Board.

FN2 Petitioner graduated from George Washington University Medical School, Washington, D.C. in 1934. He was licensed to practice medicine in California the same year and, after a three-year residency, entered private practice in 1937, specializing in ear, nose and throat problems. During 13 of his 28 years in private practice, he taught at the University of California Medical Center. Cataract surgery and resulting nerve degeneration in his eyes forced petitioner to cease private practice in 1965. He commenced employment as a medical consultant with the State Welfare Department, which became part of the State Department of Health Care Services in 1969.

FN3 Government Code section 18528 provides: "'Permanent employee' means an employee who has permanent status. 'Permanent status' means the status of an employee who is lawfully retained in his position after the completion of the probationary period provided in this part and by board rule." The "probationary period" is the initial period of employment and generally lasts for six months unless the Board establishes a longer period not exceeding one year. (Gov. Code, § 19170.)
Hereafter, unless otherwise indicated, all section references are to the Government Code.

FN4 Each of these causes provides a basis for punitive action against a permanent civil service employee under section 19572, subdivisions (h), (j), and (t).

At the hearing, the Department introduced the testimony of Philip L. Philippe, Gerald R. Green and Bernard V. Moore, three successive district administrators of the Department's Sacramento office to which petitioner had been assigned. Their testimony was corroborated in part by written documents from the Department files, and disclosed the following facts: Philippe met with petitioner on November 17, 1970, to discuss the latter's unexcused absences, apparent drinking on the job and failure to comply with Department work hour requirements. This meeting was held at the insistence of several staff members who had complained to Philippe about petitioner's conduct. The doctor was admonished to comply with pertinent Department rules and regulations.

Nevertheless, despite further warnings given petitioner and efforts made to accommodate him by extending his lunch break from the usual 45 minutes to one hour, he persisted in his unexplained absences and failure to observe work hours and as a result on February 28, 1972, received a letter of reprimand and a one-day suspension.

This punitive action had little effect on petitioner who continued to take excessive lunch periods. On March 3, 1972, Gerald Green, then district administrator, and Doris Soderberg, regional administrator, met with petitioner and discussed his refusal to obey work rules, but apparently to no avail. He took lengthy lunch breaks on March 13, 14, 15 and 16. Green again met with petitioner on March 16 in an effort to resolve the problem. When asked why he had taken 35 extra minutes for lunch that day, petitioner claimed to be sick. Green responded that on the day in question he had observed the doctor drinking and talking at a restaurant and bar. Green then suggested that petitioner, for his own convenience, change from full-time to part-time status at an adjusted compensation. Petitioner declined to do so and Green admonished him that further violations of work rules would result in disciplinary action and even dismissal.

In the early afternoon of June 26, Bernard Moore, who succeeded Green as district administrator, attempted but without success to see petitioner in the latter's office. Moore found him at a local bar laughing and talking, with a drink in front of him, his hair somewhat disheveled, and his arm around a companion. Petitioner later left the bar but did not *199 return to his office that day. Nor did he notify Moore of his proposed absence as required by Department rules. Subsequently petitioner attempted to have Moore record his absence as "sick leave."

In his defense, petitioner testified that he had in fact been sick on the afternoon of June 26, and that after an unsuccessful attempt to telephone his wife, he had informed a co-worker that he was going home. [FN5] He then went to a local bar and, after requesting a friend to call his wife, remained at the bar until she picked him up. Petitioner's version of the events was corroborated by his wife, a cocktail waitress, and the friend who had placed the call. Petitioner admitted, however, that despite his illness, he had had two martinis at lunch.

FN5 Moore apparently was not available at that

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particular time.

Petitioner further testified that his longer lunch periods involved no more than 5 to 15 extra minutes. In justification of this, he stated that he had more than made up for the time missed by skipping his morning and afternoon coffee breaks, by working more than his allotted time over holidays and by occasionally taking work home with him. He denied having a drinking problem and stated that his alcoholic intake during working hours was limited to an occasional drink or two at lunch.

Three co-workers, including Dr. F. Audley Hale, the senior medical consultant and petitioner's immediate supervisor for 13 months, confirmed petitioner's testimony that he rarely took coffee breaks. They described him as efficient, productive and extremely helpful and cooperative, and stated that his work had never appeared to be affected by alcoholic consumption. Dr. Hale rated petitioner's work as good to superior [FN6] and assessed him as "our right hand man as far as information concerning ear, nose and throat problems not only for the District Office but for the Region as well." He stated that the Department definitely needed someone with the doctor's skills.

FN6 The reports prepared during petitioner's probationary period similarly rated his work.

The Department introduced no evidence to show, and indeed did not claim, that the quality or quantity of petitioner's work was in any way inadequate; his failure to comply with the prescribed time schedule did not impede the effective performance of his own duties or those of his fellow workers. Although petitioner was handicapped by relatively serious sight and speech impediments, the Department did not rely upon these physical deficiencies as grounds for dismissal; nor did it appear that these difficulties affected his work performance. *200

On September 19, 1972, the hearing officer submitted to the Board a proposed decision recommending that the punitive action against petitioner be sustained without modification. He made findings of fact in substance as follows: (1) That on February 28, 1972, petitioner suffered a one-day suspension for a four- hour unexcused absence on January 10, 1972, for excessive lunch periods on January 11 and 19, 1972, and for a lengthy afternoon break spent at a bar on February 25, 1972; (2) that despite efforts to accommodate petitioner by extending his lunch break to one hour, he continued to exceed the prescribed period by five to ten minutes for the four days following his suspension and again on March 13, 14 and 15, 1972; (3) that on March 16, 1972, petitioner took 1 hour and 35 minutes for lunch and claimed that this was due to illness when in fact he had been drinking; (4) that on the afternoon of June 26, 1972, the district administrator found petitioner at a bar during work hours, with his hair disheveled, his arm around another patron and a drink in front of him; and (5) that the petitioner's unexcused absence on June 26, 1972, was not due to illness.

The hearing officer found that these facts constituted grounds for punitive action under section 19572, subdivision (j) (inexcusable absence without leave). In considering whether dismissal was the appropriate discipline, the officer noted that "[a]ppellant is 64 years old, has had a long and honorable medical career and is now handicapped by serious sight and speech difficulties. Also, the Senior Medical Consultant has no complaints about appellant's work." On the other hand, he pointed out that the Department's problems with petitioner dated back to 1970, that he had been warned, formally as well as informally, that compliance with Department rules was required, and that he had nevertheless persisted in his pattern of misconduct. On this basis, the hearing officer concluded that there was no reason to anticipate improvement if petitioner were restored to his position and recommended that the Department's punitive action be affirmed. The Board approved and adopted the hearing officer's proposed decision in its entirety and denied a petition for rehearing. [FN7] These proceedings followed.

FN7 The foregoing administrative actions conformed with the procedure prescribed by sections 19574- 19588 for the dismissal of a permanent civil service employee.

Petitioner urges both procedural and substantive grounds for annulling the Board's decision. As to the procedural ground, he contends that the provisions of the State Civil Service Act (Act) governing the taking of punitive action against permanent civil service employees, without *201 requiring a prior hearing, violate due process of law as guaranteed by both the United States Constitution

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and the California Constitution. As to the substantive grounds, he attacks the Board's decision on two bases: First, he argues that the Board's findings are not supported by substantial evidence; second, he asserts that the Board abused its discretion in approving petitioner's dismissal which, he claims, is unduly harsh and disproportionate to his allegedly wrongful conduct.

I

Turning first to petitioner's claims of denial of due process, we initially describe the pertinent statutory disciplinary procedure here under attack.

The California system of civil service employment has its roots in the state Constitution. Article XXIV, section 1, subdivision (b), describes the overriding goal of this program of state employment: "In the civil service permanent appointment and promotion shall be made under a general system based on merit ...." [FN8] (Italics added.) (See also Assem. Interim Com. Rep., Civil Service and State Personnel (1957-1959) Civil Service and Personnel Management, 1 Appendix to Assem. J. (1959 Reg. Sess.) p. 21.) The use of merit as the guiding principle in the appointment and promotion of civil service employees serves a two-fold purpose. It at once "'abolish[es] the so-called spoils system, and [at the same time] ... increase[s] the efficiency of the service by assuring the employees of continuance in office regardless of what party may then be in power. Efficiency is secured by the knowledge on the part of the employee that promotion to higher positions when vacancies occur will be the reward of faithful and honest service' [citation] ...." (Steen v. Board of Civil Service Commrs. (1945) 26 Cal.2d 716, 722 [160 P.2d 816].) The State Personnel Board is the administrative body charged with the enforcement of the Civil Service Act, including the review of punitive action taken against employees. [FN9] *202

FN8 Under the prescribed constitutional scheme, "[t]he civil service includes every officer and employee of the state except as otherwise provided in this Constitution." (Cal. Const., art. XXIV, § 1, subd. (a).) Article XXIV, section 4, lists those categories of officers and employees who are exempt from the civil service.

FN9 The composition of the Board is described in article XXIV, section 2, subdivision (a), of the California Constitution as follows: "There is a Personnel Board of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for 10-year terms and until their successors are appointed and qualified. Appointment to fill a vacancy is for the unexpired portion of the term. A member may be removed by concurrent resolution adopted by each house, two-thirds of the membership of each house concurring."
The Board's duties are set forth in article XXIV, section 3, subdivision (a), as follows: "The Board shall enforce the civil service statutes and, by majority vote of all of its members, shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions."

To help insure that the goals of civil service are not thwarted by those in power, the statutory provisions implementing the constitutional mandate of article XXIV, section 1, invest employees with substantive and procedural protections against punitive actions by their superiors. [FN10] Under section 19500, "[t]he tenure of every permanent employee holding a position is during good behavior. Any such employee may be ... permanently separated [from the state civil service] through resignation or removal for cause ... or terminated for medical reasons ...." (Italics added.) The "causes" which may justify such removal, or a less severe form of punitive action, [FN11] are statutorily defined. (§ 19572.)

FN10 In the instant case, we are concerned only with provisions of the Act insofar as they govern the disciplining of permanent employees (see fn. 3, ante) and we limit our discussion accordingly.

FN11 Section 19570 provides: "As used in this article, 'punitive action' means dismissal, demotion, suspension, or other disciplinary action." The Board has defined "other disciplinary action" to include, among other things, official reprimand and reduction in salary. (Personnel Transactions Man., March 1972.)
Section 19571 is the provision establishing general authority to take punitive action: "In conformity with this article and board rule, punitive action may be taken against any employee, or person whose name appears on any employment list for any cause for discipline specified in this article."

The procedure by which a permanent employee may be dismissed or otherwise disciplined is

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described in sections 19574 through 19588. Under section 19574, [FN12] the "appointing power" [FN13] or its authorized representative may effectively take punitive action against an employee by simply notifying him of the action taken. [FN14] (California Sch. Employees Assn. v. Personnel Commission (1970) 3 Cal.3d 139, 144, fn. 2 [89 Cal.Rptr. 620, 474 P.2d 436]; Personnel Transactions Man., March 1972.) ***203** No particular form of notice is required. (29 Ops.Cal.Atty.Gen. 115, 120 (1957); Personnel Transactions Man., March 1972.) However, within 15 days after the effective date of the action, the appointing power must serve upon the employee and file with the Board a written notice specifying: (1) the nature of the punishment, (2) its effective date, (3) the causes therefor, (4) the employee's acts or omissions upon which the charges are based, and (5) the employee's right to appeal. (§ 19574.) [FN15]

FN12 Section 19574 provides as follows: "The appointing power, or any person authorized by him, may take punitive action against an employee for one or more of the causes for discipline specified in this article by notifying the employee of the action, pending the service upon him of a written notice. Punitive action is valid only if a written notice is served on the employee and filed with the board not later than 15 calendar days after the effective date of the punitive action. The notice shall be served upon the employee either personally or by mail and shall include: (a) a statement of the nature of the punitive action; (b) the effective date of the action; (c) a statement of the causes therefor; (d) a statement in ordinary and concise language of the acts or omissions upon which the causes are based; and (e) a statement advising the employee of his right to answer the notice and the time within which that must be done if the answer is to constitute an appeal."

FN13 Under section 18524, "'[a]ppointing power' means a person or group having authority to make appointments to positions in the State civil service."

FN14 For the procedure regulating discipline where charges against the employee are filed by a third party with the consent of the Board or the appointing power, see section 19583.5.

FN15 See footnote 12, ante.
In an opinion issued on March 26, 1953, the Attorney General described the "statement of causes" as follows: "Such statement of causes is not merely a statement of the statutory grounds for punitive action set forth in section 19572 but is a factual statement of the grounds of discipline which, although not necessarily pleaded with all the niceties of a complaint in a civil action or of an information or indictment in a criminal action, should be detailed enough to permit the employee to identify the transaction, to understand the nature of the alleged offense and to obtain and produce the facts in opposition [citations]." (See 21 Ops.Cal.Atty.Gen. 132, 137 (1953).)

Except in cases involving minor disciplinary matters, [FN16] the employee has a right to an evidentiary hearing to challenge the action taken against him. [FN17] To obtain such a hearing, the employee must file with the Board a written answer to the notice of punitive action within 20 days after service thereof. [FN18] The answer is deemed to constitute a denial of all allegations contained in the notice which are not expressly admitted as well as a request for a hearing or investigation. (§ 19575; see fn. 18, ante.) Failure to file an answer within the specified time period results in the punitive action becoming final. (§ 19575.) ***204**

FN16 Such minor disciplinary matters generally include those cases in which the discipline imposed is suspension without pay for 10 days or less. Section 19576 describes the procedural rights of an employee subjected to this form of discipline.

FN17 Section 19578 provides that "[w]henever an answer is filed to a punitive action other than a suspension without pay for 10 days or less, the board or its authorized representative shall within a reasonable time hold a hearing. The board shall notify the parties of the time and place of the hearing. Such hearing shall be conducted in accordance with the provisions of Section 11513 of the Government Code, except that the employee and other persons may be examined as provided in Section 19580, and the parties may submit all proper and competent evidence against or in support of the causes."

FN18 Section 19575 describes the procedure to be followed by an employee in answering a notice of punitive action: "No later than 20 calendar days after service of the notice of punitive action, the employee may file with the board a written answer to the notice, which answer shall be deemed to be a denial of all of the allegations of the notice of punitive action not expressly admitted and a request for hearing or investigation as provided in this article. With the consent of the board or its

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authorized representative an amended answer may subsequently be filed. If the employee fails to answer within the time specified or after answer withdraws his appeal the punitive action taken by the appointing power shall be final. A copy of the employee's answer and of any amended answer shall promptly be given by the board to the appointing power."

In cases where the affected employee files an answer within the prescribed period, the Board, or its authorized representative, must hold a hearing within a reasonable time. (§ 19578; see fn. 17, ante.) As a general rule, the case is referred to the Board's hearing officer who conducts a hearing [FN19] and prepares a proposed decision which may be adopted, modified or rejected by the Board. (§ 19582.) The Board must render its decision within a reasonable time after the hearing. (§ 19583.) [FN20] If the Board determines that the cause or causes for which the employee was disciplined were insufficient or not sustained by the employee's acts or omissions, or that the employee was justified in engaging in the conduct which formed the basis of the charges against him, it may modify or revoke the punitive action and order the employee reinstated to his position as of the effective date of the action or some later specified date. (§ 19583; see fn. 20, ante.) The employee is entitled to the payment of salary for any period of time during which the punitive action was improperly in effect. (§ 19584.) [FN21]

FN19 At such hearing, the appointing power has the burden of proving by a preponderance of the evidence the acts or omissions of the employee upon which the charges are based and of establishing that these acts constitute cause for discipline under the relevant statutes. (§§ 19572, 19573.) The employee may try to avoid the consequences of his actions by showing that he was justified in engaging in the conduct upon which the charges are based. (See 21 Ops.Cal.Atty.Gen. 132, 139 (1953).)

FN20 Under the terms of section 19583, "[t]he board shall render a decision within a reasonable time after the hearing or investigation. The punitive action taken by the appointing power shall stand unless modified or revoked by the board. If the board finds that the cause or causes for which the punitive action was imposed were insufficient or not sustained, or that the employee was justified in the course of conduct upon which the causes were based, it may modify or revoke the punitive action and it may order the employee returned to his position either as of the date of the punitive action or as of such later date as it may specify. The decision of the board shall be entered upon the minutes of the board and the official roster."

FN21 Section 19584 provides: "Whenever the board revokes or modifies a punitive action and orders that the employee be returned to his position it shall direct the payment of salary to the employee for such period of time as the board finds the punitive action was improperly in effect.
"Salary shall not be authorized or paid for any portion of a period of punitive action that the employee was not ready, able, and willing to perform the duties of his position, whether such punitive action is valid or not or the causes on which it is based state facts sufficient to constitute cause for discipline.
"From any such salary due there shall be deducted compensation that the employee earned, or might reasonably have earned, during any period commencing more than six months after the initial date of the suspension."

In the case of an adverse decision by the Board, the employee may petition that body for a rehearing. (§ 19586.) [FN22] As an alternative or in addition to the rehearing procedure, the employee may seek review of ***205** the Board's action by means of a petition for writ of administrative mandamus filed in the superior court. (§ 19588; Boren v. State Personnel Board (1951) 37 Cal.2d 634, 637 [234 P.2d 981].) [FN23]

FN23 Section 19588 provides: "The right to petition a court for writ of mandate, or to bring or maintain any action or proceeding based on or related to any civil service law of this State or the administration thereof shall not be affected by the failure to apply for rehearing by filing written petition therefor with the board."
The judicial review proceedings are governed by Code of Civil Procedure section 1094.5. (

FN22 Section 19586 provides in pertinent part that "[w]ithin thirty days after receipt of a copy of the decision rendered by the board in a proceeding under this article, the employee or the appointing power may apply for a rehearing by filing with the board a written petition therefor. Within thirty days after such filing, the board shall cause notice thereof to be served upon the other parties to the proceedings by mailing to each a copy of the petition for rehearing, in the same manner as

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prescribed for notice of hearing.
"Within sixty days after service of notice of filing of a petition for rehearing, the board shall either grant or deny the petition in whole or in part. Failure to act upon a petition for rehearing within this sixty-day period is a denial of the petition." Boren v. State Personnel Board, supra, at p. 637.)

As previously indicated, petitioner asserts that this statutory procedure for taking punitive action against a permanent civil service employee violates due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 15 of the California Constitution. His contention is that these provisions authorize a deprivation of property without a prior hearing or, for that matter, without any of the prior procedural safeguards required by due process before a person may be subjected to such a taking at the hands of the state. As it is clear that California's statutory scheme does provide for an evidentiary hearing after the discipline is imposed (§§ 19578, 19580, 19581), we view the petitioner's constitutional attack as directed against that section which permits the punitive action to take effect without according the employee any prior procedural rights. (§ 19574; see fn. 12, ante.)

Our analysis of petitioner's contention proceeds in the light of a recent decision of the United States Supreme Court dealing with a substantially identical issue. In Arnett v. Kennedy (1974) 416 U.S. 134 [40 L.Ed.2d 15, 94 S.Ct. 1633], the high court was faced with a due process challenge to the provisions of the federal civil service act, entitled the Lloyd-LaFollette Act, regulating the disciplining of nonprobationary government employees. (5 U.S.C. § 7501.) Under that statutory scheme, a nonprobationary employee may be "removed or suspended without pay only for such cause as will promote the efficiency of the service." (5 U.S.C. § 7501 (a).) The same statute granting this substantive right to continued employment absent cause sets forth the procedural rights of an employee prior to discharge or suspension. ***206**

Pursuant to this statute and the regulations promulgated under it, the employee is entitled to 30 days advance written notice of the proposed action, including a detailed statement of the reasons therefor, the right to examine all materials relied upon to support the charges, the opportunity to respond either orally or in writing or both (with affidavits) before a representative of the employing agency with authority to make or recommend a final decision, and written notice of the agency's decision on or before the effective date of the action. (5 U.S.C. § 7501 (b); 5 C.F.R. § 752.202 (a), (b), (f).) The employee is not entitled to an evidentiary trial-type hearing until the appeal stage of the proceedings. (5 C.F.R. §§ 752.202 (b), 752.203, 771.205, 771.208, 771.210-771.212, 772.305 (c).) The timing of this hearing - after, rather than before the removal decision becomes effective - constituted the basis for the employee's due process attack upon the disciplinary procedure.

In a six to three decision, the court found the above procedure to be constitutional. However, the court's full decision is embodied in five opinions which reveal varying points of view among the different justices. As we proceed to consider petitioner's contention, we will attempt to identify the general principles which emerge from these opinions as well as from the other recent decisions of the court in the area of procedural due process and which are determinative of the matter before us.

(1) We begin our analysis in the instant case by observing that the California statutory scheme regulating civil service employment confers upon an individual who achieves the status of "permanent employee" a property interest in the continuation of his employment which is protected by due process. In Board of Regents v. Roth (1972) 408 U.S. 564 [33 L.Ed.2d 548, 92 S.Ct. 2701], the United States Supreme Court "made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. [Fn. omitted.]" (Id., at pp. 571-572 [33 L.Ed.2d at p. 557].) Rather, "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests - property interests - may take many forms." (Id., at p. 576 [33 L.Ed.2d at p. 560].)

Expanding upon its explanation, the Roth court noted: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement ***207** to it. It is a purpose of the ancient institution of property to protect those

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claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (Id., at p. 577 [33 L.Ed.2d at p. 561].)

(2) Thus, when a person has a legally enforceable right to receive a government benefit provided certain facts exist, this right constitutes a property interest protected by due process. (Goldberg v. Kelly (1970) 397 U.S. 254, 261-262 [25 L.Ed.2d 287, 295-296, 90 S.Ct. 1011]; see Geneva Towers Tenants Org. v. Federated Mortgage Inv. (9th Cir. 1974) 504 F.2d 483, 495-496 (Hufstedler, J. dissenting).) Applying these principles, the high court has held that a teacher establishing "the existence of rules and understandings, promulgated and fostered by state officials, that ... justify his legitimate claim of entitlement to continued employment absent 'sufficient cause,"' has a property interest in such continued employment within the purview of the due process clause. (Perry v. Sindermann (1972) 408 U.S. 593, 602-603 [33 L.Ed.2d 570, 580, 92 S.Ct. 2694]; see also Board of Regents v. Roth, supra, 408 U.S. at pp. 576-578 [33 L.Ed.2d at pp. 560-562].) And, in Arnett v. Kennedy, supra, 416 U.S. 134, six members of the court, relying upon the principles set forth in Roth, concluded that due process protected the statutory right of a nonprobationary federal civil service employee to continue in his position absent cause justifying his dismissal. (Id., at p. 167 [40 L.Ed.2d at pp. 40-41] (concurring opn., Justice Powell); id., at p. 185 [40 L.Ed.2d at p. 51] (concurring and dissenting opn., Justice White); id., at p. 203 [40 L.Ed.2d at p. 61] (dissenting opn., Justice Douglas); id., at p. 211 [40 L.Ed.2d at p. 66] (dissenting opn., Justice Marshall).)

The California Act endows state employees who attain permanent status with a substantially identical property interest. Such employees may not be dismissed or subjected to other disciplinary measures unless facts exist constituting "cause" for such discipline as defined in sections 19572 and 19573. In the absence of sufficient cause, the permanent employee has a statutory right to continued employment free of these *208 punitive measures. (§ 19500.) This statutory right constitutes "a legitimate claim of entitlement" to a government benefit within the meaning of Roth. Therefore, the state must comply with procedural due process requirements before it may deprive its permanent employee of this property interest by punitive action.

We therefore proceed to determine whether California's statutes governing such punitive action provide the minimum procedural safeguards mandated by the state and federal Constitutions. In the course of our inquiry, we will discuss recent developments in the area of procedural due process which outline a modified approach for dealing with such questions.

Until last year, the line of United States Supreme Court discussions beginning with Sniadach v. Family Finance Corp. (1969) 395 U.S. 337 [23 L.Ed.2d 349, 89 S.Ct. 1820], and continuing with Fuentes v. Shevin (1972) 407 U.S. 67 [32 L.Ed.2d 556, 92 S.Ct. 1983], and the line of California decisions following Sniadach and Fuentes adhered to a rather rigid and mechanical interpretation of the due process clause. Under these decisions, every significant deprivation - permanent or merely temporary - of an interest which qualified as "property" was required under the mandate of due process to be preceded by notice and a hearing absent "extraordinary" or "truly unusual" circumstances. (Fuentes v. Shevin, supra, 407 U.S. 67, 82, 88, 90-91 [32 L.Ed.2d 556, 570-571, 574-576]; Bell v. Burson (1971) 402 U.S. 535, 542 [29 L.Ed.2d 90, 96, 91 S.Ct. 1586]; Boddie v. Connecticut (1971) 401 U.S. 371, 378-379 [28 L.Ed.2d 113, 119-120, 91 S.Ct. 780]; Adams v. Department of Motor Vehicles (1974) 11 Cal.3d 146, 155 [113 Cal.Rptr. 145, 520 P.2d 961]; Brooks v. Small Claims Court (1973) 8 Cal.3d 661, 667-668 [105 Cal.Rptr. 785, 504 P.2d 1249]; Randone v. Appellate Department (1971) 5 Cal.3d 536, 547 [96 Cal.Rptr. 709, 488 P.2d 13]; Blair v. Pitchess (1971) 5 Cal.3d 258, 277 [96 Cal.Rptr. 42, 486 P.2d 1242, 45 A.L.R.3d 1206]; McCallop v. Carberry (1970) 1 Cal.3d 903, 907 [83 Cal.Rptr. 666, 464 P.2d 122].) These authorities uniformly held that such hearing must meet certain minimum

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procedural requirements including the right to appear personally before an impartial official, to confront and cross-examine adverse witnesses, to present favorable evidence and to be represented by counsel. (Brooks v. Small Claims Court, supra, 8 Cal.3d at pp. 667-668; Rios v. Cozens (1972) 7 Cal.3d 792, 798-799 [103 Cal.Rptr. 299, 499 P.2d 979], vacated sub nom. Dept. Motor Vehicles of California v. Rios (1973) 410 U.S. 425 [35 L.Ed.2d 398, 93 S.Ct. 1019], new dec. Rios v. Cozens (1973) 9 Cal.3d 454 [107 Cal.Rptr. 784, 509 P.2d 696]; see also Goldberg v. Kelly (1970) 397 U.S. 254, 267-271 [25 L.Ed.2d 287, 298-301, 90 S.Ct. 1011].) ***209**

However, as we noted a short time ago in Beaudreau v. Superior Court (1975) 14 Cal.3d 448 [121 Cal.Rptr. 585, 535 P.2d 713], more recent decisions of the high court have regarded the above due process requirements as being somewhat less inflexible and as not necessitating an evidentiary trial- type hearing at the preliminary stage in every situation involving a taking of property. Although it would appear that a majority of the members of the high court adhere to the principle that some form of notice and hearing must precede a final deprivation of property (North Georgia Finishing, Inc. v. Di-Chem, Inc. (1975) 419 U.S. 601, 606, [42 L.Ed.2d 751, 757, 95 S.Ct. 719]; Goss v. Lopez (1975) 419 U.S. 565, 579 [42 L.Ed.2d 725, 737-738, 95 S.Ct. 729]; Mitchell v. W. T. Grant Co. (1974) 416 U.S. 600, 611-612 [40 L.Ed.2d 406, 415-416, 94 S.Ct. 1895]; Arnett v. Kennedy, supra, 416 U.S. 134, 164 [40 L.Ed.2d 15, 39] (concurring opn., Justice Powell), p. 178 [40 L.Ed.2d pp. 46-47] (concurring and dissenting opn., Justice White), p. 212 [40 L.Ed.2d pp. 66-67] (dissenting opn., Justice Marshall)), nevertheless the court has made clear that "the timing and content of the notice and the nature of the hearing will depend on an appropriate accommodation of the competing interests involved." (Goss v. Lopez, supra, 419 U.S. 565, 579 [42 L.Ed.2d 725, 737], italics added; see also Mitchell v. W. T. Grant Co., supra, 416 U.S. at pp. 607-610 [40 L.Ed.2d at pp. 413-415]; Arnett v. Kennedy, supra, 416 U.S. at pp. 167-171 [40 L.Ed.2d at pp. 40-43] (concurring opn., Justice Powell), p. 188 [40 L.Ed.2d pp. 52-53] (concurring and dissenting opn., Justice White).) In balancing such "competing interests involved" so as to determine whether a particular procedure permitting a taking of property without a prior hearing satisfies due process, the high court has taken into account a number of factors. Of significance among them are the following: whether predeprivation safeguards minimize the risk of error in the initial taking decision, whether the surrounding circumstances necessitate quick action, whether the postdeprivation hearing is sufficiently prompt, whether the interim loss incurred by the person affected is substantial, and whether such person will be entitled to adequate compensation in the event the deprivation of his property interest proves to have been wrongful. (Mitchell v. W. T. Grant Co., supra, 416 U.S. at pp. 607-610 [40 L.Ed.2d at pp. 413-415]; Arnett v. Kennedy, supra, 416 U.S. at pp. 167-171 [40 L.Ed.2d at pp. 40-43] (concurring opn., Justice Powell), pp. 188-193 [40 L.Ed.2d pp. 52-56] (concurring and dissenting opn., Justice White); see Beaudreau v. Superior Court, supra, 14 Cal.3d 448, 463-464.)

These principles have been applied by the high court to measure the constitutional validity of state statutes granting creditors certain prejudgment summary remedies. In Mitchell v. W. T. Grant Co., supra, 416 U.S. ***210** 600, the court upheld against due process attack a Louisiana statute authorizing a state trial judge to order sequestration of a debtor's personal property upon the creditor's ex parte application, noting that both the creditor and the debtor had interests in the particular property seized, [FN24] that the creditor's interest might be seriously jeopardized by preseizure notice and hearing, [FN25] and that adequate alternative procedural safeguards, including an immediate postdeprivation hearing, were accorded the debtor. [FN26] On the other hand, the high court struck down a Georgia statute permitting garnishment of a debtor's property pending litigation on the alleged debt "without notice or opportunity for an early hearing and without participation by a judicial officer." (North Georgia Finishing, Inc. v. Di- Chem, Inc., supra, 419 U.S. 601, 606 [42 L.Ed.2d 751, 757].) In reaching its decision, the court emphasized that "[t]he Georgia garnishment statute has none of the saving characteristics of the Louisiana statute." (

FN26 The creditor was required to post a bond to cover the debtor's potential damages in the event of a wrongful taking. At the postdeprivation hearing which was immediately available to the debtor, the creditor had the burden of making a prima facie showing of entitlement to the property. If he failed to do so, the debtor was entitled to return of his

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property and to an award of any damages. (

FN25 The court noted that the debtor might abscond with the property and that in any event the debtor's continued use thereof would decrease the property's value. (

FN24 Under the terms of the statute, the trial judge could order sequestration only if the creditor proved by affidavit that he had a vendor's lien on the property and that the debtor had defaulted in making the required payments, thereby entitling the creditor to immediate possession. (Id., at pp. 605-606 [40 L.Ed.2d at pp. 412-413].) Id., at pp. 608-609 [40 L.Ed.2d at pp. 413-415].) Id., at pp. 606-610 [40 L.Ed.2d at pp. 412-415].) Id., at p. 607 [42 L.Ed.2d at p. 757].)

This modified position of the United States Supreme Court regarding such due process questions has also extended to the form of the hearing required. In Goss v. Lopez, supra, 419 U.S. 565, the court held that Ohio public school students had a property as well as a liberty interest in their education and that they were therefore entitled to notice and hearing before they could be suspended or expelled from school. (Id., at pp. 574-581 [42 L.Ed.2d at pp. 734-739].) However, where the suspension was short, the court concluded that the required "hearing" need be only an informal discussion between student and disciplinarian, at which the student should be informed of his alleged misconduct and permitted to explain his version of the events. (Id., at pp. 581-582 [42 L.Ed.2d at p. 738-739].) Such a procedure, the court reasoned, "will provide a meaningful hedge against erroneous action." (Id., at p. 583 [42 L.Ed.2d at p. 740].) On the other hand, the court carefully pointed out the limitations on its holding: "We stop short of construing the Due Process *211 Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process." (Id., at p. 583 [42 L.Ed.2d at p. 740].)

Our present task of determining the requirements of due process under the particular circumstances of the case at bench is made easier by the Supreme Court's decision in Arnett v. Kennedy, supra, 416 U.S. 134, upholding against constitutional attack the statutory procedure for the disciplining of nonprobationary federal civil service employees. Initially, we note that the rationale adopted by the plurality opinion of Justice Rehnquist, joined by the Chief Justice and Justice Stewart, would obviate the need for any balancing of competing interests. This rationale would apparently permit a state to narrowly circumscribe the procedures for depriving an individual of a statutorily created property right by simply establishing in the statute a procedural mechanism for its enforcement. (Id., at pp. 153-155 [40 L.Ed.2d at pp. 32- 34].) In such instances, it is reasoned, the individual "must take the bitter with the sweet," that is, the substantive benefit of the statute together with the procedural mechanism it prescribes to safeguard that benefit. (Id., at pp. 153-154 [40 L.Ed.2d at pp. 32-33].) Under this rationale, it is arguable that California's procedure for disciplining civil service employees would withstand petitioner's due process attack, since the substantive right of a permanent state worker to continued employment absent cause (§ 19500) may be "inextricably intertwined [in the same set of statutes] with the limitations on the procedures which are to be employed in determining that right ...." (Id., at pp. 153-154 [40 L.Ed.2d at p. 33].)

However, this theory was unequivocally rejected by the remaining six justices and indeed described by the dissenters as "a return, albeit in somewhat different verbal garb, to the thoroughly discredited distinction between rights and privileges which once seemed to govern the applicability of procedural due process. [Fn. omitted.]" (See Justice Marshall's dissenting opn. at p. 211 [40 L.Ed.2d at p. 66]; see also Justice *212 Powell's concurring opn. at pp. 165-167 [40 L.Ed.2d at pp. 39-41], and Justice White's concurring and dissenting opn. at pp. 177-178, 185 [40 L.Ed.2d at pp. 46-47, 51].)

Where state procedures governing the taking of a property interest are at issue, all six justices were of the view that the existence of the interest is to be

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determined in the first place under applicable state law, but that the adequacy of the procedures is to be measured in the final analysis by applicable constitutional requirements of due process. (Id., at p. 167 [40 L.Ed.2d at pp. 40-41] (concurring opn., Justice Powell), p. 185 [40 L.Ed.2d p. 51] (concurring and dissenting opn., Justice White), p. 211 [40 L.Ed.2d p. 66] (dissenting opn., Justice Marshall).) "While the legislature may elect not to confer a property interest in ... [civil service] employment [fn. omitted], it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." (Id., at p. 167 [40 L.Ed.2d at pp. 40-41] (concurring opn., Justice Powell); see also Justice White's concurring and dissenting opn. at p. 185 [40 L.Ed.2d at p. 51], and Justice Marshall's dissenting opn. at p. 211 [40 L.Ed.2d at p. 66].)

In Arnett, the remaining six justices were of the opinion that a full evidentiary "hearing must be held at some time before a competitive civil service employee maybe finally terminated for misconduct." (Id., at p. 185 [40 L.Ed.2d at p. 51], italics added (concurring and dissenting opn., Justice White); see also, Justice Powell's concurring opn. at p. 167 [40 L.Ed.2d at pp. 40-41], and Justice Marshall's dissenting opn. at p. 212 [40 L.Ed.2d at pp. 66-67].) The question then narrowed to whether such a hearing had to be afforded prior to the time that the initial removal decision became effective. (Id., at p. 167 [40 L.Ed.2d at pp. 40-41] (concurring opn., Justice Powell), p. 186 [40 L.Ed.2d at pp. 51-52] (concurring and dissenting opn., Justice White), p. 217 [40 L.Ed.2d at pp. 69-70] (dissenting opn., Justice Marshall).)

In resolving this question, the above justices utilized a balancing test, weighing "the Government's interest in expeditious removal of an unsatisfactory employee ... against the interest of the affected employee in continued public employment." (Id., at pp. 167-168 [40 L.Ed.2d at p. 41] (concurring opn., Justice Powell); see also Justice White's concurring and dissenting opn. at p. 188 [40 L.Ed.2d at pp. 52-53], and Justice Marshall's dissenting opn. at p. 212 [40 L.Ed.2d at pp. 66-67].) On one side was the government's interest in "the maintenance of employee efficiency and discipline. Such factors are essential if the Government is *213 to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial. [Fn. omitted.]" (Id., at p. 168 [40 L.Ed.2d at p. 41] (concurring opn., Justice Powell); see also Justice White's concurring and dissenting opn. at pp. 193-194 [40 L.Ed.2d at pp. 55-56] and Justice Marshall's dissenting opn. at pp. 223-225 [40 L.Ed.2d at pp. 73- 74].)

Balanced against this interest of the government was the employee's countervailing interest in the continuation of his public employment pending an evidentiary hearing: "During the period of delay, the employee is off the Government payroll. His ability to secure other employment to tide himself over may be significantly hindered by the outstanding charges against him. [Fn. omitted.] Even aside from the stigma that attends a dismissal for cause, few employers will be willing to hire and train a new employee knowing that he will return to a former Government position as soon as an appeal is successful. [Fn. omitted.] And in many States, ... a worker discharged for cause is not even eligible for unemployment compensation. [Fn. omitted.]" [FN27] (

FN27 Under California law, "[a]n individual is disqualified for unemployment compensation benefits if the director finds that ... he has been discharged for misconduct connected with his most recent work." (Unemp. Ins. Code, § 1256.) Thus, a state civil service employee who has been discharged for cause may be disqualified from receiving unemployment compensation in some circumstances. Id., at pp. 219-220 [40 L.Ed.2d at p. 71] (dissenting opn., Justice Marshall); see also, Justice White's concurring and dissenting opn. at pp. 194-195 [40 L.Ed.2d at pp. 56-57] and Justice Powell's concurring opn. at p. 169 [40 L.Ed.2d at p. 42].)

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The justices reached varying conclusions in resolving this balancing process. Justice Powell, joined by Justice Blackmun, concluded that the federal discharge procedures comported with due process requirements. In reaching this result, however, he emphasized the numerous preremoval safeguards accorded the employee as well as the right to compensation ***214** guaranteed the latter if he prevailed at the subsequent evidentiary hearing: "The affected employee is provided with 30 days' advance written notice of the reasons for his proposed discharge and the materials on which the notice is based. He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. Upon request, he is entitled to an opportunity to appear personally before the official having the authority to make or recommend the final decision. Although an evidentiary hearing is not held, the employee may make any representations he believes relevant to his case. After removal, the employee receives a full evidentiary hearing, and is awarded backpay if reinstated. See 5 CFR §§ 771.208 and 772.305; 5 U.S.C. § 5596. These procedures minimize the risk of error in the initial removal decision and provide for compensation for the affected employee should that decision eventually prove wrongful. [Fn. omitted.]." (Id., at p. 170 [40 L.Ed.2d at p. 42].)

Justice White, concurring in part and dissenting in part, agreed that due process mandated some sort of preliminary notice and hearing, and similarly "conclude[d] that the statute and regulations provisions to the extent they require 30 days' advance notice and a right to make a written presentation satisfy minimum constitutional requirements." (Id., at pp. 195-196 [40 L.Ed.2d at p. 57].) [FN28]

FN28 Justice White's dissent was based upon his view that the employee in Arnett had not been accorded an impartial hearing officer in the pretermination proceeding, which he found was required by both due process and the federal statutes. (Id., at p. 199 [40 L.Ed.2d at p. 59].)

Justice Marshall, joined by Justices Douglas and Brennan, dissented, apparently adhering to the "former due process test" requiring an "unusually important governmental need to outweigh the right to a prior hearing." [FN29] (

FN29 Justice Douglas also wrote a separate dissenting opinion in which he concluded that the employee in Arnett had been fired for exercising his right of free speech, and therefore that the discharge violated the First Amendment to the United States Constitution. (Id., at pp. 203-206 [40 L.Ed.2d at pp. 61-63].) Id., at p. 222 [40 L.Ed.2d at pp. 72-73], quoting from Fuentes v. Shevin, supra, 407 U.S. at p. 91, fn. 23 [32 L.Ed.2d at p. 576]; see also Justice Marshall's dissenting opn. at pp. 217-218, 223 [40 L.Ed.2d at pp. 69-70, 73].) Finding that the government's interest in prompt removal of an unsatisfactory employee was not the sort of vital concern justifying resort to summary procedures, the dissenters concluded that a nonprobationary employee was entitled to a full evidentiary hearing prior to discharge, at which he could appear before an independent, unbiased decisionmaker and confront and cross-examine adverse witnesses. (Id., at pp. 214-216, 226-227 [40 L.Ed.2d at pp. 67-69, 74-75].) ***215**

Applying the general principles we are able to distill from these various opinions, we are convinced that the provisions of the California Act concerning the taking of punitive action against a permanent civil service employee do not fulfill minimum constitutional demands. (3) It is clear that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, at least six justices on the high court agree that due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include 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.

California statutes governing punitive action provide the permanent employee with none of these prior procedural rights. Under section 19574, the appointing power is authorized to take punitive action against a permanent civil service employee by simply notifying him thereof. The statute specifies no particular form of notice, nor does it require advance warning. Thus, oral notification at the time of the discipline is apparently sufficient. (See 29 Ops.Cal.Atty.Gen. 115, 120 (1957), and Personnel Transactions Man., March 1972.) The employee need not be informed of the reasons for the discipline or of his right to a hearing until 15 days

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after the effective date of the punitive action. (§ 19574.) It is true that the employee is entitled to a full evidentiary hearing within a reasonable time thereafter (§ 19578), and is compensated for lost wages if the Board determines that the punitive action was improper. (§ 19584.) However, these postremoval safeguards do nothing to protect the employee who is wrongfully disciplined against the temporary deprivation of property to which he is subjected pending a hearing. (4) Because of this failure to accord the employee any prior procedural protections to "minimize the risk of error in the initial removal decision" (Arnett v. Kennedy, supra, 416 U.S. at p. 170 [40 L.Ed.2d at p. 42] (concurring opn., Justice Powell)), we hold that the provisions of the State Civil Service Act, including in particular section 19574, governing the taking of punitive action against a permanent civil service employee violate the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and of article I, sections 7 and 15 of the California Constitution.

Defendants fail to persuade us to the contrary. Relying upon cases which antedate Arnett v. Kennedy, supra, 416 U.S. 134, defendants first contend that we must apply a different and less stringent standard of due *216 process in judging the state's exercise of a "proprietary" as opposed to a "regulatory" function. Where the state is acting as an "employer," so the argument goes, the balancing process must be more heavily weighted in favor of insuring flexibility in its operation; therefore, due process is satisfied as long as a hearing is provided at some stage of the proceedings. The Supreme Court's decision in Arnett v. Kennedy, supra, 416 U.S. 134, adequately disposes of this argument. In view of our extensive analysis of this decision we need not say anything further except to observe that nowhere in that case does any member of the high court advocate the distinction advanced by defendants.

Defendants further contend that emergency circumstances may arise in which the immediate removal of an employee is essential to avert harm to the state or to the public. Adverting to section 19574.5, [FN30] which permits the appointing power to order an employee on leave of absence for a limited period of time, defendants argue that situations not covered by this statute but necessitating similar prompt action may conceivably arise under section 19574 (see fn. 12, ante). In answering this argument, we need only point out that section 19574 is not limited to the extraordinary circumstances which defendants conjure up. (Sniadach v. Family Finance Corp., supra, 395 U.S. 337, 339 [23 L.Ed.2d 349, 352];

FN30 Section 19574.5 provides: "Pending investigation by the appointing power of accusations against an employee involving misappropriation of public funds or property, drug addiction, mistreatment of persons in a state institution, immorality, or acts which would constitute a felony or a misdemeanor involving moral turpitude, the appointing power may order the employee on leave of absence for not to exceed 15 days. The leave may be terminated by the appointing power by giving 48 hours' notice in writing to the employee.

"If punitive action is not taken on or before the date such a leave is terminated, the leave shall be with pay.

"If punitive action is taken on or before the date such leave is terminated, the punitive action may be taken retroactive to any date on or after the date the employee went on leave. Notwithstanding the provisions of Section 19574, the punitive action, under such circumstances, shall be valid if written notice is served upon the employee and filed with the board not later than 15 calendar days after the employee is notified of the punitive action." Randone v. Appellate Department, supra, 5 Cal.3d at pp. 541, 553; Blair v. Pitchess, supra, 5 Cal.3d at p. 279.) Indeed, the instant case presents an example of the statute's operation in a situation requiring no special protection of the state's interest in prompt removal. (Sniadach, supra, 395 U.S. at p. 339 [23 L.Ed.2d at p. 352].) Thus, since the statute "does not narrowly draw into focus those 'extraordinary circumstances' in which [immediate action] may be actually required," we remain convinced that the California procedure governing punitive action fails to satisfy either federal or state due process standards. (Randone v. Appellate Department, supra, 5 Cal.3d at p. 541.) *217

II

(5)(See fn. 31.) Having determined that the procedure used to dismiss petitioner denied him due process of law as guaranteed by both the United States Constitution and the California Constitution, we proceed to examine under the well established standards of review [FN31] the Board's action taken against petitioner. Petitioner first contends that the

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Board's findings are not supported by substantial evidence. Specifically he disputes the Board's determination that his absences on March 16 and June 26, 1972, were due to his drinking rather than to illness.

FN31 The Board is "a statewide administrative agency which derives [its] adjudicating power from [article XXIV, section 3, of] the Constitution ... [; therefore, its factual determinations] are not subject to re-examination in a trial de novo but are to be upheld by a reviewing court if they are supported by substantial evidence. [Citations.]" (Shepherd v. State Personnel Board (1957) 48 Cal.2d 41, 46 [307 P.2d 4]; see also Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28, 35-36 [112 Cal.Rptr. 805, 520 P.2d 29].)

(6) The findings challenged are based upon the testimony of two apparently credible witnesses, Gerald Green and Bernard Moore, who stated that they personally observed petitioner at a bar drinking on the dates in question. With respect to the June 26th incident, petitioner himself testified that he had consumed two martinis at lunch, despite his illness. Clearly this evidence is sufficient to support the Board's findings with respect to the cause of petitioner's absences on these two occasions.

III

Petitioner finally contends that the penalty of dismissal is clearly excessive and disproportionate to his alleged wrong. We agree.

Generally speaking, "[i]n a mandamus proceeding to review an administrative order, the determination of the penalty by the administrative body will not be disturbed unless there has been an abuse of its discretion." (Magit v. Board of Medical Examiners (1961) 57 Cal.2d 74, 87 [17 Cal.Rptr. 488, 366 P.2d 816]; see also Nightingale v. State Personnel Board (1972) 7 Cal.3d 507, 514-516 [102 Cal.Rptr. 758, 498 P.2d 1006]; Harris v. Alcoholic Bev. etc. Appeals Bd. (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633, 400 P.2d 745]; Martin v. Alcoholic Bev. etc. Appeals Bd. (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513, 362 P.2d 337].) (7) Nevertheless, while the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, "it does not have absolute and unlimited power. It is bound to exercise legal *218 discretion, which is, in the circumstances, judicial discretion." (Harris, supra, citing Martin, supra, and Bailey v. Taaffe (1866) 29 Cal. 422, 424.) In considering whether such abuse occurred in the context of public employee discipline, we note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, "[h]arm to the public service." (Shepherd v. State Personnel Board, supra, 48 Cal.2d 41, 51; see also Blake v. State Personnel Board (1972) 25 Cal.App.3d 541, 550-551, 554 [102 Cal.Rptr. 50].) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (Blake, supra, at p. 554.)

(8) Consideration of these principles in the instant case leads us to conclude that the discipline imposed was clearly excessive. The evidence adduced at the hearing and the hearing officer's findings, adopted by the Board, establish that the punitive dismissal was based upon the doctor's conduct in extending his lunch break beyond his allotted one hour on numerous occasions, generally by five to fifteen minutes, and in twice leaving the office for several hours without permission. It is true that these transgressions continued after repeated warnings and admonitions by administrative officials, who made reasonable efforts to accommodate petitioner's needs. It is also noteworthy that petitioner had previously suffered a one-day suspension for similar misconduct.

However, the record is devoid of evidence directly showing how petitioner's minor deviations from the prescribed time schedule adversely affected the public service. [FN32] To the contrary, the undisputed evidence indicates that he more than made up for the excess lunch time by working through coffee breaks as well as on some evenings and holidays. With perhaps one or two isolated exceptions, [FN33] it was not shown that his conduct in any way inconvenienced those with whom he worked or prevented him from effectively performing his duties.

FN32 Mr. Green testified on cross-examination that there was some latitude with respect to the hours kept by professional people in the office, as long as they worked 40 hours per week and received Green's approval.

FN33 Apparently, petitioner's unexcused absence

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on the afternoon of June 26, 1972, inconvenienced Moore who wished to see him on a routine business matter.

Dr. Hale, senior medical consultant and petitioner's immediate supervisor for about 13 months, rated his work as good to superior, compared it favorably with that of other physicians in the office, and described him as efficient, productive, and the region's "right hand man" on ear, nose and throat problems. Two other employees who worked with petitioner testified that he was informative, cooperative, helpful, *219 extremely thorough and productive. No contrary evidence was presented by or on behalf of the Department of Health Care Services.

In his proposed decision, adopted by the Board, the hearing officer stated: "Appellant is 64 years old, has had a long and honorable medical career and is now handicapped by serious sight and speech difficulties. Also, the Senior Medical Consultant has no complaints about appellant's work. [¶] Consideration of appellant's age, his physical problems, the lack of any apparent affect on his work and sympathy for the man and his family are all persuasive arguments in favor of finding that appellant be given just one more chance." In testifying, petitioner apologized for his conduct and promised to adhere strictly to the rules if given another opportunity to do so.

Our views on this issue should not be deemed, nor are they intended, to denigrate or belittle administrative interest in requiring strict compliance with work hour requirements. The fact that an employee puts in his 40 hours per week by rearranging his breaks to suit his personal convenience is not enough. An administrator may properly insist upon adherence to a prescribed time schedule, as this may well be essential to the maintenance of an efficient and productive office. Nor do we imply that an employee's failure to comply with the rules regulating office hours may not warrant punitive action, possibly in the form of dismissal, under the appropriate circumstances. Indeed, in the instant case, a less severe discipline is clearly justified; and we do not rule out the possibility of future dismissal if petitioner's transgressions persist.

However, considering all relevant factors in light of the overriding concern for averting harm to the public service, we are of the opinion that the Board clearly abused its discretion in subjecting petitioner to the most severe punitive action possible for his misconduct.

In sum, we conclude that the dismissal of petitioner was improper for two reasons: First, the procedure by which the discharge was effectuated denied him due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and article I, sections 7 and 15, of the California Constitution; second, the penalty of dismissal was clearly excessive and disproportionate to the misconduct on which it was based.

Therefore, upon remand the trial court should issue a peremptory writ of mandate directing the State Personnel Board to annul and set aside its *220 decision sustaining without modification the punitive action of dismissal taken by the State Department of Health Care Services against petitioner John F. Skelly, M.D., and to reconsider petitioner's appeal in light of this opinion. [FN34]

FN34 As petitioner has heretofore been accorded a full evidentiary hearing in this matter, it is unnecessary for the Board to order the Department to reinstitute new proceedings against him in order to impose an appropriate discipline in respect to the conduct involved herein.

The judgment is reversed and the cause is remanded to the trial court for further proceedings in conformity with this opinion.

Wright, C. J., McComb, J., Tobriner, J., Mosk, J., Clark, J., and Molinari, J., [FN*] concurred.

FN* Assigned by the Chairman of the Judicial Council.

Respondents' petition for a rehearing was denied October 15, 1975. Richardson, J., did not participate therein. *221

Cal.,1975.

Skelly v. State Personnel Bd.

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ROBERT WHITE, Plaintiff and Appellant,
v.
COUNTY OF SACRAMENTO et al., Defendants and Respondents

S.F. No. 24394.

Supreme Court of California.

Jun 21, 1982.

SUMMARY

A deputy sheriff who had been reassigned to a lower paying position based on his alleged deficient performance petitioned the trial court for a writ of mandate after the county civil service commission denied his request for a hearing. Relying on the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, §§ 3300-3311), plaintiff contended that he could not be reassigned to a lower paying position without being afforded an administrative appeal, as provided by § 3304, subd. (b), with respect to punitive actions. The trial court denied the petition. (Superior Court of Sacramento County, No. 288012, Benjamin A. Diaz, Judge.)

The Supreme Court reversed and remanded to the trial court for further proceedings consistent with its opinion. The court held that the decision to reassign the deputy to a lower paying position based on his alleged deficient performance was per se disciplinary, or punitive in nature, and that he was thus entitled to an administrative appeal. In accordance with the last antecedent rule of statutory construction, the court held that the phrase "for purposes of punishment," as used in Gov. Code, § 3303, defining "punitive action" as "any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment," qualified only the word "transfer." Thus, a demotion or reduction in salary imposed for deficient performance and not for purposes of punishment fell within the scope of the statutory hearing requirement. (Opinion by Bird, C. J., expressing the unanimous view of the court.) *677

HEADNOTES

Classified to California Digest of Official Reports

(1) Law Enforcement Officers § 23--Sheriffs and Constables--Reassignment for Deficient Performance--Right to Administrative Hearing.

A decision to reassign a deputy sheriff to a lower paying position based on his alleged deficient performance was per se disciplinary, or punitive in nature, and, as such, the officer was entitled to an administrative appeal under the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3304, subd. (b)). In accordance with the last antecedent rule of statutory construction, the phrase "for purposes of punishment," as used in Gov. Code, § 3303, defining "punitive action" as "any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment," qualified only the word "transfer" and not the words "dismissal," "demotion," "suspension," "reduction in salary," and "written reprimand." The sense of the Bill of Rights Act did not require that the phrase "for purposes of punishment" be applied to each of the preceding terms in § 3303, and relevant portions of the State Civil Service Act (Gov. Code, § 18500 et seq.) also supported the conclusion that the Legislature viewed "dismissals," "demotions," "suspensions," "reductions in salary" and "written reprimands" to be per se disciplinary in nature. A transfer, however, is disciplinary in nature only if imposed for purposes of punishment. Thus, a demotion or reduction in salary imposed for deficient performance and not for purposes of punishment fell within the scope of the statutory hearing requirement.

[See Cal.Jur.3d, Law Enforcement Officers, § 23; Am.Jur.2d, Sheriffs, Police, and Constables, § 15.]

COUNSEL

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William H. Sortor, David P. Clisham and Carroll, Burdick & McDonough as Amici Curiae on behalf of Plaintiff and Appellant. *678

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John W. Witt, City Attorney (San Diego), Ronald L. Johnson, Chief Deputy City Attorney, John M. Kaheny, Deputy City Attorney, Donald L. Clark, County Counsel (San Diego), Lloyd M. Harmon, Jr., Chief Deputy County Counsel, and Arlene Prater, Deputy County Counsel, as Amici Curiae on behalf of Defendants and Respondents.

BIRD, C. J.

Does the Public Safety Officers Procedural Bill of Rights Act (Bill of Rights Act) afford a peace officer, who is reassigned to a lower paying position based on his alleged deficient performance, a right to an administrative appeal?

I.

The facts are not in dispute. Plaintiff, Robert White, is a deputy sheriff with the Sacramento County Sheriff's Department (Department). Defendants are the County of Sacramento, its civil service commission and its sheriff's department.

Under the Department's salary structure, deputy sheriffs who are assigned to certain more specialized positions, such as detective, are given the rank of corporal and a 5 percent special pay allowance. Plaintiff held such assignments from 1972 to 1980. He served in the detective division from 1975 to 1980.

In December of 1979, the Department told plaintiff that his performance was deficient and that he would be reassigned to the patrol division on or about January 13, 1980. As a result, he would lose both his rank and the special pay allowance.

Plaintiff sought a hearing before the Sacramento County Civil Service Commission, but his request was denied. Thereafter, he filed a petition for a writ of mandate to compel the commission to grant him a hearing. Relying on the Bill of Rights Act (Gov. Code, §§ 3300-3311), [FN1] *679 plaintiff contended that the Department could not reassign him to a lower paying position without affording him an administrative appeal, as provided in section 3304, subdivision (b) of the act.

FN1 All statutory references are to the Government Code unless otherwise indicated.

The trial court denied his petition and this appeal followed.

II.

(1) The Bill of Rights Act sets forth a number of basic rights and protections which must be accorded individual public safety officers by the public agencies which employ them. [FN2] One of the basic protections is the right to an administrative appeal of punitive actions. Section 3304, subdivision (b), provides that "No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal." The sole question presented by this case is whether this right to an appeal extends to a public safety officer who is reassigned to a lower paying position because of his alleged deficient performance. [FN3]

FN2 As used in the act, "public safety officer" refers to any person designated a peace officer by Penal Code sections 830.1 or 830.2, subdivisions (a) and (b). (§ 3301.) A deputy sheriff, "regularly employed and paid as such" is among those defined as peace officers under Penal Code section 830.1.

FN3 It should be stressed that this case deals only with the availability of an administrative appeal where "punitive action" is taken against an individual officer. This case does not concern, for example, mass layoffs occasioned by a reduction of personnel due to budgetary constraints.

Resolution of this question obviously turns on the definition of the term "punitive action." Plaintiff contends that his reassignment was a "demotion" and his loss of the special pay allowance a "reduction in salary" both of which, by definition, are punitive actions giving rise to a right of appeal under section 3304. Plaintiff relies upon section 3303 which defines "punitive action" as "any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment."

Defendants contend, however, that the phrase "for purposes of punishment" qualifies each of the preceding terms, thereby precluding from the reach of the statute "demotions" or "reductions in salary" not imposed "for purposes of punishment." Since plaintiff's reassignment was imposed for deficient

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performance and not as punishment for misconduct, *680 they contend that he is not entitled to a hearing under section 3304.

In order to adopt this proposed construction of section 3303, this court would have to violate the most fundamental rules of statutory construction and ignore the legislative history and the underlying policy of the Bill of Rights Act.

A longstanding rule of statutory construction - the "last antecedent rule" - provides that "qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote." (Board of Port Commrs. v. Williams (1937) 9 Cal.2d 381, 389 [70 P.2d 918]; accord People v. Corey (1978) 21 Cal.3d 738, 742 [147 Cal.Rptr. 639, 581 P.2d 644].) Applied here, the rule requires that the phrase "for purposes of punishment" be read to qualify only the word "transfer" and not the words "dismissal," "demotion," "suspension," "reduction in salary," and "written reprimand."

Further support for this reading is provided by the punctuation of the statute. (See Estate of Coffee (1941) 19 Cal.2d 248 [120 P.2d 661]; Duncanson-Harrelson Co. v. Travelers Indemnity Co. (1962) 209 Cal.App.2d 62 [25 Cal.Rptr. 718].) Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma. (Board of Trustees v. Judge (1975) 50 Cal.App.3d 920, 927-928, fn. 4 [123 Cal.Rptr. 830].)

