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MICHAEL P. STONE, GENERAL COUNSEL

6215 River Crest Drive, Suite A, Riverside, CA 92507
Phone (951) 653-0130 Fax (951) 656-0854

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A RETROSPECTIVE LOOK AT 2005: CASES SIGNIFICANT TO POLICE CIVIL RIGHTS AND LIBERTIES

by Michael P. Stone and Marc J. Berger

Each January we look back at the year prior for cases that are significant to law enforcement employees. This past year's appellate litigation in peace officer disciplinary matters has clarified two major areas of unsettled law. The year's most comprehensive decision under the Public Safety Officers' Procedural Bill of Rights Act [*Government Code* section 3300 et seq.] ["POBRA"] has curtailed the disclosure rights officers will have in the early stages of internal investigations.

The standards for terminating a peace officer for dishonesty have also been clarified by decisions resolving two termination appeals within the San Diego Sheriff's Department. The two San Diego cases were watched closely here in Riverside, where our office has conducted similar litigation against a Department that operates by the motto, "you lie, you die." The new San Diego cases will make it considerably more difficult for local departments to prevail in their efforts to persuade the courts to adopt that motto as a rule of law.

Disclosure Rights Curtailed in *Gilbert v. City of Sunnyvale*

An important POBRA decision this year was *Gilbert v. City of Sunnyvale* (2005) 130 Cal. App. 4th 1264. In a case where an accused officer sought judicial relief before the administrative hearing, the court was faced with the need to clarify the extent to which the landmark *Skelly* case and *Government Code* section 3303(g) require the Department to disclose evidence to an officer in the earlier stages of an internal investigation.

A right of access to evidence on which proposed discipline was based was recognized for public employees under investigation in *Skelly v. State Personnel Board* (1975) 15 Cal. 3d 194. Additional disclosure rights were later codified as *Government Code* section 3303(g), part of the POBRA.

It is an obvious rule of constitutional due process that a tenured public employee subject to a disciplinary sanction has a right to full disclosure of the employer's evidence at the time of

preparing for the employee's administrative appeal from the discipline. But the California courts have long struggled to sensibly define the rights to disclosure of adverse evidence at the earlier stages of investigation, which are governed by the *Skelly* rules and by POBRA.
One problem with arriving at a workable definition of these rights has been that the legal rules recognizing these rights function somewhat counterintuitively. While an officer certainly must have the right of access to adverse evidence by the time of the administrative appeal, standard investigative methods might be heavily burdened by an overbroad interpretation of a rule requiring swift disclosure of all evidence gathered by investigators while the investigation is in progress. Accordingly, the Sixth District Court of Appeal in *Gilbert* sharply curtailed the broader interpretations of the employer's disclosure requirements under *Skelly* and *Government Code* section 3303(g), while re-affirming the right to full discovery in preparation for the administrative appeal.

The Court in *Gilbert* rendered one of the most comprehensive interpretations to date on the extent of an accused officer's disclosure rights in the various stages of an internal investigation. In so doing, the court rejected the officer's contention that *Government Code* section 3303(g) gives accused officers any broad general discovery rights of the type normally granted to criminal defendants, and declined to adopt the reasoning of two precedents that had analogized these rights to criminal defense discovery, *San Diego Police Officers Assn. v. City of San Diego* (2002) 98 Cal. App. 4th 779, and *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal. 3d 564.

The *Gilbert* case arose from an investigation of Officer Randall Gilbert of the Sunnyvale Department of Public Safety, which resulted in a recommendation to terminate. A night club in Sunnyvale was under federal investigation for prostitution and immigration violations. Officer Gilbert was suspected of assisting the owners in conducting a prostitution business.
Officer Gilbert was formally charged only with releasing confidential DMV information without a legitimate law enforcement purpose to the club owners. The club owners had observed two suspicious vehicles outside the club. Officer Gilbert had run the license numbers of the vehicles and thereby was able to confirm the club owners' suspicion that the vehicles were conducting covert federal surveillance. 130 Cal. App. 4th at 1272-73. The Department also had evidence that Officer Gilbert gave rides to prostitutes or customers, and made phone calls to the club's proprietor, to massage parlors, and to other prostitution-related businesses. But it did not act upon that evidence, and consequently, did not disclose it at the interrogation and *Skelly* phases of the investigation. *Id.*

Gilbert was interrogated on November 14, 2002. On February 3, 2003, Gilbert was served with a Notice of Intended Discipline, which indicated he would be terminated, and was provided with a copy of the Department's comprehensive investigation report.

