip-sawed and bullied in the five (5) hour interview of April 25, 2002, which the Court found so offensive to the search for truth.

But aside from the presence of a representative, there was a lot more that Anthony Smith could have done to protect himself from this kind of administrative overreaching. In fact, we were so disturbed by this case after the hearing officer sustained Smith's termination, that we wrote a special bulletin based on the *Smith* case, although it does not identify it by name, which emphasized the importance of *always* ensuring

that any official statement you make whether in a report, interview or testimony, is always as accurate as possible. As we see in the *Smith* case, innocent misrecollection and failed recollection are common human memory flaws. The problem is, someone with the authority and *power* to decide, may determine that it is more than an innocent mistake. What should be obvious to us sometimes escapes us; here, that was the recognition that any statement you make can form the basis for a charge of dishonesty.<sup>4</sup> In a profession that places such a high premium on accuracy in reports and statements, members should do whatever they can to make sure their statements are accurate and consistent. **But above all else, remember to look out for yourself because nobody else owns that job.**

### STAY SAFE!

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and  
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<sup>4</sup>On this point, see our Training Bulletin, Vol. VI, Issue 2, February 2003, "Some Notes About Police Testimony, In Any Investigation or Testimony, Always Take Time To Review Your Prior Statements."

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