Here, however, the phrase "for purposes of punishment" is not set off from the preceding terms by a comma. Instead, the entire phrase, "transfer for purposes of punishment," is set off from the preceding terms by a comma followed by the word "or." Such use of the word "or" in a statute indicates an intention to use it disjunctively so as to designate alternative or separate categories. (Piet v. United States (S.D.Cal. 1959) 176 F.Supp. 576; accord People v. Smith (1955) 44 Cal.2d 77 [279 P.2d 33].) Thus, application of the ordinary rules of statutory construction strongly suggests that the phrase "for purposes of punishment" was intended to modify only the term "transfer."

There are two exceptions to the "last antecedent rule," but on examination it quickly becomes apparent that neither is applicable here. The first exception provides that "'[w]hen several words are followed by a *681 clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.'" (Wholesale T. Dealers v. National etc. Co. (1938) 11 Cal.2d 634, 659 [82 P.2d 3, 118 A.L.R. 486]; accord People v. Corey, supra, 21 Cal.3d 738, 742.)

Here, the phrase "for purposes of punishment" is not equally applicable to all the preceding terms. It would be redundant to provide for a "written reprimand" "for purposes of punishment." A reprimand, by definition, is a punishment, that is, a penalty. Accordingly, to read the statute as defendants suggest would violate the rule that "Interpretive constructions which render some words surplusage ... are to be avoided." (California Mfrs. Assn. v. Public Utilities Com. (1979) 24 Cal.3d 836, 844 [157 Cal.Rptr. 676, 598 P.2d 836].) "[E]very word, phrase and provision employed in a statute is intended to have meaning and to perform a useful function ...." (Clements v. T. R. Bechtel Co. (1954) 43 Cal.2d 227, 233 [273 P.2d 5]; Prager v. Isreal (1940) 15 Cal.2d 89 [98 P.2d 729].)

The second exception to the "last antecedent rule" provides that "[w]here the sense of the entire act requires that a qualifying word or phrase apply to several preceding wo[r]ds ..., [its application] will not be restricted ...." (2A Sutherland, Statutory Construction (4th ed. 1973) § 47.33, p. 159; see People v. Knowles (1950) 35 Cal.2d 175 [217 P.2d 1].) This is, of course, but another way of stating the fundamental rule that a court is to construe a statute "'so as to effectuate the purpose of the law'." (Tripp v. Swoap (1976) 17 Cal.3d 671, 679 [131 Cal.Rptr. 789, 552 P.2d 749].) "Where a statute is theoretically capable of more than one construction [a court must] choose that which most comports with the intent of the Legislature." (California Mfrs. Assn. v. Public Utilities Com., supra, 24 Cal.3d at p. 844.)

In this case, the "sense" of the Bill of Rights Act does not require that the phrase "for purposes of punishment" be applied to each of the preceding terms in section 3303. While there can be no doubt that the act is concerned primarily with affording

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individual police officers certain procedural rights during the course of proceedings which might lead to the imposition of penalties against them (see, e.g., §§ 3303, 3305-3307, 3309), a "transfer" is the only personnel action listed in section 3303 which is not intrinsically disadvantageous to an officer. Each of the other personnel actions - "dismissal," "demotion," "suspension," "reduction in salary" and "written reprimand" - by definition result in ***682** disadvantage, loss or hardship. They are by nature penalties, no matter for what reason imposed. A transfer need not be. Indeed, it is entirely possible that a transfer could be advantageous to an officer.

Further support for the view that the Legislature considered the other personnel actions listed in section 3303 as per se "disciplinary" or "punitive" in nature, without regard to the reason for which they are imposed, is provided by the State Civil Service Act. (§ 18500 et seq.) "Under general rules of statutory construction, [this court] may, in construing a statute, consider other statutes that might bear on the meaning of the statute at issue. [Citation.]" (People v. Corey, supra, 21 Cal.3d at p. 743.) In this regard, the State Civil Service Act is particularly germane.

This comprehensive act "invest[s] [civil service] employees with substantive and procedural protections against punitive actions by their superiors." (Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194, 202 [124 Cal.Rptr. 14, 539 P.2d 774]; see §§ 19570-19588.) Among these is the right to a hearing. (§§ 19572, 19578; see also Skelly v. State Personnel Bd., supra, 15 Cal.3d at pp. 202-216.)

The term "punitive action" is defined in section 19570 as "dismissal, demotion, suspension, or other disciplinary action." (Italics added.) "The [State Personnel] Board has defined 'other disciplinary action' to include, among other things, official reprimand and reduction in salary. [Citation.]" (Skelly v. State Personnel Bd., supra, 15 Cal.3d at p. 202, fn. 11.)

If the appointing authority decides to impose any such "disciplinary action" on an employee, he or she is entitled to an administrative appeal. (§§ 19575-19578.) It matters not in the least whether the reason for the punitive action is misconduct (see, e.g., § 19572, subds. (a), (d), (e), (f) and (g)), or "incompetency," or "inefficiency" (see § 19572, subds. (b) and (c)).

As regards transfers, the State Civil Service Act provides that an employee may protest a transfer, i.e., seek an administrative appeal, on the grounds that the transfer was ordered for the purpose of harassment or discipline. (Former §§ 19361, 19362, now §§ 19994.3, 19994.4.)

In sum, the provisions of the State Civil Service Act strongly support the conclusion that the Legislature intended, in the Bill of Rights Act, ***683** to provide the right of administrative appeal to a peace officer against whom disciplinary action is taken, and that the Legislature viewed "dismissals," "demotions," "suspensions," "reductions in salary" and "written reprimands" to be per se disciplinary in nature. A transfer, however, is "disciplinary" in nature only if imposed "for purposes of punishment." [FN4]

FN4 The provisions of the State Civil Service Act also strongly suggest that the right to an administrative appeal provided by section 3304 of the Bill of Rights Act does not apply where police officers are laid off as part of a mass reduction in personnel due, for example, to budgetary constraints. By its terms section 3303 does not include "layoffs" within the definition of "punitive action." The same is true of the comparable provision of the State Civil Service Act (see § 19570). Under that act, a civil service employee has a limited right to appeal a layoff but that right arises under an entirely separate section (former § 19541, now § 19997.14). No corollary to this right appears in the Bill of Rights Act.

Finally, this construction of sections 3303 and 3304, subdivision (b) accords with the express purpose of the Bill of Rights Act. [FN5] Section 3301 declares that the act's "rights and protections" are afforded peace officers in order to assure the "maintenance of stable employer-employee relations," and thus to secure "effective law enforcement ... services" for "all people of the state." It is evident that the more widely available the opportunity to appeal a decision resulting in disadvantage, harm, loss or hardship, the more "'meaningful [the] hedge against erroneous action'." (Skelly v. State Personnel Bd., supra, 15 Cal.3d 194, 210.)

FN5 It also finds implicit support in the legislative

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history of section 3304, subdivision (b). The Bill of Rights Act grew out of Assembly Bill No. 301 which was introduced on December 19, 1974. The bill did not originally provide for the right to an administrative hearing. The bill was amended by the Assembly on April 29, 1975, to extend such right only for dismissals, demotions and denials of promotion. The bill was amended in conference on August 12, 1976, just prior to its enactment, to increase the types of personnel actions which would be appealable to include all of those now set forth in the statute.

Erroneous action can only foster disharmony, adversely affect discipline and morale in the workplace, and, thus, ultimately impair employer-employee relations and the effectiveness of law enforcement services. With regard to the availability of the right of administrative appeal, the interpretation to which the ordinary rules of statutory construction leads is also the one which is most consonant with the express purpose of the Bill of Rights Act.

Accordingly, this court holds that a decision to reassign a peace officer to a lower paying position is per se disciplinary, or punitive in *684 nature, and that the officer therefore must be accorded the "opportunity for [an] administrative appeal." (§ 3304, subd. (b).) [FN6]

FN6 It should be noted that the parties to this appeal have not raised the question of the "timing" of the "opportunity for administrative appeal" provided by section 3304, subdivision (b). Doyle v. City of Chino (1981) 117 Cal.App.3d 673, 678-680 [172 Cal.Rptr. 844] held that the right does not arise until a decision to take punitive action is made. That court rejected the notion that the right arises upon the taking of any action which might lead to punitive action. (See § 3303 [set out ante, at pp. 681-682.)
Butler v. County of Los Angeles (1981) 116 Cal.App.3d 633, 640 [172 Cal.Rptr. 244] held that "subdivision (b) of section 3304 requires a public agency to make [an appeal] available to public safety officers ... but the appeal need not be completed prior to implementation of a punitive action."

III.

For the reasons set forth above, the judgment is reversed and the case remanded for further proceedings consistent with this opinion. Plaintiff shall recover his costs on appeal.

Mosk, J., Richardson, J., Newman, J., Kaus, J., Broussard, J., and Grodin, J., [FN*] concurred. *685

FN* Assigned by the Chairperson of the Judicial Council.

Cal.,1982.

White v. Sacramento County

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LUIS AGUILAR, Plaintiff and Appellant,
v.
JOHN R. JOHNSON, as Chief of Police, etc., Defendant and Respondent

No. F008714.

Court of Appeal, Fifth District, California.

Jun 17, 1988.

SUMMARY

A city police officer petitioned for a writ of mandate directing the city chief of police to obey certain state provisions and fulfill the requirements of the city police department manual concerning the investigation of citizens' complaints against police officers, and to destroy a citizen's complaint placed in his file. The citizen's complaint was never formally investigated. The trial court denied the petition. (Superior Court of Stanislaus County, No. 219116, Charles V. Stone, Judge.)

The Court of Appeal reversed the trial court's order denying relief and remanded with directions to treat the petition as one for mandatory injunctive relief. The court held that, under Pen. Code, § 832.5, providing that written procedures available to the public be adopted to investigate citizens' complaints, the police chief was required to investigate the citizen's complaint lodged against the officer. It held that the police chief's attempt at oral modification of the police department manual was ineffective to modify the city's written procedure. The manual could not be interpreted to authorize delay of the investigation, as such an interpretation would render terms of the manual surplusage, and would allow the police chief to circumvent the requirement of § 832.5 that the procedure be in writing and available to the public. The court held that there was no requirement that a citizen's complaint be an original, rather than a copy, in order for it to be investigated. It further held that the police chief violated Gov. Code, §§ 3305 and 3306, by failing to notify the officer of the complaint promptly and provide him an opportunity to comment on the complaint before placing it in his personnel file. It held that a citizen's complaint that contains allegations of police brutality is a comment adverse to the officer's interest under the statute. The officer was not required to exhaust his administrative remedies prior to seeking judicial relief, and was entitled to attorney fees pursuant to Code Civ. Proc., § 1021.5, since the rights affected benefited not only the officer, but all public safety officers, as well as the citizenry as a whole, who *242 benefited by virtue of stable employer-employee relations in public safety organizations. Finally, the court held that, although the relief sought was mistakenly entitled administrative mandamus rather than mandatory injunctive relief, the officer had provided the police chief with adequate notice of the nature of his claim. (Opinion by Brown (G. A.), J., [FN*] with Hamlin, Acting P. J., and Ardaiz, J., concurring.)

FN* Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

HEADNOTES

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(1) Administrative Law § 30--Effect and Validity of Rules and Regulations-- Necessity for Compliance With Enabling Statute.

Under Pen. Code, § 832.5, requiring that each agency in the state employing peace officers must adopt a written policy for the handling of citizens' complaints, a city's written policy requiring investigation of citizens' complaints regardless of whether a civil or criminal action was pending, could not be orally modified by the chief of police to prohibit an investigation if a civil or criminal case, to which the complainant was a party, was pending.

(2) Administrative Law § 35--Effect and Validity of Rules and Regulations-- Police Department Manual--Investigation Procedure.

Under provisions of a police department manual authorizing delay of an investigation into citizens' complaints against police officers upon the explicit advice of the city attorney or under the direction of the chief executive, the chief of police improperly failed to investigate a citizen's complaint of police brutality where there was no explicit advice regarding the complaint. An interpretation of the regulation allowing the chief unfettered discretion to delay an investigation would allow the exception to

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swallow the rule, rendering meaningless the remaining portions of the section, in violation of the rule of statutory interpretation disfavoring an interpretation which would render terms of the statute surplusage.

(3) Administrative Law § 35--Effect and Validity of Rules and Regulations-- Police Department Manual--Investigation of Citizens' Complaints.
Under a police department manual requiring that citizens' complaints be investigated, the chief of police violated the manual by failing to investigate charges against a police officer, although the *243 signed complaint form was a copy rather than the original, since nothing in the manual or elsewhere required that the complaint be an original.

(4) Law Enforcement Officers § 11--Police--Personnel Files--Citizens' Complaints--Rights to Notice and Comment.
A citizen's complaint alleging police brutality constituted an adverse comment under Gov. Code, § 3305, providing that no public safety officer shall have any comment adverse to his interest entered in his personnel file, or any other file used for any personnel purposes by the employer without notice, and Gov. Code, § 3306, providing that a public safety officer shall have 30 days within which to file a written response to any adverse comment entered in his personnel file. The requirement of notice and an opportunity to comment is not restricted to comments made by law enforcement personnel, but applies to adverse comments made in the form of citizens' complaints.

[See Cal.Jur.3d, Public Officers and Employees, § 148; Am.Jur.2d, Public Officers and Employees, § 170.]

(5) Law Enforcement Officers § 11--Police--Personnel Files--Requirement of Notice and Right to Comment--Citizens' Complaints--Effect of Requirement That Officer Sign Adverse Comment.
Under Gov. Code, §§ 3305 and 3306, requiring that public safety officers be given notice and an opportunity to respond to adverse comments entered in their personnel files, a citizen's complaint would be considered such an adverse comment despite the violation of Pen. Code, § 832.5, which would allegedly occur if the police chief refused acceptance of the complaint until the officer's signature was affixed, since the complaint could be accepted and simply not placed in the personnel file until the officer had the opportunity to comment.

(6) Mandamus and Prohibition § 51--Mandamus--Defenses--Prior Resolution of Issues--Police Officers--Citizens' Complaints--Placement in Personnel File.
In an action seeking to compel a police chief to comply with provisions of the city police manual and statutes concerning officers' rights regarding citizens' complaints, the mere fact that the police chief belatedly provided an opportunity to comment on a citizen's complaint did not constitute such settlement of the case as would bar the issuance of a writ. The police chief never agreed to follow procedure set forth in the manual for investigation of complaints, and never did investigate the complaint. Also, the chief incorrectly maintained that he was not required to investigate complaints when a civil or criminal action was pending, and that a citizen's *244 complaint was not an adverse comment within the meaning of Gov. Code, §§ 3305 and 3306.

(7) Law Enforcement Officers § 11--Police--Disciplinary Proceedings--Rights of Officers--Adverse Comments--Right to Notice and Opportunity to Comment--As Affected by Placement in Separate File.
Under Gov. Code, §§ 3305 and 3306, requiring that police officers be afforded notice and an opportunity to comment on adverse comments entered in their personnel files, placement of such adverse comments in a separate file does not excuse compliance.

(8) Administrative Law § 89--Judicial Review and Relief--Exhaustion of Administrative Remedies--Exceptions--Cases Arising Under the Safety Officers' Bill of Rights.
Under Gov. Code, § 3309.5, providing that the superior court shall have the initial jurisdiction in any case arising under the Public Safety Officers' Procedural Bill of Rights (Gov. Code, § 3300 et seq.), a police officer is not required to exhaust administrative remedies prior to seeking judicial relief from alleged violations of such statutes.

(9) Costs § 14--Attorney Fees--Substantial Benefit Theory.
In a successful action by a police officer to compel a police chief to afford notice and an opportunity to comment on a citizen's complaint for police brutality

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before the complaint could be entered in the officer's personnel file, and to investigate the citizen's complaint, the right sought to be enforced fell within the range of significance found sufficient to warrant attorney fees awards in earlier cases, and met the requirement of Code Civ. Proc., § 1021.5, that a large benefit be conferred upon the general public or a large group of people. The officer's action would result in affording officers the right to be made aware of and to comment on citizens' complaints before they are placed in the officer's personnel file, thereby benefiting all public safety officers; the citizenry as a whole would also benefit by the promotion of stable employer-employee relations in public safety organizations.

(10) Administrative Law § 95--Judicial Review and Relief--Mandamus-- Distinguished From Administrative Mandamus.

The writ of mandamus will not issue to compel the performance of a future duty or to forestall anticipated error; it will issue only when there is a present and actual duty to perform an act required by law. But where there is a clear mandatory statutory duty, no demand to act is necessary before seeking court relief. Thus, in a police officer's petition mistakenly entitled as one for administrative mandamus, but which specifically referred to the relief sought as being pursuant to Gov. *245 Code, § 3309.5, subd. (c), which expressly extends the authority of the superior court to grant injunctive relief, neither the chief of police against whom the action was brought, nor his attorney, could have been misled by the erroneous labeling of the petition, and thus no prejudice would result from treating the officer's petition as one for mandatory injunctive relief.

COUNSEL

James J. Milam for Plaintiff and Appellant.

Carl O. Waggoner, City Attorney, for Defendant and Respondent.

BROWN (G. A.), J. [FN*]

FN* Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

Luis Aguilar, a police officer for the City of Turlock, appeals from a denial of a petition for writ of mandate sought against John R. Johnson as Chief of Police of the City of Turlock (Chief). Appellant prays for a writ directing the Chief to henceforth obey the provisions of the California Code of Regulations [FN1] and fulfill the requirements of the Turlock Police Department Manual concerning investigation of citizens' complaints against police officers, to destroy the citizen's complaint filed in appellant's file [FN2] and for attorneys' fees.

FN1 The reference to the Code of Regulations was obviously in error. It is not shown that any sections of the Code of Regulations were violated. As conclusively demonstrated by the allegations of the petition during the hearing and briefing in the trial court, the appropriate reference is to the Public Safety Officers' Procedural Bill of Rights (Gov. Code, §§ 3300-3311).

FN2 In light of the provisions of Penal Code section 832.5, subdivision (b) requiring citizens' complaints to be maintained for five years, appellant abandoned this demand in the trial court.

Facts

In approximately May 1985, Linda Loya filed a signed citizen's complaint on a form supplied by the police department charging Officer Aguilar with conspiracy to commit police brutality. Lieutenant Zaccaro, the officer in charge of such complaints, testified the complaint was not investigated because it was a copy rather than the original and because a criminal action was pending against the complainant arising out of the same facts as the *246 citizen's complaint. The complaint was placed in a confidential investigation file separate from appellant's personnel file.

In either July or August 1985, a "Pitchess Motion" was filed in the criminal case of People v. Linda Loya (also known as Gomez), the citizen complainant. At that time, the citizen's complaint was taken from the confidential complaint file and placed in appellant's personnel file and pursuant to the Pitchess motion the citizen's complaint was revealed to the court.

Appellant testified he was not advised of the existence of the complaint until April 1986. Bill Reeves, Turlock Police Officers' Association employee representative, contacted the police department and arranged a meeting between himself,

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Lieutenant Zaccaro and the Chief to discuss the citizen's complaint. As a result of this meeting, appellant was given the opportunity to comment on the complaint and the comments were attached to the complaint. However, the complaint has never been formally investigated.

In either May or June 1986, a meeting was held between appellant's attorney, the Turlock City Attorney, and the Chief. As a result of this meeting and a subsequent telephone conversation, the Chief removed the citizen's complaint from appellant's personnel file and agreed that in the future all citizens' complaints would be kept in a file separate and apart from the personnel files. Apparently dissatisfied with the resolution, appellant filed the instant petition.

Discussion

In discussing the specific issues, we must keep in mind that both the Legislature and the Supreme Court have spoken to the public importance of guaranteeing police officers their rights under the Public Safety Officers' Procedural Bill of Rights (Bill of Rights) (Gov. Code, §§ 3300-3311). Thus, the Legislature in enacting the Bill of Rights declared: "The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that such stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California." (Gov. Code, § 3301.)

Similarly, the Supreme Court observed in Baggett v. Gates (1982) 32 Cal.3d 128, 143 [185 Cal.Rptr. 232, 649 P.2d 874]: "Moreover, it can *247 scarcely be contended that plaintiffs' litigation has not conferred a 'significant benefit' on the 'general public.' Since enforcement of the Bill of Rights Act should help to maintain stable relations between peace officers and their employers and thus to assure effective law enforcement, plaintiffs' action directly inures to the benefit of the citizenry of this state. [Citation.] No one can be heard to protest that effective law enforcement is not a 'significant benefit.'"

(1) Turning to the specific issues, Penal Code section 832.5 requires that each agency in the state employing peace officers must adopt a written policy for the handling of citizens' complaints. [FN3] (Pena v. Municipal Court (1979) 96 Cal.App.3d 77, 82 [157 Cal.Rptr. 584].)

FN3 Penal Code section 832.5 provides: "(a) Each department or agency in this state which employs peace officers shall establish a procedure to investigate citizens' complaints against the personnel of such departments or agencies, and shall make a written description of the procedure available to the public.
"(b) Complaints and any reports or findings relating thereto shall be retained for a period of at least five years."

The City of Turlock has adopted such a policy which is contained in the "Turlock Police Department Manual" (Manual) in evidence in this case. In relevant part, the Manual states: "323. Investigation Procedure. ... [¶] C. It is the responsibility of the assigned investigator to thoroughly investigate the case and submit a complete investigation report as provided under these procedures. All relevant information obtained by the investigator shall be entered into the investigation report. [¶] D. The investigation shall not be delayed or suspended because of any concurrent civil or criminal proceeding to which the complainant is a party, unless: [¶] 1. After consultation with appropriate legal authority, the Division Commander concerned determines that the complaint is a ploy to avoid prosecution and/or conviction. [¶] 2. The complainant requests such a delay and there is no reason to believe that the alleged conduct of the accused member is of a serious or continuing nature. [¶] 3. The employee has been charged with a crime arising out of the complaint. [¶] 4. Upon the explicit advice of the City Attorney or under the direction of the Chief Executive."

The citizen's complaint in this case was not investigated. The written policy above set forth adopted pursuant to Penal Code section 832.5 requires investigation of complaints regardless of

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whether a civil or criminal action is pending in the absence of certain exceptions. However, respondent testified that when he became chief of police, he changed this policy and adopted an unwritten policy under which no investigation would take place if a civil or criminal case to which the complainant is a party was pending.

The requirement that the procedure be in writing and available to the public evidences an intent to enhance communications between citizens and *248 law enforcement agencies responsible for investigation of such complaints. (See 71 Ops.Cal.Atty.Gen. 1 (1988).)

This intent is circumvented by allowing oral modifications of the written policy. In the present case, the Chief has adopted an unwritten procedure that directly conflicts with the written procedure for investigation of complaints. This action appears to violate Penal Code section 832.5's express mandate that written procedures available to the public be adopted to investigate citizens' complaints. We hold the oral modification was ineffective to modify the written procedure.

(2) The Chief next argues that subdivision (4) of section 323 of the Manual authorized delay of the investigation. As previously noted, subdivision (4) allows for a delay of an investigation "[u]pon the explicit advice of the City Attorney or under the direction of the Chief Executive." The Chief contends the change in the procedure regarding investigation of complaints where a civil or criminal action is pending was authorized by this section. Clearly, this section allows the Chief to delay investigation where the facts of an individual case indicate this is the more prudent course. In the present case, there was no "explicit advice" regarding this specific complaint. Moreover, the interpretation of this section urged by the Chief would in effect allow the exception to swallow the rule thus rendering meaningless the remaining portions of this section. Under general rules of statutory interpretation, the Chief's argument must be rejected as "an interpretation which would render terms of a statute surplusage should be avoided, and every word should be given some significance, leaving no part useless or devoid of meaning. (City and County of San Francisco v. Farrell (1982) 32 Cal.3d 47, 54 [184 Cal.Rptr. 713, 648 P.2d 935].)" (California State Employees' Assn. v. State Personnel Bd. (1986) 178 Cal.App.3d 372, 378 [223 Cal.Rptr. 826].) Finally, adoption of this interpretation would also allow the Chief to circumvent Penal Code section 832.5's requirement that the procedure be in writing and available to the public.

(3) The Chief further attempts to justify the failure to investigate on the basis that the signed complaint form was a copy rather than the original. There is nothing in the Manual or elsewhere requiring the complaint be an original. Moreover, in a somewhat contradictory argument, the Chief contends that the complaint could not be destroyed because to do so would violate Penal Code section 832.5 which requires that citizens' complaints be maintained for five years. As appellant notes, "the fact that the [Chief] has argued and continues to argue that the complaint must be preserved pursuant to the requirements of the California Penal Code establishes the validity of the complaint." We conclude the Chief violated the Manual by delaying the investigation of the complaint. *249

(4) Appellant next contends the Chief violated sections 3305 and 3306 of the Government Code's Bill of Rights by failing to promptly notify him of the complaint and providing him an opportunity to comment on the complaint before placing it in his personnel file.

Government Code section 3305 provides: "No public safety officer shall have any comment adverse to his interest entered in his personnel file, or any other file used for any personnel purposes by his employer, without the public safety officer having first read and signed the instrument containing the adverse comment indicating he is aware of such comment, except that such entry may be made if after reading such instrument the public safety officer refuses to sign it. Should a public safety officer refuse to sign, that fact shall be noted on that document, and signed or initialed by such officer." (Italics added.)

Government Code section 3306 provides: "A public safety officer shall have 30 days within which to file a written response to any adverse comment entered in his personnel file. Such written response shall be attached to, and shall accompany, the adverse comment." (Italics added.)

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The Chief argues failure to notify appellant of the complaint did not violate these provisions because a citizens' report does not constitute an adverse comment within the meaning of these two sections. Logic and general rules of statutory construction suggest that a citizens' complaint that contains allegations of police brutality is a "comment adverse to [the officer's] interest."

Under basic rules of statutory construction "courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them. [Citations.]" (California Teachers Assn. v. San Diego Community College Dist. (1981) 28 Cal.3d 692, 698 [170 Cal.Rptr. 817, 621 P.2d 856].) As relevant here, Webster defines comment as "an observation or remark expressing an opinion or attitude. ..." (Webster's Third New Internat. Dict. (1981) p. 456.) "Adverse" is defined as "in opposition to one's interest: Detrimental, Unfavorable." (Id. at p. 31.)

Appellant's interpretation that a citizens' complaint constitutes an adverse comment within the meaning of Government Code sections 3305 and 3306 is supported by the usual, ordinary meaning of the words. As appellant notes, police brutality constitutes a major violation under the Turlock Police Department Manual and would affect any present or future discipline. Moreover, although the Chief contends uninvestigated complaints are not considered in making personnel decisions, this appears to be a somewhat unsupported and self-serving declaration. Their placement in an officer's personnel file could potentially lead to not only adverse personnel ***250** decisions but could also result in a more severe penalty being imposed in a subsequent disciplinary proceeding. Because of this potential adverse impact on the officer, the complaint is an "adverse comment" within the meaning of these sections. The Chief's contention to the contrary is specious.

Although not expressly stated, the Chief appears to argue that the term "comments adverse" refers only to comments made by law enforcement personnel. The statutes make no such distinction between adverse comments made by law enforcement personnel and adverse comments made in the form of citizens' complaints. Rather, both sections refer to any adverse comment. In construing a statute a court is "not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language." (People v. One 1940 Ford V-8 Coupe (1950) 36 Cal.2d 471, 475 [224 P.2d 677]; see also Jordan v. Superior Court (1981) 116 Cal.App.3d 202, 210 [172 Cal.Rptr. 30].) Because the Chief's interpretation of the statute requires insertion of a distinction not made by the statute, it must be rejected.

(5) The Chief further argues the complaint cannot be considered an adverse comment because "it would be virtually impossible to obtain an officer's signature prior to the time a citizen's complaint is received, and a violation of section 832.5 would occur if respondent refused acceptance of the complaint until the officer's signature was affixed." This argument is patently unmeritorious. The complaint could be accepted and simply not placed in the personnel file until the officer had the opportunity to comment. Similar procedures are undoubtedly followed prior to the placement of an adverse evaluation in the officer's personnel file.

(6) The Chief further argues that even assuming appellant was entitled to comment on the complaint, he has already received any rights to which he was entitled. In this regard, the Chief notes that appellant has been given the opportunity to comment and has in fact commented on the complaint and that the Chief has agreed that in the future all citizens' complaints will be kept in a separate "confidential citizen's [sic] complaint file." Thus, the Chief contends, the case has been settled.

Although the Chief has belatedly provided an opportunity to comment on this complaint, he has never agreed to follow procedures set forth in the Manual for investigation of complaints and maintains that, under the oral modification of the written policy, he need not investigate complaints when a civil or criminal action is pending. As previously noted, the adoption of the oral modification violates the spirit, and the express mandate, of Penal Code section 832.5. Further, the complaint has never been formally investigated. ***251** Moreover, the Chief steadfastly maintains that a citizens' complaint is not an adverse comment within the meaning of Government Code sections 3305 and 3306 and thus an officer does not have a right to comment on such complaints when filed. Because a citizens' complaint is an adverse

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comment, the Chief's position violates these sections. Because appellant seeks to compel the Chief to comply with the various applicable statutory provisions, and because the Chief urges compliance is not required, the case has not been resolved.

(7) That the Chief has agreed to place complaints in a separate file does not excuse compliance with Government Code sections 3305 and 3306. Our Supreme Court has rejected this argument under an analogous provision of the Education Code. (Miller v. Chico Unified School Dist. (1979) 24 Cal.3d 703 [157 Cal.Rptr. 72, 597 P.2d 475].)

In Miller, a principal was reassigned to a teaching position allegedly in reliance on a confidential memorandum that contained adverse comments regarding the principal's performance. The principal filed a petition for writ of mandate seeking reinstatement to his position alleging the school board's failure to notify him of this memorandum and its failure to provide an opportunity to comment violated Education Code section 44031. This section, much like the ones involved in the present case, provides a school district employee must be given notice and an opportunity to comment on "derogatory information in their personnel files 'which may serve as a basis for affecting the status of their employment.'" (Miller, supra, 24 Cal.3d at p. 706.) The trial court denied the writ concluding that compliance with Education Code section 44031 was "not a prerequisite to reassignment of a principal to a teaching position ...." (Id. at pp. 706-707.)

The Court of Appeal reversed and rejected the school board's argument that Education Code section 44031 was inapplicable because the memoranda was never placed in the principal's personnel file. The court stated: "A school district, however, may not avoid the requirements of the statute by maintaining a 'personnel file' for certain documents relating to an employee, segregating elsewhere, under a different label materials which may serve as a basis for affecting the status of the employee's employment. Nor may the school district insulate itself by simply neglecting to file material which the statute contemplates will be brought to the employee's notice." (Miller, supra, 24 Cal.3d at pp. 712-713.)

Similarly, here the Chief's compliance with Government Code sections 3305 and 3306 is not excused simply because the complaint is placed in a file separate from the personnel file.

(8) The Chief also argues that the appellant should exhaust his remedies provided by the city grievance procedure before resorting to the court. The *252 claim is clearly without merit. Government Code section 3309.5, subdivision (b) provides the superior court shall have the initial jurisdiction in any case arising under the Bill of Rights. [FN4] Further, Mounger v. Gates (1987) 193 Cal.App.3d 1248 [239 Cal.Rptr. 18], is a complete answer to the Chief's position. That case held that because of Government Code section 3309.5 a police officer is not required to exhaust administrative remedies prior to seeking judicial relief from alleged violations of the Bill of Rights.

FN4 Government Code section 3309.5, subdivision (b) provides: "The superior court shall have initial jurisdiction over any proceeding brought by any public safety officer against any public safety department for alleged violations of this section."

(9) Appellant seeks an award of attorneys' fees pursuant to Code of Civil Procedure section 1021.5 (hereafter section 1021.5). [FN5]

FN5 Section 1021.5 provides: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor."

The Chief argues that even assuming appellant is a "successful party," attorneys' fees should not be awarded because there has been no "large benefit conferred upon the general public or a large group of people." The Chief concedes that attorneys' fees have frequently been awarded in cases enforcing a police officer's rights under the Bill of Rights. However, the Chief contends the rights vindicated in

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the present case "in no way approach the importance of those dealt with in Baggett."

Contrary to the Chief's assertion, the rights enforced in this case fall "within the range of significance found sufficient to warrant attorney fees awards in earlier cases." (Los Angeles Police Protective League v. City of Los Angeles (1986) 188 Cal.App.3d 1, 12 [232 Cal.Rptr. 697].) In Baggett v. Gates, supra, 32 Cal.3d 128, the right enforced was the police officer's right to an administrative appeal when reassigned to lower paying positions. (Baggett, supra, at p. 143.) In holding the action met the requirements for an award of attorneys' fees, the court stated: "Analysis of plaintiffs' action leads to the conclusion that there was no reasonable basis for the trial court's denial of their motion for attorney fees. Plaintiffs' action resulted in securing for themselves and many others the basic rights and protections of the Bill of Rights Act. This court has today concluded that these rights and protections are matters of statewide concern. It follows that the rights vindicated by plaintiffs are sufficiently 'important' to justify an attorney fee award. [Citation.]" (Id. at p. 143.) *253

In Mounger v. Gates, supra, 193 Cal.App.3d 1248, the court concluded that appellant had satisfied the first element of section 1021.5 where the action resulted in a determination that police officers need not exhaust their administrative remedies before seeking judicial relief for alleged violations of Government Code section 3303. (Id. at p. 1259.) The court further found that the second element of section 1021.5 had been satisfied in that the "decision benefits not only Mounger but also all public safety officers in the state." (Ibid.) However, the court concluded that remand was necessary for a determination of whether appellants satisfied the last criterion of section 1021.5: whether the action "imposed a financial burden on plaintiffs which was out of proportion to their individual stake in the matter." (Mounger, supra, at p. 1259; Baggett, supra, at p. 142.)

Similarly, here, appellant's action will result in affording officers the right to be made aware of and to comment on citizens' complaints before they are placed in the officer's personnel file. Moreover, the decision benefits not only appellant but all public safety officers. "[A]s the Supreme Court observed in Baggett the citizenry as a whole benefits from a decision like this which serves the legislative purpose of promoting stable employer-employee relations in public safety organizations." (Mounger v. Gates, supra, 193 Cal.App.3d at p. 1259.) As in Baggett and Gates, appellant's action resulted in enforcement of important provisions in the Bill of Rights and "conferred a ' significant benefit' on the 'general public."' (Baggett v. Gates, supra, 32 Cal.3d at p. 143.) Thus, we conclude that appellant has satisfied the first two tests of section 1021.5. Because the trial court has not considered the issue and thus the record does not contain evidence of the amount of attorneys' fees involved, on remand the trial court can determine if the final criterion of section 1021.5 is met and if favorable to the appellant determine the amount of fees to which appellant is entitled.

(10) Finally, we address the appropriateness of the remedy. The petitioner mistakenly entitled his petition one for administrative mandamus. The Chief concedes it should be treated as one for regular mandamus pursuant to Code of Civil Procedure section 1085. The relief for which appellant prays looks to the future in that he asks that the chief of police be ordered to henceforth comply with the departmental Manual and the law. It appears that the requirements of the Manual and of the Bill of Rights, with the exception of conducting an investigation, has belatedly been complied with. Technically, the writ of mandamus will not issue to compel the performance of a future duty or to forestall anticipated error; it will issue only when there is a present and actual duty to perform an act required by law. (Communist Party v. Peek (1942) 20 Cal.2d 536, 540 [127 P.2d 889]; Northridge Park County Water Dist. v. McDonell (1958) 158 Cal.App.2d 123 [322 P.2d 25].) However, contrary to the Chief's contention, where *254 there is a clear mandatory statutory duty, no demand to act is necessary before seeking court relief.

Government Code section 3309.5, subdivision (c) expressly expands the authority of the superior court. That section states: "In any case where the superior court finds that a public safety department has violated any of the provisions of this chapter, the court shall render appropriate injunctive or other extraordinary relief to remedy the violation and to prevent future violations of a like or similar nature, including, but not limited to, the granting of a

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temporary restraining order, preliminary, or permanent injunction prohibiting the public safety department from taking any punitive action against the public safety officer."

While the petition is labeled as being in mandamus, in paragraph 10 of the petition, the appellant specifically refers to seeking relief pursuant to Government Code section 3309.5 and the prayer of the petition primarily seeks relief from future acts. Filed at the same time as the petition was a memorandum of points and authorities in support of the petition which quotes in full the body of Government Code section 3309.5.

Thus, neither the Chief, nor his attorney, could have been misled by the erroneous labeling of the petition as one in mandamus and no prejudice to them appears. Quite clearly, looking to the substance of the petition rather than the form, the petition was one for relief in the nature of a mandatory injunction to command compliance with the Manual and the Bill of Rights.

In the light of the foregoing and in the interest of judicial economy, we deem the petition to have been one seeking mandatory injunctive relief to command compliance with the Manual and the Bill of Rights and that it should have been treated as such by the trial court.

The order of the superior court denying relief is reversed and the cause is remanded with directions to treat the petition as one for mandatory injunctive relief and to enter an appropriate order consistent with this opinion including a determination regarding attorneys' fees. Appellant is awarded his costs on appeal.

Hamlin, Acting P. J., and Ardaiz, J., concurred.

A petition for a rehearing was denied July 5, 1988.
*255

Cal.App.5.Dist.,1988.

Aguilar v. Johnson

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Client Identifier: **POBAR**
Date of Request: 06/17/99
Current Database is CA-ORCS

SCOTT T. BARNES, Plaintiff and Appellant,
v.
PERSONNEL DEPARTMENT OF THE CITY OF EL CAJON, Defendant and Respondent; CITY OF EL CAJON, Real Party in Interest and Respondent.

Civ. No. 16964.

Court of Appeal, Fourth District, Division 1, California.

Dec. 19, 1978.

SUMMARY

By petition for writ of mandate, a former probationary police officer sought to compel a city personnel department to set aside its order dismissing him from the force. A municipal code provision allowed termination of a probationary employee without cause. The employee claimed he was denied procedural due process, citing the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). There was evidence the employee had been informed of the nature of the investigation and of his constitutional rights, had voluntarily taken a polygraph, and had been given a summary of pertinent investigative reports. The superior court denied the writ. (Superior Court of San Diego County, No. 401305, Wesley B. Buttermore, Jr., Judge.)

The Court of Appeal affirmed, holding there was substantial evidence to support the finding that the city had complied with the act's procedural requirements and further holding the act did not prohibit termination of the probationary officer without cause. (Opinion by Brown (Gerald), P. J., with Cologne, J., and Harelson, J., [FN*] concurring.)

FN* Assigned by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1) Law Enforcement Officers § 11--Police--Disciplinary Proceedings-- Probationary Officers--Procedural Bill of Rights Act--Applicability. *503
Probationary police officers are covered by the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.).

(2) Administrative Law § 109--Judicial Review and Relief--Administrative Mandamus--Presumptions--Substantial Evidence.
Absent proof to the contrary, in a review of an administrative determination, administrative findings are presumed to be supported by substantial evidence.

(3) Appellate Review § 127--Scope and Extent.
In review of a trial court's determination, any conflict in the evidence is resolved in favor of the prevailing party and all reasonable inferences are made to uphold the findings.

(4) Law Enforcement Officers § 12--Police--Disciplinary Proceedings-- Appeal--Mandate--Procedural Due Process--Evidence.
On petition for writ of mandamus based on alleged procedural deficiencies in the termination of a probationary police officer, the trial court properly considered declarations by the city addressing the due process allegations even though the declarations were made after the administrative hearing.

(5) Law Enforcement Officers § 13--Police--Probationary Employee--Removal Without Cause.
Termination of a probationary police officer's employment without cause is not prohibited by the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), where the procedural requirements of the act have first been met.

[See Cal.Jur.3d, Law Enforcement Officers, § 33; Am.Jur.2d, Sheriffs, Police and Constables, § 14.]

COUNSEL

Robert H. Lynn for Plaintiff and Appellant.

Linley, McDougal, Meloche & Murphy, Stephen M. Eckis, Ruston, Nance & Dicaro and Thomas Grady for Defendant and Respondent and for Real

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Party in Interest and Respondent. *504

BROWN (Gerald), P. J.

Scott T. Barnes appeals the denial of his petition for a writ of mandate to direct the Personnel Department of the City of El Cajon (Department) to set aside its order dismissing him from the police force.

Barnes was a probationary officer with the City of El Cajon (City) when he arrested Brant Hokanen. Hokanen sued City for false arrest. After investigation Barnes was dismissed. On appeal he claims he was denied procedural due process because the investigation preceding his dismissal did not comply with the Public Safety Officers Procedural Bill of Rights Act (Officers' Act) (Gov. Code, § 3300 et seq.).

The parties agree Barnes was a probationary employee. Under El Cajon Municipal Code section 2.72.100 a probationary employee may be terminated without the right to a hearing or an appeal. Barnes contends the Officers' Act, which mandates a hearing, applies to all peace officers and supersedes the city's ordinance. Government Code section 3301 defines the scope of the act. 'For purposes of this chapter, the term public safety officer means all peace officers, as defined in Section 830.1 and subdivisions (a) and (b) of Section 830.2 of the Penal Code, including peace officers who are employees of a charter city or county.' Peace officers under the named Penal Code sections include 'any policeman ... regularly employed and paid as such ...' (Pen. Code, § 830.1.) (1)A probationary police officer is regularly employed and paid as a police officer. Under the statutory definition probationary employees are covered by the Officers' Act.

Government Code section 3300 et seq. set out the procedural details of the hearing required when punitive action against a peace officer is contemplated. Barnes claims City violated these procedures by: failing to make a complete tape recording of an interview held January 21, 1977 (Gov. Code, § 3303, subd. (f)); denying Barnes access to the tape of the January 21 interview; coercing Barnes into taking a polygraph (Gov. Code, § 3307) and threatening him with punitive action if he did not sign a waiver form (Gov. Code, § 3303, subd. (c)); denying Barnes access to a tape of the polygraph; holding the January 21st interview during Barnes' sleeping hours; not paying him for the time spent in the January 21st hearing (Gov. Code, § 3303, subd. (a)); withholding the nature of the investigation from him (Gov. Code, § 3303, subd. (c)); failing to inform Barnes of his constitutional rights (Gov. Code, § 3303, subd. (g)); failing *505 to tell Barnes who was conducting the investigation; and failing to incorporate Barnes' report of the incident in the investigative report.

(2)Before looking at the evidence we remind Barnes that absent proof to the contrary in a review of an administrative determination it is presumed the findings are supported by substantial evidence (Smith v. Regents of University of California, 58 Cal.App.3d 397, 405 [130 Cal.Rptr. 118]). (3)In a review of the trial court finding any conflict in the evidence is resolved in favor of the prevailing party and all reasonable inferences are made to uphold the findings. (Lacy v. California Unemployment Ins. Appeals Bd., 17 Cal.App.3d 1128, 1134 [95 Cal.Rptr. 566].)

(4)(See fn. 1.) Here Barnes is challenging the procedure used by City in coming to the decision to terminate him. [FN1] As for his complaints about the interview of January 21, 1977, there was substantial evidence this was a five- minute chance encounter in the hall between Barnes and the investigating officer which warranted neither taping nor compensation. There was evidence Barnes was told during the first investigatory interview on January 26, 1977, what the investigation concerned and who was conducting it, and was informed of his constitutional rights. There was evidence Barnes voluntarily took the polygraph and voluntarily signed the waiver on January 28, 1977. There was evidence all tapes and personnel reports were made available for Barnes' perusal even though other information, confidential because of the pending suit against City, would not necessarily be released to him (Gov. Code, § 3303, subd. (f)). The pertinent investigative report, although not directly available to Barnes because of the confidentiality problem, was summarized as part of his final performance report and was made available to him in that form. Under the circumstances, this satisfied the requirements of the Officers' Act. There is substantial evidence to support the trial court's finding that City substantially complied with the procedural

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requirements of the Officers' Act.

FN1 Barnes claims certain declarations were improperly considered by the trial court because they were made after the administrative proceedings presumably in anticipation of Barnes' court appeals. However, the administrative hearing concerned Barnes' termination, not the procedural aspects of the administrative process. By raising these new issues in his mandamus petition, Barnes created the need for declarations by City addressing these points. It was not error for the trial court to consider them.

Barnes claims there was not substantial evidence to support his termination. A review of the record shows there was, under either the substantial evidence or the independent judgment rule. However, such a review is superfluous since Barnes could be terminated at will. (5)Just *506 because the Officers' Act provides certain procedural safeguards and allows a probationary employee to establish a formal record of the circumstance surrounding his termination does not mean City cannot terminate its probationary peace officers without cause.

Barnes contends it was improper for the City manager to serve as the hearing officer on appeal when it was he who had made the initial decision to terminate Barnes. However, Barnes, represented by counsel, never objected to having the City manager sit in review. He cannot now challenge City's procedure.

The order is affirmed.

Cologne, J., and Harelson, J., [FN*] concurred. *507

FN* Assigned by the Chairperson of the Judicial Council.

Cal.App.4.Dist.,1978.

Barnes v. Personnel Dept. of City of El Cajon

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ROBERT L. BELL, Plaintiff and Appellant,
v.
JOHN DUFFY, as Sheriff, etc., Defendant and Respondent.

Civ. No. 18676.

Court of Appeal, Fourth District, Division 1, California.

Oct 31, 1980.

SUMMARY

A terminated employee in a sheriff's department who had been working under temporary employment as a "jail guard" and bailiff under a special deputy sheriff commission petitioned for a writ of mandate to invalidate termination of his employment effected without affording him the opportunity for an administrative appeal afforded peace officers within the protection of the Public Safety Officers Act (Gov. Code, § 3300 et seq.). The court denied the petition without requiring the sheriff to show cause why he should not be adjudged in contempt of court for disobedience of the court's order to answer questions presented at a deposition and to produce data relating to his employment. (Superior Court of San Diego County, No. 425223, James L. Focht, Judge.)

The Court of Appeal affirmed. The court held the temporary employee's right to an administrative appeal was dependent on his being "regularly employed" as a "peace officer" under the Public Safety Officers Act (Gov. Code, § 3300 et seq.), the record showed the temporary employee had not been so employed, and the trial court did not err in failing to require the sheriff to show cause why he should not be adjudged in contempt of court for disobedience of the court's order respecting the furnishing of information relating to the temporary employee's employment in that such information was unnecessary to the court's determination the temporary employee did not have the right to a writ of mandamus. The court also held the discharge of petitioner from employment without being afforded the right of an administrative appeal did not constitute a violation of his right to due process. (Opinion by Staniforth, J., with Brown (Gerald), P. J., and Cologne, J., concurring.) *644

HEADNOTES

Classified to California Digest of Official Reports

(1) Law Enforcement Officers § 34--Sheriffs and Constables--Discharge From Employment--Right to Administrative Appeal.
To enlist the protection of the Public Safety Officers Act (Gov. Code, § 3300 et seq.), in support of entitlement to an administrative appeal prior to termination of employment, a temporary employee in a sheriff's department working under a special deputy sheriff commission must establish that he is in fact a deputy sheriff "regularly employed and paid as such," within the contemplation of the act.

[See Cal.Jur.3d, Law Enforcement Officers, § 22; Am.Jur.2d, Sheriffs, Police, and Constables, § 15.]

(2a, 2b) Law Enforcement Officers § 34--Deputies, Discharge of Temporary Deputy Sheriff Working as Jail Guard and Bailiff.
The trial court properly denied mandamus relief sought by a terminated special deputy sheriff against discharge from employment without being accorded the right of an administrative appeal, where petitioner was not a regularly employed peace officer, but rather was a temporary employee working under a special deputy sheriff commission as a "jail guard," and bailiff. The nature of petitioner's job status was reflected by evidence he was not hired through civil service, he knew, when hired, his guard job was temporary, and he also knew his deputy sheriff commission could be cancelled, the requisition for his guard job indicated his payment was to be from "extra help payroll," and his job did not include duties assigned regular deputy sheriffs.

(3a, 3b) Law Enforcement Officers § 1--Job Termination--Temporary Appointee.
The protection of the Public Safety Officers Act (Gov. Code, § 3300 et seq.) against job termination without the right of an administrative appeal extends to probationary peace officers, but the act should not be construed to extend the right to such an appeal to a sheriff's department employee hired as a temporary guard under a procedure not requiring the

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examinations, certification, and appointment required for a classified county employee even though he may be performing some of the duties of a deputy sheriff under a special deputy commission. Such a temporary *645 employee is not within the protections afforded regularly employed peace officers under the act. A public employee serving at the pleasure of the appointing authority is by the terms of his employment subject to removal without judicially cognizable good cause. Only when such a public employee can show that his employment has been unjustifiably conditioned on the waiver of his constitutional rights will the courts intervene and give relief.

(4) Law Enforcement Officers § 34--Sheriffs and Constables--Deputies-- Discharge of Sheriff's Department Employee Working Under Special Deputy Commission--Effect of Denial of Administrative Appeal.

The discharge from employment of a temporary employee in a sheriff's department working as a jail guard under a special deputy sheriff commission without affording him the right of an administrative appeal did not violate his right to due process of law, where there was no contention that specific charges of misconduct accompanying his dismissal injured his reputation, and the only basis for his dismissal reflected by the record was vague testimony indicating that he was dismissed due to certain information as to his job performance that had come to the sheriff's attention, and certain "background investigation." The job termination notice itself only indicated that the employee working under the special deputy commission had been a temporary employee.

(5) Appellate Review § 163--Determination and Disposition of Cause-- Reversal--Where Ruling Correct but Reason Wrong--Denial of Administrative Hearing to Discharged Employee Outside Public Safety Officer's Act.

The trial court's error in ruling, as a ground for denying mandamus relief to a temporary sheriff's department employee from discharge from employment without an administrative appeal, that the right under the Public Safety Officers Act (Gov. Code, § 3300 et seq.) to an administrative appeal from termination of employment could not be constitutionally applied to a temporary, nonpermanent county employee did not require reversal of the court's decision, where the court also correctly denied the relief on the ground that the employee was not within the protections afforded under the act in that he was neither "regularly employed" nor a "peace officer" (deputy sheriff) under the act. Since the trial court's decision as to the denial of mandamus relief was correct in law, its decision denying the relief was not subject to reversal on appeal on the sole ground the decision was made for a wrong reason. *646

(6) Law Enforcement Officers § 34--Sheriffs and Constables--Deputies-- Sheriff's Department Employee Working Under Special Deputy Commission--Job Termination.

Denial of mandamus relief sought by a temporary sheriff's department employee working under a special deputy commission against discharge from his job without being afforded the right of an administrative appeal was proper despite the court's failure to require the sheriff to show cause why he should not be adjudged in contempt of court for disobedience of its order to answer certain questions presented at a deposition and to produce certain data relevant to his employment. The record showed that the only relief the temporary employee sought was the affording to him of the protection against job termination without the right of an administrative appeal afforded peace officers within the protections of the Public Safety Officers Act (Gov. Code, § 3300 et seq.), that the information the temporary employee sought from the sheriff was not relevant to whether or not he was entitled to such protection due to the nature of his job as a "jail guard" working under a special deputy commission, and that the court had correctly determined, without that information, that the temporary employee was not entitled to such protection.

COUNSEL

Gregory G. Petersen for Plaintiff and Appellant.

Donald L. Clark, County Counsel, Lloyd M. Harmon, Jr., Chief Deputy County Counsel, and Arlene Prater, Deputy County Counsel, for Defendant and Respondent.

STANIFORTH, J.

Robert L. Bell petitioned for a writ of mandate (Code Civ. Proc., § 1094.5) in the superior court alleging he was a sworn peace officer as defined by

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Penal Code section 830.1, entitled to an administrative appeal pursuant to Government Code section 3304, subdivision (b), before termination from temporary employment with the County of San Diego Sheriff's Department. *647

In response John Duffy, Sheriff of the County of San Diego, alleged Bell was employed as a "temporary guard," not a peace officer embraced in Penal Code section 830.1 Respondent claims Bell is without the protection afforded "peace officers" by the so-called "Public Safety Officers Procedural Bill of Rights Act" (Act). (Gov. Code, § 3300 et seq.) [FN1]

FN1 All references are to the Government Code unless otherwise specified.

The superior court entered judgment on January 5, 1979, dismissing the writ of mandate. The trial court reasoned "the Legislature in enacting 3300 [Gov. Code] and the following sections, did not intend a sweeping elimination of the long- standing right of governmental agencies to summarily terminate temporary ... employees without a hearing." Additionally the court determined the Act could not constitutionally be applied to regulate a matter of municipal concern in a charter city or county.

Bell appeals asserting (1) the evidence does not support the lower court's finding appellant was not a "regularly employed" peace officer, (2) due process requires an administrative appeal prior to termination of even a temporary employee, (3) the court erred in concluding this was a matter of local concern and section 3300 et seq. could not constitutionally be applied, and (4) the lower court improperly dismissed Bell's order to show cause re contempt which would have compelled respondent sheriff to answer certain depositions and produce documents.

Facts

Bell submitted an employment application (Mar. 20, 1978) to the County of San Diego personnel department for the temporary extra help position of "jail guard" with the San Diego Sheriff's Department. Bell knew of the temporary status of the guard position for which he applied. He was not required, he did not go through the county civil service appointment process for a permanent deputy sheriff position. After an interview in September of 1978, a personal requisition was forwarded to the personnel department. The position was for temporary employment as guard designated from "extra help payroll."

On October 2, 1978, Bell commenced employment. About the same time, he applied for and was approved for a special deputy sheriff commission for the designated purposes of service of civil process and *648 custody of prisoners. Bell agreed to the specific conditions of this commission, stating in writing "the sheriff has the right to cancel ... [the] Special Deputy Sheriff commission at any time he deems it necessary." William W. Knowles, of the sheriff's department, testified a "special deputy" is one commissioned to perform a specific limited function; it may be a clerk or even a nonemployee and is not a specific job classification with the county; these employees are paid less than regular deputies, are not required to take civil service exams, and wear badges different from deputy sheriffs.

Bell performed some of the duties of a deputy sheriff. He acted as bailiff, opening and closing the courtroom, and maintained prisoners. All of the duties were performed with uniform in deputy sheriff's attire and armed with a loaded firearm. Witness Knowles explained there were certain responsibilities, including investigation of crimes, crime prevention in the community and nonuniform work in criminal law enforcement, which Bell as special deputy could not perform that a deputy sheriff could.

On October 27, 1978, after working approximately four weeks, a termination interview with Bell lead to his dismissal from his position as guard. One declared basis of this decision placed significance on "additional information requested" which came to respondent's attention. Bell sought to uncover the specifics of this information but the court denied his discovery attempts.

Discussion

I

(1)To enlist the protection of the Act's entitlement to an administrative appeal prior to termination (§ 3304, subd. (b)), Bell must establish he is a "public

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safety officer" as contemplated by section 3301. Section 3301 incorporates the definition of "peace officer" contained in section 830.1 and subdivisions (a) and (b) of section 830.2 of the Penal Code, including peace officers who are employees of a charter city or county. Thus, "[a]ny sheriff, undersheriff, or deputy sheriff, regularly employed and paid as such" receives the safeguards of the Act. (Pen. Code, § 830.1; italics added.)

For Bell to be entitled to relief under the Act, he must satisfy the twofold requirement of being a "peace officer" and being "regularly employed ***649** and paid as such." (2a)Overwhelming evidence supports the trial judge's conclusion; Bell was not a regularly employed peace officer. Testimony highlighted the temporary and limited nature of Bell's duties as was spelled out in his job application. Bell can claim no frustration of reasonable expectation resulting from his termination. He secured his job without overcoming the usual hurdles an applicant to civil service must cross, including competitive examinations. (San Diego County Charter, §§ 906, 906.1; 907 (c); Campbell v. Board of Civil Service Comrs. (1946) 76 Cal.App.2d 399, 404-405 [173 P.2d 58]; Snow v. Board of Administration (1978) 87 Cal.App.3d 484, 488, 489 [151 Cal.Rptr. 127].) The temporary nature of the position could not have been made more evident to him. Bell can claim no misleading.

(3a)The protection of the Act extends to probationary police officers. (Barnes v. Personnel Department (1978) 87 Cal.App.3d 502, 504 [151 Cal.Rptr. 94].) Yet if this Act is interpreted to extend to temporary guards hired under such terms and conditions as Bell, then the temporary employee would gain the substance of civil service status contrary to the express intent of the charter provisions. If the sheriff could by the process of hiring temporary guards, without examinations, certification, appointment as provided for classified personnel and San Diego County Charter section 906 et seq., then the assigning of such person to the duties usually performed by civil service personnel would erode the 'entire fabric of the civil service system ....' " (Snow v. Board of Administration, supra., 87 Cal.App.3d 484, 489.) Or if the temporary employee by the mere assumption and performance of duties of a character performed by a classified employee, could thereby obtain civil service status and its perquisites, then promotions and appointments in civil service would no longer be made "exclusive under a general system based upon merit, efficiency and fitness as ascertained by competitive examination." " (Pinion v. State Personnel Board (1938) 29 Cal.App.2d 314, 319 [84 P.2d 185].)

To extend coverage of the Act to a temporary guard ignores the plain explicit language of Penal Code section 830.1. Bell was not a "peace officer" within the meaning of the Act.

(2b)Bell next contends by acting as a bailiff, his temporary guardship and special commission were transformed into a "county peace officer" status as defined by sections 31904 and 31469.1. ***650**

These definitions relate to county employees and county peace officer retirement laws and are expressly (§ 31903), or rationally should be, limited to the construction of their respective chapters. In any event, whether Bell's temporary work falls within these retirement laws' definitions does not aid Bell here for he must meet the express requirements of section 3301 and Penal Code section 830.1 before he can claim the benefits of section 3304, subdivision (b).

In Globe v. County of Los Angeles (1958) 163 Cal.App.2d 595, 603 [329 P.2d 971], the appeal court answered a similar claim of a temporary county employee thus: "[A] temporary employee has no vested right to county employment and may therefore be discharged summarily." The result would be different were the dismissal based upon the exercise of an employee's constitutional right. And at page 601, the court stated: "In demanding a hearing regardless of his employment status, petitioner is in effect asking the court to equalize the rights of all civil service employees whether they be temporary, probationary or permanent. To do so would lose sight of the entire philosophy of civil service in government and destroy the distinction between the various classifications."

(3b)Further, in Bogacki v. Board of Supervisors (1971) 5 Cal.3d 771, 783 [97 Cal.Rptr. 657, 489 P.2d 537], the court stated: "A public employee serving at the pleasure of the appointing authority ... is by the terms of his employment subject to removal without judicially cognizable good cause .... Only when such a public employee can show

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that his employment has been unjustifiably conditioned on the waiver of his constitutional rights will the courts intervene and give relief. [Citation.]"

The Act does not expressly or by implication eliminate these longstanding distinctions between temporary and permanent employees' rights on termination.

II

(4)Bell next asserts, if not entitled by statute, then the Constitution requires he be provided a hearing, for his good name and reputation is at stake. Bell's reliance on Board of Regents v. Roth (1972) 408 U.S. 564, 573- 574 [33 L.Ed.2d 548, 558-559, 92 S.Ct. 2701, 2707] is misplaced. In Roth, the Supreme Court reasoned that termination of an untenured professor did not deny due process because: "The State, in ***651** declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' [Citations.] In such a case, due process would accord an opportunity to refute the charge before University officials. [Fn. omitted.] In the present case, however, there is no suggestion whatever that the respondent's 'good name, reputation, honor, or integrity' is at stake.

"Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. For '[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury ....' [Citations.]" (Ibid.)