The Notice of Intended Discipline indicated that taped witness interviews and photographs would be made available on request. The comprehensive investigation report stated that "source documents" for the investigation remained with the FBI and would be made available to the Sunnyvale Police when dictated by the needs of the federal case. *Id.* at 1272.

Gilbert requested and received the audiotapes. A pre-termination *Skelly* hearing was held, the termination became effective, and Gilbert appealed to the City Personnel Board. Before the administrative appeal, Gilbert's attorney complained to the City Attorney that Gilbert had not received all the relevant investigatory materials. In response, the City Attorney furnished Gilbert with additional materials supporting the charge of misuse of DMV information, along with a letter stating that the Department does not yet have access to certain materials that are being held by the FBI. The City Attorney's letter stated, "The FBI case is still ongoing and the City does not have authority to do anything which might compromise that case." *Id.* at 1274.

Gilbert's attorney then complained that the Department had violated Gilbert's *Skelly* rights by failing to produce the evidence on which the discipline was based. The City Attorney disputed that Gilbert's *Skelly* rights were violated, because Gilbert was not being charged with assisting the club owners in the prostitution business, which was the subject of the evidence that was not produced. Gilbert was only being charged with the DMV misuses, for which the supporting evidence had been provided. *Id.* At that point in the proceedings, Gilbert brought a petition for writ of mandate seeking back pay and contending he was entitled to certain documents identified in the comprehensive investigation report produced at the time of the *Skelly* meeting. *Id.* at 1274-75.

The *Skelly* case gives the officer the right to receive, prior to the imposition of discipline, "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." *Skelly*, 15 Cal. 3d at 215. Gilbert thus argued he was denied timely access to the materials upon which the Department's action was based.

Gilbert's writ petition was also based on *Government Code* section 3303(g), which provides that after interrogation, "The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential." The statute then provides, "No notes or reports that are deemed to be confidential may be entered in the officer's personnel file." Thus, within the meaning of section 3303(g), Gilbert alleged that after interrogation, he was still being denied access to reports and complaints made by investigators and other persons. *Gilbert*, 130 Cal. App. 4th at 1282.

Analyzing Gilbert's petition from the perspective of his *Skelly* rights, the Court of Appeal arrived at a general conclusion that "Constitutional principles of due process do not create general rights of discovery." *Id.* at 1280. The court recognized that where a post-termination appeal is available, the employee's procedural rights at the pre-termination stage must be balanced by the government's "strong interest in terminating law enforcement officers who are of questionable moral character, and in doing so in an expeditious, efficient, and financially unburdensome manner." *Id.* at 1279 (citation omitted). Accordingly, the Court held, "We reject appellant's contention that the word 'materials' as used in *Skelly* means each and every document identified"

in the investigative report "was required to be produced prior to his pretermination hearing in order to satisfy due process." *Id.* at 1280. The court found that the materials produced "adequately provided an explanation of the employer's evidence"

and "notice of the substance of the relevant supporting evidence ... sufficient to enable appellant to adequately respond at the pretermination stage." *Id.* (Citations omitted).

The court similarly rejected Gilbert's argument based on section 3303(g), and in so doing attempted to narrow the post-interrogation disclosure rights contained in that statute. In the last major interpretation of this statute, the court in *San Diego Police Officers Assn. v. City of San Diego* (2002) 98 Cal. App. 4th 779 had analogized the disclosure rights under the Bill of Rights Act to the discovery rights of a criminal defendant, and granted officers the right to receive investigators' raw notes and interview tapes, in addition to any final reports based on those materials.