Here the facts bear striking resemblance. Bell has not alleged specific charges of misconduct accompanying his dismissal injure his reputation. The record makes vague reference in the declaration of William W. Knowles to "certain information ... regarding Petitioner's job performance as well as receipt of ... background investigation." Even these references were only made in answering Bell's lawsuit. The termination itself indicated only that he was a temporary employee. On this record, Bell's termination involved no deprivation of due process. (Bogacki v. Board of Supervisors, supra., 5 Cal.3d 771, 778; Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14, 539 P.2d 774]; Miller v. State of California (1977) 18 Cal.3d 808, 813 [135 Cal.Rptr. 386, 557 P.2d 970].)

III

(5)The trial court held the Act "cannot be constitutionally applied to temporary-nonpermanent-employees of the County of San Diego" to grant a right to hearing before termination. The court opined "that is a matter of local concern." This reason assigned flies in the face of the express statutory language and the well reasoned opinion of the California Attorney General (61 Ops. Cal. Atty. Gen. 31) which documents ***652** with sound rationale and authorities the constitutionality of and the applicability of the Act, as its explicit language commands, to peace officers employed by a charter county. Our conclusion that Bell was neither "regularly employed" nor a "peace officer" within the Act, subsumes the premises of constitutionality and applicability of the Act. The trial court's ruling was, however, correct in law. Therefore, it will not be disturbed on appeal on the sole ground it was made for the wrong reason. (D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 19 [112 Cal.Rptr. 786, 520 P.2d 10].)

(6)Finally, Bell complains the trial judge erred in dismissing his order to show cause re contempt for the sheriff's allegedly willful refusal to obey the court's order to answer certain questions presented at a deposition and to produce documents and records relating to Bell's employment. The court below correctly determined the dispositive issue in this case; it inquired whether Bell qualified for an administrative hearing pursuant to section 3301 et seq. Bell's petition and amended petition sought only the procedural safeguards of the Act. Any materials relating to Bell's personnel and background records were not relevant in determining his temporary employment status and its legal effect. The order

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was properly dismissed.

Judgment affirmed.

Brown (Gerald), P. J., and Cologne, J., concurred.

Cal.App.4.Dist.,1980.

Bell v. Duffy

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LAWRENCE L. BINKLEY, Plaintiff and Respondent,
v.
CITY OF LONG BEACH et al., Defendants and Appellants.

No. B069234.

Court of Appeal, Second District, Division 2, California.

Jul 8, 1993.

SUMMARY

The trial court granted a peremptory writ of mandamus in favor of a city's police chief, setting aside a directive from the city and the city manager that confirmed an earlier decision by the city manager to discharge the police chief. The writ also ordered the city and city manager to grant the police chief a new administrative appeal hearing in compliance with the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). The writ further prohibited the city manager from exercising any review authority over the administrative appeal hearing officer's decision or findings of fact. (Superior Court of Los Angeles County, No. BS 016781, Robert H. O'Brien, Judge.)

The Court of Appeal reversed the trial court's orders under review, holding that the city and city manager had complied with the Public Safety Officers Procedural Bill of Rights Act. The court held that the police chief was not denied due process by virtue of the fact that he was denied the right to cross- examine his accusers, and forced to assume the burden of disproving allegations against him at his administrative appeal hearing. The court held that the police chief held his position at the pleasure of the city manager, and the city manager was free to discharge him without "just cause," so long as he was given an opportunity to convince the employing agency to reverse its decision. The court also held that the police chief's appeal process was not biased, despite the hearing examiner's appointment by the city manager. The court further held that the administrative hearing appeal process did not violate the police chief's right to due process, despite the fact that the city manager retained final decisionmaking authority under the city charter; the right to a fair and impartial tribunal is not violated by permitting the official who makes the initial disciplinary decision to have the final say in the matter. (Opinion by Fukuto, J., with Boren, P. J., and Gates, J., concurring.) *1796

HEADNOTES

Classified to California Digest of Official Reports

(1) Law Enforcement Officers § 11--Police--Disciplinary Proceedings--Public Safety Officers Procedural Bill of Rights Act.
The Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), which provides a catalogue of basic rights and protections that must be afforded all peace officers by the public entities that employ them, bespeaks the Legislature's determination that, because labor unrest and strikes produce consequences extending far beyond local boundaries, the maintenance of stable employment relations between peace officers and their employers is a matter of statewide concern.

(2a, 2b, 2c) Law Enforcement Officers § 13--Police--Removal-- Compliance With Public Safety Officers Procedural Bill of Rights Act.
The trial court erred in granting a peremptory writ of mandamus setting aside the directive to remove a city police chief, ordering a new administrative appeal hearing, and prohibiting the city manager from exercising review authority over the hearing officer's decision, where the discharge was undertaken in compliance with the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). The police chief's hearing right arose because his discharge was based on charges of misconduct, mismanagement, and misjudgment. Since a protected liberty interest was implicated, due process required that he have an opportunity to refute the charges and clear his name. The trial court's construction of Gov. Code, § 3304, however, unnecessarily eviscerated the city manager's charter-endowed power to appoint, suspend, and remove, without cause, his department heads. Accordingly, the trial court's order violated the "home rule" provisions of Cal. Const., art. XI, § 5. The statewide interest in maintaining stable

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relations between public safety officers and their employers was adequately served by granting the police chief notice of the charges, a chance to respond, and a posttermination hearing to clear his name before a neutral finder of fact.

[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 774.]

(3) Law Enforcement Officers § 12--Police--Disciplinary Proceedings-- Appeal--Public Safety Officers Procedural Bill of Rights Act--Independent Review.

In determining the scope and coverage under the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), the reviewing court independently determines the *1797 proper interpretation of the statute and is not bound by the lower court's interpretation.

(4) Law Enforcement Officers § 11--Police--Disciplinary Proceedings--Effect of Public Safety Officers Procedural Bill of Rights Act on Charter Cities.

The Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) was not intended to interfere with a charter city's right to regulate peace officers' qualifications for employment, or the causes for which they may be removed. It was also not intended to abrogate the powers granted to charter cities by Cal. Const., art. XI, § 5, including the right to terminate a peace officer's employment at will, without a showing of "just cause." The limited purpose of an administrative appeal under Gov. Code, § 3304, is to give the peace officer subjected to punitive action an opportunity to establish a formal record of the circumstance surrounding his or her termination and to attempt to convince the employing agency to reverse its decision, either by demonstrating the falsity of charges that led to punitive action, or through proof of mitigating circumstances.

(5) Law Enforcement Officers § 12--Police--Disciplinary Proceedings-- Formulation and Adequacy of Administrative Appeal.

Gov. Code, § 3304 (protection of public safety officers' rights), requires only that an opportunity for administrative appeal be provided, but does not specify how the appeal process is to be implemented. The details of administrative appeal under Gov. Code, § 3304, subd. (b), are left to be formulated by the local agency. Where a terminated employee serves at the pleasure of a city manager, and the scope of an administrative appeal hearing is not prescribed by personnel rules, agency regulations, memoranda of understanding, or customary agency practices, the adequacy of the appeal procedure afforded must be measured according to constitutional due process principles. Due process is flexible and calls for such procedural protections as a particular situation demands. Three distinct factors must be considered: the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional procedural safeguards; and the government's interest, including the function involved and the fiscal and administrative burdens entailed by imposing additional procedural requirements.

(6) Law Enforcement Officers § 13--Police--Removal--Pretermination Hearing Requirement.

In discharging a city's police chief, the city and city manager did not have to hold a pretermination hearing as required under a prior California Supreme Court decision. The rights *1798 outlined in that decision are inapplicable to government employees holding "at will" administrative positions, who have no constitutionally protected property interest in continued employment. When the sole purpose of an administrative appeal procedure is to afford a discharged government employee an opportunity to clear his or her name, a hearing after the dismissal constitutes sufficient compliance with the due process requirements of the federal Constitution. Even if the police chief was entitled to a hearing before being deprived of a protected interest, no deprivation of a protected liberty interest occurred until stigmatizing allegations of mismanagement and misconduct led to the decision to discharge him. He received notice of the charges and a chance to respond in person to the decisionmaking authority before the effective date of termination. He also continued to receive full pay and benefits during the pendency of the investigation. Thus, a pretermination hearing was in fact held, whether or not required.

(7) Law Enforcement Officers § 13--Police--Removal--Burden of Proof--Right to Cross-examine Accusers.

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A city's police chief was not denied due process by the city and city manager when he was discharged after being denied the right to cross-examine his accusers, and forced to assume the burden of disproving allegations against him at an administrative appeal hearing. The police chief held his position at the pleasure of the city manager. The city manager was free to discharge him without "just cause," so long as he was given an adequate opportunity to convince the employing agency to reverse its decision. Thus, a letter from the city manager to the police chief did not improperly shift the burden of proof to the police chief, but, rather, it accurately apprised him of his limited right to a hearing to establish a record of the circumstance surrounding his termination and to convince the employing agency to reverse its decision. Further, authority exists to support the position that there is no right of cross-examination at a name-clearing hearing, and the police chief cited no authority supporting his claim that due process mandated he be given an opportunity to confront and cross-examine the witnesses at a trial-type, evidentiary hearing.

(8a, 8b, 8c) Law Enforcement Officers § 13--Police--Removal--Appeal Process--Bias.
The appeal process afforded to a city's police chief prior to his discharge was not biased, despite the hearing examiner's appointment by the city manager. The police chief was assured that the examiner had not prejudged the case, and had been chosen solely based on his hearing experience. The police chief was also assured that the assistant city attorney's role in the process was that of counsel for the ***1799** city manager, and that the examiner would base his decision on the evidence. Nothing indicated that the examiner had a stake in the matter, or that he harbored any animosity toward the police chief. Moreover, the police chief was not precluded from conducting his own investigation, and he was given ample opportunity to present his own evidence. Thus, the examiner was entitled to the benefit of the presumption that he was a person of conscience and intellectual discipline and judged the case fairly based on the evidence. The city manager's and city attorney's participation in the pretermination investigation also did not render the procedure biased. The combination of adjudicative and investigative functions, without more, does not offend due process.

(9) Administrative Law § 61--Adjudication--Disqualification of Hearing Officers--Bias.
In the context of an administrative appeal hearing, a party's unilateral perception of bias cannot alone serve as a basis for disqualification of the hearing examiner; bias and prejudice are not implied and must be clearly established. Prejudice must be shown against a particular party and it must be significant enough to impair the adjudicator's impartiality. The challenge to the fairness of the adjudicator must set forth concrete facts demonstrating bias or prejudice.

(10) Administrative Law § 73--Adjudication--Operation and Effect of Decisions and Orders--City Manager's Retention of Final Decisionmaking Authority Under City Charter.
The administrative hearing appeal process afforded to a city's police chief, prior to his being discharged, did not violate his right to due process, even though the city manager retained final decisionmaking authority under the city charter. The right to a fair and impartial tribunal is not violated by permitting the official who makes the initial disciplinary decision to have the final say in the matter. Once an employee has cleared his or her name at a hearing, the employer may remain free to deny the employee future employment for other reasons. In any event, the hearing examiner in the present case sustained the decision of the city manager to discharge the police chief, making it unnecessary for the city manager to disregard or override the decision rendered on appeal.

COUNSEL

John R. Calhoun, City Attorney, and Robert E. Shannon, Assistant City Attorney, for Defendants and Appellants.

Franscell, Strickland, Roberts & Lawrence, Carol D. Janssen and Rodell R. Fick for Plaintiff and Respondent. ***1800**

FUKUTO, J.

Appellants, the City of Long Beach (hereafter the City), and James C. Hankla, City Manager of the City of Long Beach (hereafter Hankla), appeal from the judgment of the superior court granting a peremptory writ of mandamus in favor of respondent, Lawrence L. Binkley, the embattled

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Chief of Police for the City of Long Beach. The writ set aside appellants' directive of March 2, 1992, confirming an earlier decision by Hankla to remove Binkley from the position of chief of police effective February 14, 1992, and ordered appellants to grant respondent a new administrative appeal hearing in compliance with the Public Safety Officers Procedural Bill of Rights Act (hereafter the Act). (Gov. Code, § 3300 et seq.) [FN1] The writ further prohibited Hankla from exercising any review authority over the administrative appeal hearing officer's decision or findings of fact. Appellants contend that the administrative appeal process afforded to respondent, an at will employee serving at the pleasure of the city manager, fully complied with the requirements of the Act. We agree and reverse the judgment.

FN1 All statutory references are to the Government Code unless otherwise indicated.

The Facts

The City is a charter city, governed by the "home rule" provisions of article XI, section 5 of the California Constitution. [FN2] Under the City's charter, the city manager is charged with the responsibility for the administration of most of the City's departments, including the police department. (Long *1801 Beach City Charter, art. III, § 300.) [FN3] The city manager's powers and duties include the appointment, suspension and removal of all City employees in the unclassified service. (Long Beach City Charter, art. III, § 301.) Department heads, including the chief of police, are members of the unclassified service and serve at the pleasure of the city manager. (Long Beach City Charter, art. XI, § 1102, subd. (a)(5).)

FN2 Article XI, section 5 of the California Constitution provides: "(a) It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith. [¶] (b) It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees."

FN3 Under the Long Beach City Charter, the city manager is responsible for the administration of all departments except the city attorney, city auditor, city prosecutor, civil service department, legislative department, harbor department and water department. (Long Beach City Charter, art. III, § 300.)

In March 1987, respondent was hired as the Chief of Police for the City. He was given the task of reforming and restoring public confidence in the City's police department, which had acquired a reputation for providing inadequate training, and exercising insufficient control and discipline over its officers.

In early October 1991, during two city council meetings at which law enforcement-related actions were taken, Long Beach City Attorney John Calhoun reportedly made statements to Deputy Police Chief Robert M. Luman, threatening to "have [respondent's] job," in part, because respondent had not spoken with City Attorney Calhoun for more than 10 months. When respondent heard about the threat, he attempted to set up a meeting with Calhoun to discuss the matter but was allegedly informed by the assistant city attorney, Robert Shannon, that it would be "fruitless" to meet with Calhoun at that time. [FN4]

FN4 Respondent asserts that on October 10, 1991, he broached the subject of Calhoun's remarks with Hankla. Hankla purportedly assured respondent that he had already talked to Calhoun, who was having problems with several City staff members, and had advised him that the "stupid" statements should not have been made.

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On December 19, 1991, Hankla invited respondent to his office and asked him to announce his retirement, effective March 1992. Respondent was told that his departure was sought because of complaints by a number of police department commanders about the "element of fear" in respondent's operation of the department.

On December 23, 1991, Hankla personally delivered to respondent a letter stating that recent events had "caused [him] to undertake a full review of [respondent's] performance as Chief of Police." The letter advised respondent that, effective immediately, he was temporarily reassigned from his current position "to a special assignment under [Hankla's] direction at a location to be determined." The letter further stated that "Deputy Chief Ellis will serve as Acting Chief of Police" during the investigation. ***1802**

On January 10, 1992, Assistant City Attorney Shannon confirmed and advised respondent's attorney of a meeting with Hankla scheduled for Monday, January 13, 1992, in the Docent's Library at Rancho Los Alamitos. The letter stated, in relevant part: "This meeting is not a Skelly hearing, nor is the Chief entitled to such a hearing. However, he will be given an opportunity to respond to the allegations set forth in the attached document. As we have previously indicated, the investigation of these allegations forms a part of the total performance review of your client. Chief Binkley will further have an opportunity to discuss the more general allegations that his management policies and practices have contributed to the destruction of morale in the Police Department in general and his Command staff in particular."

Attached to the January 10th letter was a list of specific allegations of misconduct by respondent, as follows:

(1) Initiation of sub rosa investigations on an elected City public official without authorization or notification to the city manager;

(2) Unauthorized hiring of and payment to retired police officers as undercover agents to investigate a City public official;

(3) Encouragement of command officers to file stress-related pension claims;

(4) Accusing the city manager of wrongful action in a personnel matter, i.e., that he reduced the proposed discipline of Officer J. Ponce because of a personal/business relationship, and making disparaging statements regarding the city manager's continued employment of Officer Ponce;

(5) Directing subordinates not to communicate with the director of human resources in a matter in which such communication was necessary to ensure adherence to City policy;

(6) Directing subordinates not to seek the advice of the city attorney, or to ignore advice after it was given, regarding matters in which adherence to the legal advice of that office was necessary and appropriate;

(7) Unauthorized use of a police helicopter to transport respondent to a social function while he was off duty.

On January 13, 1992, respondent and his attorney met with Hankla, Assistant City Attorney Shannon, and an investigator. Respondent was ***1803** questioned and gave statements in response to the list of allegations of misconduct.

On January 17, 1992, respondent was informed in writing that following a full review of respondent's performance as chief of police, Hankla was "satisfied that there is not sufficient evidence to conclude that you have engaged in any act of wrongdoing." The letter further stated: "However, I have, in the course of this review, discovered instances in which you have exercised questionable judgment. Further, a substantial number of your command staff have come forward to criticize your leadership, and you have, by your actions, subjected yourself to criticism from City management. As a consequence, I have lost confidence in your ability to lead the Long Beach Police Department. I am, therefore, removing you from the position of Chief of Police."

The letter advised that, because of respondent's significant past accomplishments, he would be permitted to remain on special assignment until February 14, 1992, during which time he would continue to receive full pay and benefits, including use of his City vehicle.

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On February 14, 1992, Hankla sent a letter acknowledging respondent's readiness to proceed with an appeal hearing. The letter identified Dr. Judson Schoendorf as the person selected by Hankla to conduct the scheduled appeal hearing, and included a summary of the six findings, and the supporting evidence upon which Hankla's decision to remove respondent was based. The list of allegations found by Hankla to be true included: (1) that respondent exhibited a pattern of leadership/ management which resulted in the destruction of morale in his command staff; (2) that respondent made disparaging remarks about Hankla regarding his continued employment of Officer J. Ponce, and accused Hankla of reducing Ponce's recommended discipline because of a family business relationship; (3) that respondent initiated and sustained sub rosa investigations of elected City officials without notification to or authorization from Hankla; (4) that respondent conducted an investigation into the activities of the assistant city manager without authorization by Hankla; (5) that respondent ordered staff not to communicate with the director of human resources regarding matters in which communication was necessary to ensure adherence to City policy; and (6) that, without authorization or notification to Hankla, respondent ordered a police helicopter to transport him to and from a social function while he was off duty.

The letter advised respondent that, at the administrative appeal hearing, he would "be given an opportunity to establish a formal record of the evidence ***1804** which would either tend to show that the allegations are false or that mitigating circumstances should be taken into consideration." Thereafter, the letter advised, Dr. Schoendorf would direct a report to Hankla advising him of his factual findings. However, Hankla was to retain "the final decision making authority pursuant to [his] responsibilities under the Charter."

Respondent's administrative appeal hearing was heard by Dr. Schoendorf on February 27, 1992. Only respondent testified at the hearing.

Respondent objected to the limited scope of the hearing, and Hankla's retention of final decisionmaking authority, as outlined in Hankla's letter of February 14, 1992. He demanded, but was refused the opportunity to cross- examine the individuals whose statements formed the evidentiary basis for Hankla's findings of misconduct. Respondent further objected that he was being punished for appealing his discharge as evidenced by the fact that Hankla found insufficient evidence of wrongdoing prior to respondent's invocation of the right to appeal, but was forcing respondent to defend against the same charges of wrongdoing during the appeal hearing.

On February 28, 1992, Dr. Schoendorf issued his written findings, in summary, as follows: (1) that respondent had done an excellent job as a "Reform Chief" bringing major improvements to the police department, but his inability to change his management style to become less hierarchical had led to significant destruction of morale in the department; (2) that respondent did maintain sub rosa investigations of elected City officials without notifying the city manager; (3) that respondent had problems dealing with certain City officers and should have discussed those problems with the city manager, rather than conveying concerns to command staff, who perceived that they were not to communicate with certain City departments and officials; and (4) that respondent's use of a police helicopter did not violate any rule or regulation, but was "perhaps" not politically astute, without the city manager's authorization. Dr. Schoendorf concluded that the decision to discharge respondent should be sustained based upon the "breach in morale," as well as "differences in leadership and management style."

On March 2, 1992, respondent was advised by letter that Hankla had received and fully reviewed the report of Dr. Schoendorf, and that Hankla's decision to remove him from the position of chief of police, effective February 14, 1992, remained unchanged.

Respondent filed a petition for writ of administrative mandamus seeking orders, inter alia, setting aside Hankla's March 2, 1992, directive, and compelling a new administrative appeal hearing before an independent ***1805** hearing officer. Following a hearing on June 30, 1992, the superior court found that appellants had failed "[i]n every respect" to comply with the Act (§ 3300 et seq.) and granted the writ.

Discussion

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(1) As the title suggests, the Public Safety Officers Procedural Bill of Rights Act provides a catalogue of basic rights and protections which must be afforded all peace officers by the public entities which employ them. (Baggett v. Gates (1982) 32 Cal.3d 128, 135 [185 Cal.Rptr. 232, 649 P.2d 874] [Baggett].) [FN5] The Act bespeaks the Legislature's determination that, because labor unrest and strikes produce consequences extending far beyond local boundaries, the maintenance of stable employment relations between peace officers and their employers is a matter of statewide concern. (§ 3301; Burden v. Snowden (1992) 2 Cal.4th 556, 567 [7 Cal.Rptr.2d 531, 828 P.2d 672] [Burden]; Baggett, supra, at pp. 136-139.)

FN5 In summary, the Act: (1) secures to public safety officers the right to engage in political activity, when off duty and out of uniform, and to seek election to or serve as a member of the governing board of a school district (§ 3302); (2) prescribes certain protections which must be afforded officers during interrogations which could lead to punitive action (§ 3303); (3) gives the right to review and respond in writing to adverse comments entered in an officer's personnel file (§§ 3305, 3306); (4) provides that officers may not be compelled to submit to polygraph examinations (§ 3307); (5) prohibits searches of officers' personal storage spaces or lockers except under specified circumstances (§ 3309); (6) limits the circumstances under which officers may be forced to disclose their personal financial circumstances (§ 3308); (7) gives officers the right to administrative appeal when any punitive action is taken against them, or they are denied promotion on grounds other than merit (§ 3304); and (8) protects officers against retaliation for the exercise of any right conferred by the Act (§ 3302). (32 Cal.3d at p. 135; Gray v. City of Gustine (1990) 224 Cal.App.3d 621, 625-626 [273 Cal.Rptr. 730] [Gray].)

In Baggett, supra, 32 Cal.3d 128, the Supreme Court considered whether the application of the Act to charter cities violated the "home rule" provisions of the California Constitution (Cal. Const., art. XI, § 5). The high court concluded that the Act's minimal infringement of the city's implied power to determine the manner in which its employees could be removed was not unconstitutional. (Baggett, supra, at pp. 138-140.)

Later, in Gray, supra, 224 Cal.App.3d 621, the Court of Appeal squarely addressed the applicability of the Act to a city police chief serving at the pleasure of a city manager. The appellate court held that police chiefs were "public safety officers" entitled to administrative appeal under section 3304, subdivision (b) of the Act.

In the instant matter, respondent was granted an administrative appeal hearing, but the superior court found that the hearing was inadequate to *1806 comply with section 3304 of the Act. Section 3304 provides, in relevant part, that: "(a) No public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of the rights granted under this chapter, or the exercise of any rights under any existing administrative grievance procedure. ... [¶] (b) No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

(2a) Not only do appellants contend that the administrative appeal fully complied with section 3304 of the Act, they further assert that the superior court's order, prohibiting Hankla from exercising any review authority over the administrative appeal hearing officer's decision or findings of fact, violates the "home rule" provision of the California Constitution (Cal. Const., art. XI, § 5) by abrogating the city manager's authority under the City's Charter, to appoint, suspend and remove, at will, his department heads, including the police chief. (3) In determining the scope of coverage under the Act, we independently determine the proper interpretation of the statute and are not bound by the lower court's interpretation. (Burden, supra, 2 Cal.4th at p. 562.)

(4) At the outset we note that the Act was not intended to interfere with a charter city's right to regulate peace officers' qualifications for employment, or the causes for which they may be removed. (Baggett, supra, 32 Cal.3d at p. 138.) Nor was the Act intended to abrogate the powers granted charter cities by article XI, section 5 of the California Constitution (Holcomb v. City of Los Angeles (1989) 210 Cal.App.3d 1560, 1568 [259 Cal.Rptr. 1]), including the right to terminate a peace officer's employment at will, without a showing of "just cause." (Browning v. Block (1985)

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175 Cal.App.3d 423, 430 [220 Cal.Rptr. 763] [Browning]; Barnes v. Personnel Department (1978) 87 Cal.App.3d 502, 506 [151 Cal.Rptr. 94] [Barnes].) The limited purpose of an administrative appeal under section 3304 is to give the peace officer subjected to punitive action an opportunity "to establish a formal record of the circumstance surrounding his termination" (87 Cal.App.3d at p. 506) and "to attempt to convince the employing agency to reverse its decision, either by demonstrating the falsity of charges which led to punitive action, or through proof of mitigating circumstances." (Browning, supra, at p. 430.)

(5) Section 3304 requires only that an opportunity for administrative appeal be provided. It does not specify how the appeal process is to be implemented. (Browning, supra, 175 Cal.App.3d at p. 429.) The details of administrative appeal under section 3304, subdivision (b) are left to be formulated by the local agency. (Stanton v. City of West Sacramento (1991) ***1807** 226 Cal.App.3d 1438, 1443 [277 Cal.Rptr. 478].) Where, as here, the terminated employee serves at the pleasure of a city manager, and the scope of administrative appeal hearing is not prescribed by personnel rules, agency regulations, memoranda of understanding, or customary agency practices, the adequacy of the appeal procedure afforded must be measured according to constitutional due process principles. (Gray, supra, 224 Cal.App.3d at pp. 628-632.)

Decisions of the United States Supreme Court underscore the fact that due process is flexible and calls for such procedural protections as a particular situation demands. (Mathews v. Eldridge (1976) 424 U.S. 319, 334 [47 L.Ed.2d 18, 32-33, 96 S.Ct. 893].) Three distinct factors must be considered: the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional procedural safeguards; and the government's interest, including the function involved and the fiscal and administrative burdens entailed by imposing additional procedural requirements. (Id. at pp. 334-335 [33 L.Ed.2d at pp. 32- 34].)

(2b) Respondent's right to a hearing arises because his removal from the position of chief of police was initiated based on charges of misconduct, mismanagement, and misjudgment. We must realistically assume that such allegations would have a tendency to stigmatize respondent's reputation and impair his ability to take advantage of other employment opportunities in law enforcement administration. (Murden v. County of Sacramento (1984) 160 Cal.App.3d 302, 308-309 [206 Cal.Rptr. 699] [Murden]; Lubey v. City and County of San Francisco (1979) 98 Cal.App.3d 340, 347 [159 Cal.Rptr. 440].) Because a protected "liberty" interest is implicated, due process requires, at minimum, that he be given an opportunity to refute the charges and clear his name. (Gray, supra, 224 Cal.App.3d at p. 629; Murden, supra, 160 Cal.App.3d at p. 309; see also Codd v. Velger (1977) 429 U.S. 624, 627 [51 L.Ed.2d 92, 96-97, 97 S.Ct. 882]; Board of Regents v. Roth (1972) 408 U.S. 564, 573, fn. 12 [33 L.Ed.2d 548, 558-559, 92 S.Ct. 2701] [Board of Regents].)

Appellants, of course, contend that the requirements of due process as well as section 3304 were satisfied by the pre- and post-termination name- clearing hearings afforded, and that the trial court's contrary finding stems from an unnecessarily expansive interpretation of the rights conferred by the Act. Respondent, on the other hand, seeks to demonstrate the constitutional inadequacy of the procedures employed.

(6) Among other alleged defects in the appeal procedure, respondent points to the fact that he was relieved of the duties of his office, placed on ***1808** temporary, nonexistent assignment, and replaced by an acting police chief, without a Skelly-type pretermination hearing. [FN6] However, the Supreme Court of this state has held that Skelly procedural rights are inapplicable to government employees holding "at will" administrative positions, who have no constitutionally protected property interest in continued employment. (Barthuli v. Board of Trustees (1977) 19 Cal.3d 717, 722-723 [139 Cal.Rptr. 627, 566 P.2d 261]; Board of Regents, supra, 408 U.S. at pp. 576- 577 [33 L.Ed.2d at pp. 560- 561].) The United States Supreme Court is in accord. When the sole purpose of an administrative appeal procedure is to afford a discharged government employee an opportunity to clear his name, a hearing "after the actual dismissal is a sufficient compliance with the requirements with the Due Process Clause." (Arnett v. Kennedy (1974) 416 U.S. 134, 157 [40 L.Ed.2d 15, 35, 94 S.Ct. 1633]; see also Murden, supra, 160 Cal.App.3d at

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p. 310.)

FN6 See Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14, 539 P.2d 774] (Skelly).

Even were we to assume respondent was entitled to "some kind of a hearing" before being deprived of a "protected interest" (Board of Regents, supra, 408 U.S. at p. 570, fn. 7 [33 L.Ed.2d at pp. 556-557]), no deprivation of a constitutionally protected "liberty" interest occurred until the stigmatizing allegations of mismanagement and misconduct led to the decision to terminate his employment. (Codd v. Velger, supra, 429 U.S. at p. 628 [51 L.Ed.2d at p. 97]; Paul v. Davis (1976) 424 U.S. 693, 706 [47 L.Ed.2d 405, 416-417, 96 S.Ct. 1155].) Respondent continued to receive full pay and benefits of the office of chief of police during the pendency of the city manager's investigation. He received notice of the charges under investigation and an opportunity to respond to the decisionmaking authority, in person, before the effective date of termination, February 14, 1992. Therefore, a Skelly-type pretermination hearing was in fact held, whether or not required. (Murden, supra, 160 Cal.App.3d at pp. 309-310; Skelly, supra, 15 Cal.3d at p. 215; see also Board of Regents, supra, 408 U.S. at p. 570, fn. 7 [33 L.Ed.2d at pp. 556-557].)

(7) Respondent maintains that he was denied due process, and the trial court so found, because he was denied the right to cross-examine his accusers, and forced to assume the burden of disproving the "spurious" allegations against him at the administrative appeal hearing. As evidence of the latter charge, he points to Hankla's letter of February 14, 1992, which purportedly places the burden on respondent "to establish a formal record of the circumstances surrounding [his] termination and to produce evidence which would either tend to show that the allegations are false or that mitigating circumstances should be taken into consideration." *1809

Respondent cites Parker v. City of Fountain Valley (1981) 127 Cal.App.3d 99 [179 Cal.Rptr. 351] in support of the proposition that he was improperly forced to carry the burden of proof and the burden of producing evidence, and denied cross-examination rights. The case is inapposite. In Parker, the defendant city dismissed a rank and file police sergeant-"a 'tenured' employee who could be removed from his position only for cause." (Id. at p. 106.) The applicable administrative appeal rules expressly provided a right of cross-examination, but placed the burden of proof on the party seeking to appeal the decision of the department head, and, the plaintiff was compelled to present evidence sufficient to disprove the charges before the city was required to present any evidence at the administrative appeal hearing.

By contrast, respondent held the position of police chief at the pleasure of the city manager. The city manager was free to discharge him without "just cause," so long as he was given an adequate opportunity to "convince the employing agency to reverse its decision." (Browning, supra, 175 Cal.App.3d at p. 430; Board of Regents, supra, 408 U.S. at p. 573, fn. 12 [33 L.Ed.2d at pp. 558-559].) Accordingly, Hankla's February 14th letter did not improperly shift the burden of proof to respondent. Rather, it accurately apprised respondent of his limited right, as a public employee serving at the pleasure of the city manager, to a hearing to "establish a formal record of the circumstance surrounding his termination" (Barnes, supra, 87 Cal.App.3d at p. 506) and "to convince the employing agency to reverse its decision, either by demonstrating the falsity of charges which led to punitive action, or through proof of mitigating circumstances." (Browning, supra, at p. 430.)

Respondent has failed to cite a single case which supports his claim that due process mandates that he be given an opportunity to confront and cross-examine the witnesses at a trial-type, evidentiary hearing. Neither Gray nor Browning nor Lubey-which discuss the right to administrative appeal in the context of peace officers serving in various "at will" positions-states or implies that such officers have the right of confrontation guaranteed by the Act or the due process clause. There is, however, authority supporting the position taken by appellants, that there is no right of cross-examination at a name-clearing hearing. (Murden, supra, 160 Cal.App.3d at p. 311; Mathews v. Eldridge, supra, 424 U.S. at p. 348 [47 L.Ed.2d at p. 41].)

(8a) Respondent also defends the trial court's ruling on the ground that the appeal process was biased. As indicia of the biased nature of the procedure, he points to the fact that the hearing examiner was

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appointed by the city manager, received advice from the city attorney, and his decision on appeal could be disregarded or overridden by the city manager, who retained ultimate power. Once again, the cases cited by respondent are readily distinguishable. *1810

In Gray, supra, for example, the administrative appeal hearing was held before the city manager who discharged the chief of police. According to the appeal procedure offered, the city manager was to hear the chief's evidence, and make a recommendation to the city council regarding his continued employment. (224 Cal.App.3d at p. 631.) The police chief refused to submit to the procedure. The Court of Appeal found that the administrative appeal offered was clearly inadequate because the city manager was "embroiled in the controversy" and did not constitute a neutral fact finder. (Ibid.)

In this case, respondent was afforded a factfinding hearing before a professional hearing examiner. He initially questioned the neutrality of Dr. Schoendorf, because he was selected by the city manager, but received assurances that the hearing examiner had little personal knowledge of and had not prejudged the case, and had been chosen solely because of his experience performing civil service commission hearings once per week for a period of eight years. When respondent's counsel expressed concern that Assistant City Attorney Shannon appeared to be giving Dr. Schoendorf advice, he was assured that Shannon's role was that of counsel for the city manager, and that Dr. Schoendorf would be determining what course of action to take from the evidence. At the conclusion of the hearing, respondent's counsel commented favorably on the fair manner in which the administrative appeal hearing had been conducted.

(9), (8b) As the Court of Appeal stated in Gray, supra: "Bias and prejudice are not implied and must be clearly established. A party's unilateral perception of bias cannot alone serve as a basis for disqualification. Prejudice must be shown against a particular party and it must be significant enough to impair the adjudicator's impartiality. The challenge to the fairness of the adjudicator must set forth concrete facts demonstrating bias or prejudice." (224 Cal.App.3d at p. 632.)

No facts appear in the instant record supporting a claim that the respondent's administrative appeal hearing officer was biased. There is nothing to indicate that Dr. Schoendorf had a personal or financial stake in the matter, or that he harbored any animosity toward respondent. (Murden, supra, 160 Cal.App.3d at p. 312.) Evidence is also lacking that respondent's hearing examiner was one of a "seamless web of officials out to get him." (Doyle v. City of Chino (1981) 117 Cal.App.3d 673, 682 [172 Cal.Rptr. 844].) Respondent was not precluded from conducting his own investigation and, at the hearing, he was given ample opportunity to present his own evidence. Accordingly, Dr. Schoendorf is entitled to the benefit of the presumption that he was a person " 'of conscience and intellectual discipline' " and judged respondent's case fairly based on the evidence. (Withrow v. Larkin (1975) 421 U.S. 35, 55 [43 L.Ed.2d 712, 728, 95 S.Ct. 1456].) *1811

(10) We also reject the assertion that due process was offended by the city manager's retention of final decisionmaking authority under the city charter. It has been held that "the right to a fair and impartial tribunal is not violated by permitting the official who makes the initial disciplinary decision to have the final say in the matter." (Burrell v. City of Los Angeles (1989) 209 Cal.App.3d 568, 579 [257 Cal.Rptr. 427].) Likewise, the United States Supreme Court has declared: "Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons." (Board of Regents, supra, 408 U.S. at p. 573, fn. 12 [33 L.Ed.2d at pp. 558-559].) In any event, Dr. Schoendorf sustained the decision of the city manager, making it unnecessary for him to disregard or override the decision rendered on appeal.

(8c) Respondent further argues that the procedure was biased by virtue of the fact that the city manager and city attorney participated in the pretermination investigation. The combination of adjudicative and investigative functions, without more, does not offend due process. (Withrow v. Larkin, supra, 421 U.S. at p. 47 [43 L.Ed.2d at pp. 723-724].)

(2c) We are persuaded that the trial court's construction of section 3304 of the Act unnecessarily eviscerates the city manager's charter-endowed power to appoint, suspend, and remove, without cause, his department heads (Long Beach City

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Charter, art. III, § 301; id., art. XI, § 1102, subd. (a)(5)). Accordingly, we agree with appellants that the trial court's order, prohibiting Hankla from retaining "final decision making authority" under the City's Charter resulted in a violation of the "home rule" provisions of our state Constitution (Cal. Const., art. XI, § 5). The statewide interest in the maintenance of stable relations between public safety officers and their employers was adequately served by granting respondent notice of the charges, an opportunity to respond to the city manager's charges, and a posttermination hearing to clear his name, before a neutral fact finder. (Baggett, supra, 32 Cal.3d at pp. 136-138.)

Accordingly, the orders under review are reversed. Parties are to bear their own costs on appeal.

Boren, P. J., and Gates, J., concurred.

Respondent's petition for review by the Supreme Court was denied October 21, 1993. ***1812**

Cal.App.2.Dist.,1993.

Binkley v. City of Long Beach

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GERALD W. DOYLE, Plaintiff and Appellant,
v.
CITY OF CHINO et al., Defendants and Respondents.

Civ. No. 23912.

Court of Appeal, Fourth District, Division 2, California.

Apr 1, 1981.

SUMMARY

A police chief who had been removed from office petitioned for a writ of mandate (Code Civ. Proc., § 1094.5), seeking reinstatement. The trial court found that, while the chief was wrongfully discharged initially without notice or a hearing, his termination was later upheld by an administrative body. Accordingly it determined the chief's sole remedy was back pay for the period of wrongful termination. (Superior Court of San Bernardino County, No. CW 15656, Richard C. Garner, Judge.)

The Court of Appeal affirmed. The court rejected the chief's claim he had a due process right to reinstatement, holding the proper remedy was to award back pay for the period of wrongful discipline. The court further held that Gov. Code, § 3304, a part of the so-called police officers bill of rights (Gov. Code, § 3300 et seq.), only provided an opportunity for an administrative appeal once a decision is taken to discipline an officer and that the city properly informed the chief of his right to an administrative appeal at the time the decision was reached to terminate his employment, and that such action was proper and complied with the statute. The court also held the trial court properly granted summary judgment on the ground the chief had failed to exhaust his administrative remedies by failure to appeal to the city council. The court rejected the chief's contention that the city council was biased and not an impartial administrative tribunal and that appeal to the council would have been a futile gesture, holding such contentions were not supported by the evidence in the record which would indicate a triable issue on either point. (Opinion by The Court.) *674

HEADNOTES

Classified to California Digest of Official Reports

(1) Law Enforcement Officers § 13--Police--Removal--Without Hearing-- Remedy.
A police officer who had been removed from office without notice or a hearing in violation of his due process rights was not entitled to reinstatement under the due process clauses of the California and United States Constitutions; his sole remedy was back pay from the date of his wrongful removal to the date his termination was upheld by an administrative body, the city council.

(2a, 2b) Law Enforcement Officers § 14--Police--Reinstatement--Statutory Provisions.
Gov. Code, § 3304, subd. (b), a part of the so-called police officers bill of rights (Gov. Code, § 3300 et seq.), providing that no punitive action shall be undertaken without providing a public safety officer with an opportunity for administrative appeal, did not provide a police chief who had been wrongfully terminated without notice or hearing with a statutory basis for reinstatement before any administrative appeal. The opportunity for an administrative appeal set forth in the statute exists once any decision is taken to discipline an officer. Because the city properly informed the chief of his right to an administrative appeal at the time the decision was reached to terminate his employment, the city complied with the reasonable meaning of the statute.

(3) Administrative Law § 75--Administrative Actions--Adjudication-- Findings, Decisions and Orders--Administrative Review.
An administrative appeal provides for an independent reexamination of an order or decision made. An administrative appeal may also be taken from notice of a decision or order prior to its actual date of implementation in certain situations.

(4) Administrative Law § 85--Judicial Review and Relief--Limitations on Availability--Exhaustion of Administrative Remedies.
Judicial review by way of writ of mandate is generally foreclosed when all administrative remedies have not been exhausted.

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(5) Administrative Law § 89--Judicial Review and Relief--Limitations on Availability--Exhaustion of Administrative Remedies--Exceptions--Futility.

In a mandamus proceeding by a police chief *675 seeking reinstatement following his removal, the court properly granted the city's motion for summary judgment on the ground the chief had received all the relief to which he was entitled, back pay, and that he had failed to exhaust his administrative appeal rights, where the city introduced evidence to show the chief had willfully failed to attend an appeal before the city council, and where the chief's contentions that the city council was biased and not an impartial administrative tribunal and that an appeal to the council would have been a futile gesture were not supported by any evidence in the record which would indicate a triable issue. Futility is a narrow exception to the general rule of exhaustion of administrative remedies. Because the chief failed to present any evidence that he had been denied an opportunity for an administrative hearing, the chief's rights under Gov. Code, § 3304, guaranteeing a police officer the opportunity for an administrative appeal in connection with any decision to discipline the officer, was not violated.

[See Cal.Jur.3d, Administrative Law, § 262; Am.Jur.2d, Administrative Law, § 605.]

COUNSEL

Welebir & Brunick and William J. Brunick for Plaintiff and Appellant.

Jimmy Gutierrez, City Attorney, Gutierrez & Bidart, Ochoa, Barbosa & Crook, Ochoa, Barbosa & Glennon, Henry S. Barbosa, George D. Crook and Richard J. Morillo for Defendants and Respondents.

THE COURT. [FN*]

FN* Before Gardner, P. J., Tamura, J., and Morris, J.

Gerald Doyle appeals from a judgment denying his petition for a writ of mandate. (Code Civ. Proc., § 1094.5.) The trial court denied the writ and granted summary judgment for respondent City of Chino (Chino). *676

The Facts

The facts are substantially undisputed by the parties.

Doyle was Chino's police chief. In December 1979, the city manager informed Doyle that his salary would be cut 10 percent effective January 1980. The city council confirmed the reduction in executive session. While Doyle sought review of that matter before the full council, he received a letter on January 28, 1980, summarily terminating his employment. The letter informed him of his right to an administrative appeal. Respondent Chino concedes that this initial action by the city manager violated Doyle's Skelly rights since no notice or opportunity to respond was afforded him. [FN1]

FN1 Skelly v. State Personnel Board (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14, 539 P.2d 774], held that permanent state civil service employees possess a property interest in continued employment, and prior to the termination due process requires that the employee be accorded certain minimum procedural rights, including notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and a right to respond, orally or in writing, to the authority initially imposing discipline. (Id., at p. 215.)

Chino argues the chief of police serves at the pleasure of the city council, and therefore has no legally enforceable right to continued public employment. However probationary employees are not without Skelly rights when the alleged basis for job termination is based on charges of misconduct which stigmatize one's reputation or opportunity to earn a living. (Lubey v. City and County of San Francisco (1979) 98 Cal.App.3d 340, 346 [159 Cal.Rptr. 440].) Doyle's status here is akin to a probationary employee since he has no legally enforceable right to continued public employment. In our view, the circumstances surrounding Doyle's dismissal would stigmatize him professionally because they substantially involved his on-the-job performance.

Doyle claims he is entitled to reinstatement prior to any administrative appeal. Initially on February 4, he requested reinstatement prior to any administrative appeal. The city manager rejected that request. On February 25, the city manager informed Doyle by letter of the reasons he was terminated. The letter further stated: "At the request of your counsel, I have scheduled February 29, 1980 at 3:00 p.m. in my offices to discuss the matter

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further. In the event that you are not satisfied with that opportunity to express your views, you will have the opportunity on March 5, 1980 at 6:00 p.m. to confront and cross-examine all adverse witnesses, to subpoena any witnesses on your behalf and have the matter of your termination heard and considered by the City Council."

On February 25, Doyle's attorney informed Chino's special counsel that unless Doyle was first reinstated he would not attend the conference *677 on February 29. The letter also pointed out that the city manager was not Mr. Doyle's idea of an impartial tribunal, since it was the city manager who terminated Doyle. Doyle failed to appear on February 29.

On March 3, Doyle's attorney further informed Chino's counsel that he urged Mr. Doyle not to appear for his hearing before the city council on March 5. Again, counsel reiterated the request for reinstatement as a condition precedent to participating in any administrative appeal. Chino refused to reinstate Doyle.

Doyle wilfully failed to appear before the city council. The hearing proceeded in his absence. The council took evidence in Doyle's absence on six general charges. In paraphrased form, the charges were that: (1) Doyle misrepresented to his department the position of the city manager with respect to operational and organizational matters; (2) Doyle failed to establish a long range plan in connection with the return of a command position; (3) Doyle subverted the recognized chain of command within his department; (4) Doyle misrepresented to the city manager the view of bureau commanders regarding changes in the assignments of those commanders; (5) Doyle discredited the management team by insinuating that the city manager caused Doyle to be unfavorably considered for an appointment as Police Chief of Santa Monica, California; (6) Doyle intimidated subordinates to deflect criticism from his own failings as police chief. These charges had been previously explained in greater detail to Doyle's counsel in the February 25 letter.

The council found evidence to support all six charges and affirmed the dismissal. Doyle was awarded back pay up to and including March 5.

Remedy of Reinstatement

We deal with the question of what is the appropriate remedy for an individual who has been terminated from his job in violation of his Skelly rights. (See fn. 1, ante.)

(1)Doyle contends he is entitled to reinstatement under the due process clauses of the California Constitution (art. I, § 7) and the United States Constitution (5th and 14th Amendments). He also claims his reinstatement right under Government Code section 3304. The trial court determined petitioner's sole remedy was back pay, since even *678 though Doyle was wrongfully discharged initially his termination was later upheld by an administrative body. We agree with the trial court.

Petitioner is pumping a dry well in arguing for a constitutional right to preappeal reinstatement. In Barber v. State Personnel Bd. (1976) 18 Cal.3d 395 [134 Cal.Rptr. 206, 556 P.2d 306], the Supreme Court explained, "[T]he remedy for the employee in these cases is to award back pay for the period of wrongful discipline. Thus, damages consist only of back pay for the period discipline was improperly imposed, i.e., from the date of actual discipline to the time discipline was validated by the hearing." (Id., at p. 402, citations omitted.) Other authorities are in accord. (Warren v. State Personnel Bd. (1979) 94 Cal.App.3d 95, 112 [156 Cal.Rptr. 351]; Coleman v. Regents of University of California (1979) 93 Cal.App.3d 521, 526 [155 Cal.Rptr. 589]; Pipkin v. Board of Supervisors (1978) 82 Cal.App.3d 652, 657 [147 Cal.Rptr. 502]; Kirkpatrick v. Civil Service Com. (1978) 77 Cal.App.3d 940, 945 [144 Cal.Rptr. 51]; Fugitt v. City of Placentia (1977) 70 Cal.App.3d 868, 874 [139 Cal.Rptr. 123].) Although this remedy has been questioned (Civil Service Assn. v. City and County of San Francisco (1978) 22 Cal.3d 552, 568 [150 Cal.Rptr. 129, 586 P.2d 162], Justice Tobriner conc. and dis.), it has been uniformly adopted as a proper balance between the sovereign's interest in imposing prompt discipline and the employee's right to be free from the trauma of arbitrary and erroneously imposed discipline.

(2a)Doyle's mandate petition alternatively claims that Government Code section 3304 [FN2] provides him with a statutory basis for reinstatement before any administrative appeal. We disagree. Section

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3304 is part of the so- called police officers bill of rights (Gov. Code, § 3300 et seq.) enacted in 1976 (Stats. 1976, ch. 465, § 1, p. 1204). The specific language relied on by petitioner here states: "(b) No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal." [FN3] *679

FN2. All references are to the Government Code unless otherwise indicated.

FN3 "Punitive action" is defined for purposes of the act in section 3303 as: "any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment." Chino does not question that the action taken here was "punitive."
Chino did question below whether the position of police chief fell within the meaning of "public safety officer" however. On appeal they all but concede he is a public safety officer, and it would appear to us that such a position falls within the definition set forth in Government Code section 3301. That section provides that a "'public safety officer' means all peace officers, as defined in Section 830.1 and subdivisions (a) and (b) of Section 830.2 of the Penal Code, including peace officers who are employees of a charter city or county."

Petitioner contends that since the statute is silent regarding when the administrative appeal must take place, it must precede any punitive action. Doyle's interpretation would essentially amend the statute to read: "No punitive action...shall be undertaken without first providing the public safety officer an opportunity for administrative appeal." (Italics added.) Chino argues that the language of section 3304 means simply that a peace officer is entitled to an administrative appeal in connection with any punitive job action undertaken.

Obviously, the wording of section 3304, subdivision (b) contributes to this ambiguity. Neither interpretation is implausible on its face. Moreover, neither party has provided us with any legislative history to aid in construing the Legislature's intent with respect to section 3304, subdivision (b). Nor have our independent efforts revealed any legislative intent with respect to this statute.

(3)It is generally accepted that an administrative appeal provides for an independent re-examination of an order or decision made. (United States v. Abilene & So. Ry. Co. (1924) 265 U.S. 274 [68 L.Ed. 1016, 44 S.Ct. 565, 567]; Davis, Administrative Law Treatise, § 8.18, fn. 1.) Similarly, an administrative appeal may also be taken from notice of a decision or order prior to its actual date of implementation in certain situations. (Rutherford v. Board of Trustees (1974) 37 Cal.App.3d 775 [112 Cal.Rptr. 560].) Obviously, a decision to terminate an officer's employment, whether implemented yet or not, constitutes punitive action. However, the Legislature has more broadly defined that term to encompass "any action which may lead [to discipline]." (See fn. 3, ante; italics added.) Reasoning from this, Doyle contends he is entitled to an appeal even before any decision to discipline has been reached. We disagree.

In our view, Doyle's reading of section 3304 would neither assure meaningful review, nor enhance his rights appreciably. Prior to any decision by the police department or city to take disciplinary action, there exists no order or decision which can be challenged as arbitrary, erroneous, or unsupported by the evidence. At best, only the department's internal investigative procedures could be challenged. Therefore, Doyle's request for an administrative appeal is premature. The best *680 proof of this is the fact that even if Chino entertained Doyle's request, those administrative appeal proceedings would not be judicially reviewable by writ of mandate. This is necessarily so because such writs issue "...for the purpose of inquiring into the validity of any final administrative order or decision..." (Code Civ. Proc., § 1094.5; italics added.)

We are cognizant of the fact that the broad purpose of the bill of rights is to promote stable relations between public safety employers and employees (§ 3301). However, Doyle and other police officers similarly situated are hardly without rights prior to the point the department makes a decision whether or not to take disciplinary action. To the contrary, the Legislature has provided for separate substantive provisions affording officers rights while under investigation. (§§ 3303, 3307, 3309.) The statutory scheme allows an officer to challenge the investigative procedures directly in superior court (§ 3309.5, subdivision (b)), and to obtain "...injunctive or other extraordinary relief to remedy the violation

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or to prevent future violations of a like or similar nature...." (§ 3309.5, subdivision (c).) This opportunity to challenge investigative procedures is itself a significant means to stabilize relations at the predecisional stage and deter abusive investigative practices.

(2b)We conclude that the opportunity for an administrative appeal set forth in section 3304, subdivision (b) should exist once any decision is taken to discipline an officer. [FN4] To the extent our holding may be viewed as inconsistent with the definition of "punitive action" set forth in section 3303, our interpretation is designed to bring this statute into conformity with general principles of administrative review and Code of Civil Procedure section 1094.5. In this instance, the city promptly informed Doyle of his right to an administrative appeal at the time a decision was reached to terminate his employment. That action was proper and complied with what we determine to be a reasonable meaning of this admittedly ambiguous statute. [FN5] ***681**

FN4 For example, if a decision has been made to terminate an officer, but the effective date of termination is stayed for a month, the right to an administrative appeal attaches upon the date of the decision rather than the actual date the termination becomes effective.

FN5 Our holding with respect to section 3304, subdivision (b) should in no way be interpreted as eliminating the general preremoval safeguards of notice and opportunity to be heard provided in Skelly. (See fn. 1, ante.) Conversely, the city's failure to comply with Skelly here does not justify a full administrative appeal prior to the decision to remove the officer as Doyle suggests.

Petitioner's reliance on Heyenga v. City of San Diego (1979) 94 Cal.App.3d 756 [156 Cal.Rptr. 496], is misplaced. Heyenga involved a police officer's right to a pretransfer hearing under the specific terms of his union's collective bargaining agreement as well as the city's charter. Heyenga expressly shunned premising the pretransfer hearing right on section 3304, noting: "[T]he administrative appeal referred to in the statute is not defined." (Id., at p. 760.)

Superior Court Jurisdiction

Chino contends that Doyle's failure to appear at his administrative appeal dooms his mandate petition in superior court since he failed to exhaust all administrative remedies available.

(4)Judicial review by way of writ of mandate is generally foreclosed when all administrative remedies have not been exhausted. (Wilkinson v. Norcal Mutual Ins. Co. (1979) 98 Cal.App.3d 307 [159 Cal.Rptr. 416].) Doyle pled in his mandate petition that he had exhausted all remedies. Chino unsuccessfully demurred to the petition on this basis.

(5)Chino then moved for summary judgment in superior court on the basis that petitioner had received all the relief to which he was entitled (back pay) and that petitioner had failed to pursue his administrative appeal rights. Chino introduced evidence to show Doyle had wilfully failed to attend the appeal. Doyle did not submit any counteraffidavits or evidence to rebut this point. The trial judge granted summary judgment, since wilful absences do not constitute a true exhaustion of the opportunity to be heard. (Temple of Inspired Living v. Department of Social Services (1979) 97 Cal.App.3d 564, 569 [158 Cal.Rptr. 816].)

Doyle now contends on appeal that exhaustion of his administrative remedies was unnecessary since: (1) the city council was biased and not an impartial administrative tribunal, and (2) appeal to the council would have been a futile gesture since it was predisposed to uphold petitioner's termination. Doyle's contentions, while theoretically meritorious, are not supported by any evidence in the record which would indicate a triable issue on either point.

With respect to bias, Doyle is correct as a threshold matter that his scheduled meeting with the city manager in no way comported with the fair hearing aspect of due process. The city manager was clearly "personally ***682** embroiled" in the matter since he had terminated Doyle's employment a month earlier. (See Mennig v. City Council (1978) 86 Cal.App.3d 341 [150 Cal.Rptr. 207].)

However, the city manager was not the adjudicatory body charged with providing petitioner his appeal here. The city council performed that duty. Doyle nevertheless urges us to find that the city council was part of a single seamless web of officials out to get him, and therefore was similarly

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biased.

Doyle relies on Mennig to paint that scenario. We hasten to add, however, petitioner's factual situation is wholly inapposite to Mennig. In Mennig, the record reflected an ongoing embroglio between Mennig as police chief and members of the council. More importantly, individual council members testified in support of charges leveled against Mennig at a civil service hearing. The commission found most charges unsupported by substantial evidence. The city council then acted en banc to review the commission's action, and found grounds upon which to terminate Mennig. The appellate court found the council was personally involved and the likelihood of bias to be constitutionally intolerable. (Id., at p. 351.) (Cf. Withrow v. Larkin (1975) 421 U.S. 35 [43 L.Ed.2d 712, 95 S.Ct. 1456].)

The facts here do not even colorably approach the council's involvement in Mennig. We can only echo the trial judge's observation that "... I cannot make the jump from city manager to city council; and for all the evidence before the court, the city council was an impartial body;...." There is no evidence here the manager was a member of, related to, or in any way involved with the decision-making processes of the council. At the March 5 hearing, the manager was simply a witness for the city before the council acting as an administrative review panel. Moreover, there is no evidence from which to infer that the grounds for termination involved acrimony between the council and Doyle. The record reflects that any acrimony existed instead between the city manager and Doyle.

Doyle alternatively asserts that any appeal to the city council here would have been a futile effort. (People ex rel. State Pub. Wks. Bd. v. Superior Court (Tidwell) (1979) 91 Cal.App.3d 95 [154 Cal.Rptr. 54].) Again, petitioner has failed to present evidence raising a triable issue. ***683**

Futility is a narrow exception to the general rule. In Gantner & Mattern Co. v. California E. Com. (1941) 17 Cal.2d 314 [109 P.2d 932], the court stated, "[t]he exhaustion of remedial procedure as laid down by the statute is required unless the petitioner can positively state that the commission has declared what its ruling will be in a particular case ...." (Id., at p. 318.) Petitioner points to only one item of evidence to show futility. It is the letter of February 25 addressed to Doyle indicating that he could meet with the city manager first and then have his administrative appeal if he remained unsatisfied. Doyle contends that "the entire administrative procedure established by the city manager was not in the spirit of due process ...."

We cannot agree with Doyle's single seamless web approach. The mere indication that a tentative date for an administrative appeal has or will be set in no way illustrates a fait accompli. Moreover, there is not even a logical inference to be drawn that the city council was predisposed to uphold the discipline in such a proceeding. Doyle has simply failed to produce any objective evidence to illustrate futility. His own speculative, subjective feelings about the matter do not allow him to unilaterally ignore avenues of review. If that were the case, exhaustion would be a dead doctrine.

Doyle's alternative contention is that the specific statutory language of section 3309.5 grants the superior court initial jurisdiction. Section 3309.5 provides in relevant part: "(b) The superior court shall have initial jurisdiction over any proceeding brought by any local public safety department for alleged violations of this section."

We agree with Doyle that section 3309.5, subdivision (b) confers upon the superior court "initial jurisdiction." [FN6] Further, it is apparent that the superior court here assumed jurisdiction, initial or otherwise, over Doyle's mandate petition since it alleged a violation of section 3304. Doyle would have a legitimate grievance if the superior court had granted Chino's general demurrer on the basis of lack of subject matter jurisdiction. However, as we explained in our discussion of exhaustion, the court rejected Chino's request for a demurrer to the petition. The trial court properly assumed jurisdiction, however simply ruled against Doyle on summary judgment. ***684**

FN6 Nowhere in section 3300 et seq. is there any definition of the term "initial jurisdiction." We cannot determine if the Legislature intended this term to mean the same thing as "original jurisdiction" or something else. For purposes of this appeal, we have assumed that "initial jurisdiction" means that the superior court is the appropriate trial court forum to litigate rights under section 3300 et seq. rather than justice or

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municipal courts.

The trial court's ruling on summary judgment with respect to any statutory violation was correct. We read section 3304 to guarantee a police officer be afforded the opportunity for an administrative appeal in connection with any decision to discipline an officer. The key word here is opportunity. The "opportunity" for an administrative appeal necessarily implies that such a hearing comport with standards of fair play and due process. Obviously the "opportunity" is a sham if the administrative body is biased, predisposed or otherwise prejudiced.

Doyle alleged that the administrative body did not provide him with an opportunity for a fair hearing in his petition. That allegation properly invoked the superior court's "initial" jurisdiction. However, upon piercing the pleadings on summary judgment, Doyle was unable to produce any evidence to suggest that the city council was biased or predisposed to affirm the termination. The superior court found that Doyle had not been denied the "opportunity" for an administrative hearing, or to state it another way, Doyle failed to produce any evidence that would allow the court to find a triable issue of fact as to denial of that opportunity. Therefore, the court correctly concluded there was no evidence of a violation of section 3304. The principles of summary judgment do not differ in this context from those applicable generally to civil litigation. (See People ex rel. State Pub. Wks. Bd. v. Superior Court (Tidwell), supra., at p. 102.)