The court in Gilbert, however, found that an analogy to criminal defendant discovery rights is "not apparent from the language of section 3303." *Gilbert*, 130 Cal. App. 4th at 1285. Finding no ambiguity in the plain language of section 3303 that would require interpretation, the court in *Gilbert* reasoned that "The fact that due process may require sufficient notice of the facts to enable an officer to meaningfully defend himself or herself *if* the officer is administrative charged does not require expansive judicial construction of the phrase 'any reports or complaints made by investigators or other persons' at the earlier investigation stage." *Id.* at 1285. To the contrary, the court found, "The main purpose of section 3303 is to govern the conduct of an interrogation of an officer who is under investigation, thereby preventing abusive tactics." *Id.* at 1286. The reference to stenographer's notes implicitly refers to a stenographer present at the interrogation. As stated by the court, "Fair treatment of such officer does not require that all the material amassed in the course of the investigation, such as raw notes, written communication, records obtained, and interviews conducted, be provided to the officer following the officer's interrogation." *Id.*

In denying relief to Gilbert, the court furnished a veritable compendium of the current rules governing disclosure requests under section 3303(g). First, the court clarified that an employer is not excused from providing disclosure under section 3303(g) by the fact the material is part of a criminal investigation, or that it originates from a third person or a different agency, if the material has been made part of the employer's internal investigation. The court then confirmed that the disclosure rights under section 3303(g) do not apply where the interrogation is conducted by an agency other than the officer's employing agency, unless the interrogating agency is working in concert with the officer's employer. *Id.* at 1287.

One of the main factors that persuaded the court in *Gilbert* to narrow the section 3303(g) disclosure rights was the existence of the statutory exception from disclosure for materials "deemed by the investigating agency to be confidential." The department had permissibly withheld confidential materials from other officers' personnel files from disclosure to Gilbert. *Id.*

at 1289. The court found the existence of this unchallengeable statutory exception to be a strong indication that the Legislature did not intend to grant comprehensive discovery rights to employees at the investigation stage. The reasoning behind this conclusion was that section 3303(g) "empowers the investigating agency to deem reports confidential and excepts items so designated from the agency's disclosure obligation. Nothing in the section limits an investigating agency's power to designate reports confidential to materials protected by statutory privilege." *Id.* at 1290. Based on the requirement of *Government Code* section 3305 that adverse comments may not be placed in a file used for a personnel purpose without granting the officer an opportunity to read, sign and respond, the court observed that "the repercussions of deeming an item confidential is that it may not be entered in the officer's personnel file. The implication is that the employing department may not make adverse personnel decisions concerning the officer based on reports, or the portions thereof, deemed confidential and not made available to the officer." *Id.*

Accordingly, the court concluded that "It is unreasonable to suppose that the Legislature intended [section 3303(g)] to afford an officer under investigation far-reaching disclosure rights, akin to the statutory discovery rights in criminal prosecutions, following an administrative interrogation of the officer when the Act does not expressly so provide but rather gives the investigating agency power to deem reports confidential, excludes such confidential items from the duty to disclose, and provides no mechanism for challenging such designation. The more reasonable interpretation, in light of the other features of section 3303 and other provision of the Bill of Rights Act, is that the minimal rights of disclosure included

in subdivision (g) were intended to prevent grossly abusive interrogation tactics and protect an officer's personnel file." *Id.* at 1291.

Another issue analyzed in Gilbert concerned the right of an officer to disclosure of evidence that the Department claims is beyond the scope of the investigation. As explained above, the Department withheld evidence concerning its suspicion that Officer Gilbert was assisting a prostitution business, by claiming it was not using that evidence as a basis for discipline. Officer Gilbert argued that the suspicion of assisting a prostitution business was the Department's true reason for seeking termination, and contended that the withholding of evidence impaired his ability to prove that the DMV-related charge was a pretext. Since the DMV-related charge would have been sufficient for termination, the court observed Department could not be required to proceed on the more serious charges, which might be more difficult to prove. *Id.* at 1280-81. The court found that in the writ proceeding before it, Gilbert bore the burden of proving pretext and did not carry it. *Id.* at 1281. But Gilbert would apparently have that opportunity in his administrative appeal.