Judgment affirmed.

Appellant's petition for a hearing by the Supreme Court was denied June 17, 1981. Bird, C. J., was of the opinion that the petition should be granted. *685

Cal.App.4.Dist.,1981.

Doyle v. City of Chino

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BUD GRAY et al., Plaintiffs and Appellants,
v.
CITY OF GUSTINE et al., Defendants and Respondents.

No. F012166.

Court of Appeal, Fifth District, California.

Oct 5, 1990.

[Opinion certified for partial publication. [FN*]]

FN* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part III.

SUMMARY

The trial court denied a police chief 's petition for a writ of mandate to compel the city to provide him with an administrative appeal pursuant to Gov. Code, § 3304, subd. (b) of the Public Safety Officers Procedural Bill of Rights Act, after the city manager demoted the police chief to lieutenant and reduced his salary. The police chief contended that action was punitive under the statute which entitled him to an administrative appeal. The chief rejected the city manager's offer to hear the case and make a recommendation to the city council. (Superior Court of Merced County, No. 91245, George C. Barrett, Judge.)

The Court of Appeal reversed the judgment against the police chief and remanded, but affirmed another part of the judgment for reasons stated in an unpublished portion of the opinion. The court held the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) applies to police chiefs, that the demotion and reduction in salary were "punitive actions" under the act, and the chief could not be deprived of an administrative appeal simply because he served at the pleasure of the city manager. The court further held the administrative appeal offered by the city manager was inadequate since the city manager exercised the punitive action against the chief and was embroiled in the controversy. It held the chief was entitled to have his case heard by a neutral arbiter. (Opinion by Baxter, Acting P. J., with Dibiaso and Thaxter, JJ., concurring.) *622

HEADNOTES

Classified to California Digest of Official Reports

(1) Law Enforcement Officers § 11--Disciplinary Proceedings--Bill of Rights--Application to Police Chiefs.
The Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) is applicable to police chiefs and they are entitled to its protection. The act is expressly applicable to "all public safety officers" (Gov. Code, § 3301) and that includes all police officers defined in Pen. Code, § 830.1, which includes in its definition of police officers any "police officer of a city." The broad statutory definition given to "public safety officers" leads to the conclusion the Legislature intended police chiefs to be included within the act and entitled to its protection.

(2) Law Enforcement Officers § 11--Disciplinary Proceedings--Bill of Rights--Punitive Action--Demotion of Police Chief.
The demotion of a police chief and the reduction of his salary was "punitive action" under a provision of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), providing that no punitive action shall be undertaken without providing the public safety officer with the opportunity for an administrative appeal (Gov. Code, § 3304, subd. (b)). The "reassignment" of the chief from police chief to the lower-paying former position of lieutenant was actually a demotion and reduction in salary, since his status, responsibility, and income were reduced. That action was obviously punitive as defined by Gov. Code, § 3303.

[See Cal.Jur.3d, Law Enforcement Officers, § 33.]

(3a, 3b, 3c) Law Enforcement Officers § 11--Disciplinary Proceedings--Bill of Rights--Police Chief--Service at Pleasure of City Manager.
A police chief who was subject to "punitive action" by being demoted with a reduction in salary (Gov. Code, § 3304, subd. (b)) had a right to an administrative appeal under the Public Safety Officers Procedural Bill of Rights Act (Gov. Code,

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§ 3300 et seq.), even though the police chief served at the pleasure of the city manager who demoted him. The act does not purport to limit the right of an administrative appeal to peace officers who are terminable only with cause; nor does it purport to deny that right to pleasure appointees who are terminable without cause. To exclude from an administrative appeal a police chief serving at the pleasure of a city manager requires an amendment to the plain words of the act.

(4a, 4b) Public Officers and Employees § 30--Removal From Office-- Employees--Due Process.
Although a public employee who serves ***623** at the pleasure of an appointing authority may generally be terminated without cause, and without notice and without a hearing, there are exceptions to the general rule. An employee serving at the pleasure of an appointing authority cannot be dismissed for exercising constitutional rights (U.S. Const., 1st and 14th Amends.) unless the restraints on the exercise of the rights are justified by a compelling state interest. Neither can an employee be dismissed for exercising a statutory right to join and participate in an employee organization without being afforded a hearing. The right to a hearing may be founded on the presence of personnel rules, regulations, understandings, or practices carried out by agency officials. It also may arise where a termination or demotion is based on charges of misconduct which cause stigma to one's reputation or which impair one's ability to earn a living. Deprivation of a liberty interest entitles the employee to an opportunity to refute the charge and to clear his or her name. The right to a hearing under such circumstances is a remedy mandated by the due process clause of U.S. Const., 14th Amend.

[See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 551.]

(5a, 5b) Law Enforcement Officers § 11--Disciplinary Proceedings--Bill of Rights--Police Chief--Administrative Appeal--Adequacy.
A police chief who was subject to "punitive action" by being demoted with a reduction in salary (Gov. Code, § 3304, subd. (b)) was not provided with an opportunity for administrative appeal as required by the statute by being given the opportunity to meet with the city manager who demoted him. The administrative appeal offered by the city manager was clearly inadequate and failed to comport with the fair hearing aspect of due process. The city manager exercised the punitive action against the chief and was embroiled in the controversy. The chief was entitled to have his case heard by a neutral arbiter, since a biased decision maker conducting either traditional or administrative hearings is constitutionally unacceptable. Since that was the only administrative appeal offered, the chief 's rejection of it could not be considered a waiver.

(6) Administrative Law § 61--Administrative Actions--Adjudication-- Disqualification of Hearing Officers--Bias--City Council.
A police officer entitled to an administrative hearing on being demoted by the city manager, failed to show the city council was biased against him so as to disqualify it from conducting the administrative hearing. The fact that members of the city council heard evidence of the city manager's investigation of the police chief did not alone establish bias. Bias ***624** and prejudice are not implied but must be clearly established, and a party's unilateral perception of bias cannot alone serve as a basis for disqualification. Prejudice must be shown against a particular party and it must be significant enough to impair the adjudicator's impartiality. The challenge to the fairness of the adjudicator must set forth concrete facts demonstrating bias or prejudice. Under Code Civ. Proc., § 170.1, subd. (a)(1), a judge must be disqualified if the judge "has personal knowledge of disputed evidentiary facts concerning the proceeding." That section is applicable to administrative hearing officers as well.

COUNSEL

Carroll, Burdick & McDonough, Gary M. Messing, Cathleen A. Williams and Christopher D. Burdick for Plaintiffs and Appellants.

Francis R. Ruggieri, City Attorney, for Defendants and Respondents.

BAXTER, Acting P. J.

Facts and Proceedings Below

Bud Gray appeals from a superior court judgment denying his petition for a writ of mandate to compel the City of Gustine (Gustine) et al., to provide him an administrative appeal pursuant to Government

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Code [FN1] section 3304, subdivision (b), a part of the Public Safety Officers Procedural Bill of Rights Act. The appeal of the Gustine Police Officers Association (GPOA) is separately addressed in the unpublished part of this opinion.

FN1 All statutory references are to the Government Code unless otherwise indicated.

Gray commenced employment as a lieutenant on Gustine's police department in 1979. He was promoted to police chief on March 17, 1987, received a salary increase, and served at the pleasure of the city manager. Gray's status as police chief was terminated by City Manager Earl Wilson on January 17, 1988. Gray was reinstated to his lower-paying former position of lieutenant. Wilson testified this "reassignment" was due "to a lack of full confidence in [his] performance" as police chief. *625

Gray sent Wilson a memorandum dated January 26, 1988, requesting an administrative appeal under section 3304, subdivision (b). The statute provides, in pertinent part: "(b) No punitive action ... shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

Wilson responded by letter dated March 2, 1988, proposing he conduct a hearing. Wilson proposed that Gray could be represented by anyone he chose. Gray could submit any oral or written material to Wilson. Wilson would hear Gray's case and make a recommendation to the city council concerning Gray's reinstatement as police chief.

Gray's attorney rejected the hearing proposed because of Wilson's involvement in the personnel action taken, and reiterated Gray's request for a section 3304, subdivision (b) administrative appeal. Wilson rejected the request. Gray petitioned the superior court for a writ of mandate to compel the requested administrative appeal.

The court conducted a hearing and denied Gray's petition, concluding he served at the pleasure of the city manager under Gustine Ordinance No. 291 and thus was not entitled to an administrative appeal. The court made the following specific finding: "Contrary to the assertion of petitioner[,] there is nothing in the record that a vote of the City Council was taken to either appoint or remove petitioner as Chief, but only that his status was discussed in executive session before the City Manager acted."

Gray filed a timely notice of appeal.

Discussion

I. The Public Safety Officers Procedural Bill of Rights Act (§ 3300 et seq.) Applies to Police Chiefs.

The Public Safety Officers Procedural Bill of Rights Act (Act) provides in substance that all public safety officers shall have the following rights: To engage in political activity while off duty and out of uniform or to abstain from such activity (§ 3302, subd. (a)); to seek election to a school board (§ 3302, subd. (b)); that interrogations of officers under investigation be conducted in the manner indicated (§ 3303); to not be subject to punitive action or denied promotion because of the lawful exercise of the rights granted under the Act and have the opportunity of an administrative appeal (§ 3304); that no adverse comment shall be placed in an officer's personnel *626 file unless the officer is given the opportunity to read and sign the instrument containing the adverse comment (§ 3305); that the affected officer shall have 30 days in which to respond to such adverse comments (§ 3306); to not be compelled to submit to a polygraph examination (§ 3307); to not be required to make financial disclosures, with certain specified exceptions (§ 3308); and that an officer's locker shall not be searched except under specified circumstances (§ 3309).

(1) Gustine contends Gray is not entitled to an administrative appeal under section 3304, subdivision (b) because the Act is not applicable to police chiefs. We first examine relevant language of the Act.

The legislative findings and declaration supporting the Act are contained in section 3301, which provides in pertinent part: "The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public

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safety employees and their employers. In order to assure that such stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California." (Italics added.)

Since the Act is expressly applicable to "all public safety officers" (§ 3301), we must determine whether a police chief is encompassed by the definition of that term. The first sentence of section 3301 expressly provides that the term "public safety officer" includes all peace officers as defined in Penal Code section 830.1. Penal Code section 830.1, subdivision (a) includes in its definition of peace officers, "[A]ny police officer of a city, ..." Obviously, a chief of police is a police officer of a city. "The police department of a city is under the control of the chief of police." (§ 38630.) A police chief is the chief police officer of the city. (See §§ 41601, 41602, and 41603.) We are unable to discern any legislative intent to exclude police chiefs from the Act. Conversely, the broad statutory definition given to "public safety officers" leads us to conclude that the Legislature intended police chiefs to be included within the Act and entitled to its protection.

The issue of whether a police chief is entitled to the protection of the Act has not been squarely addressed by the appellate courts or the Supreme Court of our state. However, dictum in Doyle v. City of Chino (1981) 117 Cal.App.3d 673 [172 Cal.Rptr. 844] supports our conclusion that police chiefs are encompassed by the Act: "Chino did question below whether the position of police chief fell within the meaning of 'public safety officer' *627 however. On appeal they all but concede he is a public safety officer, and it would appear to us that such a position falls within the definition set forth in Government Code section 3301. That section provides that a ' " public safety officer" means all peace officers, as defined in Section 830.1 and subdivisions (a) and (b) of Section 830.2 of the Penal Code, including peace officers who are employees of a charter city or county.' " (117 Cal.App.3d at pp. 678-679, fn. 3.)

In 1980 the Attorney General opined that the Act is applicable to police chiefs. (63 Ops.Cal.Atty.Gen. 829 (1980).) Notwithstanding this published opinion, the Legislature has not amended the Act to exclude police chiefs from its coverage.

We recognize that the dictum in Doyle and the published opinion of the Attorney General are not controlling. Nevertheless, we consider them highly persuasive. (9 Witkin, Cal. Procedure (3d ed. 1985) § 785, p. 756.)

Gustine's reliance on Bell v. Duffy (1980) 111 Cal.App.3d 643 [168 Cal.Rptr. 753] is misplaced. Bell simply holds that a temporarily employed extra help jail guard is statutorily ineligible for the Act's protection because he is not a "regularly employed" (§ 830.1) peace officer. Bell's failure to meet the statutory definition of "public safety officer" (§ 3301) precluded coverage under the Act. (111 Cal.App.3d at pp. 648-649.) Bell is inapplicable here because the evidence is uncontroverted that Gray was regularly employed as Gustine's police chief.

We conclude police chiefs are encompassed by the Act and entitled to its protection.

II. The Court Erred in Concluding Gray Had No Right to an Administrative Appeal Under Section 3304, Subdivision (b).

A. Gray's demotion and reduction in salary are "punitive action."

(2) Having concluded that police chiefs are covered by the Act, Gray's potential entitlement to an administrative appeal is based on section 3304, subdivision (b). It provides: "(b) No punitive action ... shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

The Act defines punitive action "as any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or *628 transfer for purposes of punishment." (§ 3303.) Our threshold inquiry is whether this statutory definition was met through the action taken against Gray. In White v. County of Sacramento (1982) 31 Cal.3d 676, 679-684 [183 Cal.Rptr. 520, 646 P.2d 191], the California Supreme Court held the reassignment of a peace officer to a lower-paying position is per se punitive in nature. (Also see Henneberque v. City of Culver City (1983) 147 Cal.App.3d 250, 254 [194 Cal.Rptr. 869].) The high court rejected a

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construction of section 3303 that would have limited "punitive" acts to action made solely "for purposes of delay." White's definition of "punitive" has been applied to charter cities, such as Gustine, as well as to counties. (Baggett v. Gates (1982) 32 Cal.3d 128, 140-141 [185 Cal.Rptr. 232, 649 P.2d 874].)

The "reassignment" of Gray from police chief to the lower-paying former position of lieutenant is more accurately described as a demotion and reduction in salary. His status, responsibility, and income were reduced. To contend the action was not punitive as defined by section 3303 is to deny the obvious. (Doyle v. City of Chino, supra, 117 Cal.App.3d 673, 678-681.) Nevertheless, Gustine denies the action was punitive because its police chief serves at the pleasure of the city manager and is terminable without cause.

B. Gray is not deprived of an administrative appeal simply because the police chief serves at the pleasure of the city manager.

(3a) The foundation of Gustine's argument is that an administrative appeal under section 3304, subdivision (b) contradicts the city manager's right to terminate the chief's employment without cause. As we shall explain, the concepts are not mutually exclusive. The Act does not purport to limit the right of an administrative appeal to peace officers who are terminable only with cause; nor does it purport to deny that right to pleasure appointees who are terminable without cause. To exclude an administrative appeal from a police chief serving at the pleasure of a city manager requires an amendment to the plain words of the Act. Any such exclusion is an issue better addressed by the Legislature.

(4a) Generally, a public employee who serves at the pleasure of an appointing authority may be terminated without cause, without notice and without a hearing. (Healdsburg Police Officers Assn. v. City of Healdsburg (1976) 57 Cal.App.3d 444, 450 [129 Cal.Rptr. 216] [questioned on other grounds in Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal.3d 171, 181, fn. 9 (203 Cal.Rptr. 626, 681 P.2d 893)].) However, there are exceptions to this general rule. Employees serving at the pleasure of an appointing authority cannot be dismissed from employment for exercising First and Fourteenth Amendment rights unless the restraints on the exercise of their constitutional rights are justified by a compelling state interest. (Bishop v. *629 Wood (1976) 426 U.S. 341, 350 [48 L.Ed.2d 684, 693, 96 S.Ct. 2074]; Bogacki v. Board of Supervisors (1971) 5 Cal.3d 771, 778-779 [97 Cal.Rptr. 657, 489 P.2d 537].) Public employees cannot be dismissed for exercising their statutory right to join and participate in an employee organization without being afforded a hearing. (Healdsburg Police Officers Assn. v. City of Healdsburg, supra, 57 Cal.App.3d 444, 450 [questioned on unrelated grounds in Palma v. U.S. Industrial Fasteners, Inc., supra, 36 Cal.3d 171, 181, fn. 9]; Ball v. City Council (1967) 252 Cal.App.2d 136, 142-144 [60 Cal.Rptr. 139].).

The right to a hearing may be founded on the presence of personnel rules, regulations, understandings, or practices carried out by agency officials. (Perry v. Sindermann (1972) 408 U.S. 593, 602 [33 L.Ed.2d 570, 580, 92 S.Ct. 2694]; Santos v. City of Brawley (1984) 162 Cal.App.3d 203, 207 [208 Cal.Rptr. 297]; Healdsburg Police Officers Assn. v. City of Healdsburg, supra, 57 Cal.App.3d 444, 450 [questioned on unrelated grounds in Palma v. U.S. Industrial Fasteners, Inc., supra, 36 Cal.3d 171, 181, fn. 9; Palma v. Fales (1974) 39 Cal.App.3d 939, 941-942 [114 Cal.Rptr. 808].) (3b) In the instant case, Gray's entitlement to an administrative appeal is based on statute, specifically section 3304, subdivision (b) of the Act.

(4b) A public employee's right to a hearing may arise where a termination or demotion is based on charges of misconduct which cause stigma to one's reputation or which impair one's ability to earn a living. (Paul v. Davis (1976) 424 U.S. 693, 701-702, 710 [47 L.Ed.2d 405, 413-414, 419, 96 S.Ct. 1155]; Board of Regents v. Roth (1972) 408 U.S. 564, 573 [33 L.Ed.2d 548, 558-559, 92 S.Ct. 2701]; Lubey v. City and County of San Francisco (1979) 98 Cal.App.3d 340, 346 [159 Cal.Rptr. 440].) Deprivation of a liberty interest entitles the employee to an opportunity to refute the charge and to clear his or her name. The right to a hearing under such circumstances is a remedy mandated by the due process clause of the Fourteenth Amendment. (Codd v. Velger (1977) 429 U.S. 624, 627 [51 L.Ed.2d 92, 96, 97 S.Ct. 882].)

Gustine relies on Swift v. County of Placer (1984) 153 Cal.App.3d 209 [200 Cal.Rptr. 181] to support

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its contention that termination of a peace officer terminable without cause is not "punitive action" triggering the "administrative appeal" under section 3304, subdivision (b). As we shall explain, Swift is distinguishable.

Swift was employed as a civil service correctional officer with the Placer County Sheriff's Department. He was later appointed deputy sheriff and was subject to a 12-month probation period under civil service rules. He received a notice of rejection during probation. The trial court ruled he was entitled to an administrative hearing pursuant to section 3304, subdivision *630 (b). The Court of Appeal, Third Appellate District, reversed and held: "Bare rejection during an initial hiring probation is not 'punitive action' which triggers the 'administrative appeal' right provided by section 3304, subdivision (b) ...." (153 Cal.App.3d at p. 216.)

The court's reasons were succinctly stated: "The absence of 'rejection during probation' from the types of personnel actions listed as 'punitive action' in section 3303 is highly pertinent. Rejection during probation is a discrete variety of personnel action recognized in the State Civil Service Act. (See § 19173.) The absence of such a recognized variety of personnel action from the list in section 3303 and from the comparable provision of the State Civil Service Act strongly suggests that the right to an administrative appeal provided by section 3304 does not apply. [Citation.]" (153 Cal.App.3d at pp. 216-217, fn. omitted.)

The absence of "rejection during probation" from the list of personnel actions in section 3303 may support the conclusion in Swift that the County of Placer's action against a civil service peace officer was not punitive. However, the absence of that term is irrelevant under Swift's reasoning when the peace officer does not occupy a civil service position. In the instant case, the police chief of Gustine is not a civil service position. The critical issue is whether the action taken resulted in a demotion or reduction in salary and thus was punitive action entitling Gray to an administrative appeal under section 3304, subdivision (b).

A probationary police officer terminable without cause is covered by the Act and entitled to an administrative appeal after termination. (Barnes v. Personnel Department (1978) 87 Cal.App.3d 502, 504 [151 Cal.Rptr. 94].) Gustine's contention that Gray's terminable at-will status automatically precludes any right to an administrative appeal under the Act was previously addressed in Barnes. "Just because the ... Act provides certain procedural safeguards and allows a probationary employee to establish a formal record of the circumstance surrounding his termination does not mean City cannot terminate its probationary peace officers without cause." (Id. at pp. 505-506.)

In Browning v. Block (1985) 175 Cal.App.3d 423 [220 Cal.Rptr. 763], a probationary deputy sheriff who was terminable at will was discharged for emotional instability based on reports of attempted suicide. He was entitled to an administrative appeal under the Act. In addition to establishing the formal record noted in Barnes, supra, the court articulated another reason why a peace officer terminable without cause is not automatically denied an administrative appeal under the Act. "Also inherent in the right to appeal *631 provided for in section 3304 would be the opportunity for the employee to attempt to convince the employing agency to reverse its decision, either by demonstrating the falsity of charges which led to punitive action, or through proof of mitigating circumstances." (Id. at p. 430.)

(3c) We conclude that Gray's demotion and reduction in salary constitute punitive action under the Act triggering his right to an administrative appeal under section 3304, subdivision (b). Our conclusion is supported by the plain language of the Act and by the policy considerations set forth in Barnes v. Personnel Department, supra, 87 Cal.App.3d 502, 505-506 and Browning v. Block, supra, 175 Cal.App.3d 423, 430. Those considerations apply whether the peace officer's employment is terminable with or without cause. The Legislature had a rational basis not to exclude pleasure appointees from those peace officers entitled to an administrative appeal under the Act. We reasonably assume it did so deliberately.

C. The administrative appeal offered was inadequate.

(5a) We now focus on whether Gray was provided "with an opportunity for administrative appeal" as required by section 3304, subdivision (b).

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In response to Gray's request for such an appeal, the city manager corresponded, in pertinent part: "I will set up a procedure in which you will have an opportunity to be represented by an individual of your choice and this meeting may be tape recorded. You will have an opportunity to express to me why it is you feel you should be returned to the position of Police Chief with the City of Gustine. I will listen to all of the information which you provide to me and I will make a recommendation to the City Council as to whether or not you should be reinstated into the position of Police Chief. At this meeting, you will have the opportunity to present any oral or written material which you have to support your position that you should not have been removed from your position as Chief."

Gray's counsel objected to the administrative appeal proposed because of the absence of a neutral fact finder.

The administrative appeal offered by the city manager was clearly inadequate and failed to comport with the fair hearing aspect of due process. The city manager exercised the punitive action against Gray and was embroiled in the controversy. (Doyle v. City of Chino, supra, 117 Cal.App.3d 673, 681- 682.) Due process requires that the hearing judge or judges be impartial. ***632** (American Isuzu Motors, Inc. v. New Motor Vehicle Bd. (1986) 186 Cal.App.3d 464, 472-473 [230 Cal.Rptr. 769].) Gray is entitled to have his case heard by a neutral arbiter. A biased decision maker conducting either judicial or administrative hearings is constitutionally unacceptable. (Withrow v. Larkin (1975) 421 U.S. 35, 46-47 [43 L.Ed.2d 712, 723, 95 S.Ct. 1456].)

(6) Gray further alleges that the city council is prejudiced against him and that it cannot conduct an impartial hearing. Bias and prejudice are not implied and must be clearly established. A party's unilateral perception of bias cannot alone serve as a basis for disqualification. Prejudice must be shown against a particular party and it must be significant enough to impair the adjudicator's impartiality. The challenge to the fairness of the adjudicator must set forth concrete facts demonstrating bias or prejudice. (Andrews v. Agricultural Labor Relations Bd. (1981) 28 Cal.3d 781, 792 [171 Cal.Rptr. 590, 623 P.2d 151].) In Doyle, the court found that the city council was the appropriate body to hear the police chief's appeal. (117 Cal.App.3d 673, 682-684.)

Gray has thus far failed to establish good cause to recuse the city council. The fact that members of the city council heard evidence of the city manager's investigation of Gray does not alone establish bias. Under Code of Civil Procedure section 170.1, subdivision (a)(1), a judge must be disqualified if the judge "has personal knowledge of disputed evidentiary facts concerning the proceeding." Though this section and Code of Civil Procedure sections 170.2 through 170.4 have been written for state court judges, the California Supreme Court in Andrews held that these sections should apply to administrative hearing officers as well. (28 Cal.3d 781, 793, fn. 5.) Andrews equates administrative judges with judicial officers. (Id. at p. 794.) Courts of Appeal have also applied these sections of the Code of Civil Procedure to administrative judges. (American Isuzu Motors, Inc. v. New Motor Vehicle Bd., supra, 186 Cal.App.3d 464, 472-473; United Farm Workers of America v. Superior Court (1985) 170 Cal.App.3d 97, 103-104 [216 Cal.Rptr. 4].)

(5b) The administrative appeal offered by Gustine through its city manager was clearly inadequate and denied Gray the right to a fair hearing. Since this was the only administrative appeal offered, Gray's rejection cannot be considered a waiver of the opportunity provided by section 3304, subdivision (b). ***633**

III. Gustine Did Not Violate the Meet and Confer Requirement of the Meyers-Milias-Brown Act. [FN*]

FN* See footnote, ante, page 621.

. . . . . .

Disposition

The judgment is reversed in part and affirmed in part. The judgment against Bud Gray is reversed, and the matter is remanded for further proceedings in accordance with the views expressed herein. The judgment against Gustine Police Officers Association is affirmed. The parties shall bear their own costs on appeal.

Dibiaso, J., and Thaxter, J., concurred.

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Respondents' petition for review by the Supreme Court was denied December 20, 1990. *634

Cal.App.5.Dist.,1990.

Gray v. City of Gustine

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EDUARD HENNEBERQUE, Plaintiff and Appellant,
v.
CITY OF CULVER CITY et al., Defendants and Respondents.

Civ. No. 67653.

Court of Appeal, Second District, California.

Sep 8, 1983.

SUMMARY

A city police officer was appointed to the probationary position of police sergeant. Shortly thereafter, he was elected president of the city police officers association, the recognized employee organization, pursuant to the Meyers-Milias-Brown Act. (Gov. Code, § 3500 et seq.) Although the officer received satisfactory performance evaluations, he was demoted to the position of police officer. The officer requested that the city provide him with an appeal on his involuntary demotion, but the city denied the officer's request. The officer then filed, pursuant to Code Civ. Proc., § 1085, a petition for a writ of mandate, seeking an administrative appeal in accordance with Gov. Code, § 3304, subd. (b), and reinstatement to the rank of police sergeant on the basis that he was unlawfully intimidated and discriminated against by reason of his position as president of the recognized employee organization. The trial court denied the officer's petition for a writ of mandate. (Superior Court of Los Angeles County, No. WEC68400, Raymond Choate, Judge.)

The Court of Appeal reversed. The court held that the officer was entitled to an administrative appeal under Gov. Code, § 3304, subd. (b), part of the Public Safety Officers Procedural Bill of Rights Act, which provides that "[n]o punitive action ... shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal," since punitive action was undertaken by the city. Additionally, the court held the officer also was entitled to an administrative appeal because of alleged discrimination against him for exercise of his right to participate in the recognized employee organization. (Opinion by Thompson, J., with Schauer, P. J., and Johnson, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Law Enforcement Officers § 12--Police--Disciplinary Proceedings--Appeal.

A city police officer was entitled to an administrative *251 appeal where he was promoted to the rank of police sergeant with a corresponding increase in salary and benefits, and received no unfavorable evaluations while serving in this capacity, but where he was summarily demoted and received a reduction in salary and benefits after he was elected president of the city police officers association, the recognized employee organization, pursuant to the Meyers- Milias-Brown Act. (Gov. Code, § 3500 et seq.) Punitive action was undertaken by the city without providing the required opportunity for appeal in violation of Gov. Code, § 3304, subd. (b), part of the Public Safety Officers Procedural Bill of Rights Act, which provides that "[n]o punitive action ... shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal." Additionally, the officer was also entitled to an administrative appeal because of alleged discrimination against him for exercise of his right to participate in the recognized employee organization.

[See Cal.Jur.3d, Law Enforcement Officers, § 33; Am.Jur.2d, Sheriffs, Police, and Constables, § 11.]

(2) Mandamus and Prohibition § 5--Mandamus--Provisions Affecting Issuance.

The requirements for mandamus are a clear and present duty on the part of the respondent, and a clear and present beneficial right in the petitioner to the performance of that duty. (Code Civ. Proc., §§ 1085, 1086.)

(3) Mandamus and Prohibition § 23--Mandamus--To Public Officers and Boards--Claims Against Cities, Counties and States--Protection of Public Employees' Right to Organize.

Pursuant to Code Civ. Proc., § 1085, relating to issuance of a writ of mandate, a city police officer had the clear, present, substantial right in the performance of the city's duty to refrain from

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intimidating or discriminating against him for the exercise of his right to participate in activities of a recognized employee organization pursuant to Gov. Code, § 3506, part of the Meyers-Milias-Brown Act.

COUNSEL

Ogulnik & Levine, Charles G. Ogulnik and Richard A. Levine for Plaintiff and Appellant.

Bert Glennon, Jr., City Attorney, and Joseph W. Pannone, Deputy City Attorney, for Defendants and Respondents. *252

THOMPSON, J.

Eduard Henneberque appeals from the superior court judgment denying his petition for a writ of mandate compelling respondents, City of Culver City et al., (1) to provide him an administrative appeal pursuant to Government Code section 3304, subdivision (b) (Public Safety Officers Procedural Bill of Rights Act), and (2) to reinstate him as a probationary police sergeant.

On September 6, 1980, appellant, a permanent employee of the Culver City Police Department, was appointed to the probationary position of police sergeant.

On September 18, 1980, appellant was elected president of the Culver City Police Officers Association, the recognized employee organization, pursuant to the Meyers-Milias-Brown Act. (Gov. Code, § 3500 et seq.)

Appellant received average performance evaluations. In addition, in the September progress report it was noted that appellant "is adjusting well and should develop into a good sergeant." In the October progress report, filed on November 1, 1980, it was noted that "Ed is progressing well."

On or about November 3, 1980, appellant was demoted to the position of police officer. Respondents assert that said demotion resulted from petitioner's failure to exercise his supervisorial judgment on or about October 26, 1980, in a manner consistent with the ordinary standards of conduct applicable to a sergeant. Thus, a determination was made that appellant failed to satisfactorily perform his probationary duties as sergeant.

On or about November 7, 1980, appellant requested that respondents provide him an appeal on his involuntary demotion. On November 18, 1980, respondents denied appellant's request for an administrative appeal.

On March 26, 1981, appellant filed, pursuant to Code of Civil Procedure section 1085, a petition for peremptory writ of mandate, seeking (1) an administrative appeal in accordance with Government Code section 3304, subdivision (b), and (2) reinstatement to the rank of police sergeant on the basis that appellant was unlawfully intimidated and discriminated against by reason of his position as president of the recognized employee organization.

On June 12, 1981, the lower court entered judgment denying appellant's petition for writ of mandate, and on June 22, 1981, appellant filed an appeal from said decision. *253

Discussion

(1a)Appellant contends that the trial court abused its discretion in refusing to issue a peremptory writ of mandate because respondents failed to afford him an opportunity for administrative appeal pursuant to Government Code section 3304, subdivision (b). We agree. [FN1]

FN1 In view of our finding that appellant must be afforded an administrative appeal, we need not reach the issue of his reinstatement to the position of police sergeant. This issue will be decided at the administrative appeal. If he is dissatisfied with the agency's decision, he may then seek administrative mandamus.

Respondents claim that appellant waived his right to an administrative appeal by not raising the issue below and presenting no evidence to support the issuance of a writ of mandate (Code Civ. Proc., § 1085). Our review of the record, however, discloses that appellant properly raised the issue of an administrative appeal in his pleadings before the trial court and presented evidence to support issuance of a writ of mandate.

(2)The requirements for mandamus are (1) a clear, present duty on the part of the respondent, and (2) a

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clear, present and beneficial right in the petitioner to the performance of that duty. (Code Civ. Proc., §§ 1085, 1086; [FN2] see 5 Witkin, Cal. Procedure (2d ed. 1971) Extraordinary Writs, § 61, p. 3838; Baldwin-Lima-Hamilton Corp. v. Superior Court (1962) 208 Cal.App.2d 803, 813-814 [25 Cal.Rptr. 798].) Appellant argued before the trial court and now argues that pursuant to California Government Code section 3304, subdivision (b), entitled the Public Safety Officers Procedural Bill of Rights Act, he has a clear, present, substantial right in the performance of the respondent city to provide an opportunity for administrative appeal and respondents have a clear, present, ministerial duty to provide an opportunity for such an appeal.

FN2 Section 1085 reads: "It may be issued by any court, except a municipal or justice court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person."
Section 1086 provides: "The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested."

Section 3304, subdivision (b) in pertinent part provides: "No punitive action, ... shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal." "Punitive action" within the meaning of the Bill of Rights Act, is further defined in section 3303, California Government Code, in relevant portion, "as any ***254** action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for the purposes of punishment."

In White v. County of Sacramento (1982) 31 Cal.3d 676, 678-679 [183 Cal.Rptr. 520, 646 P.2d 191], plaintiff was reassigned on the basis of alleged deficient performance to a lower paying position. Plaintiff asserted that the resulting loss in pay from the administrative decision was punitive in nature and petitioned the trial court for a writ of mandate to compel the county civil service commission to grant him an administrative appeal pursuant to Government Code section 3304, subdivision (b). The court held that "a decision to reassign a peace officer to a lower paying position is per se disciplinary, or punitive in nature, and that the officer therefore must be accorded the 'opportunity for [an] administrative appeal."' (Id., at pp. 683-684; italics added.)

(1b)In the case before this court, appellant was promoted to the rank of police sergeant with a corresponding increase in salary and benefits. He received no unfavorable evaluations while serving in this capacity. However, he was summarily demoted and received a reduction in salary and benefits. Thus, punitive action was undertaken by respondents without providing the required opportunity for appeal in violation of Government Code section 3304, subdivision (b).

Additionally, appellant also is entitled to an administrative appeal because of alleged discrimination against him for exercise of his right to participate in the recognized employee organization.

It has been held that a writ of mandate was proper to correct discrimination against employees who exercise their rights under the Meyers-Milias-Brown Act. (San Leandro Police Officers Assn. v. City of San Leandro (1976) 55 Cal.App.3d 553, 558 [127 Cal.Rptr. 856].)

(3)Pursuant to Code of Civil Procedure, section 1085, appellant has a clear, present, substantial right in the performance of respondents' duty to refrain from intimidating or discriminating against appellant for exercise of his right to participate in activities of the recognized employee organization pursuant to Government Code section 3506. [FN3]

FN3 Government Code section 3506 provides: "Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights ...."

In Healdsburg Police Officers Assn. v. City of Healdsburg (1976) 57 Cal.App.3d 444 [129 Cal.Rptr. 216], the court held that the officer's discharge ***255** without a hearing violated the Meyers-Milias-Brown Act (Gov. Code, § 3502), [FN4] providing public employees the right to join labor organizations and section 3506, prohibiting

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public agencies from interfering with the organizational representational rights of their employees. (Id., at pp. 451-452.) The court stated that: "The right to a hearing must likewise be afforded when a public officer employed at will claims that he was dismissed because he exercised a statutory right to join and participate in the activities of an employee organization." (Id., at p. 450.) In the case before this court, appellant claims that the demotion occurred because of his participation in an employee organization. Thus, both appellant here and appellant in Healdsburg claimed that they lost their positions because they exercised their rights under the Meyers-Milias-Brown Act. (Gov. Code, § 3502.) Accordingly, appellant herein, as the appellant in Healdsburg, is also entitled to a hearing.

FN4 Government Code section 3502 provides in pertinent part: "Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations."

DISPOSITION

We find that the trial court abused its discretion in refusing to issue appellant a peremptory writ of mandate ordering respondents to grant him an administrative appeal. The judgment is reversed and the case remanded for further proceedings consistent with this opinion.

Schauer, P. J., and Johnson, J., concurred. *256

Cal.App.2.Dist.,1983.

Henneberque v. City of Culver City

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WILLIAM DICKSON HEYENGA et al., Plaintiffs and Appellants,
v.
CITY OF SAN DIEGO et al., Defendants and Respondents.

Civ. No. 18159.

Court of Appeal, Fourth District, Division 1, California.

June 12, 1979.

SUMMARY

Two police officers who had been transferred from one division to another of the police department alleged their transfer was for punitive reasons in violation of a collective bargaining agreement and sought a preliminary injunction restraining their transfer pending trial or until the city provided them with an administrative appeal. The trial court denied the petition, stating the officers' contention that their transfer was punitive was based on conjecture and speculation. (Superior Court of San Diego County, No. 412853, Ross G. Tharp, Judge.)

The Court of Appeal reversed, holding it was apparent that the transfers came about because of the officers' alleged off-duty conduct, and a prima facia showing of punitive action was made in the trial court. The court held little if any harm would result to the city by delaying the transfer, the possibility of harm was within the power of the city to eliminate by granting the hearing without delay, and the disallowance of the officers' provisional remedy was tantamount to divesting them of any remedy at all. Accordingly, the court held the trial court abused its discretion in denying the petition for a preliminary injunction. (Opinion by Buttermore, J., [FN<<dagger>>] with Brown (Gerald), P. J., and Staniforth, J., concurring.)

FN<<dagger>> Assigned by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1) Injunctions § 21--Preliminary Injunctions--Appeal--Abuse of Discretion.
An appellate court will reverse the denial of a preliminary *757 injunction only if it finds an abuse of discretion by the trial judge. The test on review balances two factors: whether greater injury would result to a defendant from granting a preliminary injunction than to a plaintiff from its refusal and whether there is a reasonable probability the plaintiff will ultimately prevail in the litigation.

[See Cal.Jur.3d, Injunctions, § 11; Am.Jur.2d, Injunctions, § 353.]

(2) Injunctions § 13--Preliminary Injunctions--Grounds--Irreparable Injury--Police Officers' Transfer.
The trial court abused its discretion in denying two police officers' petition for a preliminary injunction to restrain their alleged punitive transfer pending trial or until the city provided them with an administrative appeal, where the officers made a prima facie showing of punitive action in violation of a collective bargaining agreement, where little if any harm could result to the city by delaying the transfer, where the possibility of harm was within the power of the city to eliminate by granting without delay the administrative appeal in compliance with the collective bargaining agreement and where the likelihood of the officers' prevailing at trial was great.

COUNSEL

Gregory G. Petersen for Plaintiffs and Appellants.

John W. Witt, City Attorney, and David W. Ryan, Deputy City Attorney, for Defendants and Respondents.

BUTTERMORE, J. [FN*]

FN* Assigned by the Chairperson of the Judicial Council.

Appellants William Dickson Heyenga and Raymond Pulsipher, police officers for respondent, City of San Diego, appeal an order denying a preliminary injunction which would have prevented their transfer from the northern to the central division of the

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police department. They alleged the transfer constituted a violation of their freedom of association rights guaranteed by the First Amendment of the federal Constitution and article I, section 3 of the state Constitution. They *758 asserted the transfer was proposed because they had invoked their procedural rights under the Public Safety Officers Procedural Bill of Rights (Gov. Code, § 3300 et seq.) and, as such, was a "punitive transfer" which is forbidden under that law. They now urge the trial court abused its discretion by denying the preliminary injunction.

We need not decide whether the recently enacted "Bill of Rights" for public safety officers is binding on a chartered city. For our purposes, we treat the statute as binding on the City of San Diego because its terms were incorporated into the collective bargaining agreement covering the relevant period herein.

While off duty, appellants became involved in a minor incident at a local pub. An internal investigation by the police department exonerated Heyenga. The investigation of Pulsipher was pending when the transfer order was issued.

The hearing on appellants' application for a preliminary injunction included an offer of proof and numerous affidavits which generated a disputed issue of fact as to whether the transfer of appellants from northern to central was a "transfer for purposes of punishment."

Government Code section 3304, subdivision (b), provides: "No punitive action ... shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

Government Code section 3303, in part provides: "For the purpose of this chapter, punitive action is defined as any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment."

Thirty affidavits in essentially identical language by officers assigned to the northern division were filed on behalf of appellants. They stated departmental policy guaranteed a one-year minimum of service without transfer to officers assigned to the northern division. They alleged no patrolman had been transferred from that division absent his request or promotion. They stated: "The facts in the Hayenga and Pulsipher transfer are not in alignment with the Department's normal transfer procedures as I understand them." Counsel for appellants filed an affidavit detailing resistance by appellants' superiors to attempted invocation of procedural rights provided by statute. *759

Respondent city offered the affidavit of Veon Nyhus, deputy chief of police, which outlined his experience and current duties, including making personnel assignments and transfers between substations within the patrol bureau. The affidavit stated: "I know Officer William Heyenga and Officer Raymond Pulsipher to be average officers with the potential for future advancement in the Department. In January, I became aware of their involvement in certain off-duty conduct while they were present in a local bar called the Hearth House Lounge in San Diego. I am also aware of other conduct involving these officers that led me to conclude that a transfer to the Central Patrol Division, where additional supervisory support and a more restricted geographic area are available, would be in the best interests of both the officers and the Department. The officers would benefit by virtue of the fact that their police careers would be enhanced by rotation to an area where closer supervision is available. The Department would benefit by rotating the officers before a future confrontation resulted in actual punitive disciplinary action having to be taken against the officers." While Chief Nyhus' affidavit further stated the transfers were not intended to be punitive, it is apparent they came about because of appellants' alleged off-duty conduct. Looking through form to substance, a prima facie showing of punitive action was made in the trial court.

In denying the preliminary injunction, the trial judge stated: "The plaintiff's contention that their transfers were punitive in nature is, at this time, based solely on conjecture and speculation. If said contention is substantiated by competent evidence later in these proceedings, the plaintiffs have an adequate remedy for redress of their alleged grievances through the appellate mechanism and the 'Public Safety Officers Procedural Bill of Rights Act'."

(1)An appellate court will reverse the denial of a preliminary injunction only if it finds an abuse of

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discretion by the trial judge Weingand v. Atlantic Sav. & Loan Assn., (1 Cal.3d 806, 820 [83 Cal.Rptr. 650, 464 P.2d 106] Continental Baking Co. v. Katz, 68 Cal.2d 512 [67 Cal.Rptr. 761, 439 P.2d 889]). The test on review balances two factors: "(a) whether ... greater injury will result to a defendant from granting a preliminary injunction ... than to a plaintiff from its refusal and (b) whether there is a reasonable probability the plaintiff will ultimately prevail in the litigation" (San Francisco Police Officers Assn. v. City & County of San Francisco, 69 Cal.App.3d 1019, 1022 [138 Cal.Rptr. 755]). ***760**

(2)Appellants sought to restrain their transfer pending trial or until the city provided them with an administrative appeal in compliance with their collective bargaining agreement. Little harm, if any, can result to the City of San Diego by delaying the transfer. The possibility of harm is within the power of the city to eliminate by granting the hearing without delay. To disallow appellants their provisional remedy is tantamount to divesting them of any remedy at all. Their ultimate success at trial will indeed be a hollow victory if it then is determined their transfer a year or two before violated their procedural rights.

The assertion by respondent that it was in the public interest not to grant the preliminary injunction does not comport with the Legislature's finding and declaration. Section 3301 provides in part: "The Legislature ... finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers." Granting the preliminary injunction in this case would have served to promote stable employer-employee relations.

Because the right to an administrative appeal is part of their collective bargaining agreement, we conclude the likelihood of appellants' prevailing at trial is great. The administrative appeal referred to in the statute is not defined. However, section 129 of the Charter of the City of San Diego provides for a hearing by the civil service commission when employees in classified service are terminated or suspended. An established procedure exists for conducting such hearings and could easily be applied here. We find the trial judge abused his discretion in denying the petition for a preliminary injunction.

The order is reversed.

Brown (Gerald), P.J., and Staniforth, J., concurred. ***761**

Cal.App.4.Dist.,1979.

Heyenga v. City of San Diego

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1222326 - HIGHASI,PAULA

Date and Time Printing Started:	06/17/1999	04:22:26 pm (Pacific)
Date and Time Printing Ended:	06/17/1999	04:22:42 pm (Pacific)
Offline Transmission Time:		00:00:16
Number of Requests in Group:	8	
Number of Documents Charged:	8	
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1222326 - HIGHASI,PAULA

Number of Requests in Group:	12	
Approximate Number of Lines:	4865	
Date and Time Printing Started:	06/17/1999	04:30:27 pm (Pacific)

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Client Identifier: **POBAR**
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JAMES L. HOLCOMB, Plaintiff and Respondent,
v.
CITY OF LOS ANGELES et al., Defendants and Appellants

No. B033238.

Court of Appeal, Second District, Division 2, California.

May 8, 1989.

SUMMARY

In proceedings by a police officer to overturn a 15-day disciplinary suspension, the trial court found the evidence was sufficient to support the police department board of rights' conclusion of insubordination, but found that the board's imposition of 15 days' suspension, rather than the 5 days' suspension imposed by the chief of police originally, was an illegal attempt to punish the officer for exercising his right to seek administrative review of the first decision to discipline him. Accordingly, the trial court directed the police department to reinstate the original penalty and awarded the officer costs and attorney fees. (Superior Court of Los Angeles County, No. C593219, Jerry K. Fields, Judge.)

The Court of Appeal reversed, holding that if an officer believes a board of rights imposed a greater punishment as a vindictive measure, the officer has the burden to establish that fact, which petitioner failed to do, citing only the increased punishment. The court held the record contained more than ample legitimate reasons for the decision. The court also held the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), containing the protection against retaliation for an appeal, applied to the board of rights proceeding. (Opinion by Roth, P. J., with Compton and Fukuto, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Law Enforcement Officers § 12--Police--Disciplinary Proceedings-- Appeal--Procedural Bill of Rights.

Under the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), Gov. Code, § 3304, subd. (b), providing that no punitive action may be taken against an officer without providing an opportunity for administrative ***1561** appeal, does not create the administrative appeal but merely requires the employing agency to provide such an appeal. Its purpose is to offer the aggrieved police officer an avenue to challenge a disciplinary decision which could result in disadvantage, harm, loss or hardship by providing the officer with an opportunity to convince the employer to reverse the decision, either by demonstrating the falsity of the charges which led to the punitive action, or through presentation of mitigating circumstances. Thus, because a five-day suspension imposed on a police officer was clearly a "punitive action" within the meaning of the statutory scheme and the only process available to him to challenge the discipline was to request a hearing before the police department's board of rights, that hearing was the required administrative appeal.

(2a, 2b) Law Enforcement Officers § 12--Police--Disciplinary Proceedings--Procedural Bill of Rights--Right to Appeal.

Gov. Code, § 3304, subd. (a), providing public safety officers shall not be subject to punitive action for exercising rights granted by the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), including the right of appeal, was not violated when a police officer, originally given a 5-day disciplinary suspension by the chief of police, was given a 15-day suspension on appeal to the police department's board of rights. Nothing in the record suggested the board's recommendation was prompted by the officer's exercise of his rights to the hearing as opposed to the particular facts of the case. The enactment of Gov. Code, § 3304, subd. (a), was not intended to destroy the powers granted by the city charter to the board of rights, including the right to conduct a de novo adversarial proceeding and to recommend a greater punishment than was originally imposed.

[See Cal.Jur.3d, Law Enforcement Officers, § 33; Am.Jur.2d, Civil Service, § 71.]

(3) Law Enforcement Officers § 12--Police--

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Disciplinary Proceedings-- Appeal--Increase in Punishment.

Gov. Code, § 3304, subd. (a), providing that no public safety officer shall be subjected to punitive action for exercising his rights under the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), including the right of appeal, means that a police department board of rights established by a city charter may not arbitrarily increase a punishment to retaliate against an officer for seeking a hearing. However, it is presumed that official duty has been regularly performed (Evid. Code, § 664), and if an officer believes that a board of rights imposed a greater punishment as a vindictive measure, it is the officer's burden to establish that fact. ***1562**

COUNSEL

James K. Hahn, City Attorney, Frederick Merkin and Robert Cramer, Assistant City Attorneys, for Defendants and Appellants.

Michael P. Stone and Stone & Healy for Plaintiff and Respondent.

ROTH, P. J.

This appeal by the City of Los Angeles and its chief of police arises out of disciplinary proceedings initiated by the Los Angeles Police Department (LAPD) against respondent James L. Holcomb.

Holcomb is a Los Angeles Police Officer. On August 13, 1985, Lieutenant York of the LAPD sent a message to Holcomb and his partner, who were in a police vehicle, to return to the police station. Holcomb did not respond to the message or several others which were transmitted shortly thereafter. Ultimately, Holcomb arrived at the station 25 minutes after the initial request to return had been made. A meeting, in which four individuals participated, was conducted in the office of Lieutenant York to discuss the matter. Lieutenant York asked Holcomb several times why he had not responded immediately to the request to return to the station. Holcomb refused to answer the questions. Holcomb tape-recorded the entire meeting.

A personnel complaint was filed against Holcomb alleging insubordination because of his failure to answer Lieutenant York's inquiries. Pursuant to the procedures set forth in the Los Angeles Police Department Manual, an investigation was conducted. The complaint was sustained and the recommended discipline was suspension for five days. The chief of police reviewed the matter and suspended Holcomb for five days.

At that juncture, Holcomb had two alternatives pursuant to the terms of the Los Angeles City Charter: accept the imposed suspension or request a hearing before the LAPD's board of rights (Board). Holcomb elected the latter option.

Thereafter, a full-blown day long adversarial hearing was conducted before the Board. The board consisted of two watch commanders and one captain from the LAPD. A police officer appeared as Holcomb's "Defense Representative" and a lieutenant represented the LAPD.

The first issue litigated was whether or not Holcomb had "failed to comply with the direct order of Lieutenant M. York directing [him] to state ***1563** the reason [he] did not acknowledge a call to come to the station." Six witnesses, including Holcomb, testified and were cross-examined. Seven exhibits were introduced into evidence, including the tape recording of the conversation had between Holcomb and Lieutenant York. Apparently Holcomb had not made the tape recording available during the prior internal investigation of the matter. After taking testimony, reviewing the exhibits, and hearing argument, the Board unanimously concluded Holcomb had been insubordinate.

The second phase of the hearing concerned the appropriate punishment to be imposed. The Board reviewed Holcomb's personnel file, noting both prior discipline imposed as well as commendations received. Individual members of the Board engaged in lengthy colloquys with Holcomb about his work performance and attitude. [FN1] In the course of those discussions, Holcomb conceded that he had "been out of step" at times; that he had an abrasive personality; and that he had a personality conflict with his supervisors. After private deliberations spanning almost 40 minutes, Watch Commander Allen announced the Board's decision as follows: "Now it's time for us to express our rationale for the penalty we are recommending.

FN1 One member of the Board commented: "This

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little session here lasted about 10 times as long as it ever has on the many Boards I have sat on. I hope it's of some value."

"We believe that the purpose of discipline is threefold: It is designed first to bring about a change in the attitude or behavior of the concerned employee. Its secondary purpose is to assure other Department employees that similar acts of misconduct will be appropriately resolved. And finally, its purpose is to assure the general public that the Department is appropriately mindful of its disciplinary responsibility.

"One of the things we look at in determining our recommendation for penalty is whether the misconduct seems to be out of character or whether there appears to be a reasonable foreseeability of a continuing pattern. You have been disciplined twice for preventable traffic accidents and we don't view those occurrences as germane to this situation. In 1978 you were disciplined for discourtesy. In 1980, you were disciplined for acquiescing to your partner's misconduct. And in 1985, you were disciplined for being late to work on three occasions. While we don't find that disciplinary record commendable, neither do we view it with great alarm.

"In our very lengthy examination of your personnel package, we made comments for the record expressing our concern about what we perceive as your attitude toward supervision. We are satisfied that we have a much better view of the entire situation and how it relates to you personally than the reviewers of fact had prior to this hearing. *1564

"In our view, you need to become more introspective and concentrate your considerable talent and energy toward meeting expectations rather than to continue your current habit of challenging supervisors at every turn. We noted during that same session, and you agreed, that if you were working for Ace Hardware, you would likely be fired. We have considerable investment in you, however, and choose to concentrate on your strengths and to hold out some hope for a beneficial change in your attitude. You must realize, however, that there comes a point, and you are now approaching that point, where the Department can justifiably ask whether your continued employment with the City is likely to be productive or advisable.

"We believe that discipline should be as severe as necessary and as light as possible. It is not our desire to alienate you or to detract from the possibility that you can begin to meet expectations through the appropriate channeling of your energy. We view your current difficulties as serious and entirely of your own making. We believe that we need to impose a harsh penalty so that you will realize the seriousness of your insubordination and realize the immediate need for a significant change in your attitude and behavior.

"Accordingly, it will be our recommendation to the chief of police that you be suspended without pay for a period of 15 days." (Italics added.)

The Board's recommendation was transmitted to the chief of police, who concurred in its proposal and ordered Holcomb suspended for 15 days.

To overturn the discipline, Holcomb initiated proceedings in the superior court. (Code Civ. Proc., § 1094.5.) He contended the evidence did not sustain the Board's finding and that, in any event, the imposition of 15 days' suspension, rather than the 5 days' suspension imposed after the LAPD's first investigation of the matter, was an illegal attempt to punish him for exercising his right to seek administrative review of the first decision to discipline him. The trial judge reviewed the record of the administrative proceedings and found the evidence was sufficient to support the Board's conclusion of insubordination. However, he agreed with Holcomb the increased punishment "denied him due process." Accordingly, he directed the LAPD to reinstate the original penalty of five days' suspension and awarded Holcomb costs and attorney's fees. The city and the chief of police have appealed from that decision. [FN2]

FN2 By not filing a cross-appeal to contest the superior court's finding of sufficient evidence to sustain the charge of insubordination, Holcomb has conceded that issue.

Section 202 of the Los Angeles City Charter sets forth a comprehensive scheme governing the discipline of police officers. The chief of police is *1565 permitted to suspend an officer for a period of up to 30 days after an internal investigation has been conducted in compliance with particularized

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procedural safeguards. That suspension decision is subject to the officer's right to seek a hearing before the Board of Rights. If the officer requests such a hearing, "such suspension shall thereupon automatically become a temporary relief from duty pending hearing and decision by the Board of Rights." (§ 202(2)(b) of the Los Angeles City Charter.)

The Board hearing is a de novo adversarial proceeding at which no reference is made to the evidence adduced in the course of the prior internal investigation. The Board's decision is based solely upon the evidence presented to it. A representative of the LAPD presents its case, following which the officer, through assistance of a "Defense Representative" tenders his/her version of the events. (§ 202(12) of the Los Angeles City Charter.) [FN3] The Board members actively participate, posing questions to the witnesses and each party's representative. (§ 202(9) of the Los Angeles City Charter.) [FN4]

FN3 Section 202(12) of the Los Angeles City Charter provides: "At such hearing the accused shall have the right to appear in person and by counsel or representative, or both, and make defense to such charge and may produce witnesses to testify in his behalf and cross-examine witnesses against him. The accused shall have the right and privilege to select and name any officer of the department of any rank not higher than the rank of Lieutenant (who is not otherwise disqualified by reason of prejudice or being a party to the action in any capacity) to act as defense representative, ... [I]t is hereby made the duty of such officer to use every legal means available and exercise the best efforts of which he is capable to defend the accused at such hearing. ... The said Board of Rights shall, at the conclusion of the hearing, make its specific findings of 'guilty' or 'not guilty' (on each specific charge) which must be based upon the evidence adduced before it at such hearing and not otherwise ...." (Italics added.)
These elaborate safeguards implement the charter's statement of policy that "[t]he right of an officer .... of the Police Department to hold his office ... is hereby declared to be a substantial property right of which he shall not be deprived arbitrarily or summarily, nor otherwise than as herein in this section provided." (§ 202(1) of the Los Angeles City Charter.)

FN4 Section 202(9) of the Los Angeles City Charter provides, in part: "... [T]he Board of Rights ... shall have the power to administer oaths and affirmations in any investigation or proceeding pending before said board, examine witnesses under oath, and compel the attendance of witnesses and the production of evidence before them ...."

If the Board thereafter finds the officer "guilty," the Board "... shall prescribe its penalty (by order in writing) of either suspension for a definite period not exceeding six (6) months with total loss of pay, and with or without reprimand; or reprimand without further penalty; or of removal from office or position. ... [I]n prescribing such penalty the said board must look to the nature and gravity of the offense of which the accused has been found guilty and may at its discretion review the departmental personal [sic] history and record of such accused ...." (§ 202(12) of the Los Angeles City Charter.) *1566

The Board's decision constitutes a recommendation to the chief of police who may impose the suggested penalty or a lesser penalty; the chief, however, is precluded from imposing a punishment greater than the recommendation. (§ 202(13) of the Los Angeles City Charter.)

At bench, Holcomb does not assert there has been a violation of any of these procedures. Instead, he claims if an officer exercises his right to a hearing in front of the Board and the complaint is upheld, no punishment greater than that initially imposed by the chief of police may be given. However, the city charter explicitly empowers the Board of Rights to recommend a more serious punishment than that originally imposed as the right to a hearing in front of the Board is afforded an officer who receives less than a 30 days' suspension but the Board is permitted to prescribe a suspension period of up to 6 months. Thus, Holcomb was on notice the Board hearing could possibly result in a greater punishment depending upon the Board's evaluation of the seriousness of the offense and his personnel record.

To overcome the force of this charter provision, Holcomb cites to the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.).

(1) The first question is whether this statutory scheme applies to the situation at bench. Government Code section 3304, subdivision (b) states no "punitive action" may be taken against an

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officer "without providing the officer with an opportunity for administrative appeal." Government Code section 3303 defines "punitive action" to include suspension. These provisions apply to the City of Los Angeles. (Baggett v. Gates (1982) 32 Cal.3d 128, 135-140 [185 Cal.Rptr. 232, 649 P.2d 874].)

Government Code section 3304 does not create the administrative appeal but merely requires the employing agency to provide such an appeal. (Browning v. Block (1985) 175 Cal.App.3d 423, 429 [220 Cal.Rptr. 763] [review den.].) Its purpose is to offer the aggrieved police officer an avenue to challenge a disciplinary decision which could result in disadvantage, harm, loss or hardship (see White v. County of Sacramento (1982) 31 Cal.3d 676, 683 [183 Cal.Rptr. 520, 646 P.2d 191]) by providing the officer with an opportunity to convince the employer to reverse its decision, either by demonstrating the falsity of the charges which led to the punitive action, or through presentation of mitigating circumstances. (Baggett v. Gates, supra, 32 Cal.3d 128, 140; Browning v. Block, supra, 175 Cal.App.3d at p. 430.) ***1567**

As the initial five days' suspension imposed upon Holcomb was clearly a "punitive action" within the meaning of the statutory scheme and the only process available to him at that juncture to challenge the discipline was to request a hearing before the Board, we find said hearing was, within the context of this case, the required administrative appeal. [FN5]

FN5 At the hearing conducted in the superior court, counsel for the city and its chief of police stated: "[W]e never intended to imply that the board of rights proceeding was not an administrative appeal pursuant to the public safety officers procedural bill of rights." However, on this appeal, the city and police chief equivocate as to exactly what aspect of the process is the administrative appeal.

(2a) The next question is whether Government Code section 3304, subdivision (a) has been violated. It states: "No public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of rights granted under this chapter, or the exercise of any rights under any existing administrative grievance procedure."

Holcomb urged, and the superior court agreed, the statute had been violated because he had been subjected to punitive action for exercising his right to an administrative appeal as the Board recommended a greater punishment than that initially imposed by the chief of police.

We find absolutely nothing in the record to support the trial court's finding Holcomb was impermissibly penalized for availing himself of that right. Instead, the record of the administrative proceedings reveals the Board first found Holcomb "guilty" of insubordination after careful consideration of all the evidence, including his testimony and the tape recording of the conversation in which he refused to answer Lieutenant York's questions. As the Board noted, the tape recording had not been reviewed in the initial internal investigation of the matter as Holcomb apparently had not made it available prior to the hearing. The significance of the tape recording is patent. Its contents formed the factual basis of the insubordination charge. By listening to it, the Board could not only definitively resolve any disputes about what was said but it could also draw valid conclusions about Holcomb's attitude by hearing his voice.

Furthermore, the Board suggested its penalty after thoroughly reviewing Holcomb's personnel file and engaging in a lengthy discourse with him, in the course of which Holcomb conceded he had an "attitude problem." In sum, nothing in the record even begins to suggest the Board's recommendation ***1568** of a 15 days' suspension was prompted by Holcomb's exercise of his right to the hearing as opposed to the particular facts of the case.

Holcomb has cited no decisional authority or legislative history to support his claim the enactment of Government Code section 3304, subdivision (a) was intended to destroy the powers granted by the city charter to the Board. Sound policy considerations and common sense preclude adoption of such a position given the actual contours of the hearing granted to him by the city charter. That is, while Holcomb's request for a Board hearing is the pragmatic equivalent of an administrative appeal of the chief of police's prior decision, it is not an appeal in the traditional mode whereby the reviewing tribunal is limited to canvassing the evidence already adduced and is bound by earlier

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factual determinations. Instead, the Board hearing is a de novo adversarial proceeding. In light of this circumstance, the city charter provision permitting the Board, if it finds the officer "guilty" of the charge(s), to recommend a potentially larger punishment is logical. Having had an opportunity to determine each witness's credibility, to examine evidence, and to review and discuss with the officer his personnel file, the Board is best suited to determine the appropriate sanction within the limitations set forth by the city charter.

(3) In order to harmonize Government Code section 3304, subdivision (a) with these procedures, we therefore construe it to mean merely that the Board may not arbitrarily increase a punishment to retaliate against an officer for seeking a hearing. However, "[i]t is presumed that official duty has been regularly performed." (Evid. Code, § 664.) This rebuttable presumption affects the burden of proof (Evid. Code, § 660) and effectuates the policy of relieving governmental officials from having to justify their conduct whenever it is called into question. (People v. Smith (1984) 155 Cal.App.3d 1103, 1128-1129 [203 Cal.Rptr. 196] [hg. den.].) Hence, if an officer believes the Board imposed a greater punishment as a vindictive measure, it is the officer's burden to establish that fact as "[t]he effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." (Evid. Code, § 606.) (2b) At bench, the only evidence cited by Holcomb in that regard is that the Board recommended 15 days' suspension. As already explained, the record contains more than ample legitimate reasons for that decision. Holcomb has failed to carry his burden of proving by a preponderance of the evidence the nonexistence of the presumed fact. (155 Cal.App.3d at p. 1130.). *1569

The judgment is reversed. Appellant to recover costs on appeal.

Compton, J., and Fukuto, J., concurred. *1570

Cal.App.2.Dist.,1989.

Holcomb v. City of Los Angeles

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EDWARD M. HOPSON et al., Plaintiffs and Appellants,
v.
CITY OF LOS ANGELES et al., Defendants and Respondents.

Civ. No. 63261.

Court of Appeal, Second District, Division 4, California.

Jan 24, 1983.

SUMMARY

Two police officers who had been involved in the shooting of a citizen petitioned the trial court for a writ of mandate and injunctive relief after the Board of Police Commissioners proposed to enter in the officers' personnel files that part of a commission report which concluded that their actions in the shooting violated departmental policies and represented serious errors in judgment. Rejecting the officers' contention that the report constituted a "punitive action" within the meaning of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3303), so as to entitle them to an administrative hearing before the proposed action could be accomplished, the trial court denied the requested relief. (Superior Court of Los Angeles County, No. C300775, Jerry Pacht, Judge.)

The Court of Appeal reversed. The court held that the commission report constituted a "punitive action" under the Public Safety Officers Procedural Bill of Rights Act and thus could not be placed in the officers' personnel files without first affording them an opportunity for an administrative appeal (Gov. Code, § 3304, subd. (b)), since there was testimony by the Chief of Police that such proposed action would have adverse ramifications for the officers' career opportunities. The court further held the fact that the proposed action did not constitute discipline under the city charter was not determinative of the issue whether it was punitive action under the state statute. (Opinion by Amerian, J., with Kingsley, Acting P. J., and McClosky, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Law Enforcement Officers § 11--Police--Disciplinary Proceedings--What Constitutes Punitive Action--Placement of Police Commission Report in Officer's Personnel File.

A report by a board of police commissioners concluding that the actions of two officers involved in the ***348** shooting of a citizen violated departmental policies and represented serious errors in judgment constituted a "punitive action," within the meaning of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3303), and thus could not be placed in the officers' personnel files without first affording them an opportunity for an administrative appeal (Gov. Code, § 3304, subd. (b)), where there was testimony by the Chief of Police that such proposed action would have adverse ramifications for the officers' career opportunities. The fact that the proposed action did not constitute discipline under the city charter was not determinative of the issue whether it was punitive action under the Public Safety Officers Procedural Bill of Rights Act.

[See Cal.Jur.3d, Law Enforcement Officers, § 33; Am.Jur.2d, Administrative Law, § 541.]

COUNSEL

Cotkin, Collins, Kolts & Franscell and Steven Lincoln Paine for Plaintiffs and Appellants.

Ira Reiner, City Attorney, Frederick N. Merkin, Senior Assistant City Attorney, and Catharine H. Vale, Assistant City Attorney, and Lewis N. Unger, Deputy City Attorney, for Defendants and Respondents.

AMERIAN, J.

On August 20, 1982, this court filed its opinion in this matter. Thereafter, on October 21, 1982, the Supreme Court granted petition for hearing, transferred the cause to that court and retransferred the case to this court, calling attention to White v. County of Sacramento (1982) 31 Cal.3d 676, 683 [183 Cal.Rptr. 520, 646 P.2d 191], and to Baggett v. Gates (1982) 32 Cal.3d 128 [185 Cal.Rptr. 232,

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649 P.2d 874]. Thereafter, the matter was briefed by the parties on those issues and reargued in this court.

We adopt the statement of the case and statement of facts from our prior opinion and repeat them here, indicated by the use of brackets.

Statement of the Case

[Appellants, Edward M. Hopson and Lloyd W. O'Callaghan, Jr., both police officers employed by the City of Los Angeles, appeal from a judgment in the *349 Superior Court of the State of California for the County of Los Angeles, denying appellants' petition for peremptory writ of mandate, and injunctive relief in connection with the use of part I of a written report issued by the Board of Police Commissioners (Commission) of the Los Angeles Police Department (LAPD or Department) entitled: "Report of the Board of Police Commissioners Concerning the Shooting of Eulia Love and the Use of Deadly Force" (Report). [FN1] Appellants contend that the Commission's issuance of the written Report, specifically, part I, amounted to a written condemnation of them. Appellants further contend that the Commission's further threatened (but as yet unexecuted) entering of copies of part I of the Report into their personnel files constitutes imposition of discipline and "punitive action." As such, appellants urge that pursuant to Government Code section 3300 et seq. they are entitled to a full trial-type "administrative appeal" hearing in conformity with Government Code section 3304, subdivision (b) and the procedures set forth in Los Angeles City Charter section 202.

FN1 Pursuant to established LAPD procedure, the circumstances surrounding the shooting of Eulia Love were investigated by a LAPD "Officer-Involved Shooting Team" (OIS) which issued its own report to a LAPD "Shooting Review Board" (SRB). In keeping with established guidelines, the SRB issued its own report. Two members of the SRB found the shooting to be "in policy", i.e., in keeping with the then-current shooting policy of the LAPD. The third member of the SRB issued a minority report, finding that the shooting was "in policy but fails to meet the Department standards." Both the United States attorney and the district attorney investigated the shooting from the standpoint of possible criminal prosecution of appellants. Both offices declined to prosecute.

A hearing was held on November 20, 1980, and judgment denying all relief requested by appellants on the belief that the Commission's actions did not constitute discipline, punitive action, or harm to appellants was entered on January 6, 1981. This timely appeal followed.

Statement of Facts

At all times in question, appellants were sworn employees of the City of Los Angeles Police Department, entitled to all of the protections afforded by the Los Angeles City Charter.

On January 3, 1979, Mrs. Eulia Love was shot to death by the appellant LAPD officers during an on-duty confrontation. In the aftermath of that tragic and highly publicized event, the Commission undertook a comprehensive inquiry into the facts surrounding the shooting. It conducted a series of public "hearings" at which citizens, particularly representatives of the black community, expressed extreme criticism and distrust of the Department's evaluations of incidents involving officers' use of deadly force and of its adjudications of allegations of police misconduct and improper tactics. *350

In addition to receiving such public comment, the Commission "completed an independent examination of the circumstances and reevaluated the Department's previous determination [that the officers' conduct was consistent with policy governing use of firearms] in light of additional factual information." In reaching its conclusion, the Commission scrutinized investigative reports prepared by the Department's specialized "Officer Involved Shooting" team (OIS), the district attorney and the internal "Shooting Review Board ('SRB')." The Report also discloses that the Commission considered other factors, such as specific time lapses, developed from departmental records, and accorded different weight and drew different inferences from reported accounts under consideration.

Ultimately, the Commission determined "that the actions taken by the officers violated the policies of the Los Angeles Police Department concerning the use of firearms and deadly force, and that the officers made serious errors in judgment, and in their choice of tactics, which contributed to the fatal shooting of Eulia Love." These findings were

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announced in part I of the Report, released to the public in October 1979.

In part I, the Commission also commented upon the prior decision of the chief of police to initiate no disciplinary action. Recognizing that the chief's decision, by charter, "constituted a final determination regarding the issue of discipline," that determination remained undisturbed. The Commission directed, however, that copies of part I be entered into the officers' personnel files ....]

Issue

Is the proposed entry of the Report of the Commission into the personnel files of appellant officers per se disciplinary or punitive in nature, for purposes of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) so that appellants were entitled to an administrative appeal under Government Code section 3304, subdivision (b)?

Discussion

Government Code section 3303 provides, in part, "For the purpose of this chapter, punitive action is defined as any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment."

Section 3304, subdivision (b) provides, "No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency *351 without providing the public safety officer with an opportunity for administrative appeal."

The Supreme Court in White v. County of Sacramento, supra., 31 Cal.3d 676, construed sections 3303 and 3304, subdivision (b) to provide for the right to an administrative appeal in the instance of a reassignment to a lower paying position, because such action is per se disciplinary in nature. The court stated, in part, "Section 3301 declares that the act's 'rights and protections' are afforded peace officers in order to assure the 'maintenance of stable employer-employee relations,' and thus to secure 'effective law enforcement ... services' for 'all people of the state.' It is evident that the more widely available the opportunity to appeal a decision resulting in disadvantage, harm, loss or hardship, the more "'meaningful [the] hedge against erroneous action".' (Skelly v. State Personnel Bd., supra., 15 Cal.3d 194, 210.) [¶] Erroneous action can only foster disharmony, adversely affect discipline and morale in the workplace, and, thus, ultimately impair employer- employee relations and the effectiveness of law enforcement services ...." (At p. 683.)

Our focus, then, must be on the impact, if any, placing the Report into their personnel files may have on appellants Hopson and O'Callaghan.

The Report states in part I: "The Department's investigation and evaluation of officer-involved shooting incidents, unlike those of the District Attorney and the United States Attorney, is not undertaken for the purpose of resolving issues relating to criminal prosecution of the officers. Rather the Department's task is to analyze the existing Department policies and apply them to the facts of each case so that it may properly evaluate the conduct of its officers and determine what administrative action, if any, is required.

The Report states in part IV, under the heading, "Discipline": "We believe that the final departmental record and public record must reflect the conclusion that the officers involved in the shooting of Eulia Love violated applicable Los Angeles Police Department policies and standards. The question of whether these officers should now be ordered by the Chief of Police to stand trial before a Board of Rights, which has the sole authority under our City Charter to impose significant punishment, is a separate matter which has troubled the Commission greatly.

"Prior to the Commission's study of the Love shooting, the Department conducted an investigation under the then existing rules and procedures. A Department Shooting Review Board reviewed the matter and the majority, again under the existing rules and procedures, found no violation of Department policies. Finally, the Chief of Police, who, under the Charter, has the legal responsibility for discipline considered the matter thoroughly and decided that no discipline *352 should be imposed. Under the then existing rules and procedures, the Chief's decision constituted a final determination regarding the issue of discipline. His final decision was communicated to the individual officers and to

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the public. The officers were entitled, under the then existing procedures, to rely on the Chief's final decision and to conclude that, since their case had been finally adjudicated by the Chief of Police, they could not again be placed in jeopardy.

"Based on our examination and review of the Love shooting, we are in disagreement with the decision reached by the majority of the Shooting Review Board. Certain of the facts which affect our conclusion were not before the Chief of Police when he adjudicated the disciplinary issue. However, while the Commission might well have reached a contrary conclusion to that reached by the Chief even under the facts presented to him, we believe that any attempt to impose discipline at this time would violate the rights to due process of law to which the two officers, like all other persons, are entitled.

"For the reasons set forth above, we are not directing that the Chief institute disciplinary proceedings. We are, however, directing that a copy of our findings be placed in the officers' personnel files. We would also note, although it is not a basis for our decision, that referral of this the [sic] matter, by the Chief, to a Board of Rights at this time would in our opinion be futile and would serve no useful purpose, since we are persuaded that the Board would not impose discipline upon the officers in view of the judgments regarding this case previously expressed by the Chief of Police and the Shooting Review Board."

(1)The trial judge concluded that the Report did not constitute a "disciplinary adjudication" and was not "punitive action" as defined in Government Code section 3303. We hold that the Report constitutes "punitive action" as set out in Government Code sections 3303 and 3304, subdivision (b), thereby affording the officers a right to administrative appeal.

In the record there was testimony from the chief of police that if the Report were placed in the personnel package of each officer, there would be ramifications for the career opportunities of the officers. [FN2] The source of the Report (the *353 board of police commissioners, the head of the police department), [FN3] its contents and its potential impact on the career opportunities of the two officers are all significant features in support of our conclusion. In addition, the Commission apparently received and considered "new" evidence which had not been considered by the chief of police when he decided whether or not to discipline the officers.

FN2 "Q. I would like to go to a different phase. Let us assume that not only did they find, as they did here, that the shooting was out of policy, let us assume that this is placed ultimately in the officer's personnel packages, Are you familiar with what effect this would have upon their employment, their future prospective employment, their ability to gain and seek transfers, et cetera?

"A. Well, the personnel package is made available to oral examination boards for any kind of promotion, whether that be a promotion within the organization through pay grade advancement or promotion, civil servant promotion, the package is available. [¶] That information being contained in the package, of course, would be detrimental to the officers, particularly the classification of that shooting being out of policy.

"Q. Other supervisors to whom, for instance, Hopson or O'Callaghan might wish to work for, would be extremely reluctant to take them on; would they not?

"A. Well, certainly that would be considered a mark against them in terms of their capabilities of handling various police situations.

"Q. Do you remember the Detweiler shooting?

"A. I do.

"Q. Do you remember an officer by the name of Jerry Bova?

"A. Yes, I do.

"Q. Do you remember after that shooting what the findings were?

"A. The finding was accidental as I recall.

"Q. And Jerry Bova, notwithstanding the finding that it was accidental, had a serious impediment to his future employment? By that, I mean transferring and promotions within the Los Angeles Police Department?

"A. Yes. There was so much notoriety connected with that case, it took him a great deal of time to, quote, live it down, end quote, and there was nothing wrong with the shooting, except that it was, indeed, accidental. "Q. And, of course, here the finding is ultimately out of policy?

"A. That is much more severe.

"Q. Let us say the man wants to seek a promotion. They will have access to this package at that time; will they not?

"A. That's correct. I should say that the only time that information is placed in a package today is when the officer has been disciplined. This is

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unique in that the officers have not been disciplined, and to place [sic] the package would be different from what normally is done when a disciplinary case is adjudicated.
"

. . . . .

"Q. By Mr. Franscell: In addition to that, once a man retires from this duty, should he wish to go to another law enforcement agency or seek some other type of job in a similar field of law enforcement, private investigator or whatever, they would have the right of access to his personal package?
"A. To any other governmental agency we do provide information concerning the past record of the employee.
"Q. If, in fact, he sought a job with another governmental agency and the shooting was declared to be out of policy and it was placed in this package, this could have a substantial effect?
"A. I would think so."

FN3 Los Angeles City Charter sections 70(b) and 78.

Respondents contend that because under the city charter disciplinary action can only be imposed by the chief of police (§ 80(a)(2) and § 202), there is no discipline expressed or implied by the act of including the report in the personnel file of appellants. We are not concerned simply with acts of discipline under the Los Angeles City Charter. Our focus is on whether such a written report is "punitive action" under the Public Safety Officers Procedural Bill of Rights Act. The inquiries are different and unrelated. In our view, placing a report of this type in a personnel file is punitive action under the Public Safety Officers Procedural Bill of Rights Act although it is not "discipline" under the Los Angeles City Charter. ***354**

Accordingly, placing the Report in the personnel file of each appellant cannot be done without affording each appellant an opportunity for administrative appeal under section 3304, subdivision (b). We believe that this result is consistent with the mandate of White v. County of Sacramento, supra., 31 Cal.3d 676, since placing this Report into the personnel files will result in disadvantage, harm, loss or hardship. (See 31 Cal.3d at p. 683.)

Disposition

The judgment is reversed.

Kingsley, Acting P. J., and McClosky, J., concurred. ***355**

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Hopson v. City of Los Angeles

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MICHAEL HOWELL, Plaintiff and Respondent,
v.
COUNTY OF SAN BERNARDINO et al., Defendants and Appellants.

Civ. No. 29777.

Court of Appeal, Fourth District, Division 2, California.

Nov 3, 1983.

SUMMARY

A member of a county sheriff's department who was reassigned from the civil division to a jail facility, allegedly for punitive purposes, and whose request for review of such reassignment was not timely filed, petitioned the trial court for a writ of mandate after the county civil service commission decided it could not excuse untimeliness on a showing of good cause and thus determined that it could not review the reassignment. The trial court issued a peremptory writ ordering the commission to conduct a hearing to determine whether good cause existed to entertain an untimely request for administrative review of the reassignment. (Superior Court of San Bernardino County, No. 214031, Thomas M. Haldorsen, Judge.)

The Court of Appeal reversed. The court held that the officer was not entitled to consideration of his untimely request for review on a showing of good cause, since there was no basis for finding a good cause exception to the time limit for filing appeals. There was no express good cause provision in the county personnel rule prescribing the time limit, no provision indicating a policy of flexibility, no established rule of liberal construction, and no fundamental vested right to continuation in a particular job assignment. Although Gov. Code, § 3304 (Public Safety Officers Procedural Bill of Rights Act) guarantees an opportunity for appeal of any punitive action, the court held that it does not require the same opportunity regardless of the discipline imposed; nor does it prescribe the time limits for administrative appeals. Rather, the Legislature left such matters to the entities employing the officers. (Opinion by Rickles, J., with McDaniel, J., concurring. Separate dissenting opinion by Morris, P. J.) *201

HEADNOTES

Classified to California Digest of Official Reports

(1) Law Enforcement Officers § 44--Sheriffs and Constables--Disciplinary Actions--Reassignment--Untimeliness of Request for Review--Good Cause Exception.

A member of a county sheriff's department who was reassigned from the civil division to a jail facility, allegedly for punitive purposes, and whose request for review of such reassignment was filed after expiration of the five-day time limit prescribed by the applicable county personnel rule, was not entitled to consideration of such untimely request for review on a showing of good cause, since there was no basis for finding a good cause exception to the time limit established by the county rule. There was no express good cause provision, no provision indicating a policy of flexibility, no established rule of liberal construction, and no fundamental vested right to continuation in a particular job assignment. Although Gov. Code, § 3304 (Public Safety Officers Procedural Bill of Rights Act) guarantees an opportunity for appeal of any punitive action, it does not requite the same opportunity regardless of the discipline imposed; nor does it prescribe the time limits for administrative appeals. Rather, the Legislature left such matters to the entities employing the officers.

[See Cal.Jur.3d, Law Enforcement Officers, § 33; Am.Jur.2d, Sheriffs, Police, and Constables, § 11 et seq.]

COUNSEL

Alan K. Marks, County Counsel, and Ronald D. Reitz, Deputy County Counsel, for Defendants and Appellants.

Silver & Kreisler and Stephen H. Silver for Plaintiff and Respondent.

RICKLES, J.

The County of San Bernardino and the Civil Service Commission of San Bernardino County, defendants in the court below, have appealed from a judgment granting a peremptory writ of mandate.

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The writ orders the commission to conduct a hearing to determine whether good cause exists to entertain an untimely request for administrative review of an employee reassignment. The issue on appeal is whether a good cause exception *202 should be read into an administrative rule prescribing a five-day limit for requesting review of an employee reassignment.

Facts

Plaintiff Michael Howell was employed by the county as a sheriff's sergeant. Effective August 27, 1982, plaintiff was reassigned and transferred from the civil division to the Glen Helen jail facility.

Through an employee organization, plaintiff asked the commission to review his reassignment. The request was mailed by plaintiff's attorneys on September 14, 1982, and received by the commission on the following day. On October 1, 1982, plaintiff's attorneys mailed a second letter to the commission, in which they alleged the existence of a good cause excuse for plaintiff's failure to meet a five-day time limit set forth in the personnel rules of the County of San Bernardino. Plaintiff requested the commission to hold a hearing on the merits of his appeal or to hold a separate hearing on the preliminary issue of good cause.

The commission met on October 21, 1982, and heard oral argument on the matter, after which it determined it could not review plaintiff's reassignment. The commission did not make a finding on the existence of good cause, but instead decided it could not excuse untimeliness on a showing of good cause.

Following this decision, plaintiff filed a timely petition for writ of mandate under Code of Civil Procedure section 1085, naming the commission and the county as parties defendant. An answer was filed on behalf of both defendants, a hearing was held, and the matter was taken under submission. The trial court ruled in favor of plaintiff, holding that the untimeliness of plaintiff's request could be excused by a showing of good cause, and accordingly that the commission had erred in failing to determine whether good cause existed.

I

In 1976, the Legislature enacted the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). One provision of the act guarantees to every public safety officer an opportunity for administrative appeal of any "punitive action." (Gov. Code, § 3304, subd. (b).) Defendants do not dispute plaintiff's status as a public safety officer within the meaning of this provision, thereby conceding his right to administrative review of any "punitive action." The term "punitive action" is defined as "any action which may lead to dismissal, demotion, suspension, reduction in salary, *203 written reprimand, or transfer for purposes of punishment." (Gov. Code, § 3303. See Baggett v. Gates (1982) 32 Cal.3d 128, 141 [185 Cal.Rptr. 232, 649 P.2d 874]; White v. County of Sacramento (1982) 31 Cal.3d 676, 679-684 [183 Cal.Rptr. 520, 646 P.2d 191].) The interpretation of these provisions is not in dispute here; plaintiff and defendants agree the right to have a transfer reviewed exists only where the transfer is "for purposes of punishment."

In his first letter to the commission, plaintiff alleged that his reassignment "was exclusively for disciplinary purposes." The county has denied this, alleging in its answer to the petition for writ of mandate that "no punitive action was taken against" plaintiff. No finding has been made on this disputed factual issue.

The County of San Bernardino has enacted personnel rules, the pertinent provision of which reads: "Reassignments are not subject to review or appeal except when used exclusively for disciplinary purposes. An employee alleging that a reassignment was exclusively for disciplinary purposes may appeal the reassignment action to the Civil Service Commission. The employee must file any such appeal request in writing with the Civil Service Commission within five (5) working days of notice of the reassignment." (Rule X, § 3, subd. (b), San Bernardino County personnel rules.)

Plaintiff has conceded he had notice of his reassignment by August 27, 1982, at the latest, and his request for review accordingly was at least two weeks late. According to plaintiff, the fault lies with his employee organization. He says he asked the employee organization to act on his behalf in challenging this reassignment, but his request was misplaced by the employee organization and not

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located until September 12, 1982, when it was forwarded to the attorneys for action. Plaintiff offered to produce evidence regarding the exact circumstances resulting in the late filing, but was never given an opportunity to do so. Instead, the commission ruled it had no authority to waive the five- day time limit of rule X upon a showing of good cause.

In support of his argument in favor of an implied good cause exception to the mandatory five-day time limit, plaintiff has relied primarily on Gonzales v. State Personnel Bd. (1977) 76 Cal.App.3d 364 [142 Cal.Rptr. 787]. In its notice of ruling, the trial court also relied extensively on Gonzales. To understand Gonzales, however, it is necessary to discuss two earlier cases. Gibson v. Unemployment Ins. Appeals Bd. (1973) 9 Cal.3d 494 [108 Cal.Rptr. 1, 509 P.2d 945], construed section 1328 of the Unemployment *204 Insurance Code, which established a 10-day limit for administrative appeal of a decision denying unemployment benefits, but also expressly provided that the 10-day period could be "extended for good cause." The Unemployment Insurance Appeals Board had adopted an interpretation of the provision under which errors of applicants or their attorneys, no matter how reasonable or excusable, could not constitute good cause. Our Supreme Court found this interpretation erroneous, basing its decision primarily on an analysis of the nature and objectives of the unemployment insurance program. The court concluded: "We find that the language and purpose of the Unemployment Insurance Code, and the judicial construction of its provisions, present a consistent picture-a remedial statute, liberally construed to carry out the state policy of aiding the unemployed worker, administered informally without resort to technicalities that might deprive the unsophisticated applicant of his right to benefits. In the face of this analysis we perceive no justification for a construction of section 1328 which limits 'good cause' for relief to exclude cases in which delay was attributable to excusable error of petitioner's counsel." (Gibson v. Unemployment Ins. Appeals Bd., supra., at pp. 500-501.)

Gibson was followed by Faulkner v. Public Employees' Retirement System (1975) 47 Cal.App.3d 731 [121 Cal.Rptr. 190]. In that case, a police officer requested administrative review of a decision denying his application for disability retirement benefits. An administrative regulation (Cal. Admin. Code, tit. 2, § 555.1) established a 30-day period within which to file a written notice of appeal. The police officer's notice of appeal was filed four days late, but he presented evidence the delay was caused by the excusable neglect of his attorney. The appeals board refused to hear the appeal and the police officer sought a writ of mandate. The trial court denied the writ but its decision was reversed on appeal.

The Faulkner court relied heavily on Gibson. Like the statutory scheme examined in Gibson, the unemployment insurance provisions were subject to a rule of liberal construction, the court observed, and its objectives were inconsistent with strict enforcement of procedural rules to deny an applicant's right of appeal. Although Gibson, unlike Faulkner, involved a statute with an express "good cause" provision, the court in Faulkner found a regulation which it interpreted as the functional equivalent of a good cause provision. This regulation gave the executive officer discretionary power to refer a matter for hearing at any time, which the Faulkner court found to be inconsistent with "an iron-clad statute of limitations." (Faulkner v. Public Employees' Retirement System, supra., 47 Cal.App.3d 731, 736.) The court also cited certain provisions of the Tort Claims Act (i.e., Gov. Code, §§ 911.2, 911.4, 946.6) as evidence of a general "legislative attitude of liberality toward the rights of citizens to file late appeals." (Ibid.) The court *205 concluded: "... the absence in the state retirement system regulations of a specific provision enabling an applicant for retirement benefits to file a late appeal, for good cause shown, does not preclude the filing of such an appeal." (Ibid.)

This brings us to Gonzales, in which a Youth Authority counselor sought an administrative appeal of his dismissal. Under Government Code section 19575, he had 20 days to file his appeal, but it was not filed until the 26th day. The superior court found the failure to timely file was the result of excusable neglect and issued a writ of mandate directing the California State Personnel Board to hear the appeal. The reviewing court affirmed, stating:

"Although it is true that no statute or case law has yet decided, as was the case in Faulkner, that the statutory scheme should be interpreted liberally in favor of an employee, we deal here, as in Faulkner, with a fundamental and vested right. We understand

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the concern of an employer to know whether or not an employee has been lawfully terminated, so that proceedings to replace that employee may be instituted. Where the delay in filing is long delayed [sic] and the employing unit can show that it has, in fact, replaced the employee, a reason for denying equitable relief may exist. However, in the case at bench, the delay in filing the notice of appeal was only six days and the employer made no attempt to show that a replacement had been hired within that brief period. We conclude that a reasonable reconciliation between the rights of the employee and the employer requires that, where good cause is shown for a brief delay and no prejudice to the employer is shown, relief from the default should be given." (Gonzales v. State Personnel Bd., supra., 76 Cal.App.3d 364, 367.)

Gibson, Faulkner, and Gonzales are all based on statutory construction. In Gibson, the issue was the meaning of an express good cause provision. In Faulkner and Gonzales, there were no express good cause provisions but the existence of a good cause exception was held to be implicit in the statutory scheme. In reaching this conclusion, Faulkner relied on a provision which indicated a policy of flexibility and on an established judicial rule of liberal construction, whereas Gonzales relied primarily on the existence of a fundamental vested right.

(1)In the present case, there is no express good cause provision, no provisions indicating a policy of flexibility, no established rule of liberal construction, and no fundamental vested right. Although a permanent employee's right to continued employment is generally regarded as fundamental and vested, an employee enjoys no similar right to continuation in a particular job assignment. (Cf. Thompson v. Modesto City High School Dist. (1977) 19 Cal.3d 620, 623-626 [139 Cal.Rptr. 603, 566 P.2d 237].) *206 In the absence of these factors relied upon in previous cases, we are aware of no principle of statutory construction which would permit us to find an implied good cause exception to the time limit established by rule X.

Reaching a contrary conclusion, the trial court reasoned: "Respondents argue that Gonzales, supra., involved a fundamental vested right and that such a right is not jeopardized here. Assuming that it is not, Government Code sections 3303 and 3304 provide for administrative appeals in all disciplinary actions including dismissals and transfers of the type alleged to have occurred here. The Legislature has recognized the same rights in all such cases. It follows that the same rights to relief from default should be available regardless of the nature of the alleged discipline imposed." (Original italics.)

We respectfully disagree with this reasoning. Section 3304 of the Government Code guarantees only "an opportunity for administrative appeal." It does not require the same opportunity regardless of the kind of disciplinary action imposed, nor does it prescribe the time limits within which application for administrative appeal must be made. Rather, the Legislature has left all such matters to be determined by the entities employing the public safety officers. The County of San Bernardino, through its personnel rules, has established a time limit which applies only to transfers and not to dismissals. It is this rule, and this rule only, which must be construed. Because a transfer, unlike a dismissal, does not involve a fundamental vested right, Gonzales is distinguishable and does not provide support for the trial court's ruling. We find no grounds for departing from the plain language of rule X. As the commission correctly concluded, rule X does not permit consideration of untimely requests for review on a showing of good cause.

The judgment is reversed and the cause is remanded with directions to deny the petition.

McDaniel, J., concurred.

MORRIS, P. J.

I rspectfully dissent.

I would affirm the judgment granting the peremptory writ of mandate for the reasons stated by the trial court in its notice of ruling.

The majority interprets Gonzales too narrowly. The rationale of that decision is not limited to cases involving a vested right. Although the court noted that the case involved a fundamental vested right, the conclusion applies with equal force to other significant rights of the employee. The court *207 concluded that "a reasonable reconciliation between the rights of the employee and the employer requires that, where good cause is shown for a brief delay and no prejudice to the employer is shown, relief

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from default should be given." (Gonzales v. State Personnel Bd. (1976) 76 Cal.App.3d 364 at p. 367 [142 Cal.Rptr. 787].)

Although the right of an employee to appeal from "a transfer for purposes of punishment" may not be as fundamental as the right to appeal from a dismissal, it is also true that the possibility of prejudice to the employer as a result of the delay is likely to be less.

I agree with the trial court that in providing for administrative investigations, interrogations and appeals, Government Code sections 3303 and 3304 make no distinction between the various kinds of disciplinary actions. The trial court's reasoning is sound, where the Legislature has recognized the same rights to an administrative hearing "[i]t follows that the same rights to relief from default should be available regardless of the nature of the alleged discipline imposed."

Respondent's petition for a hearing by the Supreme Court was dneied January 6, 1984. Bird, C. J., was of the opinion that the petition should be granted. ***208**

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Howell v. San Bernardino County

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JAMES LUBEY et al., Plaintiffs and Respondents,
v.
CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Appellants.

Civ. No. 43013.

Court of Appeal, First District, Division 1, California.

November 2, 1979.

SUMMARY

In an action by two terminated probationary police officers against a city and its police chief, the trial court, in effect, ordered that the police chief set aside his order terminating the officers and that they be reinstated with back pay and benefits. A citizen had made unsworn charges of misconduct against each of the officers. They were interrogated and thereafter furnished with an unverified complaint, or statement of the charges. A memorandum reciting those and other charges not made known to the officers was forwarded to the police chief or police commission with a recommendation that the officers be tried for misconduct. The contents of the memorandum were never made known to the officers. About two and a half months later, on a few hours' notice, they were summoned to the police chief's office and told that he intended to dismiss them and that the purpose of the meeting was to provide them with an opportunity to address the charges and give reasons why they should not be terminated. At the meeting's close they were handed previously signed notices of termination, effective that day, "for misconduct on the charges made." The officers generally denied the charges of which they had been informed. The trial court found that, by virtue of the charges and consequent job terminations, it was difficult or impossible for the officers to be employed as such, anywhere. (Superior Court of the City and County of San Francisco, No. 715434, Byron Arnold, Judge. [FN*])

The Court of Appeal modified the judgment of trial court so as to remove any inconsistency between it and the opinion and, as so modified, affirmed the judgment. Though a charter provision permitted the police chief to terminate a probationary police officer's employment simply by giving the officer, and the civil service commission, written notice of *341 such termination specifying the reason therefor, the court held that another section stating a procedure for disciplining "members" of the city's police department for breach of duty or misconduct, which contained adequate procedural due process requirements, and permitted sanctions of reprimand, fine, suspension, or dismissal, was applicable where either a probationary or permanent police officer of the city was disciplined on charges of misconduct and subject to dismissal or other punishment provided by the section. The court held that, since the officers' reputations were "stigmatized," their chances of future employment in their chosen field, and elsewhere, "seriously impaired," and their standing in the community "seriously damaged," the case fell within an exception to the rule that a probationary employee ordinarily may be dismissed without a hearing or judicially cognizable good cause. The court held that the officers were entitled to reinstatement as probationary officers and to payment of damages in the amount of lost benefits and net loss of salary from the date of the improper terminations to the date of reinstatement. It further held, however, that the police chief was not precluded from otherwise properly inquiring into their present qualifications or ability to perform as police officers or from ordering their termination if it were properly determined that there were grounds therefor under the section relating to probationary officers. The court also held that the chief or the officers, or either of them, could within a reasonable time elect to bring about an appropriate resolution of the misconduct charges according to the requirements of the section on discipline.

FN* Retired judge of the superior court sitting under assignment by the Chairperson of the Judicial Council.(Opinion by Elkington, J., with Racanelli, P. J., and Newsom, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Municipalities § 79--Officers, Agents and Employees-- Removal and Suspension--

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Procedure--Due Process--Termination of Probationary Police Officers for Misconduct.
A city police chief's termination of two probationary police officers' employment was invalid under the due process clause of U.S. Const., 14th Amend., and under a charter provision stating a procedure for disciplining "members" of the city's police department for breach of duty or misconduct, which contained adequate procedural due process requirements, and permitted sanctions of reprimand, fine, suspension, ***342** or dismissal, where the employment was terminated for misconduct without even a pretense of due process, or notice and opportunity for hearing appropriate to the nature of the case, or opportunity to refute the charges or to clear their names, and where the officers' reputations were thereby stigmatized, their chances of future employment in their chosen field, and elsewhere, seriously impaired, and their standing in the community seriously damaged. Though a charter provision permitted the police chief to terminate a probationary officer's employment simply by giving him, and the civil service commission, written notice of such termination specifying the reasons therefor, the section relating to discipline is applicable where either a probationary or permanent police officer of the city is disciplined on charges of misconduct and subject to dismissal or other punishment provided by that section. Compliance with the section was also required by the memorandum of understanding between the police officer employees organization of the city in all cases involving discipline of sworn personnel.

[See Cal.Jur.3d, Municipalities, § 226; Am.Jur.2d, Municipal Corporations, Counties and Other Political Subdivisions, § 314.]

(2) Civil Service § 7--Discharge, Demotion, Suspension and Dismissal-- Probationary Employees--Due Process.
Ordinarily, a probationary civil service employee may be dismissed without a hearing or judicially cognizable good cause. Such a dismissal does not deprive the employee of a vested, or property, right. A public agency may constitutionally employ persons subject to removal at its pleasure; a broad discretion reposes in governmental agencies to determine which probationary employees they will retain. An exception exists, however, where there is a deprival of the liberty guaranteed all persons by the due process clause of U.S. Const., 14th Amend. The exception is applied where the probationary employee's job termination, or dismissal, is based on charges of misconduct which stigmatize his reputation, or seriously impair his opportunity to earn a living, or which might seriously damage his standing or associations in his community. Where there is such a deprival of a "liberty interest," due process requires giving the employee an opportunity to refute the charge and to clear his name. He must be afforded notice and opportunity for hearing appropriate to the nature of the case, before the termination becomes effective. ***343**

(3) Municipalities § 11--Charters--Contents and Interpretation-- Construction as a Whole.
Statutes and municipal charter provisions should be read and construed as a whole in harmony with other statutes relating to the same general subject.

(4) Municipalities § 11--Charters--Contents and Interpretation-- Construction Consistent With Constitutional Requirements.
Where the terms of a statute or a municipal charter provision are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution. The Constitution and the statute are to be read together.

COUNSEL

George Agnost, City Attorney, Rick Murphy and Michael C. Killelea, Deputy City Attorneys, and Thomas C. H. Mills for Defendants and Appellants.

Cotchett, Hutchinson & Dyer, Cotchett, Dyer & Illston, Joseph W. Cotchett, Girard Fisher and Charles A. Dyer for Plaintiffs and Respondents.

ELKINGTON, J.

Respondents James Lubey and George Hood were probationary members of the uniformed ranks of the Police Department of the City and County of San Francisco. A citizen made unsworn charges of misconduct against each of them. The matter was referred to the police department's internal affairs bureau and an investigation was started. The officers were interrogated and thereafter furnished with an unverified complaint, or statement of the charges. A memorandum reciting those and other charges not

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made known to the officers, was then forwarded by the internal affairs bureau to the police chief or police commission, with a recommendation that the officers be tried for misconduct. The contents of the memorandum were never made known to the officers. *344

About two and a half months after the investigation's start, upon a few hours' notice, the probationary officers were summoned to the police chief's office. They were told "that he intended to dismiss [them] and that the purpose of the meeting was to provide [them with] the opportunity to address the charges against them to give reasons why they should not be terminated." At the meeting's close the officers were handed written notices of termination of employment, effective that day, "for misconduct on the charges made ..." (Italics added.) The termination notices had been prepared and signed prior to the meeting.

The complaining citizen was not present at the meeting, and the officers were not shown the evidence against them. As later found by the superior court, they were not permitted to call and examine witnesses, and they did not have the chance to perform an independent investigation or to present evidence. Nor had they been given prior notice of all of the charges or of the purpose of the meeting. As to such of the charges of which they had been informed, the officers have generally denied them.

Two months after termination of their employment the officers were advised by the city's civil service commission that they were entitled to "no future employment with the City and County of San Francisco." And as found by the superior court, by virtue of the charges and consequent job terminations, "it is difficult or impossible for them to be employed as police officers anywhere."

Thereafter by the instant action against the city, its police chief and others (hereafter sometimes collectively, the City), the officers prayed that they be returned to their employment, that the police chief be ordered "to set aside his decision and do all things necessary to correct the circumstances complained of herein" and that "all back wages and benefits be awarded" them.

Following a trial the superior court's judgment effectively granted, and implemented, the relief sought.

The City has appealed from the judgment.

(1a)We choose first to consider the appellate issue described by the City as: "Whether the provisions of San Francisco Charter Section 8.340 specifically dealing with the discipline of probationary employees *345 of the City and County of San Francisco prevails over Section 8.343 dealing with the termination of police officers in general." (Italics added.)

Charter section 8.340 provides the procedure for "termination" of a probationary police officer's employment. It permits the City's police chief to terminate such employment simply by giving the officer, and the civil service commission, written notice of such termination specifying the reasons therefor.

On the other hand, charter section 8.343 states a procedure for disciplining "members" of the City's police department for breach of duty or "misconduct." It sets forth adequate procedural due process requirements, and the permitted sanctions are reprimand, fine, suspension, or dismissal.

It will be seen that the City has mischaracterized the instant issue. Section 8.340 deals with the "termination," not "discipline," of probationary employees. Section 8.343 is concerned with the "discipline" and "dismissal," not "termination," of police officers generally. Here, as noted, the probationary police officers were expressly "terminated" for "misconduct."

A review of the constitutional principles of due process, claimed by the officers to be applicable in the circumstances of their case, becomes appropriate.

(2)It is settled law that a probationary (or nontenured) civil service employee, at least ordinarily, may be dismissed without a hearing or judicially cognizable good cause. (Perry v. Sindermann, 408 U.S. 593, 596 [33 L.Ed.2d 570, 576, 92 S.Ct. 2694]; Board of Regents v. Roth, 408 U.S. 564, 578 [33 L.Ed.2d 548, 561, 92 S.Ct. 2701]; Bogacki v. Board of Supervisors, 5 Cal.3d 771, 782 [97 Cal.Rptr.657, 489 P. 657, 489 P.2d 537] [cert. den., 405 U.S. 1030 (31 L.Ed.2d 488,

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92 S.Ct. 1301)]; McNeill v. Butz (4th Cir. 1973) 480 F.2d 314, 319; Kestler v. City of Los Angeles, 81 Cal.App.3d 62, 65 [146 Cal.Rptr. 61]; Healdsburg Police Officers Assn. v. City of Healdsburg, 57 Cal.App.3d 444, 450 [129 Cal.Rptr. 216]; Daniel v. Porter (W.D.N.C. 1975) 391 F.Supp. 1006.) Such a dismissal does not deprive the employee of a vested, or property, right. (Codd v. Velger, 429 U.S. 624, 628 [51 L.Ed.2d 92, 97, 97 S.Ct. 882]; Board of Regents v. Roth, supra., pp. 578-579 [33 L.Ed.2d pp. 561-562]; Bogacki v. Board of Supervisors, supra., pp. 782-783; McNeill v. Butz, supra., p. 319.) A public agency *346 may constitutionally "employ persons subject to removal at its pleasure" (Bogacki v. Board of Supervisors, supra., p. 782), for "'[u]nquestionably, a broad discretion reposes in governmental agencies to determine which [probationary] employees they will retain"' (id., p. 783).

But there is an important exception to this rule, which is founded upon the Fourteenth Amendment. It arises where there is a deprival of the "liberty" guaranteed all persons by that amendment's due process clause. The exception will be applied where the probationary employee's job termination, or dismissal, is based on charges of misconduct which "stigmatize" his reputation, or "seriously impair" his opportunity to earn a living (Paul v. Davis, 424 U.S. 693, 702 [47 L.Ed.2d 405, 414, 96 S.Ct. 1155]), or which "might seriously damage his standing or associations in his community" (Board of Regents v. Roth, supra., 408 U.S. 564, 573 [33 L.Ed.2d 548, 558]; and to the same effect see McNeill v. Butz, supra., 408 F.2d 314, 319; Daniel v. Porter, supra., 391 F.Supp. 1006, 1010). [FN1]

FN1 Another exception to the rule lies where the public employer's termination of the employment "was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, ..." (Bishop v. Wood, 426 U.S. 341, 350 [48 L.Ed.2d 684, 693, 96 S.Ct. 2074]; and see Perry v. Sindermann, supra., 408 U.S. 593, 596- 597 [33 L.Ed.2d 570, 576-577]; Bogacki v. Board of Supervisors, supra., 5 Cal.3d 771, 778-779; Healdsburg Police Officers Assn. v. City of Healdsburg, supra., 57 Cal.App.3d 444, 450.) Such an issue is absent from the case before us.

Where there is such a deprival of a "liberty interest" the employee's "remedy mandated by the Due Process Clause of the Fourteenth Amendment is 'an opportunity to refute the charge' [and] 'to clear his name."' (Codd v. Velger, supra., 429 U.S. 624, 627 [51 L.Ed.2d 92, 96].) He must be afforded ""'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective.""' (Board of Regents v. Roth, supra., 408 U.S. 564, 570, fn. 7 [33 L.Ed.2d 548, 556].) [FN2]

FN2 Where the probationary employee at no time makes denial of the charges of misconduct, his contention of deprival of due process will be rejected. (See Codd v. Velger, supra., 429 U.S. 624, 627-629 [51 L.Ed.2d 92, 96-98]; Kestler v. City of Los Angeles, supra., 81 Cal.App.3d 62, 66.) '(Here, as noted above, the charges were denied by the officers.) And ordinarily, the "'same conclusion applies to the discharge of a [probationary or otherwise nontenured] public employee ... when there is no public disclosure of the reasons for the discharge."' (Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 84 [55 L.Ed.2d 124, 131, 98 S.Ct. 948].)

(1b)Here, as noted, charges of misconduct were levied against the two probationary police officers. Without even pretense of due process, or "notice and opportunity for hearing appropriate to the nature of the *347 case," or opportunity "to refute the charges" or "to clear their names," the officers' employment was terminated "for misconduct on the charges made ..." It must fairly be said that their reputations were thereby "stigmatized," their chances of future employment in their chosen field, and elsewhere, "seriously impaired," and their standing in the community "seriously damaged."

We are unpersuaded by the City's arguments that the police personnel files were confidential, that Officers Lubey and Hood have by their action now brought upon themselves the stigmatizing notoriety of which they complain, and that despite the civil service commission's letter denying them "future employment" by the City, they are as a matter of law permitted to compete for such employment. It is unrealistic to assume that a citizen's charges of misconduct against police officers, investigated by the police department, found true by the police chief, and resulting in termination the reasons for which had been communicated to the civil service commission, have nevertheless somehow retained their confidentiality. And we must also realistically assume that in the officers' future applications for employment, inquiry will be made of their prior job

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experience, and then into the reasons for their termination as policemen.

We conclude therefore that, however described, the "termination" or "dismissal" of Probationary Officers Lubey and Hood did not comport with Fourteenth Amendment requirements.

We are brought more closely to the instant issue, i.e., whether charter section 8.340, or charter section 8.343, was apposite to the proceedings leading to the probationary officers' separation from the police department.

Manifestly, an ambiguity appears.

(3)Statutes and charter provisions such as those before us should be read and construed as a whole in harmony with other statutes relating to the same general subject. (Associated Home Builders etc., Inc. v. City of Livermore, 18 Cal.3d 582, 596 [135 Cal.Rptr. 41, 557 P.2d 473, 92 A.L.R.3d 1038]; Select Base Materials v. Board of Equal., 51 Cal.2d 640, 645 [335 P.2d 672]; In re Marquez, 3 Cal.2d 625, 628 [45 P.2d 342].)

(4)And where the terms of a statute (or charter provision) "'are by fair and reasonable interpretation capable of a meaning consistent with ***348** the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution."' (San Francisco Unified School Dist. v. Johnson, 3 Cal.3d 937, 948 [92 Cal.Rptr. 309, 479 P.2d 669] [cert. den., 401 U.S. 1012 (28 L.Ed.2d 549, 91 S.Ct. 1266)]; County of Los Angeles v. Legg, 5 Cal.2d 349, 353 [55 P.2d 206]; see also Baldwin v. City of San Diego, 195 Cal.App.2d 236, 240-241 [15 Cal.Rptr. 576].) "'The Constitution and the statute are to be read together, ..."' (County of Madera v. Gendron, 59 Cal.2d 798, 801 [31 Cal.Rptr. 302, 382 P.2d 342, 6 A.L.R.3d 555].)

(1c)Applying the foregoing criteria, we find an intent and purpose that charter section 8.343, and not charter section 8.340, applies in cases where either a probationary or permanent police officer of the City is disciplined on charges of misconduct, and subject to dismissal or other punishment provided by that section.

It follows that the action of the City's police chief dismissing Probationary Officers Lubey and Hood "for misconduct on the charges made" without due process as provided by charter section 8.343 was in violation of the City's charter, and the Fourteenth Amendment. [FN3] It will accordingly be set aside.

FN3 We find the due process requirements of charter section 8.343 to be substantially in accord with federal and state constitutional demands.

The probationary officers have also contended that their termination was contrary to a "Memorandum of Understanding" entered into by the San Francisco Police Officers Association, their "recognized employee organization," and certain of the City's officials, pursuant to the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.).

But we observe that the subject memorandum of understanding provides: "The disciplinary procedure provided for in Section 8.343 of the San Francisco Charter shall be the exclusive procedure utilized ... for action taken by the [Police] Department against sworn personnel of the Department who are guilty of an offense, or violate the rules and regulations of the Department." (Italics added.) Compliance with section 8.343's due process procedures thus not only satisfies both state and federal constitutional due process obligations owed the subject probationary police officers, but also the requirements of the memorandum of understanding. We accordingly need not consider the City's further argument urging the invalidity of that agreement.

Our remaining problem concerns the final disposition of the probationary police officers' action. We are aided by Board of Regents v. Roth, supra., 408 U.S. 564, 570, footnote 7 [33 L.Ed.2d 548, 556], by ***349** the recent decision of Ofsevit v. Trustees of Cal. State University & Colleges, 21 Cal.3d 763, 775-778 [148 Cal.Rptr. 1, 582 P.2d 88], and by the cases there relied upon, i.e., NLRB v. Rutter-Rex Mfg. Co., 396 U.S. 258, 262-266 [24 L.Ed.2d 405, 410-412, 90 S.Ct. 417]; Stolberg v. Members of Bd. of Tr. for State Col. of Conn. (2d Cir. 1973) 474 F.2d 485, 488-491; Johnson v. Butler (W.D. Va. 1977) 433 F.Supp. 531, 537. Although of differing factual contexts, we find this authority to be reasonably applicable here.

We declare that Probationary Officers Lubey and Hood were entitled to the due process protection of

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the City's charter section 8.343 before their unlawful termination. (408 U.S., p. 570, fn. 7 [33 L.Ed.2d p. 556].) Upon the filing of our remittitur they will be entitled to reinstatement as probationary police officers, and "to payment of damages in the amount of lost benefits and net loss of salary from the date of the improper [terminations], to the date of [their] reinstatement." (21 Cal.3d, p. 775.) The "net loss of salary" will cover the lost salary, "less whatever sums were earned ... during that period ..." (433 F.Supp., p. 537; and see 396 U.S., p. 263 [24 L.Ed.2d, p. 410], and 474 F.2d, p. 488.) The probationary officers' reinstatement will be as of the date of their termination, and subject to the remaining probationary periods as then existed. Their right of reinstatement in no way precludes the City's police chief from otherwise properly inquiring into their present qualifications or ability to perform as police officers, or from ordering their termination if it is properly determined that there are grounds therefor under charter section 8.340. (21 Cal.3d, p. 776, fn. 13.) In making such determination, if any, the police chief will not consider the proceedings leading to the officers' earlier termination or the related "findings." If the officers are not so terminated according to section 8.340 the police chief, and in any event the officers or either of them, may within a reasonable time elect to bring about an appropriate resolution of the subject misconduct charges according to the requirements of section 8.343.

The judgment of the superior court will be modified so as to remove any inconsistency with what we have herein said and held; as so modified, the judgment is affirmed. Respondents will recover their costs of appeal.

Racanelli, P. J., and Newsom, J., concurred.

Appellants' petition for a hearing by the Supreme Court was denied December 27, 1979. Manuel, J., was of the opinion that the petition should be granted. ***350**

Cal.App.1 Dist., 1979.

Lubey v. City and County of San Francisco

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WAYNE McMANIGAL, Plaintiff and Appellant,
v.
CITY OF SEAL BEACH, Defendant and Respondent.

Civ. No. 30559.

Court of Appeal, Fourth District, Division 3, California.

Mar 27, 1985.

SUMMARY

A city police officer who was transferred from motorcycle officer to patrol officer and thereby lost an extra 5 percent "skill" pay petitioned the trial court for a writ of mandate, contending he was entitled to an administrative appeal of the transfer. The trial court denied the writ, concluding that the transfer was not "punitive" within the meaning of a provision in the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, §§ 3300-3311) requiring an administrative appeal in case of a punitive action (Gov. Code, § 3304, subd. (b)). (Superior Court of Orange County, No. 387175, Phillip A. Petty, Judge.)

The Court of Appeal reversed and remanded, holding that the transfer was punitive because it resulted in the officer's being placed in a lower paying position, and because it was triggered by his supervisor's unfavorable evaluation of his performance. (Opinion by Sonenshine, J., with Trotter, P. J., and Wallin, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Law Enforcement Officers § 12--Police--Disciplinary Proceedings-- Appeal--Public Safety Officers Procedural Bill of Rights Act--Punitive Action by Public Agency.
The provisions of the State Civil Service Act strongly support the conclusion that the Legislature intended, in the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, §§ 3300-3311), to provide the right of administrative appeal to a peace officer against whom disciplinary action is taken, and that the Legislature viewed dismissals, demotions, suspensions, reductions in salary, and written reprimands, all of which are part of the definition of "punitive action" in § 3303, to be per se disciplinary in nature. A transfer, however, is "disciplinary" in nature only if it is ***976** imposed for purposes of punishment. Accordingly, a decision to reassign a peace officer to a lower paying position is per se disciplinary, or punitive in nature, and triggers the provision in § 3304, subd. (b) that a public agency shall not undertake a punitive action against a public safety officer without affording him an opportunity for an administrative appeal.

[See Cal.Jur.3d, Law Enforcement Officers, § 33.]

(2a, 2b) Law Enforcement Officers § 11--Police--Disciplinary Proceedings--Application of Public Safety Officers Procedural Bill of Rights Act.
The Public Safety Officers Procedural Bill of Rights Act (Gov. Code, §§ 3300- 3311) applies to California charter cities. In general, matters of statewide concern are binding on charter cities and counties.

(3) Law Enforcement Officers § 12--Police--Disciplinary Proceedings-- Appeal--Public Safety Officers Procedural Bill of Rights Act--Right to Administrative Appeal--Transfer and Loss of "Skill Pay."
The transfer of a city police officer from a motorcycle to patrol car was "punitive" within the meaning of a provision in the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, §§ 3300-3311) authorizing administrative appeal of punitive actions (Gov. Code, § 3304, subd. (b)), though the officer retained the same rank, where he lost "skill" pay as a result of the transfer and thus was placed in a lower paying position, and where he was transferred because his supervisor had evaluated his performance as being deficient.

(4) Courts § 36--Prospective and Retroactive Decisions--Judicial Discretion--Factors Considered.
In general, judicial decisions apply retroactively. To determine whether a decision should be given retroactive effect, the court first undertakes a threshold inquiry: Does the decision establish a new rule of law? If it does, the new rule may or may not be retroactive, but if it does not, there is no material change in the law and no question of retroactivity arises. With respect to opinions interpreting statutes,

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whenever a decision undertakes to vindicate the original meaning of an enactment, putting into effect the policy intended from its inception, retroactive application is essential to accomplish that aim. If in addition the decision represents the first authoritative construction of the enactment, no history of extended and justified reliances upon a contrary interpretation will arise to argue against retroactivity.

[See Am.Jur.2d, Courts, § 233.] *977

(5) Appellate Review § 159--Determination and Disposition of Cause--Scope and Extent of Relief--Remand.

It is general appellate practice to remand causes for further proceedings without deciding the merits if justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made on essential points.

COUNSEL

Silver & Kreisler, Silver, Kreisler, Goldwasser & Shaeffer, Stephen H. Silver, William J. Hadden and Susan Silver for Plaintiff and Appellant.

Richards, Watson, Dreyfuss & Gershon, Gregory W. Stepanicich, City Attorney, Teresa R. Tracy, Ronald F. Garrity and Stacy T. Picascia for Defendant and Respondent.

SONENSHINE, J.

Appellant asks us to consider whether he was entitled to an administrative appeal after he was transferred from motorcycle to patrol officer with a reduction in pay. We conclude he was.

Appellant Wayne McManigal is a police officer for the city of Seal Beach. In June 1976 his duties changed from patrol officer to motorcycle officer and he received an additional 5 percent "skill" pay.

From the time of this assignment to the end of 1978, McManigal's supervisor generally gave him satisfactory evaluations. However, for the period of January 1, 1979 through June 30, 1979, McManigal was rated as "needing improvement." The written evaluation criticized the quantity of work performed, noting McManigal was below average in "statistics" [FN1] for the first half of 1979. It also noted McManigal loved his work but sometimes "bent the rules," giving him more time to ride his motorcycle. Finally, the evaluations said his attitude and judgment were slipping due to "tunnel vision" which led him to desire only to ride his motorcycle. McManigal's supervisor said if his attitude did not change, a transfer would be recommended. *978

FN1 This is presumably a reference to the number of citations issued and arrests made.

On September 11, 1979, McManigal's supervisor sent a memorandum to the division commander reiterating the perceived deterioration of McManigal's "aptitude for a motorcycle assignment." It recommended McManigal's reassignment to a patrol car at the earliest convenient date. The supervisor and division commander met and agreed McManigal would be transferred. A notice of transfer dated September 19, 1979, issued and on October 1, 1979, McManigal was reassigned to a patrol car losing the 5 percent "skill" pay he received as a motorcycle officer. McManigal met with his supervisor and the division commander requesting they change their minds, but the transfer order remained in effect.

In May 1981 McManigal contacted an attorney. On July 23, 1981, McManigal and his attorney met with the chief of police [FN2] and a representative of the city attorney but no resolution was reached.

FN2 The aforementioned division commander who had transferred McManigal had become the chief of police.

McManigal's counsel sent letters requesting a written statement of reasons for the transfer and review of the action taken. The Civil Service Board denied a hearing because "the matter did not involve disciplinary action [and thus] it did not fall under the jurisdiction of the Civil Service Board ...." On September 10, 1982, following two California Supreme Court opinions we discuss in detail post, McManigal's attorney again requested a statement of reasons for the transfer and a full hearing before the Civil Service Board. These requests were denied.

McManigal petitioned the superior court for a writ of mandate contending, among other things, he was entitled to an administrative appeal of the transfer.