The *Gilbert* opinion also implicitly addressed the remedy for a violation of section 3303(g), as the court specifically found that Gilbert had not shown a violation that would justify ordering back pay, *id.* at 1292, but also stated that "Upon an adequate showing of entitlement, the court is not obligated to provide any specific remedy and it might, for example, conclude the appropriate relief

is immediate disclosure." *Id.* at 1293. This outcome shows that a court could remedy a section 3303(g) violation by simply ordering disclosure. Back pay, which is ordinarily available as a matter of course in a *Skelly* violation, is still treated as a proper remedy for a Bill of Rights Act violation, but after the *Gilbert* decision, a litigant seeking back pay for a 3303(g) violation will be under a greater burden than before to show why immediate disclosure would not be adequate under the circumstances of the particular case.

The curtailment of disclosure rights in *Gilbert* is not a welcome development from the perspective of employees and their unions. It is possible that *Gilbert* will not be the final word on section 3303(g) disclosure rights. *Gilbert* seems to be at odds with prior Court of Appeal cases, including primarily the 2002 *San Diego Police Officers Assn. v. City of San Diego* decision that ordered post-interrogation disclosure of raw notes and interview tapes, and took a broad view of section 3303(g) disclosure rights.

Another case in conflict with *Gilbert* is *Hinrichs v. County of Orange* (2004) 125 Cal. App. 4th 921. The court in *Hinrichs* rejected two arguments made by the Orange County Sheriff's Department, that section 3303(g) does not require disclosure of documents created before the interrogation, and that section 3303(g) rights do not apply where the only discipline is a written reprimand. 125 Cal. App. 4th at 928-30.

We discussed *Hinrichs* in last year's retrospective, as a case that was not initially certified for publication but should be published. Shortly after we advocated its publication, the Court of Appeal ordered it published. The apparent conflict between *Gilbert* on the one hand, and the *San Diego* and *Hinrichs* cases on the other, suggests that the California Supreme Court may accept a future case that raises this issue. As employee counsel, we shall continue to request the broadest possible post-interrogation disclosures, and to litigate all legitimate claims of unjustified refusal.

Dishonesty Standards Clarified In San Diego Sheriff Department appeals

The past year also brought considerable development of legal standards for a law enforcement employer's burden of proof in termination cases based on allegations of dishonesty. Two published precedents from the Fourth District Court of Appeal, resolving appeals brought by the San Diego County Sheriff's Department, underscored the principle that a law enforcement employer must prove culpable intent to sustain a disciplinary penalty for dishonesty.

In both cases, the Civil Service Commission had reduced a proposed termination to a 90-day suspension. One of these cases, *Kolender v. San Diego County Civil Service Commission (Berry)* (2005) 132 Cal. App. 4th 716, reversed the Civil Service Commission's decision to reduce the penalty where a deputy followed a code of silence about a use of force on an inmate, even though the deputy ultimately told the truth. The other case, *Kolender v. San Diego County Civil Service Commission (Salenko)*(2005) 132 Cal. App. 4th 1150, rejected the Sheriff's argument that a Sergeant who made careless factual errors in a report of an assigned investigation into a deputy's

alleged abuse of sick leave must be terminated, and upheld the Commission's recommendation to reduce the penalty to a 90-day suspension and demotion to Deputy. The two cases clarified several unsettled questions governing discipline for dishonesty.