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The trial court denied the writ, concluding the transfer was not disciplinary or punitive in nature and therefore no administrative appeal was required by the Public Safety Officers Procedural Bill of Rights Act. (Gov. Code, §§ 3300-3311.) [FN3]

FN3 All statutory references are to the Government Code unless otherwise specified.

I

"The Bill of Rights Act sets forth a number of basic rights and protections which must be accorded individual public safety officers by the public agencies which employ them. One of the basic protections is the right to an administrative appeal of punitive actions. Section 3304, subdivision (b), provides that 'No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal.'" (White *979 v. County of Sacramento (1982) 31 Cal.3d 676, 679 [183 Cal.Rptr. 520, 646 P.2d 191], fn. omitted.) "[S]ection 3303 ... defines 'punitive action' as 'any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.'" (Ibid.)

Our Supreme Court addressed the administrative appeal issue in White v. County of Sacramento, supra., 31 Cal.3d 676 and Baggett v. Gates (1982) 32 Cal.3d 128 [185 Cal.Rptr. 232, 649 P.2d 874]. White was a sheriff's deputy who was reassigned from a detective to patrol officer as a result of deficient performance. He lost both rank and a 5 percent special pay allowance.

(1)The court indicated, "the provisions of the State Civil Service Act [see Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194 (124 Cal.Rptr. 14, 539 P.2d 774)] strongly support the conclusion that the Legislature intended, in the Bill of Rights Act, to provide the right of administrative appeal to a peace officer against whom disciplinary action is taken, and that the Legislature viewed 'dismissals,' 'demotions,' 'suspensions,' 'reductions in salary' and 'written reprimands' to be per se disciplinary in nature. A transfer, however, is 'disciplinary' in nature only if imposed 'for purposes of punishment.'" (White v. County of Sacramento, supra., 31 Cal.3d 676, 682-683,fn. omitted.) "Accordingly, this court holds that a decision to reassign a peace officer to a lower paying position is per se disciplinary, or punitive in nature, and that the officer therefore must be accorded the ' opportunity for [an] administrative appeal.' (§ 3304, subd. (b).)" (Id., at pp. 683-684, fn. omitted.)

In Baggett v. Gates, supra., 32 Cal.3d 128, police officers were also reassigned to lower paying positions [FN4] pursuant to departmental findings their performance had been negligent and unsatisfactory. (2a)First, the Supreme Court held the Bill of Rights Act applies to California charter cities (see Cal. Const., art. XI, § 5). (Baggett v. Gates, supra., at pp. 135-140.) Seal Beach is a charter city; on the strength of Baggett the Act applies to Seal Beach. The court reiterated its holding in White. "'[A] decision to reassign a peace officer to a lower paying position is per se disciplinary, or punitive in nature ....' [Citation.]" (Baggett v. Gates, supra., at p. 141.)

FN4 The officers worked in the firearms and explosives unit and were each ranked as a police officer III, denoting a specialized position involving increased responsibilities or calling for special qualifications. This was known as an "advanced pay grade assignment." The officers were reassigned to police officer II positions. This is a position for officers with one and one-half years of service and has a lower salary.

In our case, Seal Beach raises a defense grounded in semantics. The city maintains McManigal retained the same rank and his salary was not reduced *980 by the transfer. Rather, he merely lost hazard pay which was not part of his "salary," as that term is used in section 3303. The superior court accepted this argument, distinguishing White and Baggett by reasoning the base salary for McManigal remained the same and he lost only "premium pay."

(3)The trial court erred. It is true McManigal did not lose any rank, which distinguishes the case from White and Baggett. But this is a distinction without a difference. Both of those cases make it very clear a transfer to a "lower paying position" is per se disciplinary and entitles the peace officer to an administrative appeal. There can be no question McManigal was transferred to a lower paying position. The particular salary structure and nomenclature used by the city cannot be

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determinative. If, as here, the officer is paid less, he or she is entitled to an administrative appeal. McManigal's retention of his rank does not change this. Section 3303 lists "demotion" as a separate disciplinary measure requiring an administrative appeal. And the fact Seal Beach placed McManigal in a lower paying position without reducing his rank cannot serve to circumvent the requirements of the act.

"[T]his construction of sections 3303 and 3304, subdivision (b) accords with the express purpose of the Bill of Rights Act. Section 3301 declares that the acts 'rights and protections' are afforded peace officers in order to assure the 'maintenance of stable employer-employee relations,' and thus to secure 'effective law enforcement ... services' for 'all people of the state.' It is evident that the more widely available the opportunity to appeal a decision resulting in disadvantage, harm, loss or hardship, the more "' meaningful [the] hedge against erroneous action."' [Citation.] [¶] Erroneous action can only foster disharmony, adversely affect discipline and morale in the workplace, and, thus, ultimately impair employer-employee relations and the effectiveness of law enforcement services. With regard to the availability of the right of administrative appeal, the interpretation to which the ordinary rules of statutory construction leads is also the one which is most consonant with the express purpose of the Bill of Rights Act." (White v. County of Sacramento, supra., 31 Cal.3d 676, 683, fn. omitted.)

In Baggett, 32 Cal.3d 128, the court "'looking through form to substance,"' concluded the reassignments were for purposes of punishment. (Id., at p. 141.) We conclude McManigal's transfer was similar to that in White-a result of his perceived deficient performance. The city's position this was simply a routine transfer is untenable. The record makes it clear McManigal's transfer was the result of his supervisor's evaluation of his performance. *981

Hopson v. City of Los Angeles (1983) 139 Cal.App.3d 347 [188 Cal.Rptr. 689] is also instructive. There comments criticizing the officers' conduct in a shooting were placed in their personnel files. The court concluded this was punitive action, although no discipline was imposed, because "placing this Report into the personnel files will result in disadvantage, harm, loss or hardship. [Citation.]" (Id., at p. 354.) The court relied on White and Baggett. Put another way, "punitive action" is construed broadly in this context. The issue is whether there was a detriment to the officer. Here, as in Hopson, the action was detrimental to McManigal.

For all these reasons, we hold McManigal's transfer was an assignment to a lower paying position within the meaning of White and Baggett. As a result, he was entitled to an administrative appeal under section 3304, subdivision (b).

II

As a fallback position, Seal Beach argues White and Baggett should not be applied retroactively. Again we disagree.

(4)The issue of retroactivity was exhaustively examined recently by our Supreme Court in People v. Guerra (1984) 37 Cal.3d 385 [208 Cal.Rptr. 162, 690 P.2d 635]. "'As a rule, judicial decisions apply "retroactively. " [Citation.] Indeed, a legal system based on precedent has a built-in presumption of retroactivity.' [Citation.]" (Id., at p. 399.)

"To determine whether a decision should be given retroactive effect, the California courts first undertake a threshold inquiry: does the decision establish a new rule of law? If it does, the new rule may or may not be retroactive, ...; but if it does not, 'no question of retroactivity arises' because there is no material change in the law. [Citations.]" (Ibid.) Among the examples recited in Guerra of decisions that do not establish a new rule of law for purposes of retroactivity are those "in which [the court] gave effect to a statutory rule that the courts had theretofore misconstrued [citation] or had not definitively addressed [citation] ...." (Id., at p. 399, fn. 13.)

The Supreme Court also discussed the retroactivity of opinions interpreting statutes in People v. Garcia (1984) 36 Cal.3d 539 [204 Cal.Rptr. 671, 683 P.2d 670]. "Whenever a decision undertakes to vindicate the original meaning of an enactment, putting into effect the policy intended from its inception, retroactive application is essential to accomplish that aim. [Citation.] If in addition, ... the decision represents the first authoritative construction of the

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enactment, no history of extended and justified reliances *982 upon a contrary interpretation will arise to argue against retroactivity." (Id., at p. 549.)

The decisions in White and Baggett do not establish a new rule of law; they vindicate the original meaning of an enactment. (People v. Garcia, supra., 36 Cal.3d 539, 549.) Even assuming earlier Court of Appeal opinions gave a different construction to the applicable portions of the act, as the city contends, prior misconstruction of a statute by the courts does not prevent the retroactive application of the Supreme Court's authoritative interpretation. (People v. Guerra, supra., 37 Cal.3d 385, 399, fn. 13; see also People v. Mutch (1971) 4 Cal.3d 389, 394 [93 Cal.Rptr. 721, 482 P.2d 633].) Finally, the city's argument about the deliterious impact of retroactivity is beside the point; the balancing process suggested by the city (see People v. Guerra, supra., at pp. 399-406) does not even occur unless a decision establishes a new rule of law. (2b)(See fn. 5.) Since White and Baggett do not, they are fully retroactive. [FN5]

FN5 In addition, with respect to Baggett's holding the Bill of Rights Act applies to charter cities, we note it has long been held matters of statewide concern are binding on charter cities and counties. (See Los Angeles County Civil Service Com. v. Superior Court (1978) 23 Cal.3d 55 [151 Cal.Rptr. 547, 588 P.2d 249]; Bishop v. City of San Jose (1969) 1 Cal.3d 56 [81 Cal.Rptr. 465, 460 P.2d 137]; Professional Fire Fighters, Inc. v. City of Los Angeles (1963) 60 Cal.2d 276 [32 Cal.Rptr. 830, 384 P.2d 158].) We see no reason why this aspect of Baggett calls for the prospective application of that case or White.

III

The parties ask us to address several other issues. McManigal argues he was entitled to a hearing before the Seal Beach Civil Service Board under the provisions of the city charter, he was entitled to advance written notice and an administrative hearing under the due process clause of the California Constitution and the actions actually taken did not comply with the obligation to provide an administrative appeal. In addition, McManigal asks us to pass on the issues of attorney's fees in the underlying lawsuit and award him back pay. In turn, the city argues the action is barred by the statute of limitations and laches.

However, the trial court did not rule or make findings on any of these issues. (5)"'It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points.' [Citation.]" (Pandol & Sons v. Agricultural Labor Relations Bd. (1979) 98 Cal.App.3d 580, 591 [159 Cal.Rptr. 584]; see also Burkhart v. Department of Motor Vehicles (1981) 124 Cal.App.3d 99, 113 [177 Cal.Rptr. 175].) *983

The judgment is reversed and remanded for further proceedings consistent with the views expressed in this opinion.

Trotter, P. J., and Wallin, J., concurred. *984

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McManigal v. City of Seal Beach

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JAMES R. MURDEN, Plaintiff and Appellant,
v.
COUNTY OF SACRAMENTO et al., Defendants and Respondents.

Civ. No. 23136.

Court of Appeal, Third District, California.

Sep 26, 1984.

SUMMARY

In a proceeding on a petition for writ of mandate filed against the county by a former temporary deputy sheriff assigned to jail duties whose employment had been terminated following what he contended was an inadequate pretermination hearing, the trial court concluded the hearing had been sufficient under the circumstances and denied the petition. Among charges made against petitioner were reports by female clerks, which they submitted in letters, that petitioner had initiated sexually offensive conversations with them. (Superior Court of Sacramento County, No. 308552, Joseph G. Babich, Judge.)

The Court of Appeal affirmed. It held that, although the petitioner had not had a legitimate claim of entitlement to continued employment, the charges concerning the conversations with the female clerks implicated a protected liberty interest by impugning his character and gave him the right to a hearing solely for the purpose of clearing his name. It held, however, that the hearing he was afforded, which included presentation of his case before two different officers and appeal to a third officer, was sufficient under the circumstances, though it was not a trial-type proceeding. (Opinion by Byrne, J., [FN*] with Regan, Acting P. J., and Carr, J., concurring.)

FN* Assigned by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1) Constitutional Law § 107--Procedural Due Process.

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. If a protected interest is implicated, the right to ***303** some kind of prior hearing is paramount, and it must be determined what procedures constitute due process.

(2) Public Officers and Employees § 30--Duration and Termination of Tenure--Removal From Office--Property Interest in Government Employment.

To have a property interest in continued government employment, so as to invoke the due process requirements of the Fourteenth Amendment, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

(3a, 3b) Public Officers and Employees § 30--Duration and Termination of Tenure--Removal From Office--Right to Hearing--Charges Impugning Employee's Reputation.

A temporary deputy sheriff, whose assignment as an on-call deputy at the jail was terminable at will and whose position in the sheriff's deputy reserves was strictly voluntary, did not have a legitimate claim of entitlement to continued employment. Charges that he had initiated embarrassing sexual conversations with female clerks, however, which accompanied his suspension and dismissal, might seriously have damaged his reputation and impaired his ability to find other employment. Such charges by the government, made in connection with the loss of a government benefit, here, employment, implicate protected liberty interests, and the deputy was therefore entitled to notice and a hearing solely to permit him a chance to clear his name.

[See Cal.Jur.3d, Law Enforcement Officers, § 32; Am.Jur.2d, Sheriffs, Police and Constables, § 15.]

(4) Employer and Employee § 8--Contracts of Employment--Duration and Termination--Right to Hearing Before Pretermination Suspension.

Due process requires that when a state seeks to terminate a protected interest it must afford notice and opportunity for hearing appropriate to the nature of the case before the termination becomes effective. Underlying the claim to any predeprivation hearing as a matter of right is the proposition that full relief

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cannot be obtained at a postdeprivation hearing. With respect to a hearing afforded a nontenured employee who has been stigmatized in the course of a decision to terminate his employment, however, a hearing that is afforded solely to provide the person an opportunity to clear his name, the liberty interest involved is not offended by the dismissal from employment itself, and a hearing provided before release from the person's employment assignment would provide no more relief than a postrelease hearing. Such an employee therefore is not entitled to a hearing before a suspension that precedes his termination. *304

(5a, 5b) Constitutional Law § 109--Procedural Due Process--Hearing-- Hearing to Clear Employee's Name of Charges Involved in Termination.

At a minimum, due process requires that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. The fundamental requisite is the opportunity to be heard at a meaningful time and in a meaningful manner. The judicial model of an evidentiary hearing is not, however, a required, or even the most effective, method of decisionmaking in all circumstances. In particular, differences in the origin and function of administrative agencies preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts. Thus a temporary deputy sheriff who was entitled to a hearing on a decision to terminate his employment solely to clear his name against charges that he had initiated inappropriate sexual conversations with female employees, was afforded a sufficient hearing, though it was not like a trial. Before his termination, he was appraised of the charges against him and permitted to read letters written by the female employees describing the conversations, and to refute the charges and explain his behavior before two different officers of the department and to appeal his case to a third officer.

COUNSEL

David P. Mastagni and Richard J. Chiurazzi for Plaintiff and Appellant.

L. B. Elam, County Counsel, and Anthony L. Wright, Deputy County Counsel, for Defendants and Respondents.

BYRNE, J. [FN*]

FN* Assigned by the Chairperson of the Judicial Council.

Petitioner James Murden appeals from a denial of his petition for writ of mandate. Petitioner alleges his "liberty interests" as protected by the California and the United States Constitutions had been violated upon his termination of employment for the Sacramento County Sheriff's Department as a deputy sheriff with the reserve forces. His termination was based upon charges of misconduct. He requested an adequate due process *305 hearing for the purpose of clearing his name. He also requested backpay. We affirm.

Facts

In December 1981 petitioner began work as a nonpaid voluntary member of the reserve forces of the Sacramento County Sheriff's Department. On April 4, 1982, he was given a nine-month paid assignment as an on-call deputy sheriff at the Sacramento County main jail facility. An on-call deputy sheriff is an employee hired from the reserve forces to temporarily fill vacancies when regular officers are absent or there is otherwise some temporary vacancy in a permanent position. The assignment was terminable at will. Petitioner did not have any permanent or probationary status.

On May 11, 1982, Lieutenant Dick Bennett, executive officer of the main jail, informed petitioner of certain charges of misconduct and poor job performance that had been made against him. Officers who had contact with petitioner felt uncomfortable with him and believed he was not capable of grasping the basic duties and job functions at the jail facility after a sufficient training period. It was generally reported that petitioner appeared to be afraid of the inmates. In addition, two female clerks reported that petitioner initiated a conversation with them on the subject of masturbating in front of his girlfriend which they found offensive and embarrassing.

Lieutenant Bennett asked petitioner for an explanation of his conduct. He admitted using the term "masturbation" in a conversation with one woman but stated he did not use it in an offensive or

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embarrassing manner or in reference to his own activities. Petitioner stated the women were forced to write accusatory letters against him. He believed other officers were against him and were not giving him a chance. Lieutenant Bennett informed petitioner his performance was not acceptable and he was not suited to law enforcement work. He immediately suspended petitioner from his main jail assignment.

The following day, Lieutenant Bennett informed his superior, Chief Gilbert Baker, of petitioner's suspension and recommended that petitioner be permanently removed from the reserve forces and not be hired as a regular deputy. Chief Baker concurred with the recommendation. On May 18, petitioner was suspended from the reserve forces. His badge and identification were taken from him pending review of his case by Lieutenant Lonnie Beard, commander of the sheriff's training and reserve forces bureau, and Corporal Robert Skay, reserve forces coordinator.

The morning after petitioner's suspension, he contacted Lieutenant Beard and requested a meeting. At the meeting, petitioner discussed the allegations *306 and explained his view of the circumstances surrounding them. Lieutenant Beard was not familiar with the facts at that time, but he assured petitioner he would discuss the matter with him again after he received information from the jail supervisor and he would order an investigation.

Corporal Skay investigated the allegations to determine whether petitioner was properly suspended and whether he should be permanently terminated as a reserve deputy sheriff. If Corporal Skay had cleared petitioner of the allegations and he had been retained as a member of the reserve forces, Lieutenant Beard did not have the authority to reinstate him to his main jail assignment if Chief Baker did not want him back. However, Lieutenant Beard had the authority to reassign petitioner to another paid on-call assignment within the sheriff's department.

Corporal Skay reviewed letters from Lieutenant Bennett and Sergeant Martin, another employee of the main jail, as well as letters from the two female employees. In June Corporal Skay met with petitioner, at which time he permitted petitioner to read the letters for the first time. He was not given copies but he was permitted to write them out. These letters were placed in petitioner's personnel file.

Corporal Skay did not ask for an oral response, but instead asked petitioner to prepare and submit a written response to the allegations. Petitioner did so. Corporal Skay attempted to make appointments with the two female employees to discuss their statements, but he was able to talk with only one.

Following his investigation, and after considering petitioner's statement, Corporal Skay determined the allegations against petitioner were true and concluded they constituted just cause for his suspension and subsequent termination from the reserve forces. Petitioner was permanently terminated as an on-call deputy sheriff and a reserve deputy sheriff effective June 29, 1982. Corporal Skay informed petitioner he could appeal the decision to Lieutenant Beard.

Petitioner appealed the decision and met with Lieutenant Beard. Lieutenant Beard reviewed the investigation and discussed the matter with Corporal Skay. He affirmed the discharge of petitioner.

Petitioner requested a hearing before the county civil service commission. The commission denied petitioner's request on the ground it did not have jurisdiction to hear appeals from terminated temporary employees.

Petitioner filed a petition for writ of mandate to compel respondents to reinstate him to his former position, pay back wages lost during the period *307 of unlawful termination, and pay punitive damages, costs, and attorney's fees. [FN1] Petitioner's action was based upon the ground that he was denied due process in being terminated on charges that impugn his character without an adequate pretermination hearing. [FN2]

FN1 At trial, petitioner abandoned his request for reinstatement and punitive damages, seeking only backpay and attorney's fees.

FN2 Although in his moving papers petitioner did not expressly request that respondents be ordered to provide a hearing, this issue was raised in the posttrial briefs and was decided by the trial court.

The trial court concluded the allegations against

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petitioner infringed upon his liberty interests and thus he was entitled to notice and a hearing to afford him an opportunity to clear his name. However, the court determined petitioner was afforded an adequate hearing under the circumstances and denied the petition.

Discussion

Petitioner contends he was entitled to a pretermination hearing on the allegations of inappropriate sexual conversations, and that such hearing must include reasonable notice of the proposed action and a written statement of reasons; an opportunity to be represented by an attorney; a hearing before an impartial reviewer; and an opportunity to confront and cross-examine the witnesses against him.

(1)"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount." (Board of Regents v. Roth (1972) 408 U.S. 564, 569-570 [33 L.Ed.2d 548, 556, 92 S.Ct. 2701].) Thus, application of this principle requires a two-step analysis; "We must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty or property'; if protected interests are implicated, we must then decide what procedures constitute 'due process of law.'" (Ingraham v. Wright (1977) 430 U.S. 651, 672 [51 L.Ed.2d 711, 731, 97 S.Ct. 1401].)

A. Petitioner's Interest

Petitioner concedes he had no property interest in either his on-call jail assignment or his position in the reserve forces. (2)To have a property interest in continued government employment, "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of ***308** entitlement to it." (Board of Regents v. Roth, supra., 408 U.S. at p. 577 [33 L.Ed.2d at p. 561].) (3a)Petitioner's on-call assignment was temporary and terminable at will. His position in the reserve was strictly voluntary. Thus, he had no legitimate claim of entitlement to continued employment.

We agree with the trial court, however, that the charges of inappropriate and embarrassing sexual conversations accompanying petitioner's suspension and dismissal implicated protected liberty interests. Although a probationary employee may generally be dismissed without a hearing and without good cause, an employee's liberty is impaired if the government, in connection with an employee's dismissal or failure to be rehired, makes a "charge against him that might seriously damage his standing and associations in the community," such as a charge of dishonesty or immorality, or would "impose[] on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." (Board of Regents v. Roth, supra., 408 U.S. at p. 573 [33 L.Ed.2d at pp. 558-559]; see also Wilkerson v. City of Placentia (1981) 118 Cal.App.3d 435, 441-442 [173 Cal.Rptr. 294]; Lubey v. City and County of San Francisco (1979) 98 Cal.App.3d 340 [159 Cal.Rptr. 440].) A person's protected interests are not infringed merely by defamatory statements, for an interest in reputation alone is not a constitutionally protected liberty interest. (Paul v. Davis (1976) 424 U.S. 693, 711-712 [47 L.Ed.2d 405, 420, 96 S.Ct. 1155].) Rather, the liberty interest is infringed only when the defamation is made in connection with the loss of a government benefit, such as, in this case, employment. (Id., at pp. 708-710 [47 L.Ed.2d at pp. 417-419]; Margoles v. Tormey (7th Cir. 1981) 643 F.2d 1292, 1298-1299.)

When the government infringes on a person's liberty interest in this manner, "the remedy mandated by the Due Process Clause of the Fourteenth Amendment is ' an opportunity to refute the charge.' ... 'The purpose of such notice and hearing is to provide the person an opportunity to clear his name,' ..." (Codd v. Velger (1977) 429 U.S. 624, 627 [51 L.Ed.2d 92, 96, 97 S.Ct. 882]; citation omitted.)

Petitioner was charged with engaging two female employees in embarrassing and inappropriate conversation with regard to his sexual activities, particularly masturbation. He was charged with being unable to learn the basic duties of his job and being inordinantly afraid of inmates. All three charges allegedly "created a great deal of resentment" toward petitioner from his coworkers and supervisors. The latter charges, concerning

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petitioner's competency and ability to get along with coworkers, do not infringe upon his liberty interest. (Stretten v. Wadsworth Veterans Hospital (9th Cir. 1976) 537 F.2d 361, 366.) The first charge, however, impugns petitioner's ***309** character and morality, and thus, if circulated, would damage his reputation and seriously impair his ability to find employment in his chosen profession.

We must realistically assume that potential employers in the public law enforcement field would investigate petitioner's background and discover the reasons for his suspension and termination. (See Lubey v. City and County of San Francisco, supra., 98 Cal.App.3d at p. 347.) Corporal Skay testified it was very doubtful another law enforcement agency would hire petitioner with the two letters from the female employees in his personnel file. Although petitioner might conceivably refuse to permit the release of his file to potential employers, it is "naive and unrealistic" to believe that a law enforcement agency would consider hiring petitioner without a full disclosure of his employment record. "His refusal to consent to the full release of information would only raise the specter of much more serious misconduct than that contained in the personnel file. He would have no real choice except to consent to the release of his personnel file ...." (Giordano v. Roudebush (S.D.Iowa 1977) 448 F.Supp. 899, 906.)

Accordingly, we conclude petitioner's liberty interest was implicated by the charges of inappropriate and embarrassing sexual conversations made in connection with his loss of employment. He was entitled to an opportunity to refute the charges and clear his name.

B. What Process Is Due

We must next decide whether the procedures followed by respondents in this case constituted "due process of law," for "'[o]nce it is determined that due process applies, the question remains what process is due."' (Goss v. Lopez (1975) 419 U.S. 565, 577 [42 L.Ed.2d 725, 737, 95 S.Ct. 729].)

(4)Petitioner first contends he was entitled to a "pretermination" hearing, before he was suspended from his on-call assignment at the county jail. We disagree. "'[D]ue process requires that when a State seeks to terminate [a protected] interest ..., it must afford "notice and opportunity for hearing appropriate to the nature of the case" before the termination becomes effective."' (Board of Regents v. Roth, supra., 408 U.S. at p. 570, fn. 7 [33 L.Ed.2d at p. 556]; second italics added.) Petitioner was merely suspended from his on-call assignment. His badge and identification were taken from him pending an investigation by Corporal Skay. He was still a member of the sheriff's reserve forces. Not until after he was given an opportunity to respond to the charges was he finally terminated from the employ of the sheriff's department. Although he may not have been reassigned to the jail facility if he had cleared his name, he had no entitlement to any particular assignment. However, if he had cleared his name he would have remained ***310** a member of the reserve forces and available for other on-call assignments. His effective termination came when he was permanently dismissed from the reserve forces. He therefore was given a hearing before his termination became effective.

In this case petitioner had no constitutionally protected interest in his on- call assignment at the jail. It was a temporary position, terminable at will. The hearing to which he was entitled was not intended to protect that interest. Instead, "the hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is solely 'to provide the person an opportunity to clear his name."' (Codd v. Velger, supra., 429 U.S. at p. 627 [51 L.Ed.2d at p. 96]; italics added.)

Underlying the claim to a predeprivation hearing as a matter of right is "the proposition that full relief cannot be obtained at a post deprivation hearing." (Mathews v. Eldridge (1976) 424 U.S. 319, 331 [47 L.Ed.2d 18, 31, 96 S.Ct. 893].) A hearing prior to petitioner's release from his jail assignment would have provided no more relief than a postrelease hearing. Even if he had cleared his name of the charges of improper behavior at a prerelease hearing, his supervisors would have remained free to release him for the other reasons set forth or for no articulated reason whatsoever. (See Board of Regents v. Roth, supra., 408 U.S. at p. 573, fn. 12; [33 L.Ed.2d at p. 558].) Had the reasons for petitioner's release not impugned his good name, he would not have been entitled to any hearing. (Garcia v. Daniel (7th Cir. 1973) 490 F.2d 290, 292.)

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Although not adopted by the majority, we are persuaded by the reasoning of the plurality opinion of the Supreme Court in Arnett v. Kennedy (1974) 416 U.S. 134, 157 [40 L.Ed.2d 15, 35, 94 S.Ct. 1633], wherein Justice Rehnquist (joined by Burger, C. J., and Stewart, J.) concluded the liberty interest involved where a probationary employee is dismissed on charges that impugn his good name "is not offended by dismissal from employment itself, but instead by dismissal based upon an unsupported charge which could wrongfully injure the reputation of an employee. Since the purpose of the hearing in such a case is to provide the person 'an opportunity to clear his name,' a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause." (Italics added.) [FN3]

FN3 The concurring opinions do not actually disagree with this portion of the plurality opinion, but rather concur in the result on other grounds. (See Arnett v. Kennedy, supra., 416 U.S. at pp. 164-203 [40 L.Ed.2d at pp. 39-61] (conc. opn. of Powell, J., joined by Blackmun, J., and conc. and dis. opn. of White, J.).)

Accordingly, petitioner was not entitled to a hearing to clear his name prior to his suspension from the county jail assignment. *311

It remains to be determined whether the hearing petitioner received complied with the requirements of due process. Petitioner contends he was entitled to such trial-type elements as written notice of charges, counsel, presentation of witnesses under oath, confrontation and cross-examination, an impartial reviewer, and a hearing transcript.

(5a)At a minimum, due process require"[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' '[T]he fundamental requisite of due process of law is the opportunity to be heard,' ..." (Goss v. Lopez, supra., 419 U.S. at p. 579 [42 L.Ed.2d at p. 737], citation omitted.) Moreover, "[t]he key component of due process, when a decisionmaker is acquainted with the facts, is the assurance of central fairness at the hearing. Essential fairness is a flexible notion, but at a minimum one must be given notice and opportunity to be heard 'at a meaningful time and in a meaningful manner."' (Vanelli v. Reynolds School Dist. No. 7 (9th Cir. 1982) 667 F.2d 773, 779-780; citations omitted.) "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (Mathews v. Eldridge, supra., 424 U.S. at p. 335 [47 L.Ed.2d at p. 33].)

Petitioner is not necessarily entitled to a full trial-type evidentiary hearing with its attendant procedural rules. "[D]ifferences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts.' ... The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances." (Id., at p. 348 [47 L.Ed.2d at p. 41], citation omitted.)

Although petitioner's interest in being free from charges that impugn his character and impair his freedom to obtain employment is of great weight, so, too, is the government's interest in terminating law enforcement officers who are of questionable moral character, and in doing so in an expeditious, efficient, and financially unburdensome manner. (See Mathews v. Eldridge, supra., 424 U.S. at pp. 347-348 [47 L.Ed.2d at pp. 40-41].)

(3b)In considering the nature of this case, it must be emphasized that the purpose of a hearing here is not to protect a property interest in petitioner's *312 position with the reserve forces. The sheriff's department acted within its "broad discretion ... to determine which ... employees" it will retain, a discretion that may be exercised without judicially cognizable good cause, unless employment has been unjustifiably conditioned on the waiver of constitutional rights. (Bogacki v. Board of Supervisors (1971) 5 Cal.3d 771, 783 [97 Cal.Rptr. 657, 489 P.2d 537].) The department was justified in terminating petitioner on the independent allegations of incompetency, allegations which do not implicate his liberty interest. Thus petitioner's

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continued employment with the department did not hinge on particular findings of fact with regard to the charges of inappropriate sexual conversations. The purpose of the hearing was solely to provide petitioner an opportunity to refute the charges and clear his name. (Codd v. Velger, supra., 429 U.S. at p. 627 [51 L.Ed.2d at p. 96].)

(5b)Prior to his termination, petitioner was appraised of the charges against him and given an opportunity to read the letters of the female employees. He had the opportunity to refute the charges and explain his behavior before two different officers of the department, and appealed his case to a third. He submitted a detailed written response to the letters in which he explained his version of events. He was not precluded from conducting his own investigation or presenting his own evidence. He did not deny using the term "masturbate" in conversation with one of the employees, but rather suggested she should not have been offended by it. Corporal Skay orally discussed the incidents with the two employees. Lieutenant Beard considered the matter on appeal and concurred in Corporal Skay's recommendation. The risk of error in these proceedings was not so great as to require more formal proceedings. There is no indication petitioner could have more effectively refuted the charges had he been afforded a trial-type hearing. Such a hearing would place financial and procedural burdens on the county inappropriate to the nature of this case.

We conclude petitioner was afforded a meaningful and adequate opportunity to refute the charges and clear his name.

Petitioner makes the further contention Lieutenant Beard was not an impartial decisionmaker as an appeal officer because he made the initial decision to terminate petitioner prior to the date of his termination, June 29, 1982. This fact is unsupported by the record, which indicates Lieutenant Beard did not make a decision until after Corporal Skay's decision on that date. Petitioner cites no other evidence indicating Lieutenant Beard was not capable of impartially considering the matter. There is nothing to indicate he had a personal or financial stake in the action, or harbored any animosity toward petitioner. State administrators "'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy ***313** fairly on the basis of its own circumstances."' (Withrow v. Larkin (1975) 421 U.S. 35; 55 [43 L.Ed.2d 712, 728, 95 S.Ct. 1456].)

California cases cited to by petitioner are distinguishable. In Lubey v. City and County of San Francisco, supra., 98 Cal.App.3d 340, probationary police officers were terminated on the basis of citizen charges of misconduct. The officers were not appraised of all the charges against them. They were discharged at a meeting with the police chief on a few hours' notice. At the meeting, the chief told the officers he intended to dismiss them and only then gave them an opportunity to refute the charges. At the close of the meeting, the officers were handed previously signed notices of termination, effective immediately. In our case, petitioner was not terminated as a reserve officer without being given notice of the charges, an opportunity to review the evidence and submit a detailed response, and an opportunity to appeal. He was not denied an opportunity to conduct his own investigation or present his own evidence. Moreover, the court in Lubey concluded the city and county violated their own charter provisions in terminating the officers.

In both Doyle v. City of Chino (1981) 117 Cal.App.3d 673 [172 Cal.Rptr. 844], and Wilkerson v. City of Placentia, supra., 118 Cal.App.3d 435, employees were discharged without any prior hearing whatsoever.

Accordingly, we conclude that under the circumstances of this case petitioner was afforded a meaningful and adequate opportunity to refute the charges and clear his name and thus was not denied due process of law. Our conclusion makes it unnecessary to reach the issue of the proper remedy.

The judgment is affirmed.

Regan, Acting P. J., and Carr, J., concurred.

A petition for a rehearing was denied October 25, 1985, and appellant's petition for a hearing by the Supreme Court was denied January 3, 1985. Broussard, J., was of the opinion that the petition should be granted. ***314**

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Murden v. Sacramento County

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JOHN S. NG, Plaintiff and Appellant,
v.
STATE PERSONNEL BOARD, Defendant and Respondent

Civ. No. 15812.

Court of Appeal, Third District, California.

March 29, 1977.

SUMMARY

A permanent civil service employee, whose demotion by the Department of Corrections, on October 1, 1973, from the position of supervisor of academic instruction at the California Rehabilitation Center, was upheld by the State Personnel Board on February 6, 1974, on grounds of the employee's incompetence and inefficiency, petitioned the superior court nearly one year later for writ of mandate. The court, declaring that the board had adopted the decision of its hearing officer without referring to the reporter's transcript, remanded the decision for consideration, and on July 23, 1975, the board upheld its original decision and denied the employee's request for rehearing. The mandamus proceeding was resumed, and on January 29, 1976, the court denied the employee's petition. (Superior Court of Sacramento County, No. 254220, Joseph A. DeCristoforo, Judge.)

The Court of Appeal reversed for the limited purpose of directing an award of salary in arrears, and otherwise affirmed. The court held that the findings of incompetency and inefficiency, without recourse to hearsay, were supported by substantial evidence, and that the fact that the board had rejected additional charges by the department, including inexcusable neglect of duty and failure of good behavior, did not require the case to be returned to the department for reassessment of the penalty and did not render the penalty of demotion excessive. However, declaring that demotions as well as dismissals come within the procedural due process doctrine applicable to the punitive provisions of the Civil Service Act (Gov. Code, § 18500 et seq.), and that the 90-day limitation in Gov. Code, § 19630, within which an aggrieved employee must seek judicial relief for compensation, is applicable to pay arrearages after, but not before, a decision of the board, the court held that the employee in *601 the instant case was entitled to back pay from the date of the department's order of demotion on October 1, 1973, to the date of the board's first decision on February 6, 1974, by which time the employee had exercised his right to respond to the accusations, thereby removing the prior procedural infirmity in the case. It was immaterial, the court held, that the board's first decision had been invalidated by the court and that the board's second decision, upholding the first, was thereby delayed 17 months. (Opinion by Friedman, J., with Puglia, P. J., and Evans, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Appellate Review § 60--Taking and Perfecting Appeal--Time for Filing-- Effect of Interlocutory Order.

Where a permanent civil service employee, on being demoted by the State Personnel Board for inefficiency, petitioned the superior court for a writ of mandate, the court's order, declaring that the board had adopted the decision of its hearing officer without referring to the reporter's transcript of the hearing and ordering remand to the board for reconsideration, was interlocutory only, and the pivotal date within which the employee could file an appeal was not the date of such order but the date of the court's subsequent judgment denying the employee's petition.

(2a, 2b) Civil Service § 10--Discharge, Demotion, Suspension, and Dismissal--Administrative Hearing and Decision--Evidence--Sufficiency--To Support Demotion.

Findings of the State Personnel Board of inefficiency and incompetence on the part of a Department of Corrections civil service employee, leading to his demotion, were supported by substantial evidence, where, without recourse to hearsay, the record showed that the conduct of the employee, as supervisor of academic instruction at the Rehabilitation Center, had included inadequate evaluation of teachers, lack of supervision over enrollment procedures and over a new education program, failure to respond to a teacher's request for leave of absence, false entries in reports on student dropouts, and failure to take effective action to stop a resident student from raising black widow spiders. *602

(3) Civil Service § 12--Discharge, Demotion,

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Suspension, and Dismissal-- Judicial Review--Weight and Effect of Administrative Findings.
On judicial review of a ruling by the State Personnel Board, the courts do not reweigh the evidence before the board but draw from the evidence all reasonable inferences supporting the board's findings.

(4) Administrative Law § 51--Administrative Actions--Adjudication-- Evidence--Hearsay.
A disciplinary charge before the State Personnel Board will not be supported solely by hearsay evidence.

[See Cal.Jur.3d, Administrative Law, § 184; Am.Jur.2d, Administrative Law, § 382.]

(5) Civil Service § 11--Discharge, Demotion, Suspension, and Dismissal-- Judicial Review--Penalty.
The State Personnel Board, being the ultimate authority delegated by law to fix appropriate disciplinary action against employees within its jurisdiction (Gov. Code, § 19582), the courts will not interfere with the penalty imposed by the board unless it has abused its discretion, namely, if the penalty exceeds the bounds of reason. Thus, where a Department of Corrections civil service employee, on substantial evidence, was demoted on various grounds of inefficiency and incompetence, the demotion could not be judicially declared to be an excessive penalty, even though the board failed to return the case to the department for reassessment of the penalty after rejecting several of the department's charges against him.

(6a, 6b, 6c) Civil Service § 7--Discharge, Demotion, Suspension, and Dismissal--Employee Demoted Without Compliance With Due Process--Back Pay--Effect of Remand of Board's Decision.
A permanent civil servant employed by the Department of Corrections who, without prior compliance with procedural due process standards, was demoted by the department, was entitled to back pay from the date of such demotion to the date the infirmity was corrected, namely, by the first decision of the State Personnel Board sustaining the demotion after he had exercised the right to respond to the accusation. The employee was neither barred from such compensation by failing to file for judicial relief within 90 days of such decision, nor entitled to extended back pay by the facts that such decision was invalidated by the court for being adopted from that of the hearing officer without reference to the reporter's transcript, and *603 that the board's second decision, upholding the first, was thereby delayed 17 months.

(7) Civil Service § 7--Discharge, Demotion, Suspension, and Dismissal-- Procedural Due Process--Demotions.
Demotions, as well as dismissals, come within the procedural due process doctrine applicable to the punitive provisions of the Civil Service Act (Gov. Code, § 18500 et seq.); thus, before a demotion becomes effective, the employee is entitled to notice, an opportunity to respond, and an evidentiary hearing.

(8) Civil Service § 3--Validity and Construction of Statutes--Compensation Through Judicial Relief--90-day Limitation.
Under Gov. Code, § 19630, providing, in part, that a person with a grievance under civil service law may not recover compensation by lawsuit unless the suit is filed within 90 days after the cause or ground arose, the 90-day limitation, with respect to the person's salary as affected by a ruling of the State Personnel Board, deals only with arrearages accruing after the board's final decision; the limitation cannot bar back pay claims accruing prior to such decision.

COUNSEL

Donald M. Sea for Plaintiff and Appellant.

Evelle J. Younger, Attorney General, and Stephen Egan, Deputy Attorney General, for Defendant and Respondent.

FRIEDMAN, J.

Plaintiff held a permanent civil service position as supervisor of academic instruction at the California Rehabilitation Center, apparently a position comparable to school principal. The Department of Corrections ordered his demotion to the position of elementary school teacher effective October 1, 1973. The stated reasons were incompetence, inefficiency, inexcusable neglect of duty and failure of good behavior. Plaintiff appealed to the State Personnel Board. The *604 board found plaintiff incompetent and inefficient, expressly rejected the other charges and concluded that the demotion was justified. Plaintiff's request for a rehearing was denied on April 24, 1974. Plaintiff filed this superior court action on April 21, 1975, almost one year later.

On May 29, 1975, the superior court filed its decision declaring that the personnel board had

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adopted the decision of its hearing officer without referring to the reporter's transcript of the hearing and ordering remand to the board for reconsideration. In compliance with the court's order, the personnel board reviewed the reporter's transcript and exhibits, then upheld its original decision and denied plaintiff's rehearing request. Plaintiff then returned to the superior court and filed a motion for issuance of a writ of mandate. On January 29, 1976, the court entered judgment denying the petition for writ of mandate. On February 26, 1976, plaintiff filed a notice of appeal.

(1) There is no merit in the Attorney General's charge of tardy appeal. The Attorney General argues that plaintiff should have appealed from the judgment or order of May 29, 1975. The argument is ill taken because that order was interlocutory only. The pending mandate proceeding vested the court with continuing jurisdiction to review the personnel board's final decision rendered after compliance with the interlocutory order. The appeal from the judgment of January 29, 1976, is properly before us.

(2a) Plaintiff contends that the findings of incompetence and inefficiency were not supported by substantial evidence. (3) As is well known, the courts do not reweigh the evidence before the personnel board and draw from the evidence all reasonable inferences supporting its findings. (Neely v. California State Personnel Bd., 237 Cal.App.2d 487, 489 [47 Cal.Rptr. 64].)

(4) Plaintiff is correct in asserting that several items of supporting evidence were hearsay and that hearsay alone will not support a charge. (Walker v. City of San Gabriel, 20 Cal.2d 879, 881 [129 P.2d 349, 142 A.L.R. 1383].) (2b) We find substantial evidence other than hearsay to support the findings. Mr. Tyson, plaintiff's immediate superior, testified that plaintiff took no effective action to stop a resident student from raising black widow spiders and that he, Tyson, had to take the corrective action. Contrary to Mr. Tyson's instructions, plaintiff failed to make observations and evaluations of teachers adequately or with required frequency. Plaintiff filed standard report forms concerning ***605** student dropouts, many of which contained false entries made by plaintiff. Mr. Tyson's investigation revealed that in 19 of 35 cases the dropout reports filed by plaintiff reflected the wrong reason for withdrawal. Despite instructions, plaintiff failed to supervise enrollment procedures to attain classes of approximately equal size. He failed to supervise and evaluate a new program of elementary education; when another person was put in charge of the program, it showed better results. Plaintiff failed to respond, one way or another, to a teacher's request for leave of absence. These occurrences supplied substantial evidence of incompetence and inefficiency.

(5) Relying upon Walker v. State Personnel Board, 16 Cal.App.3d 550 [94 Cal.Rptr. 132], plaintiff argues that the personnel board should have returned the case to the Department of Corrections for reassessment of the penalty after the board rejected several of the department's charges. In Walker the court rejected some charges and sustained others, then directed the personnel board to reconsider the penalty. The Walker case is not analogous. The relationship between the court and the personnel board is far different than that between the personnel board and the employing agency. The personnel board is the ultimate authority delegated by law to fix appropriate disciplinary action. (Gov. Code, § 19582.) The courts will not interfere with its penalty unless it has abused its discretion. (Nightingale v. State Personnel Board, 7 Cal.3d 507, 515 [102 Cal.Rptr. 758, 498 P.2d 1006].)

Plaintiff argues that the penalty was excessive. Discretion is abused when the action exceeds the bound of reason. (People v. Russel, 69 Cal.2d 187, 194 [70 Cal.Rptr. 210, 443 P.2d 794].) We cannot say that plaintiff's demotion was an unreasonable penalty.

(6a) Plaintiff charges that his demotion without a prior hearing deprived him of procedural due process of law and entitled him to salary in arrears. (7) In Skelly v. State Personnel Board, 15 Cal.3d 194 [124 Cal.Rptr. 14, 539 P.2d 774], the California Supreme Court established the proposition that the State Civil Service Act confers upon permanent employees a property right in continued employment, which is protected by due process (id., at pp. 206-207); that the punitive action provisions of the act do not fulfill minimum constitutional demands; that these demands require notice and an opportunity to respond before the discipline becomes effective (id., at p. 215). ***606**

More recently, in Barber v. State Personnel Bd., 18 Cal.3d 395 [134 Cal.Rptr. 206, 556 P.2d 306], the Supreme Court held the Skelly principle retroactively applicable to pending proceedings; concluded that an employee dismissed without prior due process is entitled to salary in arrears from the time discipline is

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actually imposed until the date the State Personnel Board files its decision (id., at pp. 402-403).

In our view the procedural due process doctrine enunciated in Skelly extends to demotions as well as dismissals. In a practical sense a permanent employee's property interest in continued employment embraces his current classification as well as his current salary. His property interest is damaged by demotion as well as dismissal. The latter deprives him of the entire interest, the former of part. In Skelly (15 Cal.3d at p. 203) the court pointed to the employee's right to an evidentiary hearing except as to minor discipline consisting of suspension of 10 days or less. The right to an evidentiary hearing extends equally to dismissals and demotions. (Gov. Code, § 19578.) The Skelly opinion (15 Cal.3d at pp. 207-208) places dismissal and other disciplinary measures within the ambit of the right to continued employment which forms a property interest evoking due process protection. Both conceptually and verbally, the Skelly due process principle embraces demotions as well as dismissals.

(6b) The Attorney General contends that plaintiff lost any right to back pay because his mandate proceeding was filed more than 90 days after the personnel board's demotion order. (8) He relies upon the following arguendo statement extracted from the Supreme Court's opinion in Barber v. State Personnel Bd., supra, 18 Cal.3d at page 402: "Further, all proceedings in which the employee seeks compensation as damages - those involving costs to the board - are barred unless the employee sought review within 90 days of the date the board's decision became final. (§ 19630)."

The quoted sentence is dictum, entitled to respect but not binding. (People v. Gregg, 5 Cal.App.3d 502, 506 [85 Cal.Rptr. 273].) The sentence is an elliptical but inaccurate rendition of part of Government Code section 19630. The full text of that statute appears in the margin. [FN1] It *607 establishes a one-year statute of limitations on lawsuits seeking review of State Personnel Board decisions. The period commences when the "cause of action ... first arose." According to the statute's last sentence, the cause of action does not arise until the board's "final decision." The next-to-last sentence establishes an inner statute of limitations. It bars recovery of compensation "for the time subsequent to the date when such cause or ground arose" unless the lawsuit is filed and served within 90 days "after such cause or ground arose."

FN1 Government Code section 19630: "No action or proceeding shall be brought by any person having or claiming to have a cause of action or complaint or ground for issuance of any complaint or legal remedy for wrongs or grievances based on or related to any civil service law in this State or the administration thereof unless such action or proceeding is commenced and served within one year after such cause of action or complaint or ground for issuance of any writ or legal remedy first arose. Such a person shall not be compensated for the time subsequent to the date when such cause or ground arose unless such action or proceeding is filed and served within 90 days after such cause or ground arose. Where an appeal is taken from a decision of the board the cause of action does not arise until the final decision of the board."

The 90-day clause needs no interpretation. It deals solely with salary arrearages accruing after the personnel board's final decision, that is, "subsequent to the date when such cause or ground arose." It prevents inflation of back pay claims through the medium of lawsuit delay. It protects the public pocketbook by minimizing claims for compensation accruing during the period following the personnel board's decision.

The 90-day clause has nothing to do with back pay which accrued preceding the personnel board's decision. The amount which accrued before the board's decision cannot be enlarged by delay in filing a lawsuit after the board's decision. As a matter of law the 90-day limitation of section 19630 does not affect back pay claims accruing prior to the personnel board's decision.

The Supreme Court's dictum in Barber fails to observe the difference between salary accruals before and after the personnel board decision. Were the Supreme Court squarely faced with the question, the court would doubtless follow the statute rather than its dictum. Where, as here, the back pay entitlement is based on the Skelly-Barber due process doctrine, none of it could have accrued after the personnel board's decision. (6c) Plaintiff's back pay entitlement is not barred by his failure to sue within 90 days.

Plaintiff's demotion without prior compliance with due process standards entitles him to back pay from October 1, 1973, the declared date of demotion, to the date the infirmity was corrected. This kind of infirmity is corrected when the employee has received notice and an opportunity to respond, ordinarily when

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the State Personnel Board *608 renders its decision. (Barber v. State Personnel Bd., supra, 18 Cal.3d at p. 403.) The present case is idiosyncratic because the personnel board rendered two demotion decisions, one on February 6, 1974, when the board filed a decision later invalidated by the superior court, and a second on July 23, 1975, which was sustained by the superior court. Although the first of these decisions was nullified, it represented the fulfillment of plaintiff's right to respond to the accusation; thus it establishes the date when the needs of procedural due process were satisfied. Plaintiff's back pay entitlement commenced on October 1, 1973, and ended on February 6, 1974.

The judgment is reversed for the limited purpose of directing the superior court to remand the case to the State Personnel Board for the award of salary in arrears. The judgment is otherwise affirmed. Each side will bear its own costs of appeal.

Puglia, P. J., and Evans, J., concurred.

A petition for a rehearing was denied April 26, 1977, and appellant's petition for a hearing by the Supreme Court was denied May 26, 1977. Bird, C. J., did not participate therein. *609

Cal.App.3.Dist.,1977.

NG v. California State Personnel Bd.

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ORANGE COUNTY EMPLOYEES ASSOCIATION, INC., et al., Plaintiffs and Appellants,
v.
COUNTY OF ORANGE et al., Defendants and Respondents

No. G005382.

Court of Appeal, Fourth District, Division 3, California.

Oct 31, 1988.

SUMMARY

The director of a county delinquent boys facility who was transferred to the post of director of juvenile court services filed a petition for a writ of mandate to require the county to afford him an opportunity for a full trial- type administrative appeal regarding the transfer. The trial court denied the petition. (Superior Court of Orange County, No. 509056, Gary L. Taylor, Judge.)

The Court of Appeal affirmed, holding that the transfer was not a punitive one within the meaning of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), and thus the director was not entitled to an administrative hearing subject to judicial review. (Opinion by Sills, J., [FN*] with Sonenshine, Acting P. J., and Wallin, J., concurring.)

FN* Assigned by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Law Enforcement Officers § 12--Police--Disciplinary Proceedings--Appeal--Transfer of Probation Officer:Public Officers and Employees § 1--Public Safety Officers Procedural Bill of Rights Act--Appeal Rights--Transferred Probation Officer.
In a proceeding for a writ of mandate by the director of a county delinquent boys facility, who was transferred to the post of director of juvenile court services after the head of the county probation department became concerned with the director's handling of a sexual harassment complaint, the trial court's conclusion that the transfer was not punitive ***1290** within the meaning of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) and that the director was therefore not entitled to an administrative hearing subject to judicial review was supported by substantial evidence. The transfer did not entail any financial loss, most of the directors at the same level had been transferred to another directorship, and a memorandum relating to the director's handling of the sexual harassment complaint was removed from his file.

[See Cal.Jur.3d, Law Enforcement Officers, § 33; Am.Jur.2d, Sheriffs, Police, and Constables, § 37 et seq.]

(2) Appellate Review § 149--Questions of Law and Fact--Sufficiency of Evidence--Power of Court.
Under the substantial evidence test, the court views the evidence in a light most favorable to the respondent. Factual matters will be viewed most favorably to the prevailing party. Where the evidence is in conflict, the appellate court will not disturb the verdict of the jury or the findings of the trial court. An appellate court's power begins and ends with a determination as to whether there is any substantial evidence to support the factual findings; it has no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom.

(3) Appellate Review § 143--Discretion of Trial Court--Authority of Appellate Court.
A reviewing court is without power to substitute its deductions for those of the trial court.

COUNSEL

Kathleen Sage for Plaintiffs and Appellants.

Adrian Kuyper, County Counsel, and Terry C. Andrus, Deputy County Counsel, for Defendants and Respondents. ***1291**

SILLS, J. [FN*]

FN* Assigned by the Chairperson of the Judicial

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Council.

We are asked to determine whether a public safety officer's transfer was punitive within the meaning of the Public Safety Officers Procedural Bill of Rights Act and conclude that it was not. [FN1]

FN1 Government Code section 3300, et seq. is commonly referred to as the Public Safety Officers Procedural Bill of Rights Act. Section 3303 provides in pertinent part: "For the purpose of this chapter, punitive action is defined as any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment." Section 3304, subd. (b) provides: "No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

Most of the facts are not contested. Vaughn Roley was the director of Los Pinos Forestry Camp, a county facility for delinquent boys. After 16 years in that position, he was transferred to the post of director of juvenile court services. His compensation in all respects including benefits remained the same. Shortly after his transfer, he received a pay raise.

The table of organization of the Orange County Probation Department is headed by the chief probation officer, Dr. Michael Schumaker. Under him are three chief deputy probation officers. The next tier of management consist of 12 division director positions. All are the same level management positions. Each of these directors reports directly to one of the three chief deputies.

Prior to the transfer, a series of events occurred at Los Pinos which caused Dr. Schumaker considerable concern about Roley's performance of his duties. One of these events involved a part-time employee at Los Pinos who complained to the Orange County Affirmative Action Committee that a subordinate of Roley's had sexually harassed her. Dr. Schumaker was bothered by the fact that he had not learned of the filing of the complaint from his staff and by what he concluded was a lack of thoroughness by Roley in conducting an investigation of the matter. Roley's immediate supervisor placed a critical memorandum in his personnel file about how he handled the situation.

Other incidents occurred at Los Pinos during the months prior to the transfer which also caused Dr. Schumaker "... concerns over how effectively Mr. Roley was managing the operations at Los Pinos." None of these incidents resulted in any disciplinary action against Roley. The parties do not dispute the fact, however, that in addition to the way Roley handled the sexual harassment complaint, his management style in handling certain ***1292** trailer rentals, the disposal of cooking grease along an access road and use of the facility by a boys' club all caused Dr. Schumaker to question whether he had the right person in charge of Los Pinos and whether a change should be made.

After the transfer, Roley requested a hearing per section 3304, subd. (b) of the act. He contended that his transfer was "punitive" within the meaning of Government Code section 3303 - that the transfer was "for purposes of punishment." Dr. Schumaker responded to the request by advising Roley that he had no recourse under the act since the transfer was not punitive. Dr. Schumaker pointed out that division directors are transferred from one position to another as a matter of routine practice. He advised Roley, however, that he could avail himself of the county grievance procedure and for purposes of his complaint, he would waive the internal steps and refer the matter to the county personnel director for final decision. [FN2]

FN2 Following are excerpts from Dr. Schumaker's letter which the trial court considered in reaching its decision: "In your letter, you indicated that you believe that you have a right to an administrative appeal under the Peace Officer Bill of Rights concerning this transfer. My response is that no discipline was anticipated by this change of assignment and upon its accomplishment, no discipline will have taken place. All Division Director positions in the Probation Department are at an M-6 level. There is no one position that is favored above the others as far as rank, status or salary are concerned (with the exception of the Juvenile Hall bonus). All Division Director positions are critical to the operation of this Department. A transfer from one position to another is not a disciplinary measure and is therefore not covered by the Peace Officer Bill of Rights. [¶] Rotation of Supervisors, Division Directors and Chief Deputies in this Department has been an established practice for many years. Most, if not all, Division Directors have been rotated among the positions in this Department at least once, and in some cases twice, since I assumed this office. I am therefore directing that

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> your reassignment is to take place effective May 23, 1986. This does not however preclude you from using the grievance procedure as outlined in the Personnel and Salary Resolution to express your complaint/grievance. For the purpose of resolution of this particular matter, I will agree to waive the internal steps and refer the matter to the County Personnel Director for a final decision."

Roley then filed a "grievance" and also wrote Orange County Personnel Director Russell C. Patton requesting an administrative appeal. Patton replied by advising Roley that he would meet with him "... to discuss and hear your appeal as a peace officer and to address your grievance." A meeting was held, Patton permitted Roley to present his version of the events which he perceived led to his transfer, and a week later Patton made his decision - the transfer would stand but the critical memo about Roley's handling of the sexual harassment incident would be removed from his personnel file.

Roley then filed a petition for a writ of mandate requesting that the court require the county afford Roley the opportunity for a full trial type administrative appeal regarding his recent transfer. ***1293**

The trial court in denying the writ concluded: "Based on the evidence that's before the court, the court must conclude that it is not a punitive transfer. ..." Neither party requested a statement of decision.

(1a) Roley appeals contending under case law, such a transfer was for "purpose of punishment," and as a result, he is entitled to an administrative hearing subject to judicial review. We disagree and uphold the decision below.

At the outset, we note that both parties in their briefs concede that "the sufficiency of the evidence is reviewed under the substantial evidence test." Neither discuss the nature of the test, however, and appellant reargues the evidence at some length in his brief.

We are bound by established rules of appellate review. (2) As even appellant points out in his brief, under the substantial evidence test, the court views the evidence in a light most favorable to the respondent. In other words, factual matters will be viewed most favorably to the prevailing party. (Nestle v. City of Santa Monica (1972) 6 Cal.3d 920, 925 [101 Cal.Rptr. 568, 496 P.2d 480].) "Where the evidence is in conflict, the appellate court will not disturb the verdict of the jury or the findings of the trial court. The presumption being in favor of the judgment ... the court must consider the evidence in the light most favorable to the prevailing party, giving him the benefit of every reasonable inference, and resolving conflicts in support of the judgment." (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 278, p. 289.) An appellate court's "... power begins and ends with a determination as to whether there is any substantial evidence to support [the factual findings]; [it has] no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom." (Overton v. Vita-Food Corp. (1949) 94 Cal.App.2d 367, 370 [210 P.2d 757], partial italics added.)

(1b) Before us are several undisputed facts which were before the trier. The transfer did not entail any financial loss - no reduction in pay or decrease in benefits. Most directors at that level routinely had been transferred to another directorship. It appears from the record that Roley served in the Los Pinos directorship longer than any other director in the department. There was no disciplinary action of any type taken when the transfer occurred. The objectionable memorandum was removed from Roley's file. The trial court's conclusion - its inference that the transfer was not punitive - is most certainly supported by substantial evidence. (3) A "... ***1294** reviewing court is without power to substitute its deductions for those of the trial court; ..." (Crawford v. Southern Pacific Co. (1935) 3 Cal.2d 427, 429 [45 P.2d 183].)

Appellants cite several cases in support of their position. All, however, involved some type of sanction imposed on the officer being transferred. In Baggett v. Gates (1982) 32 Cal.3d 128 [185 Cal.Rptr. 232, 649 P.2d 874], a peace officer was reassigned to a lower paying position; White v. County of Sacramento (1982) 31 Cal.3d 676 [183 Cal.Rptr. 520, 646 P.2d 191] involved a transfer to a lower paying position; and McManigal v. City of Seal Beach (1985) 166 Cal.App.3d 975 [212 Cal.Rptr. 733] concerned a reassignment that resulted in a loss of pay. Hopson v. City of Los Angeles (1983) 139 Cal.App.3d 347 [188 Cal.Rptr.

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689] did not involve a transfer but dealt with whether a critical report placed in a police officer's personnel file constituted punitive action such that a full trial type administrative appeal hearing was required. Doyle v. City of Chino (1981) 117 Cal.App.3d 673 [172 Cal.Rptr. 844] involved a police chief who first had his pay cut and later was dismissed. Appellant has been able to cite no case where a transfer unaccompanied by other actions adverse to the officer was characterized as punitive.

In the instant case, appellant urges us to interpret the evidence differently than did the trial court and reach a different conclusion. The flaw in Roley's argument is revealed in the first page of his reply brief: "But Mr. Roley's transfer was punitive, since it was based on perceived deficient performance." (1c) Appellant assumes transfers based on performance deficiencies, whether perceived or real, are per se punitive. Deficiencies in performance are a fact of life. Right hand hitters sit on the bench against certain pitchers, some professors write better than they lecture, some judges are more temperamental with criminal cases than others. The manager, chancellor or presiding jurist must attempt to find the proper role for his personnel. Switching Casey from shortstop to second base because he can't throw to first as fast as Jones is not in and of itself a punitive transfer.

The trial judge weighed and considered this very issue when it observed: "... it appears to the court that there is a difference between a transfer to punish for a deficiency in performance, versus a transfer to compensate for a deficiency in performance. [¶] In other words, if a person is deficient in performance and they are transferred someplace else where that deficiency will not matter or is compensated for by the new assignment, that is not necessarily punitive. It can be just the opposite of punitive. [¶] And it is the view of the court that, among the various arguments that were made, which *1295 the court is persuaded by, I think that there is no showing by the moving party satisfactory to convince me that this is [a] punitive transfer."

Based on the evidence before the trial court, we cannot disagree. The judgment is affirmed.

Sonenshine, Acting P. J., and Wallin, J., concurred. *1296

Cal.App.4.Dist.,1988.

Orange County Employees Ass'n Inc. v. County of Orange

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JOSE RIVEROS, Plaintiff and Appellant,
v.
CITY OF LOS ANGELES et al., Defendants and Respondents.

No. B086787.

Court of Appeal, Second District, Division 5, California.

Jan 22, 1996.

SUMMARY

The trial court entered a judgment denying a probationary police officer's petition for a writ of mandate to be reinstated to his job as a police officer, from which he was removed by the police chief for having an off-duty relationship with a person he had arrested. (Superior Court of Los Angeles County, No. BS022701, Robert H. O'Brien, Judge.)

The Court of Appeal affirmed. The court held that the officer's probationary period was extended, permitting his summary removal, pursuant to a rule of the board of civil service commissioners, for the time he was absent from duty following his notice of termination, even though the city's charter did not mention extension of the probationary period. The charter called for a probationary period to be fixed by the board's rules, thereby granting the board authority to define how that period would be measured. The court also held that under the city charter provision that the appointing authority (in this case the police chief) could fire a probationary employee by assigning in writing the reasons for that decision to the board of civil service commissioners (which the chief of police provided to the board when he issued his order order of termination) the chief of police had the right and power to weigh not only proven acts of misconduct but also more subtle matters of character and judgment, and to act on his expertise in deciding whether the probationer should attain the secure status of a permanent employee. The court also held that Gov. Code, § 3304 ("no punitive action ... shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal"), did not entitle the probationary officer to an evidentiary hearing at which the police department bore the burden of proof to sustain the charges against him before he could be fired. The Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), of which Gov. Code, § 3304, is a part, was intended to afford the police officer a chance to attempt to convince his or her employer to change his or her mind, and was not intended to abrogate the powers granted charter cities under Cal. Const. art. XI, § 5, including the right to terminate a probationary peace officer's employment at will, without a showing of just cause. (Opinion by Godoy Perez, J., with Grignon, Acting P. J., and Armstrong, J., concurring.) ***1343**

HEADNOTES

Classified to California Digest of Official Reports

(1) Law Enforcement Officers § 13--Removal--Probationer--Extension of Probationary Period.
A police officer's probationary period was extended, permitting his summary removal, pursuant to a rule of the board of civil service commissioners, for the time he was absent from duty following his notice of termination, even though the city's charter did not mention extension of the probationary period. The charter called for a probationary period to be fixed by the board's rules, thereby granting the board authority to define how that period would be measured. This extension of the probationary period due to absences over seven calendar days was not unreasonable in view of the purpose of the probationary period, which is to provide management with a reasonable opportunity to observe and evaluate an employee's performance on the job before according him or her the status of a permanent employee.

(2) Law Enforcement Officers § 13--Removal--Probationer--Procedure.
Under a city charter provision that the appointing authority (in this case a police chief) could fire a probationary employee by assigning in writing the reasons for that decision to the board of civil service commissioners, the chief of police had the right and power to weigh not only proven acts of misconduct but more subtle matters of character and judgment, and to act on his expertise in deciding whether a probationary officer should attain the secure status

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of a permanent employee. While the chief was required to have some reason for firing a probationary officer which was supported by some evidence, he still possessed the essential powers of probationary evaluation. The kinds of acceptable reasons the chief was required to state to the board were as broad as his discretion, and he met his obligation under the charter so long as he articulated a reason and acted within those bounds and his decision was supported by some credible evidence. In accordance with these standards, the chief of police properly terminated a probationary police officer for the stated reason that the officer had developed an off-duty relationship with a person he had arrested while on duty. The evidence to sustain the charge was amply documented by the investigative report, including the officer's admission.

(3) Law Enforcement Officers § 13--Removal--Probationer--Procedure-- Applicability of Bill of Rights.

Gov. Code, § 3304 ("no punitive action ... shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal"), did not entitle a probationary police officer employed by *1344 a charter city to an evidentiary hearing at which the police department bore the burden of proof to sustain the charges against him, before he could be fired. The Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), of which Gov. Code, § 3304, is a part, was intended to afford the police officer a chance to attempt to convince his or her employer to change his or her mind, and was not intended to abrogate the powers granted charter cities under Cal. Const. art. XI, § 5, including the right to terminate a probationary peace officer's employment at will, without a showing of just cause. The act only establishes the right to a posttermination appeal of some kind. Nothing in Gov. Code, § 3304, or the charter, requires that a probationary police officer be given a pretermination hearing at which the department must produce substantial evidence to support the reasons for the discharge. The discharged probationary employee enjoys only a limited right to establish a formal record of the circumstances surrounding his or her termination and to attempt to convince the employer to reverse its decision by demonstrating the falsity of the charges which led to the termination or through proof of mitigating factors, which right does not affect the appointing authority's power to terminate probationary officers without good cause.

[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 774.]

(4) Law Enforcement Officers § 13--Removal--Probationer--Authority of Chief of Police to Reverse Acting Chief's Earlier Decision.

A 22-day suspension imposed on a probationary police officer by an assistant police chief as the acting chief was not a final decision that the police chief could not reverse merely because the officer acquiesced in it and began to serve his suspension. Nothing in the city charter or any other statutory provisions restricted the police chief's ability to reverse an initial decision to discipline a probationary employee and instead terminate him. In fact, that power is consonant with the broad authority granted the police chief in dealing with probationary officers.

COUNSEL

Darryl Mounger and Diane Marchant for Plaintiff and Appellant.

James K. Hahn, City Attorney, Frederick N. Merkin and Leslie E. Brown, Assistant City Attorneys, for Defendants and Respondents. *1345

GODOY PEREZ, J.

Jose Riveros appeals from the judgment denying his petition for writ of mandate to be reinstated to his job as a Los Angeles police officer. For the reasons set forth below, we affirm the judgment.

Facts and Procedural History

Appellant Jose Riveros (Riveros) was sworn in as a rookie member of the Los Angeles Police Department (the Department) on September 9, 1991. By all accounts, Riveros was an excellent and dedicated officer who showed an early commitment to a law enforcement career. Pursuant to section 109, subdivision (c) of the Los Angeles City Charter, Riveros would remain a probationary employee of the Department for 18 months. [FN1]

FN1 All further charter references are to the Los Angeles City Charter unless otherwise indicated.

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On November 3, 1992, a complaint against Riveros was lodged by 18-year-old Heather Stupnik, alleging that after Riveros arrested her the month before on drug charges, he struck up a personal relationship with her which culminated in sexual intercourse. Stupnik's allegations were investigated between November 20, 1992, and December 14, 1992. The investigation revealed that Riveros and his training officer, William Murphy, responded to a child abuse call made by Bonnie Ivy, Stupnik's mother. Ivy told Riveros and Murphy that Stupnik, a chronic drug abuser, was endangering the life of Stupnik's young child by keeping narcotics in the house. Riveros arrested Stupnik for drug possession. During the arrest and booking procedure, Riveros gave Stupnik his business card, telling her to call if she needed help.

Riveros was professional and courteous during this encounter. About one week later, Stupnik began leaving several messages for Riveros at the police station until Riveros returned her call. At this point, the accounts of what took place diverge. Stupnik contends that after a few "general" phone conversations, Riveros became flirtatious and asked to meet. Riveros picked her up at a Long Beach street corner, took her to a motel so they could talk, then had sex with her. Their lovemaking was not rape and was purely consensual, she told investigators. Riveros checked into the motel under a fictitious name. After she began calling Riveros at home, he changed his phone number and threatened to file a complaint about harassing phone calls. Feeling spurned, she wrote letters to Riveros with the intent to make him feel guilty. The Department's investigator noted that Stupnik admitted portions of the letters were not factual and were in part a "product of her imagination." The letters were later discovered by Stupnik's husband, who insisted that she file the complaint. ***1346**

Riveros contended that his phone calls and meeting with Stupnik were intended to discuss ways she could overcome her drug use problem. Riveros admitted renting a motel room under a fictitious name and paying for that room in cash. He also admitted sitting on the bed with Stupnik, but contended he left when she made sexual advances to him, denying that they ever engaged in sexual intercourse.

The results of the investigation were included in a letter of transmittal by Riveros's commanding officer, Captain Timothy King. In analyzing Riveros's conduct, King noted that Riveros was involved in ongoing phone conversations- including calls to his home-with a known addict, that he did not inform anyone he was receiving such calls, that his off-duty meeting with a known addict and rental of a motel room for their meeting "would normally be suspicious to an officer" and that any "thinking, tactics conscious[] officer would have been fearful of being 'set-up' ...." Whether or not he had sex with Stupnik, King believed that Riveros "exposed himself to such personal risk, which subjected the Department to criticism, which was so inherently wrong that only the strongest discipline is applicable. Riveros, a good probationer, seems to have exposed a personality flaw, a deep rooted malignancy in his ability to make judgments that keep his professional position from benefiting his personal appetite." Riveros was contrite, expressed remorse and acknowledged his poor judgment. Based on his previously unblemished performance, Capt. King recommended a 15-day suspension.

After Commander Arthur Lopez learned that a drug user was involved, he recommended that Riveros be fired instead. Capt. King advised Riveros of the new recommendation and the paperwork was finally sent to Assistant Chief of Police Bernard Parks, who was the acting chief of police in the absence of Police Chief Willie Williams.

On February 19, 1993, Parks imposed a 22-day suspension based upon the following charge: "On or about October 3, 1992, you inappropriately turned an on duty official contact with arrestee H. Stupnik into an off duty social relationship." Riveros learned about the intended suspension on February 18, 1993, and began to serve it that day. He signed and was officially served the suspension papers on February 23, 1993. On February 24, 1993, Riveros left for San Francisco to work a part-time job while on suspension.

At 3 p.m. on February 23, however, Capt. King's temporary replacement was notified that Chief Williams had overturned the suspension and intended to fire Riveros. The Department tried unsuccessfully to reach Riveros in San Francisco. When Riveros returned from his trip four days later he found a notice posted on his door that he had been fired. ***1347**

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While the notice of termination is not in the record, Riveros contends and the Department does not dispute that the notice was on a form identical to the one used in imposing the original 22-day suspension. That form, from the Department's chief of police, is titled, "Notice of Termination or Suspension of Sworn Probationary Employee." Pursuant to charter section 109, subdivision (c), Chief Williams was terminating Riveros "pending any appeal to the Chief of Police." The second page of the form, in a section captioned "Administrative Appeal," advised that Riveros had five days from service of the notice to appeal the decision. The form contained instructions for service of the notice, including a provision that the completed original had to be filed with the Board of Civil Service Commissioners (the Board) of the City of Los Angeles (the City) at the end of the five-day appeal period if there were no appeal or immediately after the chief's final decision if an appeal were taken.

Riveros appealed the chief's decision and a hearing was held on March 23, 1993, before Capt. Joseph Curreri as hearing officer. That hearing was described by Curreri as a "liberty interest" hearing. After reading the charge to Riveros, Curreri told Riveros that he had the right to be represented by private counsel, a departmental representative, or both. Riveros was told he also had the right to produce witnesses on his behalf, cross-examine adverse witnesses and testify on his own behalf. Fifteen officers, many of them long-time veterans, testified that Riveros was an excellent and dedicated young officer who had shown one unfortunate lapse of judgment, urging that he be suspended instead of terminated. It was stipulated that 12 other officers who were not present would offer similar testimony if called. The Department called no witnesses.

Riveros testified that he gave Stupnik his business card because he believed he was supposed to hand one to every field contact he had. When Stupnik first called, she merely asked for advice, which he tried to give in a professional manner. When the calls continued, he explained that their relationship was only professional. After Stupnik persisted, including phoning Riveros at home, he threatened to report her for making harassing calls and changed to an unlisted home phone number. He did not report the phone calls because he did not believe he had done anything wrong. It was Stupnik's idea to meet at a motel because she had been kicked out of the house. Riveros rented a motel room at her request and told Stupnik it was the last thing he would do for her. He used a fictitious name to avoid embarrassing the Department.

Curreri said he at first believed the charge but, after hearing and considering all the testimony, was no longer convinced of Riveros's guilt. This *1348 doubt was based on evidence of Riveros's strong work performance and that Riveros consistently tried to help people. He concluded that there was a preponderance of "equal if not greater evidence ... to not resolve the allegation rather than to sustain the charge...." He recommended that Chief Williams reevaluate the classification of the complaint as a charge of conduct unbecoming an officer and, if Williams did so, to instead impose a 22-day suspension. Curreri cautioned Riveros that his findings were not binding on Chief Williams, who was free to follow or disregard them.

On March 24, 1993, Curreri signed a form captioned "Decision of the Hearing Officer Administrative Appeal Hearing and Order of the Chief of Police," making a recommendation in accordance with his statements at the hearing. Below the space for the hearing officer's decision was a section captioned "Order of the Chief of Police." On April 14, 1993, Chief Williams signed this section, ordering Riveros's termination. Attached to the order was a typewritten page signed by Chief Williams which read: "I have reviewed the report of the Hearing Officer and weighed the evidence. Notwithstanding the recommendation, I have come to the conclusion that Police Officer I Jose Riveros should be Removed from his position as a Police Officer with the Los Angeles Police Department." The transcript of Riveros's appeal hearing was not prepared until May 10, 1993, however.

Riveros filed a notice and demand for reinstatement with the Board on April 14, 1993. The notice was made pursuant to charter section 1121/2, which governs the procedures for the termination of city employees who have passed their probationary period of employment. By letter dated May 11, 1993, the Board replied that it could not hear any appeal because Riveros was fired while still on probation.

On April 14, 1993, Riveros filed a petition for writ of mandate in the superior court, seeking

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reinstatement as a police officer. Named as respondents in the petition were the respondents on appeal here, the City and Chief Williams. [FN2] Riveros's operative first amended petition was filed on May 4, 1994. A writ of mandate was justified pursuant to Code of Civil Procedure section 1085, he alleged, because under charter section 109, subdivision (c) and the Department's own rules, the Department was obligated to cite specific reasons for his termination but failed to do so. Pursuant to the Department's rules and Government Code section 3304, subdivision (b), he alleged that he was entitled to an evidentiary hearing on those reasons, with *1349 the Department required to assume the burden of proof, produce evidence and make findings which were supported by substantial evidence. [FN3]

FN2 The City and Chief Williams will sometimes be referred to collectively as "respondents."

FN3 Government Code section 3304 is part of the Public Safety Officers Procedural Bill of Rights Act, Government Code section 3300 et seq., which establishes certain minimal procedural protections for police officers subject to discipline or termination. Those provisions will be discussed in more detail post.

A writ of mandate pursuant to Code of Civil Procedure section 1094.5 was justified, he alleged for the same reasons, with the City and Chief Williams having no jurisdiction to fire Riveros because they did not follow the required procedures.

Points and authorities, with supporting evidence, were submitted by the parties to the trial court and oral argument was heard on June 6, 1994. Judge Robert O'Brien filed a statement of decision on July 12, 1994, finding that Riveros, as a probationary employee, could be fired at will and that the liberty interest hearing before Captain Curreri provided due process. Because Riveros had no protected property interest at stake, the City had no burden of proof to meet at the hearing. Further, while the need for some hearing technically brought the action within the purview of Code of Civil Procedure section 1094.5, that hearing and its outcome did not alter Chief Williams's power to fire Riveros at will. Judgment denying the petition was entered the same day.

Riveros makes the following principal contentions on appeal: (1) Chief Williams did not have the authority to overturn the earlier suspension imposed by Assistant Chief Parks as acting chief; (2) under charter section 109, subdivision (c), Williams was obligated to send a written statement of reasons for Riveros's termination to the Board before Riveros's probationary period expired on March 9, 1993. Since Williams did not do so until April 14, 1993, Riveros became a tenured police officer who could only be fired for good cause after a full and complete hearing before a Board of Rights; and (3) even if Chief Williams's decision was timely, charter section 109, subdivision (c) requires that reasons for the termination be given and that those reasons be supported by substantial evidence. Since the Department produced no witnesses adverse to Riveros at the appeal hearing and since Captain Curreri did not sustain the charge against Riveros, no such evidence was produced.

Standard of Review

To the extent this appeal calls for the interpretation of statutes and charter provisions prescribing the procedures for terminating a probationary police *1350 officer, it raises pure questions of law which we resolve de novo. (Greenwood Addition Homeowners Assn. v. City of San Marino (1993) 14 Cal.App.4th 1360, 1367 [18 Cal.Rptr.2d 350]; Rodriguez v. Solis (1991) 1 Cal.App.4th 495, 502 [2 Cal.Rptr.2d 50].) Because we conclude that Riveros was still a probationary employee at the time of his termination, to the extent his appeal calls for a resolution of disputed factual issues, we examine the record to see whether the trial court's findings are supported by substantial evidence. (Alexander v. Board of Trustees (1983) 139 Cal.App.3d 567, 572 [188 Cal.Rptr. 705].)

Discussion

1. Riveros Was Still a Probationary Employee at the Time of Chief Williams's Final Order

Charter section 109, subdivision (c) sets an 18-month probationary period for new police officers. It also provides, in relevant part: "At or before the expiration of the probationary period, the appointing authority of the department or office in which the candidate is employed may terminate him upon assigning in writing the reasons therefor to said board. Unless he is thus terminated during the probationary period his appointment shall be deemed

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complete...." The appointing authority for the Department is the chief of police. (Charter § 206, subd. (a)(2).) The board to which the chief must assign his reasons in writing is the board of civil service commissioners. (Schrader v. City of Los Angeles (1937) 19 Cal.App.2d 332, 334 [65 P.2d 374], hereafter Schrader.)

The Schrader court construed charter section 109, subdivision (c) literally, holding that a probationary employee was not effectively discharged if the notice were sent to the Board after his probationary period expired. (19 Cal.App.2d at p. 334.) Riveros contends that because his probationary period would have expired March 9, 1993, Chief Williams's notice to the Board on April 14, 1993, was ineffective and he therefore became a tenured member of the Department entitled to a hearing before a Board of Rights. [FN4]

FN4 Charter section 202 provides that a tenured police officer can only be fired for good cause after being found guilty by a Board of Rights. At such a hearing, the accused officer in entitled to subpoena witnesses and documents and otherwise present a complete defense.

Respondents urge that we deem this contention waived since it was never raised below. (Musquiz v. City of Huntington Park (1986) 180 Cal.App.3d 876, 882- 883 [225 Cal.Rptr. 817].) Because the contention raises a question of law based on undisputed facts, however, we will exercise our discretion and consider it. (Resolution Trust Corp. v. Winslow (1992) 9 Cal.App.4th 1799, 1810 [12 Cal.Rptr.2d 510].) ***1351**

We conclude that Riveros's reliance on Schrader to interpret charter section 109, subdivision (c) is misplaced. The court in Schrader considered whether a Los Angeles city gardener was properly fired under that charter provision. The brief opinion was factually sparse, noting only that the superintendent of parks "attempted to discharge" Schrader during his six-month probationary period but did not assign written reasons for the discharge to the board until after the six-month period ran. Since charter section 109, subdivision (c) states that a probationary employee may be fired by assigning the reasons in writing to the Board, but that the appointment to the classified civil service of an employee "not thus discharged" during the probationary period becomes complete, Schrader's termination was ineffective. (Schrader, supra, 19 Cal.App.2d at pp. 333-334.)

No reported decision has since cited Schrader to construe charter section 109, subdivision (c). The court in Randolph v. City of Los Angeles (1977) 67 Cal.App.3d 201 [136 Cal.Rptr. 543] (hereafter Randolph), disapproved on another point in Judson Steel Corp. v. Workers' Comp. Appeals Bd. (1978) 22 Cal.3d 658, 667, footnote 7 [150 Cal.Rptr. 250, 586 P.2d 564] considered whether the probationary period set forth in that charter provision could be extended due to employee absences. The petitioner in Randolph was a city ambulance attendant demoted five days after his six-month probationary period would have run. The employee had been absent 16 days due to industrial injuries.

Charter section 101 states that the Board is to make rules to carry out the purposes of the charter's civil service provisions in accordance with those provisions. Charter section 109, subdivision (c) provides that a probationary period not exceeding 18 months is "to be fixed by said rules." The Randolph court held that charter section 101 authorized the Board to define by rule the length of the probationary period. (Randolph, supra, 67 Cal.App.3d at p. 205.) Board rule 5.26 states the period of probation excludes "(a) The entire period or periods of any absence or absences whether on leave or not, except vacation and time off for overtime, if such period or periods, in the aggregate, exceed seven calendar days." Accordingly, the Randolph court held that the probationary period was extended by the petitioner's absences and he was fired while still on probation. (67 Cal.App.3d at pp. 205-206.)

(1) The same rationale applies here. Board rule 5.26 extends the probationary period by any absence greater than seven days. [FN5] The Department's notice of termination form includes a section captioned "Extension of ***1352** Probation Period" which reads: "Civil Service Commission Rule 5.26 states that in the event a probationary officer is absent in excess of seven calendar days in the aggregate, except for vacation or time off for overtime, that officer's probationary period shall be extended by the entire period or periods missed. Therefore, your probationary period may be extended as a result of absences relating to this matter." (Italics added.) We therefore hold that

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Riveros's probationary period was extended by his absences from the date of his notice of termination on February 24, 1993, to April 14, 1993, when Chief Williams signed the order of termination which was forwarded to the Board. [FN6]

FN5 Respondents contend that under Randolph the probationary period is not extended. Rather, it is "adjusted" to compensate for the probationary employee's absences in excess of seven calendar days. We will not quibble with this distinction, but choose to label the effect of absences under Board rule 5.26 as an extension of the probationary period since that is the language used in Randolph.

FN6 We asked for supplemental briefing on this issue and Riveros concedes in his brief that if Board rule 5.26 applies here, then his probationary period was in fact extended by the period between his relief from duty and Chief Williams's April 14 order. The record does not disclose whether Riveros had any other absences which would have tolled the probationary period any earlier and, for discussion's sake only, we will assume he did not. Riveros alleges that his termination took effect February 24, even though he also admitted that he began serving his suspension on February 18, 1994. Even accepting February 24 as the date of his first absence, there were still a full 14 calendar days until his probation would have expired on March 9, 1993, and under Board rule 5.26, any absences after seven calendar days extended the probationary period. However, Riveros contended for the first time during oral argument that his termination never became effective since there was no evidence in the record that Chief Williams in fact ever transmitted his written statement of reasons to the Board. We deem this argument waived because it was never raised in Riveros's briefs. (Mann v. Cracchiolo (1985) 38 Cal.3d 18, 41 [210 Cal.Rptr. 762, 694 P.2d 1134].) This argument also contradicts Riveros's opening brief, in which he stated that Chief Williams did transmit his statement of reasons to the Board. We deem these statements a concession by Riveros that Williams did so. (Franklin v. Appel (1992) 8 Cal.App.4th 875, 893, fn. 11 [10 Cal.Rptr.2d 759].)

Riveros relies on two decisions-California School Employees Assn. v. Compton Unified School Dist. (1985) 165 Cal.App.3d 694 [211 Cal.Rptr. 653] (hereafter School Employees) and Currieri v. City of Roseville (1970) 4 Cal.App.3d 997 [84 Cal.Rptr. 615] (hereafter Currieri)-to argue that Randolph was wrongly decided. In School Employees, two workers who were fired claimed their probationary periods had previously expired. Under Education Code section 45301, the probationary period was six months or 130 days of paid service, whichever was longer, as prescribed by school board rules, with the board empowered to exclude from this computation time off while on leave of absence. The defendant school board's rule tracked this language, setting a probationary period of six months or one hundred thirty actual days at work, whichever was longer, excluding time off for paid and unpaid leaves of absence. *1353

The school board argued that the employees' paid vacation time was also properly included to extend their probationary periods. The Court of Appeal rejected this contention, focusing on the interplay between Education Code section 45301 and other provisions which statutorily granted school employees the right to paid holidays and vacations. (Ed. Code, §§ 45203, 45197, subd. (a).) The school board's rule conflicted with all three provisions, which the court construed together as calling for a probationary period of 130 days of "paid status." (School Employees, supra, 165 Cal.App.3d at pp. 698- 701.)

Currieri involved the calculation of the probationary period for two discharged police officers. The Roseville City Charter directed the city council to enact by ordinance "a period of probation not to exceed one year ... before ... appointment is made permanent" for municipal employees. The ordinance which was adopted, however, provided that the change from probationary to permanent status could only occur after a written statement authorizing the change in status had been filed. The plaintiff police officers were fired more than one year after their probationary period started but before the required statement had been filed.

The Court of Appeal held that the city ordinance was unlawful since it contradicted the express language of the city charter, which only authorized a probationary period of one year, and which the court interpreted as automatically conferring permanent status on any police officer not discharged during the probationary period. (Currieri, supra, 4 Cal.App.3d at pp. 1000-1001.)

Based on these two decisions, Riveros contends that the Randolph rule creates a similar conflict with

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charter section 109, subdivision (c), which provides for a probationary period not to exceed 18 months and which requires that the chief's written reasons for discharge be sent to the Board within that time period.

The conflicts between statute and city charter present in School Employees and Currieri, however, were not present in Randolph and are not present here. While the Education Code's grant of paid holidays and vacation time precluded use of paid vacation time to extend the probationary period in School Employees, Board rule 5.26 specifies that vacation time will not extend that period. The city charter in Currieri did not include a grant of authority to the city council to fix the probationary period, but instead directed the council to set a one-year limit on that period.

In contrast, charter section 109, as the Randolph court observed, calls for a probationary period to be fixed by the Board's rules, thereby granting the *1354 Board authority to define how that period will be measured. (Randolph, supra, 67 Cal.App.3d at p. 205.) This extension of the probationary period due to absences over seven calendar days "is not unreasonable in view of the purpose of the probationary period, which is to provide management with a reasonable opportunity to observe and evaluate an employee's performance on the job before according him or her the status of a permanent employee. [Citations.]" (Ibid., cited with approval by School Employees, supra, 165 Cal.App.3d at p. 699.) [FN7]

FN7 Riveros also attempts to distinguish Randolph based on the first paragraph of Board rule 5.26. That paragraph sets forth the probationary period for police officers, firefighters and paramedics, stating that in computing their probationary periods, time spent on restricted duty as required by a physician shall be excluded. The paragraph then sets the probationary period for managers and those hired in all other classes. It concludes with the sentence: "In computing the period of probation, the following shall be excluded: ... ," which leads directly to subdivision (a) and the exclusion of any absences more than seven days. Riveros appears to contend that this final sentence and the concomitant exclusion of all absences over seven days applies only to managers and all other employees since it immediately follows the provisions which set their probationary periods. Both the plain meaning and a common sense interpretation of this provision refute this contention. Nothing in the final sentence of this paragraph precludes its application to police and other safety and rescue officers. Nor can we conceive of any sound reason for making such a distinction between those officers and all other city employees.

The charter provisions were not intended to cover the entire civil service system but only to establish policies and standards to be carried out in detail by the Board through it rules-making power. As such, the Board was empowered to adopt reasonable rules and regulations that it deemed necessary to the efficient exercise of its powers expressly granted by the charter. Although authority to exclude lengthy absences from the prescribed probationary period was not expressly conferred by the charter, the authority is implied in the Board's broad discretionary power under charter sections 101 and 109, subdivision (c) to administer and enforce the civil service laws and to fix the probationary period by its rules. (See Baker v. Wadsworth (1970) 6 Cal.App.3d 253, 261 [85 Cal.Rptr. 880].) Rules promulgated by such a board will bot be interfered with as long as they are reasonable and not capricious. (Water v. Civil Service Board (1955) 133 Cal.App.2d 733, 736 [284 P.2d 919].)

This rule applies with special force to probationary police officers, since to hold otherwise would tie the Department's hands in terminating such officers involved in some misconduct shortly before their probationary term expires. As we explain, post, probationary police officers fired for misconduct have the right to a limited, name-clearing hearing before their termination becomes effective. The Department gives its officers five days to request such a hearing, which involves the presentation of witnesses and *1355 other evidence. It was only after this hearing that Chief Williams provided the Board with his written statement of reasons for Riveros's termination and it was only then that the termination became effective under charter section 109, subdivision (c). When a probationary officer is given notice of termination near the end of his probationary term, it may be impossible to convene such a hearing and have the chief deliver his statement of reasons to the Board before that term expires. [FN8] As a result, miscreant probationary officers would achieve tenure and all its concomitant protections merely because their misconduct occurred or was not dicovered until late in their

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probationary term.

FN8 In this case, for instance, Stupnik's complaint was not filed until a few weeks after the incident. An investigation did not begin until more than two weeks after the complaint was filed and did not conclude for nearly three weeks. A decision on whether and how to discipline Riveros was not made for two more months and an appeal hearing was not convened for yet another month.

This appeal requirement did not exist when Schrader was decided more than 58 years ago. The facts of Schrader are few and do not tell us what attempts were made to fire the petitioner before his probationary period ended. Neither did that decision discuss or consider the applicability of Board rule 5.26. An opinion is not authority for propositions not considered. (Ginns v. Savage (1964) 61 Cal.2d 520, 524, fn. 2 [39 Cal.Rptr. 377, 393 P.2d 689].) Accordingly, we do not believe Schrader controls here and choose to follow Randolph instead. Since Riveros's absences after February 24, 1993, extended his probationary period, his probationary period had not yet expired at the time Chief Williams transmitted to the Board his written reasons for firing him. [FN9] Accordingly, his termination became effective within the probationary period.

FN9 Riveros's reliance on the Department's "Special Order No. 14" does not alter our conclusion. That order "revises the procedures for completing a [complaint] ... which could result in the discipline of a probationary employee." It also refers to the notice of termination as a "tentative decision" while the notice of termination itself, in describing the procedures for service of the notice, refers to the chief's "final" decision after any appeal. Regardless of whether Chief Williams's February 23 decision was in any sense "tentative," Riveros's probationary period was still extended by his absences after February 24 and he was therefore still on probation when Williams signed the "final" order on April 14.

2. Riveros's Termination Was Proper Under Charter Section 109

(2) Charter section 109, subdivision (c) provides that the appointing authority, in this case Chief Williams, may fire a probationary employee by assigning in writing the reasons for that decision to the Board. The court in Puckett v. City and County of San Francisco (1962) 208 Cal.App.2d 471 [25 Cal.Rptr. 276] (hereafter Puckett) interpreted a similar provision from the *1356 San Francisco charter and concluded that the police chief "cannot act arbitrarily or capriciously [in firing a probationary officer] but instead must act reasonably and upon substantial evidence." (Id. at p. 475.) [FN10] Riveros contends that Puckett controls here, mandating the existence of reasons for his termination which were supported by substantial evidence. We believe that Kestler v. City of Los Angeles (1978) 81 Cal.App.3d 62 [146 Cal.Rptr. 61] (hereafter Kestler) controls and sets the parameters for the applicability of Puckett.

FN10 Section 148 of the San Francisco charter provided, in relevant part, that "[a]t any time during the probationary period the appointing officer may terminate the appointment upon giving written notice of such termination to the employees and to the civil service commission specifying the reasons for such termination." (Puckett, supra, 208 Cal.App.2d at p. 474.)

The court in Kestler applied charter section 109, subdivision (c) in affirming the termination of a probationary police officer based on one incident of misconduct: driving while highly intoxicated following a fellow officer's retirement party.

Though the Kestler court did not discuss Puckett, it did discuss the broad discretion which charter section 109 grants the police chief in deciding whether to fire a probationary officer: "It is of the essence of a probationary employment that the employee is on trial for the probationary period. Observation of the employee during that period may disclose things about his character, personality and efficiency not discoverable at the time of [his] original employment. Those matters involve more than objectively provable acts of misconduct. They involve matters requiring expert evaluation by the employee's superior and supervisory officers. The citizens of Los Angeles have determined, by [charter] section 202, that if a probationary police officer has not been found unsatisfactory until after his probationary period has passed he shall not thereafter be dismissed except for misconduct that is susceptible of proof at a hearing and that the penalty for acts so proven shall be determined by an independent agency-the board of rights. But the citizens have reserved, in section 109, the essentials of probationary evaluation and have left to the chief

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of police the right and power to weigh not only proven acts of misconduct but more subtle matters of character and judgment, and to act on his expertise in deciding whether the probationer should attain the secure status of a permanent employee." (Kestler, supra, 81 Cal.App.3d at p. 65.)

The officer in Kestler contended that the following facts showed the chief abused his discretion in firing him: he had many commendations and the incident was an isolated one which occurred off-duty. The court rejected that ***1357** argument, holding that the chief was free to determine that "even a single act of drunk[en] driving by a police officer evidenced such bad judgment as to make him a poor risk for further police duties. [¶] ... The chief, relying on his professional expertise, exercised the discretion granted him by section 109 to determine whether to risk some additional evidence of poor judgment-the next time while acting as a police officer. We cannot say that the chief abused his discretion in making that decision." (81 Cal.App.3d at pp. 66-67, fn. omitted.)

We do not believe that Puckett's interpretation of the similarly-worded San Francisco charter provision deprives the chief of the broad discretion described in Kestler. While the chief must have some reason for firing a probationary officer which is supported by some evidence, he still possesses the essential powers of probationary evaluation. The kinds of acceptable reasons the chief must state to the Board are as broad as his discretion under Kestler. So long as he articulates a reason and acts within those bounds and his decision is supported by some credible evidence, he has met his obligations under charter section 109, subdivision (c). [FN11] To the extent Puckett can be read as imposing any greater requirements, we disagree with the decision and choose not to follow it.

FN11 Substantial evidence must be reasonable, credible and of solid value. (Rivard v. Board of Pension Commissioners (1985) 164 Cal.App.3d 405, 414 [210 Cal.Rptr. 509].) It is defined as evidence which a fair and reasonable mind could accept as adequate to support a conclusion. (Chappell v. Palmer (1965) 236 Cal.App.2d 34, 36-37 [45 Cal.Rptr. 686].)

Chief Williams did state his reason for terminating Riveros-his development of an off-duty relationship with an on-duty arrestee. While Riveros denied that he and Stupnik ever had sex, and portrayed his involvement as nothing more than a misguided but sincere desire to help her, we cannot ignore Captain King's critical evaluation of Riveros's admittedly poor judgment in having off-duty contacts with a known drug addict and meeting that addict in a motel room which Riveros rented under a fictitious name. We presume Chief Williams did not ignore that evaluation either. If a one-time drunken driving incident justified the discharge in Kestler, then Riveros's one-time serious lapse in judgment justified the same result in this matter. The evidence to sustain this charge was amply documented by the investigative report, including Riveros's admission that he did develop an off-duty relationship with Stupnik. [FN12] ***1358**

FN12 We view as a red herring Riveros's contention that Chief Williams's April 14, 1993, order could not have been based on an evaluation of the evidence since the decision was made before the transcript of the appeal hearing was prepared. The April 14 order had nothing to do with the decision to terminate Riveros in the first instance, which was made in February 1993. Whether the chief acted properly in rejecting the hearing officer's recommendations after the appeal hearing will be discussed post.

We also reject Riveros's assertion that the trial court erred in ruling that respondents had no burden of proof to satisfy in support of its stated reason for firing him. The trial court's statement of decision held that respondents had no such burden in connection with the posttermination appeal hearing under Government Code section 3304, a proposition which we also consider post. In regard to the discharge itself, the court stated that it was "controlled" by charter section 109, subdivision (c) and that Chief Williams exercised his discretion under that provision. The court made no direct finding that substantial evidence supported the discharge, however. Since Riveros does not contend and the record does not disclose that he ever brought this omission to the court's attention, we will presume that all factual findings necessary to the judgment were made by the trial court, leaving as the sole issue for determination whether substantial evidence supports those implied findings. (In re Marriage of Arceneaux (1990) 51 Cal.3d 1130, 1133-1135 [275 Cal.Rptr. 797, 800 P.2d 1227].) As noted, there was ample evidence to support the implied finding that Chief Williams did state reasons for the discharge which were supported by substantial evidence.

3. Applicability of the Police Officers "Bill of

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Rights" Act

(3) Riveros contends that before he could be fired, he was entitled under Government Code section 3304 to an evidentiary hearing at which the Department bore the burden of proof to sustain the charges against him. [FN13] Section 3304 is part of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq., hereafter the Act). The Act provides a catalogue of basic rights which must be afforded all peace officers by the public entities which employ them. [FN14] It was designed to avoid the adverse consequences of labor unrest and strikes by peace officers by maintaining stable employment relations between those officers and their employers. (§ 3301; Binkley v. City of Long Beach (1993) 16 Cal.App.4th 1795, 1805 [20 Cal.Rptr.2d 903], cert. den. ___ U.S. ___ [127 L.Ed.2d 653, 114 S.Ct. 1301], hereafter Binkley.)

FN13 All further statutory references are to the Government Code unless otherwise indicated.

FN14 In summary, the Act: (1) secures for peace officers the right to engage in political activity when off duty and out of uniform and to seek election to or serve as a member of a local school board (§ 3302); (2) establishes certain protections which must be provided officers during interrogations which could lead to punitive actions (§ 3303); (3) gives the right to review and respond in writing to adverse comments entered in an officer's personnel file (§§ 3305, 3306); (4) provides that officers may not be required to undergo polygraph examinations (§ 3307); (5) prohibits, except under limited circumstances, the search of an officer's locker or personal storage spaces (§ 3309); (6) limits the circumstances under which an officer can be forced to disclose his personal finances (§ 3308); (7) gives officers the right to an administrative appeal following any punitive action (§ 3304); and (8) protects them against retaliation for the exercise of any rights conferred by the Act (§ 3302).

While his argument on this point is confusing, we believe Riveros has improperly blended charter section 109-which controls the reasons and procedures for terminating a probationary police officer-with provisions of the Act, which only provides a limited right of appeal from such a termination. As we make clear, the rights and obligations imposed by charter section 109, subdivision (c) are separate and apart from those established by the Act. *1359

At issue here is section 3304, which provides, in relevant part: "(b) No punitive action ... shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal." The right to such a hearing arises from the due process protections of the Fourteenth Amendment to the United States Constitution. Even though he was only a probationary officer, because Riveros's discharge was based on an allegation of misconduct, which could stigmatize his reputation and make it difficult to obtain other law enforcement jobs, a protected "liberty" interest was implicated, requiring that he be afforded the name-clearing appeal provided by section 3304, subdivision (b) before his termination became effective. (Phillips v. Civil Service Com. (1987) 192 Cal.App.3d 996, 1001 [237 Cal.Rptr. 751]; Lubey v. City and County of San Francisco (1979) 98 Cal.App.3d 340, 345-346 [159 Cal.Rptr. 440]; Binkley, supra, 16 Cal.App.4th at p. 1807; Swift v. County of Placer (1984) 153 Cal.App.3d 209, 216, fn. 6 [200 Cal.Rptr. 181]; Fleisher v. City of Signal Hill (9th Cir. 1987) 829 F.2d 1491, 1494-1495.)

The limited purpose of the section 3304 appeal is to give the peace officer a chance to establish a formal record of the circumstances surrounding his termination and try to convince his employer to reverse its decision, either by showing that the charges are false or through proof of mitigating circumstances. (Binkley, supra, 16 Cal.App.4th at p. 1806.) This is very nearly the same purpose for the hearing mandated by due process requirements, which must afford the officer a chance to refute the charges or clear his name. (Lubey v. City and County of San Francisco, supra, 98 Cal.App.3d at pp. 346-347; see also Baggett v. Gates (1982) 32 Cal.3d 128, 138, fn. 13 [185 Cal.Rptr. 232, 649 P.2d 874] [section 3304 appeal is to some extent coextensive with requirements of due process].) [FN15]

FN15 It is arguable that Riveros was entitled to no such hearing at all, since his admission of the substantial truth of the charges against him eviscerates any claim that his due process rights would be violated absent a name-clearing appeal. (Lukin v. City and County of San Francisco (1986) 187 Cal.App.3d 807, 813-814 [232 Cal.Rptr. 1]; Kestler, supra, 81 Cal.App.3d at p. 66.) Even so,

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we will proceed to examine whether Riveros's posttermination hearing satisfied his rights under section 3304, subdivision (b).

The Act was not, however, "intended to abrogate the powers granted charter cities under article XI, section 5 of the California Constitution [citation], including the right to terminate a peace officer's employment at will, without a showing of 'just cause.' [Citations.]" [FN16] (Binkley, supra, 16 Cal.App.4th at p. 1806.) "Just because the ... Act provides certain procedural safeguards and allows a probationary employee to establish a formal ***1360** record of the circumstances surrounding his termination does not mean [the Department] cannot terminate its probationary peace officers without cause." (Barnes v. Personnel Department (1978) 87 Cal.App.3d 502, 505-506 [151 Cal.Rptr. 94].) [FN17]

FN16 Under this so-called "home rule" provision, the state Constitution grants charter cities plenary authority to provide for the "compensation, method of appointment, qualifications, tenure of office and removal" of their employees. (Cal. Const., art. XI, § 5, subd. (b)(4).)

FN17 That Riveros's appeal hearing was intended to satisfy these requirements is made clear by Captain Curreri's designation of the procedure as a "liberty interest hearing" and his warning that Chief Williams was free to disregard his recommendations.

In short, section 3304, subdivision (b) of the Act has no application to why respondents fired Riveros. (Baggett v. Gates, supra, 32 Cal.3d at p. 138.) It only establishes his right to a posttermination appeal of some kind. (Gray v. City of Gustine (1990) 224 Cal.App.3d 621, 630 [273 Cal.Rptr. 730] [probationary police officer terminable without cause is covered by the Act and entitled to an administrative appeal after termination].) In so holding it is important to note that we are only concerned with the protections which the Act provides probationary police officers under section 3304, subdivision (b). Our decision does not concern the applicability of other provisions of the Act and does not address the interpretation of section 3304 in regard to tenured peace officers. (See, e.g., Crupi v. City of Los Angeles (1990) 219 Cal.App.3d 1111, 1120-1121 [268 Cal.Rptr. 875].)

Nothing in either charter section 109 or section 3304 of the Act requires that a probationary police officer be given a pretermination hearing at which the Department must produce substantial evidence to support the reasons for the discharge. In fact, such a requirement would contradict the applicable case law. (Lubey v. City and County of San Francisco, supra, 98 Cal.App.3d at p. 345 ["It is settled law that a probationary (or nontenured) civil service employee, at least ordinarily, may be dismissed without a hearing or judicially cognizable good cause."].) It would also produce the absurd result of probationary police officers receiving very nearly the same protections as tenured police officers. (Kestler, supra, 81 Cal.App.3d at pp. 64-65 [under charter section 202, tenured police officers in the civil service must receive a full and fair pretermination hearing and can only be fired upon a showing of good cause; the rights of probationary officers under charter section 109 must be construed in reference to the rights conferred by charter section 202 and, under charter section 109, the chief is given the essential powers of probationary evaluation].) [FN18] ***1361**

FN18 Neither are we persuaded by Riveros's abstruse attempt to convert the section 3304 liberty interest hearing into an adjudicatory hearing conferring the full panoply of civil service procedural protections by virtue of the Department's Special Order No. 14 and its reference to a "tentative" versus a postappeal "final" decision. Nothing in the record even hints that a hearing under Special Order No. 14 is anything other than the liberty interest hearing mandated by section 3304 and due process concerns. Instead, Curreri advised Riveros that it was a "liberty interest" hearing. Further, the fact that Williams was free to disregard the outcome of the appeal hearing, as Curreri advised Riveros, is in accord with the liberty interest function of a section 3304 hearing: to provide an opportunity to refute the charge or offer evidence of mitigating circumstances so the employer can decide whether to reverse its decision. (Binkley, supra, 16 Cal.App.4th at p. 1806.)

Riveros's contention that the appeal hearing required under section 3304, subdivision (b) placed certain procedural and substantive burdens on respondents is incorrect. The Binkley court considered and rejected the contention that the employer bears the burden of proof at such a hearing. Instead, the discharged probationary

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employee enjoys only a limited right to establish a formal record of the circumstances surrounding his termination and to convince the employer to reverse its decision by demonstrating the falsity of the charges which led to the termination or through proof of mitigating factors. (Binkley, supra, 16 Cal.App.4th at p. 1809.) [FN19]

FN19 In fact, the Department's procedures granted Riveros a right which section 3304, subdivision (b) does not confer: to cross-examine adverse witnesses. (Binkley, supra, 16 Cal.App.4th at p. 1809.)

Chief Williams's choice to stand by his decision without reviewing the transcript of the appeal hearing does not alter our conclusion. Even though Riveros was entitled to refute the charges and try to convince the chief to reverse his decision, section 3304, subdivision (b) does not affect his right to terminate probationary officers without good cause. (Barnes v. Personnel Department, supra, 87 Cal.App.3d at pp. 505-506.) As discussed, ante, the decision to fire Riveros did comport with charter section 109, subdivision (c), and nothing in the charter or section 3304 provides a right to have that decision reversed. Similarly, nothing in the applicable law required the chief to do anything other than provide the liberty hearing which due process and section 3304 compel. Respondents did so.

The trial court's finding that the hearing comported with section 3304, subdivision (b) and applicable due process requirements was therefore correct. (Binkley, supra, 16 Cal.App.4th at p. 1807 [due process requires at a minimum that the employee be given a chance to refute the charges and clear his name].)

4. Chief Williams Was Free to Override Riveros's Initial Suspension

(4) Finally, we dispose of Riveros's contention that the 22-day suspension imposed by assistant chief Parks as the acting chief was a final decision which Chief Williams could not reverse. Riveros contends that the initial decision to suspend him became effective once he acquiesced in and began to serve his suspension. His reliance on In re Governorship (1979) 26 Cal.3d ***1362** 110 [160 Cal.Rptr. 760, 603 P.2d 1357], to support this contention is misplaced. The court in that decision held that judicial appointments made by the Lieutenant Governor, as acting Governor in the absence of the Governor, could be revoked by the Governor because they had not become effective. (Id. at pp. 120-122.) That holding was based on interpretations of a chief executive's power dating back to Marbury v. Madison (1803) 5 U.S. (1 Cranch) 137 [2 L.Ed. 60], and has no application here.

Nothing in charter section 109, subdivision (c) or any other statutory or charter provisions restricts the police chief's ability to reverse an initial decision to discipline a probationary employee and instead terminate him. In fact, that power is consonant with the broad authority granted the chief in dealing with probationary officers. To hold otherwise would unduly restrict those powers. As respondents point out, it could also lead to absurd results, such as where the acting chief had imposed no discipline at all for an offense which the chief deemed worthy of sanction, or where an initial decision to discipline must be supplanted by termination when new and more egregious facts come to light.

Disposition

For the reasons set forth above, the judgment is affirmed. Each party to bear its own costs on appeal.

Grignon, Acting P. J., and Armstrong, J., concurred.

A petition for a rehearing was denied February 20, 1996, and the opinion was modified to read as printed above.

Cal.App.2.Dist.,1996.

Riveros v. City of Los Angeles

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GARY RUNYAN, Plaintiff and Respondent,
v.
WILLIAM C. ELLIS, as Chief of Police, etc., et al., Defendants and Appellants.

No. B080924.

Court of Appeal, Second District, Division 3, California.

Dec 1, 1995.

SUMMARY

The trial court issued a writ of mandate ordering a city and associated defendants to provide a police officer, who was temporarily transferred and subject to a reduction in pay as discipline for deficient performance, with an administrative appeal before the city's civil service commission in accordance with the Public Safety Officers' Procedural Bill of Rights Act (Gov. Code, § 3304, subd. (b)). (Superior Court of Los Angeles County, No. NS002792, Anita Rae Shapiro, Temporary Judge. [FN<<dagger>>])

FN<<dagger>> Pursuant to California Constitution, article VI, section 21.

The Court of Appeal affirmed. The court held that the officer had a right to an administrative appeal because his temporary transfer with an accompanying cut in pay was "punitive action" within the meaning of Gov. Code, § 3303. Although the officer was required to seek a meeting with the city manager pursuant to a memorandum of understanding (MOU), and such a meeting was necessary, it was not sufficient to meet the administrative appeal requirements of Gov. Code, § 3304, subdivision (b). Defendants were collaterally estopped, by a prior decision involving the same defendants, to relitigate the adequacy of the meeting with the manager under the MOU. Given the only existing apparatus in the city for an administrative appeal by police officers was found with the civil service commission, that was the apparatus the officer was entitled to use. Requiring such a hearing did not violate the "home rule" provision of Cal. Const., art. XI, § 5. (Opinion by Aldrich, J., with Klein, P. J., and Kitching, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Law Enforcement Officers § 12--Police--Disciplinary Proceedings-- Appeal--Civil Service Commission--Right Under Public Safety ***962** Officers' Procedural Bill of Rights Act.

The trial court properly issued a writ of mandate ordering a city and associated defendants to provide a police officer, who was temporarily transferred and subjected to a reduction in pay as discipline for deficient performance, with an administrative appeal before the city's civil service commission in accordance with the Public Safety Officers' Procedural Bill of Rights Act (Gov. Code, § 3304, subd. (b)). The officer had a right to an administrative appeal because his temporary transfer with an accompanying cut in pay was "punitive action" within the meaning of Gov. Code, § 3303. Although the officer was required to seek a meeting with the city manager pursuant to a memorandum of understanding (MOU), and such a meeting was necessary, it was not sufficient to meet the administrative appeal requirements of Gov. Code, § 3304, subdivision (b). Defendants were collaterally estopped, by a prior decision involving the same defendants, to relitigate the adequacy of the meeting with the manager under the MOU. Given the only existing apparatus in the city for an administrative appeal by police officers is found with the Civil Service Commission, that was the apparatus the officer was entitled to use. Requiring such a hearing did not violate the "home rule" provision of Cal. Const., art. XI, § 5.

[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 774.]

COUNSEL

James E. Trott and Larry J. Roberts for Plaintiff and Respondent.

John R. Calhoun, City Attorney, and Linda L. Daube, Deputy City Attorney, for Defendants and Appellants.

ALDRICH, J.

Introduction

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Respondents, the City of Long Beach (the City), the City's Manager, James C. Hankla and the City's Chief of Police, William C. Ellis (the Chief), appeal from the grant of a peremptory writ of mandate ordering them to *963 provide petitioner, Gary Runyan, a police officer with the City, an administrative appeal before the City's civil service commission in accordance with the Public Safety Officers' Procedural Bill of Rights Act (hereinafter the Bill of Rights Act). (Gov. Code, § 3304, subd. (b).) [FN1] Because we hold the writ was properly issued, the judgment is affirmed.

FN1 All further statutory references are to the Government Code unless otherwise indicated.

Factual and Procedural Background

In June, 1992, the police department for the City filed an internal affairs complaint against Runyan for deficiencies in his performance. On September 28, 1992, the City sent a formal letter of reprimand listing six incidents of alleged failure on Runyan's part to meet the police department's standards as a peace officer. Runyan was notified the City would take the disciplinary measure of temporarily transferring him for 90 days from the patrol bureau, field support division to the patrol bureau, east division, team 24 and reduce his pay. Runyan was also notified of his right, pursuant to the memorandum of understanding (MOU) between the City and the Long Beach Police Officers Association, to appeal the disciplinary action to the city manager or his designee. (MOU, art. VIII, § III, subd. D.2, par. 2.)

Runyan requested an administrative appeal before the City's civil service commission but his request was denied. Runyan filed a second formal request for administrative appeal before the civil service commission. The second request for appeal before the civil service commission was also denied.

Runyan filed his petition for peremptory writ of mandate, pursuant to section 1085 of the Code of Civil Procedure, seeking to force the civil service commission to provide Runyan with an administrative appeal as the result of his punitive transfer to a lower paying position.

The City, its manager and the Chief responded to the petition by opposing it on three grounds: (1) the bargained-for MOU; (2) the "home rule" provisions of the Constitution; (3) the rules of the civil service commission which do not provide Runyan with an administrative appeal before it.

The trial court granted Runyan's petition for peremptory writ of mandate and ordered the respondents to provide an administrative appeal before the *964 civil service commission in accordance with section 3304, subdivision (b). Respondents filed this timely appeal.

Discussion

(1) The issue respondents raise in this appeal is whether Runyan had a right to an administrative appeal before the City's civil service commission pursuant to the Bill of Rights Act, the City's charter, and the civil service rules.

"In determining the scope of coverage under the [Bill of Rights] Act, we independently determine the proper interpretation of the statute and are not bound by the lower court's interpretation. [Citation.]" (Binkley v. City of Long Beach (1993) 16 Cal.App.4th 1795, 1806 [20 Cal.Rptr.2d 903].)

The Bill of Rights Act "provides a catalogue of basic rights and protections which must be afforded all peace officers by the public entities which employ them." (Binkley v. City of Long Beach, supra, 16 Cal.App.4th at p. 1805, fn. omitted; White v. County of Sacramento (1982) 31 Cal.3d 676, 679 [183 Cal.Rptr. 520, 646 P.2d 191].)

One such basic protection is the right to an administrative appeal of punitive actions. Section 3304, subdivision (b) of the Bill of Rights Act provides, "No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

We conclude Runyan had a right to an administrative appeal because his 90-day transfer with accompanying cut in pay was "punitive action" pursuant to section 3303. (See also White v. County of Sacramento, supra, 31 Cal.3d at pp. 681-683.) Section 3303 defines punitive action as "any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer

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for purposes of punishment." (Italics added.) The action taken against Runyan was a transfer for purposes of punishment for the numerous instances of infractions and resulted in a reduction in pay. As he was subjected to punitive action, Runyan had a right to an administrative appeal.

While respondents do not deny Runyan had a right to an administrative appeal, they contend Runyan had no "absolute right" to a hearing before the ***965** civil service commission. Respondents argue the City strictly complied with the provisions of the civil service rules and the MOU with the result they satisfied the procedural due process requirements of the Bill of Rights Act.

"Section 3304 requires only that an opportunity for administrative appeal be provided. It does not specify how the appeal process is to be implemented. [Citation.]" (Binkley v. City of Long Beach, supra, 16 Cal.App.4th at p. 1806.) Here, the MOU requires "[t]he employee shall have the right to appeal the discipline in writing to the City Manager or his designee within ten (10) days of receiving written notice of transfer. The City Manager or his designee will schedule a meeting with the employee within five days of receiving notice from the employee. [¶] E. The City Manager's decision under Section III, C. and D. above is final." We conclude, while the meeting is a necessary part of the appeal process, it is nevertheless insufficient to fulfill due process requirements.

Runyan correctly argues respondents are collaterally estopped to relitigate the adequacy of the meeting with the manager under the MOU. Pursuant to rule 977(b)(1) of the California Rules of Court, [FN2] Runyan cites an unpublished opinion issued by this division of this district court in the case entitled Stowe v. City of Long Beach (Feb. 19, 1992) B053521. A review of this opinion reveals the case does involve the same City, city manager and the police chief, construction of the identical provision of the MOU in conjunction with the identical section 3304 of the Bill of Rights Act now before us. Further, the issue there was decided on its merits and on a similar factual basis as the case here. Hence, the City is estopped to relitigate the sufficiency of the administrative appeal process under article VIII, section III, subdivision D.2, paragraph 2 of the MOU. (Verdugo Hills Hospital, Inc. v. Department of Health (1979) 88 Cal.App.3d 957, 962, fn. 6 [152 Cal.Rptr. 263].) [FN3]

FN2 California Rules of Court, rule 977 provides, "(a) An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).... [¶] (b) Such an opinion may be cited or relied on; [¶] (1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel...."

FN3 In light of this decision, respondent's contention they have complied with the MOU is disingenuous. A different panel of this court has already held a police officer in the City who is subject to disciplinary action has a right to an administrative appeal pursuant to the Bill of Rights Act.

In Stowe v. City of Long Beach, supra, B053521, we addressed this issue affirming the trial court's ruling the police officer had a right to an administrative appeal before the civil service commission. Stowe was a probationary sergeant in the City's police department who was demoted to corporal ***966** with the accompanying salary reduction. Stowe first met with the City manager and then sought an administrative appeal of his demotion before the same civil service commission. The comission refused to hear Stowe's appeal. The trial court issued a peremptory writ of mandate pursuant to Code of Civil Procedure section 1094.5. Just as they do here, the City, the manager and the Chief argued that the hearing under the MOU satisfied the requirements of the Bill of Rights Act. We disagreed, stating, "This contention is also devoid of merit. A review of the written transcript for the 'hearing' given to Stowe shows that it was in no way the evidentiary type of appeal process envisioned by section 3304, subdivision (b).... [¶] There was no sworn testimony by anyone at the hearing. Stowe and his attorney simply presented their position on Stowe's demotion and answered the questions put to them by the City Manager and the Deputy City Attorney, two people who can hardly be considered to be disinterested, neutral fact-finders. No one from the City's ' side' made any presentation. Without a presentation by his opposition, Stowe had no way of responding to the City's position; in fact, he had no way of knowing just what that position was." Based on our opinion in Stowe, we conclude the MOU does not comply with

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the requirements of section 3304, subdivision (b).

Respondents nevertheless argue the trial court's ruling Runyan must have a hearing before the civil service commission violates the "home rule" provision of the state Constitution.

We recognize the City is a charter city, governed by the "home rule" provisions of the California Constitution, article XI, section 5. [FN4] The Bill of Rights Act "... was not intended to interfere with a charter city's right to regulate peace officers' qualifications for employment, or the causes for which they may be removed. [Citation.] Nor was the Act intended to abrogate the powers granted charter cities by article XI, section 5 of the *967 California Constitution [citation], including the right to terminate a peace officer's employment at will, without a showing of 'just cause.' [Citations.]" (Binkley v. City of Long Beach, supra, 16 Cal.App.4th at p. 1806.)

FN4 Article XI, section 5 of the California Constitution provides, in relevant part, "(a) It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith. [¶] (b) It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation and government of the city police force ... (4) plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein ... the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, ... and for the compensation method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees."