The *Berry* and *Salenko* cases offer an opportunity to recap the paramount legal rules that determine appeals from termination for dishonesty. Locally, we all know that dishonesty is an issue that is often hotly contested. Dishonesty cases are hard-fought partly because they involve intensely fact-specific applications of a few very general settled rules. The only truly settled rules about dishonesty is that the "overriding consideration" is "the extent to which the employee's conduct resulted in, or if repeated, is likely to result in, 'harm to the public service,'and that the surrounding circumstances, and the likelihood of recurrence of the misconduct" are also pertinent factors. See, e.g., *Hankla v. Long Beach Civil Service Commission* (1995) 34 Cal. App. 4th 1216, 1222-23.

The publication of new dishonesty precedents at this stage in legal history cases lays the groundwork to synthesize more specific legal rules that may gradually make these cases more predictable. The new cases also create a rare opportunity to compare two decisions that arise under nearly identical procedural situations. In both cases, the Civil Service Commission reduced a termination for dishonesty to a lesser punishment. In *Salenko*, the appellate court upheld the Commission's ruling that a Sergeant who misstated facts in a report could keep his job, essentially because he had not intended to deceive. In *Berry*, the appellate court reversed the Commission's ruling that a deputy who lied to cover up another deputy's physical abuse of an inmate could keep his job, essentially because the Commission's ruling "manifested indifference to public safety and welfare." *Berry*, 132 Cal. App. 4th at 721 (citation omitted).

General conclusions about the standard for terminating a law enforcement officer's employment for dishonesty can be derived by pinpointing the reasoning behind these opposite outcomes. The extensive analysis of intent in the two cases furnishes authority for adding intent to deceive to the list of pertinent factors in a law enforcement termination for dishonesty.

The cases also reaffirm the established rule that a reviewing court will rarely reject the credibility findings of the judge or hearing officer who actually heard the live testimony.
The *Salenko* case rejected the Department's attack on the credibility of the employee's innocent explanation for his factual misstatements, and confirmed that a reviewing court will accept the credibility assessment of the judge or hearing officer who heard the live testimony unless the testimony is "inherently improbable ... physically impossible or wholly unacceptable to reasonable minds." *Salenko*, 132 Cal. App. 4th at 1155 (internal punctuation and citation omitted). The *Berry* case does not reject the credibility of the employee's excuses and regrets for lying, but found the lie serious enough to warrant termination because of the public harm inflicted by a code of silence. *Berry*, 132 Cal. App. 4th at 723.

Salenko

In the *Salenko* case, the Department assigned Sergeant Edward Salenko to investigate and prepare reports on a deputy's possible abuse of sick leave. *Id.* at 1153. Salenko's reports contained misstatements on two subjects. One of the reports stated that Salenko had interviewed a Lieutenant about whether the deputy's sick leave had been approved, and the Lieutenant had said yes. In truth, Salenko had not interviewed the Lieutenant, but only made an informal inquiry. Salenko's reports also stated he had interviewed the Sergeant who had started the investigation, and that the other sergeant did not recall the details of the investigation. In truth Salenko had spoken to that Sergeant, but not conducted a formal interview. That first sergeant testified that she did recall the details, but Salenko had failed to ask her about them. *Id.* at 1153-54, and fn. 1.

Salenko defended by "insisting he did not intentionally seek to mislead his superiors." *Id.* at 1155. He claimed his reports were materially accurate, and ascribed inconsistencies to confusion, forgetting the exact circumstances, and losing "track of how many individuals he spoke with in the course of his investigation, and who said what to him." *Id.*

The appellate court observed that the case involved "the reasonable inferences to be drawn from Salenko's explanations...." The Department argued Salenko was "untruthful, and not merely sloppy, disorganized and forgetful as Salenko successfully argued before the Commission." *Id.*

The court rejected the Department's argument, initially observing that "The hearing officer was in the best position to observe the witnesses' demeanors and assess their credibility." *Id.* The court concluded, "We defer to the trier of fact on issues of credibility, and conclude substantial evidence supported the hearing officer's decision to credit Salenko's explanation for his inaccurate and unprofessional report." *Id.* at 1155. Because of the trial court's superior position to be able to observe the live witnesses, live testimony that supports the decision below "may be rejected only when it is inherently improbable or incredible, i.e., unbelievable *per se*, physically impossible or wholly unacceptable to reasonable minds." *Id.* (citation and internal punctuation omitted). This formulation can be treated as a working definition of the burden an appellant must undertake to persuade a reviewing court to reject the credibility findings of a judge or hearing officer who heard the live testimony.

Although the court found no apparent motive for Salenko's misstatements (*id.* at 1154), the misstatements actually seem self-serving, as they had the effect of concealing or minimizing Salenko's omissions, neglect and lack of thoroughness in carrying out his assignment to investigate the deputy's suspected abuse of sick leave. The opinion does not expressly indicate whether the misstatements actually hampered the investigation of the deputy's abuse of sick leave, but some harm can reasonably be inferred. The deputy had given conflicting reasons for taking the sick leave. Assuming the Department sought to call the deputy to account, the inconsistent handling of the investigation would hinder the Department's cause. The inaccuracies may have indirectly harmed the public treasury by impairing the Department's effectiveness in enforcing its sick leave policies. Nevertheless, the appellate court found that the Commission was within its

authority in reducing the termination to a suspension based on finding that the inaccuracies appeared unintentional and immaterial. *Id.* at 1154.

The *Salenko* opinion also addresses the proper standards of judicial review for administrative decisions in public employee disciplinary appeals. A "standard of review" in this context determines how much weight, respect, or deference the court gives to the decision of the administrative body. Under *Code of Civil Procedure* section 1094.5, the statute authorizing a writ of mandate to review an administrative agency's disciplinary decision, a court reviewing an administrative agency's disciplinary decision is required to determine whether the agency abused its discretion.

The Department in *Salenko* raised a mischievous argument about the standard of review. Attempting to confuse the court about the rule that the court must determine whether the Civil Service Commission abused its discretion, the Department argued that the Civil Service Commission is limited to determining whether the *Sheriff's initial recommendation* to the Civil Service Commission was an abuse of the Sheriff's discretion. If the Department's argument were correct, the Civil Service Commission would be required to adopt the Sheriff's recommendation if the Sheriff's recommendation as long as the decision was supported by substantial evidence, and if so, to disregard any contrary evidence. The court in *Salenko* rejected the Department's argument that the Civil Service Commission was limited to deferential review of the Sheriff's recommendation for abuse of discretion, by observing that *Government Code* section 31108 and the San Diego County Charter both authorized the Civil Service Commission to "affirm, modify or revoke" the Sheriff's order to terminate an employee. That "authority to 'modify' the Sheriff's disciplinary order" was found "more consistent with an independent review than with substantial evidence review of the Sheriff's finding." *Id.* at 213-14. This same argument was attempted this year in similar appeals by the Riverside County Sheriff's Department in the matters of two employees fired for "dishonesty". Both of them are reinstated. Our local courts have thus far quite easily seen through that attempt to distort the standard of review, now with the added guidance of the *Salenko* decision.

Berry

In the *Berry* case, Deputy Timothy Berry, during his probationary period of employment, observed Deputy Alfonso Padilla using force on an inmate who had become belligerent. *Id.* at 719. After sending Berry away, Padilla repeatedly bumped the inmate's head against the wall. After the inmate filed a grievance, Padilla requested Berry to lie about the incident, by saying he saw Padilla simply take the inmate to the medical holding area, and Berry agreed, realizing the lie would be important to Padilla. *Id.*

A week later, investigators had received other information and confronted Berry with his earlier statement. In a taped re-interview, investigators stopped the tape and told Berry he was not being honest. Berry then admitted that he had lied to protect Padilla, and proceeded to tell the investigators the truth. *Id.*

The Civil Service Commission found that while not all lies required termination, Berry's lie was "serious and not frivolous." *Id.* at 720. The Commission found that a code of silence existed within the Department, that Berry was assigned to an "angry team" of "rogue" deputies, and "went along with Padilla's lie in order to avoid being ostracized and possibly losing his teammates' protection if conflicts arose with the inmates." *Id.* at 720 and fn. 3. Berry testified that he was only a few months out of the Academy and regretted telling the lie. *Id.*

The *Berry* opinion begins its analysis by recognizing that the Commission's decision is subject to review for "abuse of discretion," and that "An abuse of discretion occurs where, as here, the administrative decision manifests an indifference to public safety and welfare." *Id.* at 721. Citing *Hankla v. Long Beach Civil Service Commission* (1995) 34 Cal. App. 4th 1216, an earlier case where the appellate court had found termination the only proper penalty, the court stated, "The public is entitled to protection from unprofessional employees whose conduct places people at risk of injury and the government at risk of incurring liability." *Id.* Quoting from *Talmo v. Civil Service Commission* (1991) 231 Cal. App. 3d 210, the court in *Berry* explained, "A deputy sheriff's job is a position of trust and the public has a right to the highest standard of behavior from those they invest with the power and authority of a law enforcement officer. Honesty, credibility and temperament are crucial to the proper performance of an officer's duties. Dishonesty is incompatible with the public trust." *Id.* at 721.

Applying these rules to the case before it, the appellate court in *Berry* reasoned that "Dishonesty is not an isolated act; it is more a continuing trait of character. False statements, misrepresentations, and omissions of material facts in internal investigations, if repeated, would result in continued harm to the public service." *Id.* Berry had "forfeited the trust of his office and the public" because he lied about a "grave matter" and the lie "implicated important values essential to the orderly operation of the office." *Id.*

The appellate opinion then rejected Berry's evidence in mitigation, that he had ultimately told the truth. First, the court noted that "Berry apparently did not believe he had a professional duty to correct his first lie on his own, and he elected not to do so. Instead, Berry let one week go by, and only told the truth after the office discovered his lie and pressed him for the truth; otherwise, he might never have done so." *Id.* at 721-22. Berry was found "complicit in covering up abuse of an inmate." *Id.* at 722. Given the Commission's "findings regarding the existence of the 'code of silence,' the physical abuse of inmates, and the 'rogue team'" to which Berry was assigned, the appellate court found the Sheriff "was entitled to discharge Berry in the first instance...." *Id.*

The Commission had justified the reduced penalty by finding that Berry had ultimately "told the truth and risked everything." *Id.* His testimony had helped uphold Padilla's termination. But the appellate court commented that "Berry did nothing special by testifying truthfully against Padilla; indeed, the dishonesty and truthfulness charges against Padilla would have been easier and more quickly proved if Berry had simply responded honesty to the investigators when he first was asked." *Id.*

Finally, the appellate court rejected an argument that the Department "typically did not terminate those who eventually told the truth." *Id.* at 723. Quoting *Talmo*, the court held, "there is no requirement that charges similar in nature must result in identical penalties." *Id.*

The *Berry* case stands for the general proposition that some dishonesty and other misconduct amounts to such a serious abuse of the public trust that it is an abuse of discretion for an administrative body to let the employee keep the job. The appellate court reached that result in *Berry*, even though the employee offered evidence in mitigation, that he regretted his lie, that he ultimately told the truth in time to protect the public interest of terminating the deputy who abused an inmate.

In our experience in litigating dishonesty cases locally, some departments seem to be attempting to persuade the courts that termination is required as a matter of law in all dishonesty cases. The true rule is, and remains, that the overriding consideration in reviewing disciplinary penalties is harm to the public service if the misconduct is repeated, with surrounding circumstances and likelihood of recurrence also bearing on the outcome. In reviewing cases of termination for dishonesty, the court is still required to examine whether the employee manifested an intent to deceive; and whether the misstatement is material; and there is still a requirement that the Department prove both of these elements before the employee's career can be forfeited.

Litigation Privilege

Another active topic of litigation affecting peace officers last year was in the area of the "litigation privilege" codified by *Civil Code* section 47(b), which creates an absolute immunity from civil liability for statements made in connection with judicial proceedings. The "litigation privilege" ideally protects citizens from liability for reporting suspected crimes to law enforcement where the report proves erroneous or the prosecution otherwise fails. But California courts have struggled for decades to clarify close questions involving the relatedness between the litigation and the statement sought to be protected.

Several cases this past year have examined the relatedness element of the litigation privilege. One case of particular interest to public employees is *Brown v. Department of Corrections* (2005) 132 Cal. App. 4th 20. In that case, the appellate court was faced with the need to harmonize the litigation privilege with various employee whistleblower protection statutes, and resolved the

conflict by vindicating the privilege while weakening the protections against retaliation conferred by the whistleblower protection statutes.

In *Brown v. Department of Corrections*, a correctional officer, Kevin Brown, reported to the Office of Inspector General ["OIG"], a prison oversight body, that he had been subjected to battery and harassment by two supervisors. In the course of making the report, in response to questioning, Brown acknowledged that he could possibly "lose it" and kill the supervisors if the mistreatment continued. An OIG official, Anthony Lewis, reported Brown's threat to the prison warden, who in turn filed an action against Brown seeking an injunction based on an alleged "credible threat of violence" within the meaning of *Code of Civil Procedure* section 527.8.

Brown successfully defended against the injunction by showing the warden had insufficient evidence of a "credible threat of violence." Brown then brought a civil action against Lewis, the OIG, and the warden, for retaliation in violation of two specific California whistleblower protection statutes, *Labor Code* section 1102.5 and *Government Code* section 8547.8. In other words, Brown alleged that under these statutes, he was a protected whistleblower in making his initial report of mistreatment by his supervisors, and that Lewis and his supervisors wrongfully retaliated against his making of that report, by treating the report as a so-called "credible threat of violence" and by filing the action for an injunction against Brown.

In defense of Brown's civil whistleblower action, the defendants argued that Lewis was protected by the "litigation privilege" and the defendants who had reported Brown's so-called "credible threat" asserted that their own report to the warden was protected by the "litigation privilege," since it was a step in the process of initiating a judicial proceeding against Brown.

The appellate court was thus faced with the need to harmonize the whistleblower protection statutes with the litigation privilege. Essentially, the whistleblower protection statutes should

protect Brown from suffering retaliation from his supervisors after Brown had reported his supervisors for physical mistreatment of him. But the litigation privilege protected the supervisors from liability for statements made in the initiation of the judicial proceeding under CCP section 527.8.

The court ruled that the litigation privilege takes precedence in this context, so that while the whistleblower protection statutes would protect Brown from retaliation in his employment, the whistleblower protection statute could not be used to impose liability on the employer or anyone else for making statements that were part of the initiation of a judicial proceeding against Brown. So the whistleblower protection statutes protect the employee against retaliation that takes the form of employment sanctions, but cannot protect the employee from retaliation that takes the form of a judicial proceeding.

While not all protected reports can potentially give rise to an official proceeding against the complainer, this precedent significantly weakens the force of the whistleblower protection statutes where such a possibility exists. The decision places employers on notice that while they may incur civil liability if they retaliate against an employee in the form of employment sanctions, they can retaliate in the form of initiating criminal or other judicial proceedings against the employee, if the circumstances give the employer an opportunity to initiate such official proceedings.

In the *Brown* case, the complaining officer would have been safe if he had kept his complaint simple, that he had been attacked and harassed. The opinion does not really answer the question whether the complainer stumbled into making this unfortunate threat, or whether the Office of Inspector General may have deliberately provoked or goaded the complainer into making a type of threatening statement that would subject him to a criminal proceeding. But given the rule of law resulting from the *Brown* decision, employees should recognize that the whistleblower statutes are

limited to protecting against retaliatory employment sanctions, but do not protect against all other possible means of retaliation.

The legal rules governing the litigation privilege are still developing. Because law enforcement officers are often the victims of defamatory statements and targets of defamation claims, it is important to follow developments in the field of litigation privilege and other privileges that protect the essential functions of the judicial and criminal justice systems.