Nevertheless, as the court in Binkley went on to note, "The limited purpose of an administrative appeal under section 3304 is to give the peace officer subjected to punitive action an opportunity 'to establish a formal record of the circumstances surrounding his termination' [citation], and 'to attempt to convince the employing agency to reverse its decision, either by demonstrating the falsity of charges which led to punitive action, or through proof of mitigating circumstances.' [Citation.]" (Binkley v. City of Los Angeles, supra, 16 Cal.App.4th at p. 1806.) In short the Bill of Rights Act comes into play whenever a public employer fires or takes punitive action against a peace officer. "[T]here can be no doubt that the [A]ct is concerned primarily with affording individual [peace] officers certain procedural rights during the course of proceedings which might lead to the imposition of penalties against them...." (White v. County of Sacramento, supra, 31 Cal.3d at p. 681.)

Reconciling the home rule provisions with section 3304, we therefore conclude Runyan was required to seek a meeting with the city manager pursuant to subdivision (d) of section III of article VIII of the MOU. However, while such a meeting is necessary, it is not sufficient to meet the administrative appeal requirements of section 3304, subdivision (b).

Given the only existing apparatus in the city for an administrative appeal by police officers is found with the civil service commission, and pursuant to our opinion in Stowe, Runyan is entitled to an administrative appeal before the civil service commission.

Runyan insists we establish the parameters of the administrative proceeding in cases such as this, where an officer suffers only temporary punitive action. Respondents suggest, because Runyan suffered a temporary reassignment rather than a permanent demotion or termination, different procedures were called for than those afforded Binkley, the chief of police who was terminated in Binkley v. City of Long Beach, supra, 16 Cal.App.4th 1795.

We decline the invitation to establish the administrative process. "The details of administrative appeal under section 3304, subdivision (b) are left to be formulated by the local agency. [Citation.]" (Binkley v. City of Long Beach, supra, at p. 1806.) We hold only that a meeting with the city manager, in compliance with article VIII, section III, subdivision D.2 of the MOU, is necessary but not sufficient to meet the mandate of the Bill of Rights Act, and that Runyan has a right to an administrative appeal before the

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civil service commission. ***968**

Disposition

The trial court's issuance of the peremptory writ of mandate is affirmed.

Klein, P. J., and Kitching, J., concurred.

A petition for a rehearing was denied December 28, 1995, and appellants' petition for review by the Supreme Court was denied February 22, 1996. ***969**

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Runyan v. Ellis

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SANTA CLARA COUNTY DISTRICT ATTORNEY INVESTIGATORS ASSOCIATION et al.,
Plaintiffs and Appellants,
v.
COUNTY OF SANTA CLARA et al., Defendants and Appellants

Civ. No. 34756.

Court of Appeal, First District, Division 3, California.

September 11, 1975.

SUMMARY

Following a county's denial of a district attorney investigators association's petition for recognition as the representative of such investigators in their employer-employee relations with the county, the association sought writs of mandamus and/or prohibition to compel the county to create a special unit to represent the investigators, thus removing them from an existing "All County Unit." The trial court rendered a judgment which, in part, prohibited the county from including the job classification of such an investigator in any representation unit with nonpeace officers, but which denied the association's request that the county designate the association as the investigators' representative. (Superior Court of Santa Clara County, No. 277143, Richard W. Rhodes, Judge.)

The Court of Appeal affirmed on the county's appeal and, on the ground of tardiness of notice, dismissed the association's cross-appeal. After concluding that Gov. Code, § 3508, is, with respect to the matter at issue, so clear as not to require the use of extrinsic evidence in aid of interpretation, the court held that the statute grants to the investigators, as peace officers within Pen. Code, § 830.3, subd. (b), the right to be placed in an employee representation unit exclusive of, and separate from, nonpeace officer employees. But it was held that the trial court had not erred in failing to compel the county to grant representational status to the petitioning association, in view of its failure to show that an all peace officer unit, including peace officers other than district attorney investigators, could not effectively represent the investigators.(Opinion by Scott, J., with Draper, P. J., and Coughlin, J., [FN*] concurring.)*256

FN* Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

HEADNOTES

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(1) Statutes § 19--Construction--Where Terms Are Clear.
Where the words of a statute are clear, a court may not add to or alter them to accomplish a purpose which does not appear on its face or in its legislative history.

(2) Labor § 21--Labor Unions--Organization and Government--Public Employees--Construction of Statute.
The words of Gov. Code, § 3508, relating to public employee associations, are clear. Hence, in writ proceedings, it was not error to exclude extrinsic evidence as an aid to interpretation.

[See Cal.Jur.2d, Statutes, § 167; Am.Jur.2d, Statutes, § 147.]

(3) Labor § 23--Labor Unions--Organization and Government--Representation-- Peace Officers.
Gov. Code, § 3508, relating to public employee associations, grants to peace officers, as defined by Pen. Code, § 830.3, subd. (b), the right to be placed in an employee representation unit exclusive of and separate from nonpeace officer employees.

(4a, 4b) Labor § 35--Labor Unions--Judicial Intervention--Relief--Peace Officers.
In writ proceedings challenging a county's denial of an association's petition for recognition as the representative of district attorney investigators in employer-employee relations with the county, it was not error to fail to require the county to grant the association the status of a recognized employee organization for representation purposes, where such investigators came within the definition of "peace officers," as the term appears in Gov. Code, § 3508, relating to public employee associations, and the association had not shown inability of an all peace officer unit, including peace officers other than the

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investigators, to effectively represent the investigators.

(5) Labor § 35--Labor Unions--Judicial Intervention--Relief--Peace Officers.
On a county's appeal from a judgment prohibiting the county from including the job classification of district attorney investigator in any representation unit with nonpeace officers, the dismissal of plaintiffs' cross-appeal necessitated by tardiness in *257 filing notice thereof did not foreclose plaintiffs from reapplying to the county personnel board to obtain recognized employee organization status, where the original denial of that status had been based, in part, on the erroneous assumption that an established "All County Unit" made up largely of nonpeace officers was an appropriate representation unit for such investigators.

(6) Mandamus and Prohibition § 73--Mandamus--Rehearing and Appeal-- Supersedeas and Stay.
A contention that the trial court erred in ordering that an appeal from a judgment in mandamus proceedings should not operate as a stay is rendered moot by affirmance of the judgment.

COUNSEL

William M. Siegel, County Counsel, and Leland D. Stephenson, Deputy County Counsel, for Defendants and Appellants.

Carroll, Burdick & McDonough and Christopher D. Burdick for Plaintiffs and Appellants.

SCOTT, J.

The County of Santa Clara, its board of supervisors, personnel board, and director of personnel (hereinafter collectively referred to as County) appeal from that portion of a judgment, entered after trial by court, prohibiting County from including the job classification of district attorney investigator in any representation unit with nonpeace officers. The Santa Clara County District Attorney Investigators Association, J. Nishikawa, Tony Cvetan, and B. P. Blackmore (hereinafter collectively referred to as Association) appeal from that portion of the judgment denying their request that County be required to designate the Santa Clara County District Attorney Investigators Association as a separate recognized employee organization representing the district attorney investigators.*258

County had created an all county representation unit pursuant to its Ordinance No. NS-300.130 (adopted to implement the Meyers-Milias-Brown Act [Gov. Code, §§ 3500-3510]), [FN1] which included the job classification of district attorney investigator. The "All County Unit" was represented by the Santa Clara County Employees Association and its successor, Service Employees International Union, AFL-CIO, Local 715. The All County Unit represented, in great majority, employees who were not peace officers.

FN1 Unless otherwise indicated all statutory references are to the Government Code.

The respondent Association's membership comprises all of the full-time investigators employed by the County and the Santa Clara District Attorney as district attorney investigators. Its membership consists solely of peace officers [FN2] and the Association concerns itself exclusively with the wages, hours, working conditions, welfare programs, and advancement of the academic and vocational training of its members in the furtherance of the police profession. The Association is not subordinate to any other organization. The Association was created for the purpose of representing its members in their employer-employee relations with the County.

FN2 District attorney investigators are peace officers (Pen. Code, § 830.3, subd. (b)) as that term is used in section 3508.

The Association had petitioned County, pursuant to Ordinance No. NS-300.130, for recognition of Association as the representation unit for the district attorney investigators in its employer-employee relations with County. The petition was denied.

Association sought writs of mandamus and/or prohibition to compel County to create a district attorney investigators representation unit, thus removing the investigators from the previously existing "All County Unit."

At the time set for hearing of County's demurrer, the parties represented to the court that the facts in the case were not in dispute and invited the court to rule on the substantive issues presented by the

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pleadings and, in particular, to interpret Government Code, section 3508 as it applied to the undisputed facts. The court filed its memorandum of intended decision. Findings of fact and conclusions of law and judgment were entered. On motion for new trial, County asserted that it wanted a full trial, including the right to present evidence in interpretation of*259 section 3508. The court found that section 3508 was clear and unambiguous, and made the aforementioned rulings.

I. County contends that the trial court erred in not admitting extrinsic evidence to aid in the interpretation of section 3508. However, County has nowhere shown that it made clear to the trial court what evidence it sought to have admitted. (Evid. Code, § 354.) Nor has County shown this court what evidence it sought to put before the trial court to bear on the interpretation of the statute, nor how the exclusion of such evidence was error, nor how the error was prejudicial. There is no basis upon which this court can conclude that any error occurred, nor that but for the alleged error a result more favorable to County would be reasonably probable. (People v. Strickland (1974) 11 Cal.3d 946, 955 [114 Cal.Rptr. 632, 523 P.2d 672]; People v. Watson (1956) 46 Cal.2d 818, 835, 837 [299 P.2d 243].)

Section 3508 deals with the formation of employee organizations by employees who "have duties consisting primarily of the enforcement of state laws or local ordinances." It grants to full-time "peace officers" as defined in Penal Code, section 830 et seq. the right to form, join, or participate in employee organizations composed solely of such peace officers; and are concerned solely with the wages, hours, working conditions, welfare programs and advancement of academic and vocational training in furtherance of the police profession, and which are not subordinate to any other organization.

(1, 2) It is clear from section 3508 that peace officers have the right to a separate public employees organization, as we shall hereafter discuss. The only question is whether there is a concurrent right to a separate all peace officer representation unit. We have concluded that section 3508, read together with other sections of the Meyers-Milias-Brown Act (MMB Act), makes it equally clear that peace officers are entitled to such separate representation unit. When the words of a statute are clear, a court may not add to or alter them to accomplish a purpose that does not appear on the face of a statute or in its legislative history. (Estate of Simmons (1966) 64 Cal.2d 217, 221 [49 Cal.Rptr. 369, 411 P.2d 97]; People v. Knowles (1950) 35 Cal.2d 175, 183 [217 P.2d 1]; Organization of Deputy Sheriffs v. County of San Mateo (1975) 48 Cal.App.3d 331, 340 [122 Cal.Rptr. 210]; County of Madera v. Carleson (1973) 32 Cal.App.3d 764, 769 [108 Cal.Rptr. 515].)*260

The court did not err in not admitting extrinsic evidence to interpret section 3508.

II. County contends that the trial court erred in ruling that section 3508 grants to peace officer employees a right to be placed in an employee representation unit exclusive of and separate from nonpeace officers.

The MMB Act provides only that "professional employees" shall not be denied the right to be represented separately from nonprofessional employees. (§ 3507.3.) Other than this specific grant of separate representation, and by implication separate unit determination to professional employees, the act only requires that a bargaining unit be "appropriate." (§§ 3507, subd. (d), 3507.1.) [FN3] As stated in Alameda County Assistant Public Defenders Assn. v. County of Alameda (1973) 33 Cal.App.3d 825, 830 [109 Cal.Rptr. 392]: "Numerous cases have pointed out that the board need not determine the ultimate unit or the most appropriate unit. The act requires only that the unit be ' appropriate.' [Citations.]" Both Professional Fire Fighters, infra, and Alameda make clear that section 3507, subdivision (d) grants the right of representation to an "all agency" association or "appropriate unit" thereof.

FN3 However, Professor Grodin in his article, Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts (1972) 23 Hastings L.J. 719, 738-739, states: "Concerning the criteria for unit determination, the MMB Act, characteristically, sheds little light. The only explicit criteria are contained in section 3508, which authorizes rules requiring not only separate units but separate organizations for peace officers, and section 3507.3, which provides that professional employees may not be denied the right to be represented separately from nonprofessional

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employees and by a professional employee organization."

Even within such a specific grant of separate unit representation, further questions may be addressed to determine if those placed in a unit which on its face may be "appropriate" is, in fact, "appropriate": whether there is a sufficient "community of interest" among those placed within the unit, the employer's authority to bargain effectively at the level of the unit, and the effect of a unit on the efficient operation of the public service. (Alameda County Assistant Public Defenders Assn. v. County of Alameda, supra, at pp. 829-832.) As the court stated in Organization of Deputy Sheriffs v. County of San Mateo, supra, 48 Cal.App.3d at page 339, footnote 6 [122 Cal.Rptr. 210]: "In the absence of any standards other than reasonableness to determine what are 'appropriate units' recourse must be had to federal standards where the*261 following factors have been considered by NLRB: Community of Interests; History of Bargaining; Desires of Employees; Nature and Organization of Business; Public Interest, etc. (18 C Business Organizations, Kheel, Labor Law § 14.02.1.) Schneider's study, supra, 3 CPER, page 4, names three criteria commonly in use in the public sector, viz.: Community of Interest; Employer's authority to bargain effectively at the level of the unit; and, the effect of a unit on the efficient operation of the public service."

Association contends, and County disputes, that section 3508 is such a specific grant of a separate bargaining unit to full-time peace officers. The section, originally enacted in 1961, was amended in 1965 to add the underlined portion, and was further amended (immaterial to this case) in 1968 and 1971 to presently provide as follows: "The governing body of a public agency may, in accordance with reasonable standards, designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws or local ordinances, and may by resolution or ordinance adopted after a public hearing, limit or prohibit the right of employees in such positions or classes of positions to form, join or participate in employee organizations where it is in the public interest to do so; however, the governing body may not prohibit the right of its employees who are full-time 'peace officers' as that term is defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, to join or participate in employee organizations which are composed solely of such peace officers, which concern themselves solely and exclusively with the wages, hours, working conditions, welfare programs, and advancement of the academic and vocational training in furtherance of the police profession, and which are not subordinate to any other organization.

"The right of employees to form, join and participate in the activities of employee organizations shall not be restricted by a public agency on any grounds other than those set forth in this section."

In 1963, in Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal.2d 276, 289 [32 Cal.Rptr. 830, 384 P.2d 158], the court stated: "In enacting the instant Labor Code sections the Legislature undoubtedly had in mind many logical distinctions between firefighters and other public employees. By Government Code sections 3500-3509, inclusive, it granted to all public employees the right to join labor unions, but therein provided that the employing agencies might except police from the *262 operation of the statute. No one can doubt that the denial of the overall benefits to the police was a reasonable denial of benefits and privileges to a class of persons charged with duties which might be inimicable to union membership." (Italics added.)

Thus, until the 1965 amendment of section 3508, the governing body could absolutely prohibit peace officers from forming, joining, or participating in employee organizations where it was in the public interest to do so. The 1965 amendment clearly acknowledged the reservation expressed in Professional Fire Fighters, that is, that police are "charged with duties which might be inimicable to union membership" by retaining the governing body's right to limit or prohibit full-time peace officers from participating in an employee association "subordinate to any other organization." However, the 1965 amendment qualified the governing body's right to so limit or prohibit such participation by granting full-time "peace officers" the right to participate in a solely peace officer organization not subordinate to any other organization. Section 3508 provides that a governing body may prohibit peace officers from joining or participating in a nonpeace officer organization where such is in the public interest; however, the

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governing body has no right to prohibit peace officers from joining or participating in a peace officer organization which is not subject to any other organization.

The purpose of MMB, in part, is "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (§ 3500; italics added.) The express language of the 1965 amendment to section 3508 is to grant to peace officers as a separate group the right to organize to concern themselves "solely and exclusively with the wages, hours, working conditions, welfare programs, and advancement of the academic and vocational training in furtherance of the police profession"; thus, to pursue the purposes of the MMB Act.

Obviously, if peace officers were placed in a representation unit with nonpeace officers, the unit would not be concerned solely with the police profession. Peace officers ought not to be put in the position of possibly becoming parties to a public employee labor dispute by being in an organization with nonpeace officers. This would clearly be contrary to the public interest. The right to a separate all peace officer organization would have little meaning if peace officers were placed in a bargaining*263 unit which had as its "recognized employee organization" (§ 3501, subd. (b)) an organization either predominantly composed of nonpeace officers or not exclusively concerned with peace officer interests.

(3) We hold that section 3508 grants to peace officers (as defined by Pen. Code, § 830.3, subd. (b)) the right to be placed in an employee representation unit exclusive of and separate from nonpeace officer employees. [FN4]

FN4 There is, arguably, additional authority within MMB which entitles peace officers to a separate representation unit. Section 3507.3 provides in part: "Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization consisting of such professional employees." Section 3508 refers to the "police profession." Where the same word (or root variations thereof) is used in the same statute, it will not be used in two different senses. This could lead us to the conclusion that special investigators of the district attorney's office are full-time peace officers and members of the "police profession" and, as such, are professional employees within the meaning of section 3507.3. It would follow that the inclusion of these employees in a bargaining unit composed largely of nonprofessional employees is inappropriate and also precluded by section 3507.3.

III. (4a) Association contends that the court erred in failing to require that County grant Association the status of a recognized employee organization for representation purposes.

(5) County contends that Association failed to file a timely notice of cross-appeal and therefore their cross-appeal should be dismissed. Association's notice of cross-appeal was filed six days beyond the time required by California Rules of Court, rule 3.

Although we are required to dismiss Association's cross-appeal, Association is not foreclosed from reapplying to the County Personnel Board, in accordance with County Ordinance No. NS-300.130, to obtain "recognized employee organization" status. The original denial of that status was predicated in part upon what we have held to be the erroneous assumption that the "All County Unit" was an appropriate representation unit for district attorney investigators - thus putting them in a unit composed largely of nonpeace officers and nonprofessional employees.

County must make a determination as to whether district attorney investigators are entitled to a representation unit separate from an all peace officer unit. This inquiry must determine whether within such a specific grant of separate unit representation there is a sufficient "community of interest" among those placed within what on its face is*264 an "appropriate" unit, i.e., an all peace officer representation unit, whether the employer is able to bargain effectively at that level of the unit, and the effect of the unit on the efficient operation of the public service.

County's Ordinance No. NS-300.130, adopted to implement the MMB Act, provides in article 4, section 3.9.4-6 that in resolving disputes as to what is an appropriate representation unit or units, "the County Personnel Board shall in each case determine the broadest feasible bargaining unit based

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upon such factors as internal and occupational community of interest and the history of representation."

Without intimating that there may be no other factors that may be considered where they exist (see Organization of Deputy Sheriffs v. County of San Mateo, supra, 48 Cal.App.3d at p. 339, fn. 6), the two factors enumerated in the ordinance are not "unreasonable" when used by County to determine whether the peace officer unit is "appropriate."

Although a given peace officer organization may be entitled to recognition as a separate representation unit, the mere fact that a group of public employees form an organization does not necessarily entitle them to either a separate representation unit or "recognized employee organization" status.

A clear distinction must be drawn between public employees' rights to organize and their right to separate bargaining units. As this court stated in Organization of Deputy Sheriffs (at p. 339): "We have noted that MMB differentiates between the designation of appropriate bargaining units and the formation of employee organizations." (§ 3501, subds. (a), (b).) A "recognized employee organization" is one which has been "formally acknowledged by the public agency as an employee organization" (§ 3501, subd. (b)) as being entitled to "meet and confer" with the governing body on labor/management problems (§ 3505). Representation units may comprise several recognized employee organizations so long as the unit is appropriate. Further, Organization of Deputy Sheriffs points out that "[the] plural use of 'employee organizations' appears to recognize the possibility of the existence of more than one peace officer employee's organization within the agency." (48 Cal.App.3d at pp. 341-342.)***265**

Association relies on Alameda County Assistant Public Defenders Assn. v. County of Alameda (1973) 33 Cal.App.3d 825 [109 Cal.Rptr. 392], in support of its argument that district attorney investigators have a right to a separate peace officer representation unit. Alameda details the agency's obligation as to which and how many different employee organizations the agency must recognize for "meet and confer" purposes. In Alameda the court was interpreting section 3507.3 and, applying a standard of reasonableness, concluded that professional employees with common interests cannot be forced into association with other professional employees with whom there existed little, if any, community of interest to pursue their rights under the Meyers- Milias-Brown Act. To do so would unreasonably deprive the public defense lawyers, the subject of the Alameda case, of the right given by section 3507, subdivision (d) to recognition as an "appropriate unit" by the agency. The Alameda decision does not mandate separate recognition of Association. The governing body is required to consider whether the Association members' community of interest with other peace officers is such that it is entitled to recognition as a separate unit, or whether it is required that Association's members be represented in a unit with other peace officers.

The County may not unreasonably withhold recognition of such employee organization. (§ 3507.) (4b) But Association has not put before this court, or the trial court, facts showing any lack of community of interest with the other peace officers in the County, nor any facts indicating that the all peace officer unit is unable to effectively represent their interests and effectively bargain for them in labor negotiations. [FN5] If such facts exist, Association should present the question to the governing body in an appropriate application for designation as a recognized employee organization and for representation separate from the all peace officer unit. The resolution of the question must be reasonable and in conformity with all pertinent sections of Meyers-Milias- Brown.

FN5 We may note that the Deputy Sheriffs Association is the recognized employee organization which represents employees who are full-time peace officers. At present, it appears that the Deputy Sheriffs Association is excluding respondents from membership. Under section 3503, admission to or dismissal from membership in the organization is to be "reasonable." If such exclusion of respondents cannot be resolved and is held to be reasonable, this may be a factor bearing on the recognition of respondent Association. If so recognized, the question of appropriateness of Association being designated as a single representation unit will be for the governing body.

We recognize that the MMB Act is not a model of clarity. It affords little but the vague criterion of "reasonableness" as a guide for the future***266** courses of the interested parties. (Organization of

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Deputy Sheriffs v. County of San Mateo, supra, 48 Cal.App.3d at p. 336.) This results in confused and conflicting claims between those whom the act is designed to guide, with consequent frequent resort to litigation. In turn, litigation leads to judicial interpretation in matters that would preferably be resolved by clarifying legislation. [FN6]

FN6 Grodin, Public Employee Bargaining in California: The Meyers-Milias- Brown Act in the Courts (1972) 23 Hastings L.J. 719, 719-722, 738-739, 760; Schneider, An Analysis of the Meyers-Milias-Brown Act of 1968 (1969) 1 Cal. Public Employee Relations A-1; Poyer, Good Faith in Collective Bargaining: Private Sector Experience With Some Emerging Public Sector Problems (1969) 2 Cal. Public Employee Relations 1; Staudohar, Strikes and the Rights of Public Employees in California (1970) 7 Cal. Public Employee Relations 1; Bowen, Feuille & Strauss, The California Experience (1971) Cal. Public Employee Relations, Special Issue; Schneider, Unit Determination: Experiments in California Local Government (1969) 3 Cal. Public Employee Relations 1.

IV. Lastly, County contends that the trial court erred in ordering that this appeal shall not operate as a stay of execution of judgment. It contends that Code of Civil Procedure section 1110b requires a showing by the Association that it will suffer irreparable damage before a court may order that an appeal in a mandamus action will not operate as a stay. County contends that there was no evidentiary showing that Association would suffer such injury; that any injury was speculative.

(6) Where the judgment directing issuance of a writ of mandamus has been affirmed, such contention is moot. (Fuller v. San Bernardino Valley Mun. Wat. Dist. (1966) 242 Cal.App.2d 66, 67-68 [51 Cal.Rptr. 130]; Knoff v. City etc. of San Francisco (1969) 1 Cal.App.3d 184, 206 [81 Cal.Rptr. 683].)

Respondent Association's cross-appeal is dismissed.

Judgment is affirmed.

Draper, P. J., and Coughlin, J., [FN*] concurred.

FN* Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

Cal.App.1.Dist.,1975.

Santa Clara County Dist. Atty. Investigators Ass'n v. Santa Clara County

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STEVEN STANTON, Plaintiff and Appellant,
v.
CITY OF WEST SACRAMENTO et al., Defendants and Respondents.

No. C008159.

Court of Appeal, Third District, California.

Jan 18, 1991.

SUMMARY

A police officer received a written reprimand for discharging a weapon in violation of departmental rules. Before he received the reprimand, he was interviewed by a police lieutenant, and after receiving it, he appealed to the police chief, in accordance with provisions in the memorandum of understanding negotiated between the city and the police officers association. The police chief upheld the reprimand. The officer petitioned for a writ of mandate to direct the city to provide him with an administrative appeal pursuant to a city personnel rule or the memorandum. The trial court denied the petition, finding that the appeal to the police chief constituted an appeal within the meaning of Gov. Code, § 3304, subd. (b) (public safety officer's right to administrative appeal). (Superior Court of Yolo County, No. 63822, Harry A. Ackley, Judge.)

The Court of Appeal affirmed. It held that the appeal process as set forth in the memorandum of understanding and complied with by the city satisfied the requirements of Gov. Code, § 3304, subd. (b). The court further held that the officer was not deprived of his due process rights to notice of the proposed disciplinary action, the reasons therefor, a copy of the charges and materials upon which the action was based, and the right to respond, either orally or in writing, to the authority initially imposing discipline. The court held that these due process requirements do not extend to situations involving written reprimands. (Opinion by DeCristoforo, J., [FN<<dagger>>] with Marler, Acting P. J., and Scotland, J., concurring.) ***1439**

FN<<dagger>> Assigned by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1) Law Enforcement Officers § 12--Police--Disciplinary Proceedings-- Appeal--Written Reprimand--Due Process Rights.

A police officer was not deprived of his due process rights to notice of a proposed disciplinary action, the reasons therefor, a copy of the charges and materials upon which the action was based, and the right to respond, either orally or in writing, to the authority initially imposing discipline, where he was issued a written reprimand for discharging a weapon in violation of departmental rules, and where he then appealed to the police chief pursuant to the appeals process outlined in the memorandum of understanding negotiated between the city and the police officers association, and the chief upheld the reprimand. Although due process requires a predisciplinary hearing, and the police officer was issued a reprimand and only then allowed to appeal to the police chief, the due process requirements do not extend to situations involving reprimands. Demotion, suspension, and dismissal all involve depriving the public employee of pay or benefits; a written reprimand results in no such loss to the employee.

(2a, 2b) Law Enforcement Officers § 12--Police--Disciplinary Proceedings--Appeal--Written Reprimand--Statutory Rights.

A police officer was not disciplined in violation of Gov. Code, § 3304, subd. (b) (public safety officer's right to administrative appeal), where, in accordance with provisions of a memorandum of understanding negotiated between the city and the police officers association, the officer, after receiving a written reprimand from a police lieutenant, was allowed to appeal to the police chief, who upheld the reprimand. In the appeal, the officer was represented by counsel and was provided with an opportunity to present evidence and argue his case, in compliance with the memorandum of understanding. The police chief was not involved in the internal investigation leading to the reprimand; thus the officer was not deprived of an "independent re-examination" as required by an administrative appeal. The appeal process as set forth in the memorandum of understanding and complied with by the city satisfied the requirements of § 3304, subd. (b).

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[See Cal.Jur.3d, Law Enforcement Officers, § 33; 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 774.]

(3) Law Enforcement Officers § 1--Public Safety Officers Procedural Bill of Rights Act--Formulation of Administrative Appeal Process.
The procedural details of an administrative appeal required by Gov. *1440 Code, § 3304, subd. (b) (public safety officer's right to administrative appeal), are to be formulated by the local agency.

COUNSEL

Mastagni, Holstedt & Chiurazzi and Mark R. Kruger for Plaintiff and Appellant.

Kronick, Moskovitz, Tiedemann & Girard and Philip A. Wright for Defendants and Respondents.

DeCRISTOFORO, J. [FN*]

FN* Assigned by the Chairperson of the Judicial Council.

Plaintiff Steven Stanton, a police officer employed by defendant City of West Sacramento (the City) appeals from the denial of his petition for a writ of mandamus by the Yolo County Superior Court. Plaintiff, who had been issued a written reprimand by the City, contends that the West Sacramento Police Department's (the Department) appeals procedure denied him due process. We shall affirm the judgment.

Factual and Procedural Background

Plaintiff, a police officer, was disciplined by the Department for discharging a weapon in violation of departmental rules. Initially, plaintiff received notification that an internal affairs investigation into the matter was being conducted. An interview between plaintiff and Lieutenant Muramoto of the department took place, followed by a written reprimand signed by Muramoto.

Plaintiff appealed pursuant to the appeals process outlined in the memorandum of understanding (MOU) negotiated between the City and the West Sacramento Police Officers Association (the Association). The MOU states: "Section 22.6.4 A written reprimand issued by a supervisor shall be appealable only to the Chief of Police. A written reprimand issued by the Chief of Police shall be appealable only to the Appointing Authority or his/her designee. Appeal of written reprimands are excluded from the below appeal procedure for disciplinary actions." Plaintiff appealed to the Police Chief Kalar, who held a hearing in which plaintiff, represented by counsel, had an *1441 opportunity to present evidence in his behalf. Subsequently, Chief Kalar upheld the written reprimand and denied the appeal.

Plaintiff filed a petition for writ of mandamus pursuant to Code of Civil Procedure section 1085 in Yolo County Superior Court. The Superior Court issued an alternative writ of mandate, directing the City to provide plaintiff with an administrative appeal pursuant to City personnel rule 4.14 and the MOU or to show cause why the City has not done so. City personnel rule 4.14 provides that an employee, after disciplinary action may request that the matter be submitted to an arbitrator. [FN1]

FN1 Rule 4.14 states: "The employee after service of an order of disciplinary action may request that the matter be submitted to an arbitrator as provided in the following sections. A written request for an appeal must be served on the Employee Relations Officer or his/her representative within ten (10) calendar days. Following receipt of the order [of] discipline, the demand for a hearing shall include: [¶] (a) Specific grounds for review; [¶] (b) Copies of materials on which the appeal is based."

Following a hearing (not recorded by a court reporter), the superior court found that an appeal to the chief of police satisfies the requirement of Government Code section 3304 subdivision (b) that "[n]o punitive action ... shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal." The court, finding the appeal to the chief of police constitutes an appeal within the meaning of Government Code section 3304 subdivision (b), denied plaintiff's writ.

Plaintiff filed a timely notice of appeal.

I. Procedural Due Process Rights.

(1) Plaintiff argues the procedure for appeal of disciplinary actions under the MOU conflicts with the due process rights outlined by the Supreme

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Court in Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14, 539 P.2d 774].

In Skelly the court held a public employee who achieves the status of permanent employee has a property interest in the continuation of that employment. The court found due process mandates the employee be accorded certain procedural rights before the employer takes punitive action. "As a minimum, these preremoval safeguards must include 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." (15 Cal.3d at p. 215.) ***1442**

Plaintiff contends he was deprived of his due process rights under Skelly because the meeting with Police Chief Kalar took place after issuance of the written reprimand. Skelly, as plaintiff points out, requires a predisciplinary hearing.

Plaintiff advances two theories: (1) the meeting between plaintiff and Chief Kalar, by taking place after the Department issued the written reprimand, failed to provide plaintiff with his rights under Skelly; or (2) the meeting with Chief Kalar constituted a predisciplinary hearing under Skelly, in which case plaintiff is still entitled to an appropriate administrative appeal pursuant to Government Code section 3304, subdivision (b).

We disagree. As the City notes, no authority supports plaintiff's underlying assertion that issuance of a written reprimand triggers the due process safeguards outlined in Skelly. Courts have required adherence to Skelly in cases in which an employee is demoted (Ng v. State Personnel Bd. (1977) 68 Cal.App.3d 600, 606 [137 Cal.Rptr. 387]); suspended without pay (Civil Service Assn. v. City and County of San Francisco (1978) 22 Cal.3d 552, 558- 560 [150 Cal.Rptr. 129, 586 P.2d 162]); or dismissed (Chang v. City of Palos Verdes Estates (1979) 98 Cal.App.3d 557, 563 [159 Cal.Rptr. 630]). We find no authority mandating adherence to Skelly when a written reprimand is issued.

We see no justification for extending Skelly to situations involving written reprimands. Demotion, suspension and dismissal all involve depriving the public employee of pay or benefits; a written reprimand results in no such loss to the employee.

Moreover, Government Code section 3300 et seq., the Public Safety Officers Procedural Bill of Rights Act, provides police officers who are disciplined by their departments with procedural safeguards. Section 3304, subdivision (b) states no punitive action may be taken by a public agency against a public safety officer without providing the officer with an opportunity for administrative appeal. Punitive action includes written reprimands. (Gov. Code § 3303.) Even without the protections afforded by Skelly, plaintiff's procedural due process rights, following a written reprimand, are protected by the appeals process mandated by Government Code section 3304, subdivision (b).

II. Compliance With Government Code Section 3304, Subdivision (b).

(2a) Plaintiff argues the MOU, agreed to by the Association and the Department, fails to provide an appropriate administrative appeal as required by Government Code section 3304, subdivision (b). ***1443**

(3) At the outset, we note the procedural details of an administrative appeal required by section 3304, subdivision (b) are to be formulated by the local agency. (Browning v. Block (1985) 175 Cal.App.3d 423, 429 [220 Cal.Rptr. 763].) The MOU defendant attacks was negotiated between the Association and the Department. The agreement establishes the procedural details for administrative appeals within the Department. Under the MOU, the chief of police hears administrative appeals brought by officers against whom a written reprimand has been filed. In addition, if a written reprimand is issued by the chief of police, the officer reprimanded may appeal to the appointing authority.

Here, plaintiff received a written reprimand from Lieutenant Muramoto. The reprimand followed an interview between Muramoto and plaintiff. Plaintiff appealed the written reprimand to Chief Kalar, and Chief Kalar provided plaintiff with an administrative appeal. In this appeal, plaintiff, represented by counsel, was provided with an opportunity to present evidence and argue his case. This procedure complies with requirements set forth in the MOU.

(2b) However, plaintiff contends an appeal to the chief of police does not provide an "independent re-

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examination" as required by an administrative appeal. (Doyle v. City of Chino (1981) 117 Cal.App.3d 673, 679 [172 Cal.Rptr. 844].)

Again, we disagree. Nowhere does plaintiff allege Chief Kalar was involved in any way in the internal investigation which lead to the written reprimand. Another officer, Lieutenant Muramoto, conducted the investigation and issued the reprimand. Chief Kalar reviewed Muramoto's decision and allowed plaintiff and his counsel an opportunity to present evidence and set forth arguments in his behalf. We find this procedure provided plaintiff with an administrative appeal " 'before a reasonably impartial, noninvolved reviewer. ...' " (Civil Service Assn. v. Redevelopment Agency (1985) 166 Cal.App.3d 1222, 1227 [213 Cal.Rptr. 1], citation omitted.) [FN2] The appeals process as set forth in the MOU, and complied with by the City in the present case, satisfies the requirement that no punitive action may be taken without providing an administrative appeal, as codified in Government Code section 3304, subdivision (b). *1444

FN2 Plaintiff directs our attention to the recent case of Gray v. City of Gustine (1990) 224 Cal.App.3d 621 [273 Cal.Rptr. 730], in which the Fifth District Court of Appeal found an administrative appeal inadequate. However, in Gray the administrative appeal was to be heard by the city manager, who had brought the underlying punitive action against the plaintiff. The Gray court found the city manager was not an impartial judge. (Id. at pp. 631-632.) In the present case Chief Kalar was not involved in the events leading to the written reprimand.

Disposition

The judgment is affirmed. The City is awarded costs on appeal.

Marler, Acting P: J., and Scotland, J., concurred. *1445

Cal.App.3.Dist.,1991.

Stanton v. City of West Sacramento

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Commission on State Mandates

Originated: 04/03/1996 **Today' s Date** 07/06/1999

Mailing List

CSM/SB # CSM-4499 **Claim Title** City of Sacramento Test Claim

Government Code Section amending sections 3300-3310

Chapters 465/76, 775, 1173, 1174, 1175/78, 1367/80, 944/82, 964/83, 1165/89, 675/90,

Issue Peace Officers Procedural Bill of Rights

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CSM/SB # CSM-4499 **Claim Title** City of Sacramento Test Claim

Government Code Section amending sections 3300-3310

Chapters 465/76, 775, 1173, 1174, 1175/78, 1367/80, 944/82, 964/83, 1165/89, 675/90,

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Hearing Date: August 26, 1999
File Number: CSM 4499
f:\mandates\\4499\tcdraft.doc

Draft Staff Analysis (Dated July 6, 1999)

Government Code Sections 3300 through 3310

As Added and Amended by Statutes of 1976, Chapter 465;
Statutes of 1978, Chapters 775, 1173, 1174, and 1178;
Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994;
Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and
Statutes of 1990, Chapter 675

Peace Officers Procedural Bill of Rights

Executive Summary

Introduction

In order to ensure stable employer-employee relations and effective law enforcement services, the Legislature enacted the Peace Officer Procedural Bill of Rights (POBOR).

The test claim legislation provides procedural protections to peace officers employed by local agencies and school districts when a peace officer is subject to an interrogation by the employer, is facing punitive action or receives an adverse comment in his or her personnel file. The protections required by the test claim legislation apply to peace officers classified as permanent employees, peace officers who serve at the pleasure of the agency, and peace officers on probation who have not reached permanent status.

Claimant's Position

The claimant, the City of Sacramento, contends that the test claim legislation constitutes a reimbursable state mandated program. The claimant acknowledges that due process principles apply to this claim. However, the claimant asserts that the requirements imposed by the test claim legislation are broader than those imposed by the due process clause. The claimant states that "[t]he basic intent of the City's test claim is to seek reimbursement of costs associated with activities specifically afforded peace officers that go beyond what the court has set as minimum requirements for public employees."

State Agency Comments

The Department of Finance contends that the test claim legislation does not constitute a reimbursable state mandated program because the due process principles set forth in *Skelly* v. *State Personnel Board*[1], which predate the enactment of the test claim legislation, require local agencies to perform the same activities.

The State Personnel Board contends that the procedural protections accorded a peace officer under the test claim legislation during interrogations, the rights afforded officers facing punitive action, and those protections afforded officers subject to adverse comments entered in

[1] (1975) 15 Cal.3d 194.

their personnel files all further important due process values. The State Personnel Board states that "[g]iven that a recognized value in federal due process is, to a great extent, to promote accuracy in its decision-making, one can assume that a governmental entity implementing POBOR will achieve a greater accuracy in its decision-making in the personnel arena" and less retaliatory litigation. Thus, the State Personnel Board asserts that the cost savings resulting from the test claim legislation should more than offset any costs that might be attributable solely to the test claim legislation.

Staff Analysis

Several courts have recognized a connection between the test claim legislation and the due process clause of the United States and California Constitutions. The due process clause, like the test claim legislation, affords notice and hearing protections to permanent employees when the employee is subject to a dismissal, demotion, suspension, reduction in salary or written reprimand. The due process clause also affords procedural protections to probationary and at-will employees when the employee's reputation and ability to obtain future employment is harmed by a dismissal.

Under these circumstances, the due process clause requires public employers to provide the employee with notice of the proposed action, reasons for the action, 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 the disciplinary action.

The test claim legislation imposes some of the same due process notice and hearing protections to peace officers. This connection between the due process clause and the test claim legislation is relevant to the analysis of this claim in two respects. First, the due process clause of the United States and California Constitutions were in effect before the enactment of the test claim legislation. Thus, the Commission must determine whether the test claim legislation imposes a new program or higher level of service on local agencies and school districts.

Second, the due process clause of the United States Constitution is a form of federal law. Pursuant to Government Code section 17556, subdivision (c), there are *no* "costs mandated by the state" if the test claim legislation "implemented a federal law resulting in costs mandated by the federal government, unless the [test claim legislation] mandates costs which exceed the mandate in that federal law or regulation." Thus, the Commission must also determine if the test claim legislation results in "costs mandated by the state."

Based on a comparison of the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation, staff finds that the test claim legislation constitutes a partial reimbursable state mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following reimbursable activities:

1. Providing the opportunity for an administrative appeal for the following disciplinary actions (Government Code section 3304, subdivision (b)):
   - Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest are *not* affected (i.e.; the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);

- Transfer of permanent, probationary and at-will employees for purposes of punishment;
- Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and
- Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

2. Conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures. (Government Code section 3303, subdivision (a).)
3. Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Government Code section 3303, subdivisions (b) and (c).)
4. Producing transcribed copies of any notes made by a stenographer at an interrogation, and reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer in the following circumstances (Government Code section 3303, subdivision (g)):

   (a) When the investigation *does not* result in disciplinary action; and

   (b) When the investigation results in:

   - A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e.; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
   - A transfer of a permanent, probationary or at-will employees for purposes of punishment;
   - A denial of promotion for a permanent, probationary or at-will employee for reasons other than merit; and
   - Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career of the employee.

5. Performing the following activities upon receipt of an adverse comment (Government Code sections 3305 and 3306):

   School Districts

   (a) If the adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then schools are entitled to reimbursement for:

   - Obtaining the signature of the peace officer on the adverse comment; or

- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If due the adverse comment *is* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If the adverse comment *is not* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Counties

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then counties are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If the adverse comment *is* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If the adverse comment *is not* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Cities and Special Districts

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then cities and special districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If the adverse comment *is* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If the adverse comment *is not* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Staff Recommendation

Staff recommends that the Commission approve this test claim accordingly.

Claimant

City of Sacramento

Chronology

12/21/95	Claimant files test claim with the Commission
01/26/96	Staff notifies claimant that the test claim is incomplete
03/08/96	Claimant files letter providing statutory code sections included in the test claim
04/26/96	Staff notifies claimant that the test claim is complete
07/17/96	Response filed by the Department of Finance
11/19/96	Staff issues letter to claimant requesting status of claimant's rebuttal
12/06/96	Claimant files rebuttal
12/20/96	Claimant requests continuance of hearing
12/23/96	Staff issues letter to parties regarding revised schedule
01/27/97	Informal conference
01/31/97	Staff issues letter to parties regarding revised schedule
08/06/97	Staff issues letter to claimant requesting status of additional requested information
09/05/97	Claimant files supplemental information
03/19/98	Staff issues letter to parties requesting supplemental briefing on due process issues
06/17/98	Claimant files supplemental comments in response to staff request of March 19, 1998
06/17/98	State Personnel Board files comments in response to staff request of March 19, 1998

Test Claim Legislation

In 1976, the Legislature enacted Government Code sections 3300 through 3310, known as the Peace Officers Procedural Bill of Rights Act. The test claim legislation provides a series of minimum rights and procedural safeguards to peace officers employed by local agencies and school districts that are subject to investigation or discipline. Legislative intent is expressly provided in Government Code section 3301 as follows:

> "The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is

necessary that this chapter be applicable to all public safety officers, as defined in this section, within the State of California."

The test claim legislation applies to all employees classified as "peace officers" under specified provisions of the Penal Code, including those peace officers employed by counties, cities, special districts and school districts.[2] The test claim legislation also applies to peace officers that are classified as permanent employees, peace officers who serve at the pleasure of the agency and are terminable without cause ("at-will" employees)[3] and peace officers on probation who have not reached permanent status.[4]

STAFF ANALYSIS

Issue: **Does the test claim legislation, which establishes rights and procedures for peace officers subject to investigation or discipline, constitute a reimbursable state mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514[5]?**

For a statute to impose a reimbursable state mandated program, the statutory language must direct or obligate an activity or task upon local governmental agencies. In addition, the required activity or task must be new, thus constituting a "new program", or create an increased or "higher level of service" over the former required level of service. The court has defined a "new program" or "higher level of service" as a program that carries out the governmental function of providing services to the public, or a law which, to implement a state policy, imposes unique requirements on local agencies and does not apply generally to all residents and entities in the state. To determine if a required activity is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately prior to the enactment of the test claim legislation. Finally, the newly required activity or increased level of service must be state mandated and impose "costs mandated by the state."[6]

The test claim legislation requires local agencies and school districts to take specified procedural steps when investigating or disciplining a peace officer employee. The stated

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[2] Government Code section 3301 states: "For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.38, 830.4, and 830.5 of the Penal Code."

[3] *Gray* v. *City of Gustine* (1990) 224 Cal.App.3d 621; *Binkley* v. *City of Long Beach* (1993) 16 Cal.App.4th 1795.

[4] *Bell* v. *Duffy* (1980) 111 Cal.App.3d 643; *Barnes* v. *Personnel Department of the City of El Cajon* (1978) 87 Cal.App.3d 502.

[5] Government Code section 17514 defines "costs mandated by the state" as follows: "'Costs mandated by the state' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

[6] *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 537; *City of Sacramento* v. *State of California* (1990) 50 Cal.3d 51, 66; *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 835; Gov. Code, § 17514.

purpose of the test claim legislation is to promote stable relations between peace officers and their employers and to ensure the effectiveness of law enforcement services. Based on the legislative intent, staff finds that the test claim legislation carries out the governmental function of providing a service to the public. Moreover, the test claim legislation imposes unique requirements on local agencies and school districts that do not apply generally to all residents and entities of the state. Thus, the test claim legislation constitutes a "program" within the meaning of article XIII B, section 6 of the California Constitution.

Several California courts have analyzed the test claim legislation, however, and found a connection between its requirements and the requirements imposed by the due process clause of the United States and California Constitutions. For example, the court in *Riveros* v. *City of Los Angeles* analyzed the right to an administrative appeal under the test claim legislation for a probationary employee and noted that the right to such a hearing arises from the due process clause.

> "*The right to such a hearing arises from the due process protections of the Fourteenth Amendment to the United States Constitution*. . . . .The limited purpose of the section 3304 appeal is to give the peace officer a chance to establish a formal record of the circumstances surrounding his termination and try to convince his employer to reverse its decision, either by showing that the charges are false or through proof of mitigating circumstances [citation omitted]. *This is very nearly the same purpose for the hearing mandated by due process requirements*, which must afford the officer a chance to refute the charges or clear his name." (Emphasis added.)[7]

Thus, the Commission must continue its inquiry and compare the test claim legislation to the prior legal requirements imposed on public employers by the due process clause to determine if the activities defined in the test claim legislation are new or impose a higher level of service.

Furthermore, the Commission must determine whether there are any "costs mandated by the state." Since the due process clause of the United States Constitution is a form of federal law, Government Code section 17556, subdivision (c), is triggered. Pursuant to Government Code section 17556, subdivision (c), there are *no* "costs mandated by the state" and no reimbursement is required if the test claim legislation "implemented a federal law resulting in costs mandated by the federal government, unless the [test claim legislation] mandates costs which exceed the mandate in that federal law or regulation."[8]

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[7] *Riveros* v. *City of Los Angeles* (1996) 41 Cal.App.4th 1342, 1359.

[8] Government Code section 17513 defines "costs mandated by the federal government" as follows:

> " 'Costs mandated by the federal government' means any increased costs incurred by a local agency or school district after January 1, 1973, in order to comply with the requirements of a federal statute or regulation. 'Costs mandated by the federal government' includes costs resulting from enactment of state law or regulation where failure to enact that law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state. 'Costs mandated by the federal government' does not include costs which are specifically reimbursed or funded by the federal or state government or programs or services which may be implemented at the option of the state, local agency, or school district."

These issues are discussed below.

The Due Process Clause of the U.S. and California Constitutions

The due process clause of the United States and California Constitutions provide that the state shall not "deprive any person of life, liberty, or property without due process of law."[9] In the public employment arena, an employee's property and liberty interests are commonly at stake.

Property Interest in Employment

Property interests protected by the due process clause extend beyond actual ownership of real estate or money. The U.S. Supreme Court determined that a property interest deserving protection of the due process clause exists when an employee has a "legitimate claim" to continued employment:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . ."
>
> "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - -rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[10]

Applying the above principles, both the U.S. Supreme Court and California courts hold that "permanent" employees, who can only be dismissed or subjected to other disciplinary measures for "cause", have a legitimate claim of entitlement to their job and thus, possess a property interest in continued employment.[11]

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[9] U.S. Constitution, 14th Amendment; California Constitution, Article 1, §§ 7 and 15.

[10] *Board of Regents* v. *Roth* (1972) 408 U.S. 564, 577.

[11] *Slochower* v. *Board of Education* (1956) 350 U.S. 551, where the U.S. Supreme Court found that a tenured college professor dismissed from employment had a property interest in continued employment that was safeguarded by the due process clause; *Gilbert* v. *Homar* (1997) 520 U.S. 924, where the U.S. Supreme Court found that a police officer, employed as a permanent employee by a state university, had a property interest in continued employment and was afforded due process protections resulting from a suspension without pay; *Skelly* v. *State Personnel Board* (1975) 15 Cal.3d 194, where the California Supreme Court held a permanent civil service employee of the state has a property interest in continued employment and cannot be dismissed without due process of law.

Moreover, California courts require employers to comply with due process when a permanent employee is dismissed[12], demoted[13], suspended[14], receives a reduction in salary[15] or receives a written reprimand.[16,17]

When a property interest is affected, the procedural safeguards required by the due process clause generally require notice to the employee and an opportunity to respond, with some variation as to the nature and timing of the procedural safeguards. In cases of dismissal, demotion, long-term suspension and reduction of pay, the courts have prescribed the following due process requirements *before* the discipline becomes effective:

- Notice of the proposed action;
- The reasons for the action;
- 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.[18]

In cases of short-term suspensions (ten days or less), the employee's property interest is protected as long as the employee receives notice, reasons for the action, a copy of the charges, and the right to respond *either during the suspension, or within a reasonable time thereafter*.[19]

Similarly, in the case of a written reprimand where the employee is not deprived of pay or benefits, the employer is not required to provide the employee with the due process safeguards before the effective date of the written reprimand. Instead, an appeals process provided to the employee *after* the issuance of the written reprimand satisfies the due process clause.[20]

Liberty Interest

Although probationary and at-will employees, who can be dismissed without cause, do not have a property interest in their employment, the employee may have a liberty interest affected

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[12] *Skelly, supra*, 15 Cal.3d 194.

[13] *Ng*. v. *State Personnel Board* (1977) 68 Cal.App.3d 600.

[14] *Civil Service Assn.* v. *City and County of San Francisco* (1978) 22 Cal.3d 552, 558-560.

[15] *Ng, supra,* 68 Cal.App.3d 600, 605.

[16] *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438.

[17] In this respect, staff disagrees with the comment filed by the State Personnel Board that due process property rights attach when an employee is transferred, *without* an accompanying reduction in pay or demotion. In *Runyon* v. *Ellis* (1995) 40 Cal.App.4th 961, a case cited by SPB, the court found that the employee was entitled to an administrative hearing as a result of a transfer *and* an accompanying reduction of pay. Conversely, in *Howell* v. *County of San Bernardino* (1983) 149 Cal.App.3d 200, 205, the court recognized that "[a]lthough a permanent employee's right to continued employment is generally regarded as fundamental and vested, an employee enjoys no such right to continuation in a particular job assignment."

[18] *Skelly, supra*, 15 Cal.3d 194, 215.

[19] *Civil Service Assn., supra*, 22 Cal.3d 552, 564.

[20] *Stanton, supra* ,226 Cal.App.3d 1438, 1442.

by a dismissal when the charges supporting the dismissal damage the employee's reputation and impair the employee's ability to find other employment. The courts have defined the liberty interest as follows:

> "[A]n employee's liberty is impaired if the government, in connection with an employee's dismissal or failure to be rehired, makes a 'charge against him that might seriously damage his standing and associations in the community,' such as a charge of dishonesty or immorality, or would 'impose on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. [Citations omitted.] A person's protected liberty interests are not infringed merely by defamatory statements, for an interest in reputation alone is not a constitutionally protected liberty interest. [Citations omitted.] Rather, the liberty interest is infringed only when the defamation is made in connection with the loss of a government benefit, such as employment. [Citations omitted.]" [21]

For example, in *Murden* v. *County of Sacramento*, the court found a protected liberty interest when a *temporary* deputy sheriff was dismissed from employment based on charges that he was engaging two female employees in embarrassing and inappropriate conversation regarding sexual activities. The court noted that the charge impugned the employee's character and morality, and if circulated, would damage his reputation and impair his ability to find other employment.

The court in *Murden* clarified that a dismissal based on charges that the employee was unable to learn the basic duties of the job does *not* constitute a protected interest.[22]

When the employer infringes on a person's liberty interest, due process simply requires notice to the employee, and an opportunity to refute the charges and clear his or her name. Moreover, the "name-clearing" hearing can take place after the actual dismissal.[23]

Test Claim Legislation

As indicated above, employers are required by the due process clause to offer notice and hearing protections to *permanent* employees for

- Dismissals;
- Demotions;
- Suspensions;
- Reductions in salary; and

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[21] *Murden* v. *County of Sacramento* (1984) 160 Cal.App.3d 302, 308, quoting from *Board of Regents* v. *Roth*, *supra*, 408 U.S. at p. 573. See also *Paul* v. *Davis* (1976) 424 U.S. 693, 711-712; and *Lubey* v. *City and County of San Francisco* (1979) 98 Cal.App.3d 340.

[22] *Murden, supra*. 160 Cal.App.3d 302, 308

[23] *Murden, supra*, 160 Cal.App.3d 302, 310; *Arnett* v. *Kennedy* (1974) 416 U.S. 134, 157; and *Codd* v. *Velger* (1977) 429 U.S. 624, 627.

- Written reprimands.

Employers are also required by the due process clause to offer notice and hearing protections to *probationary* and *at-will* employees when the dismissal harms the employee's reputation and ability to obtain future employment.

As more fully discussed below, the test claim legislation imposes some of the *same* notice and hearing requirements imposed under the due process clause.

Administrative Appeal

Government Code section 3304 provides that "no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

Punitive action is defined as follows:

> "For the purpose of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary[24], written reprimand, or transfer for purposes of punishment."[25]

The California Supreme Court determined that "for purposes of punishment" in the foregoing section relates only to a transfer and not to other personnel actions.[26] Thus, in transfer cases, the peace officer is required to prove that the transfer was intended for purposes of punishment in order to be entitled to an administrative appeal. If the transfer is to "compensate for a deficiency in performance," however, an appeal is not required.[27]

In addition, at least one California appellate court determined that employers must extend the right to an administrative appeal under the test claim legislation to peace officers for other actions taken by the employer that result in "disadvantage, harm, loss or hardship" and impact the peace officer's career.[28] In *Hopson*, the court found that an officer who received a report in his personnel file by the police chief regarding a shooting in violation of policies and procedures was entitled to an administrative appeal under Government Code section 3304. The court held that the report constituted "punitive action" under the test claim legislation based on the source of the report, its contents, and its potential impact on the career of the officer.[29]

Finally, the test claim legislation does not specifically set forth the hearing procedures required for the administrative appeal. Rather, the type of administrative appeal is left up to the

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[24] The courts have held that "reduction in salary" includes loss of skill pay (*McManigal* v. *City of Seal Beach* (1985) 166 Cal.App.3d 975), pay grade (*Baggett* v. *Gates* (1982) 32 Cal.3d 128), rank (*White* v. *County of Sacramento* (1982) 31 Cal.3d 676), and probationary rank (*Henneberque* v. *City of Culver City* (1983) 147 Cal.App.3d 250).

[25] Gov. Code, § 3303.

[26] *White* v. *County of Sacramento* (1982) 31 Cal.3d 676.

[27] *Holcomb* v. *City of Los Angeles* (1989) 210 Cal.App.3d 1560; *Heyenga* v. *City of San Diego* (1979) 94 Cal.App.3d 756; *Orange County Employees Assn., Inc.* v. *County of Orange* (1988) 205 Cal.App.3d 1289.

[28] *Hopson* v. *City of Los Angeles* (1983) 139 Cal.App.3d 347, 354, relying on *White* v. *County of Sacramento* (1982) 31 Cal.3d 676, 683.

[29] *Id* at p. 353-354.

discretion of each local agency and school district.[30] The courts have determined, however, that the type of hearing required under Government Code section 3304 must comport with standards of fair play and due process.[31, 32]

The Department of Finance contends that the cost of conducting an administrative hearing is already required under the due process clause and the *Skelly* case, which predate the test claim legislation.

Staff agrees that in some circumstances, the due process clause requires the same administrative hearing as the test claim legislation. However, as reflected by the table below, the test claim legislation is broader than the due process clause and applies to additional employer actions that have not previously enjoyed the protections of the due process clause.

Due Process	Test Claim Legislation
Dismissal of a permanent employee	Dismissal of permanent, *probationary* or *at-will employees*
Demotion of a permanent employee	Demotion of permanent, *probationary* or *at-will employees*
Suspension of a permanent employee	Suspension of permanent, *probationary* or *at-will employees*
Reduction in salary for a permanent employee	Reduction in salary for permanent, *probationary* or *at-will employees*
Written reprimand of a permanent employee	Written reprimand of permanent, *probationary* or *at-will employees*
Dismissal of a probationary or at-will employee which harms the employee's reputation and ability to find future employment	Dismissal of a probationary or at-will employee which harms the employee's reputation and ability to find future employment
	Transfer of a permanent, probationary or at-will employee for purposes of punishment
	Denial of promotion for permanent, probationary or at-will employees on grounds other than merit
	Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee

[30] *Binkley* v. *City of Long Beach* (1993) 16 Cal.App.4th 1795, 1806; *Runyan, supra*, 40 Cal.App.4th 961, 965.

[31] *Doyle* v. *City of Chino* (1981) 117 Cal.App.3d 673, 684. In addition, the court in *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438, 1442, held that the employee's due process rights were protected by the administrative appeals process mandated by Government Code section 3304. Furthermore, in cases involving "misconduct", the officer is entitled to a liberty interest name-clearing hearing under Government section 3304. (*Lubey* v. *City and County of San Francisco* (1979) 98 Cal.App.3d 340; *Murden, supra*.)

[32] Staff notes that at least two cases have referred to the need for an administrative appeals procedure that would enable the officer to obtain court review pursuant to Code of Civil Procedure section 1094.5. Such a review implies that an evidentiary hearing be held from which a record and findings may be prepared for review by the court. (*Doyle, supra*, 117 Cal.App. 3d 673; *Henneberque, supra*, 147 Cal.App.3d 250.) In addition, the California Supreme Court uses the words "administrative appeal" of section 3304 interchangeably with the word "hearing." (*White, supra*, 31 Cal.3d 676.)

Thus, staff finds that the administrative appeal would be required in the absence of the test claim legislation when:

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal.

Under these circumstances, the administrative appeal *does not* constitute a new program or higher level of service because prior law requires such an appeal under the due process clause. Moreover, pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing the administrative appeal in the above circumstances would not constitute "costs mandated by the state" since the administrative appeal merely implements the requirements of the United States Constitution.

Staff finds, however, that the due process clauses of the United States and California Constitutions does not require an administrative appeal in the following circumstances:

- Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest *are not* affected (i.e.; the charges do not harm the employee's reputation or ability to find future employment);
- Transfer of permanent, probationary and at-will employees for purposes of punishment;
- Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and
- Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

Thus, in these situations, staff finds that the administrative appeal required by Government Code section 3304 constitutes a new program or higher level of service and imposes "costs mandated by the state" under Government Code section 17514.

Compensation and Timing of an Interrogation

Government Code section 3303 describes the procedures for the interrogation of a peace officer. The procedures and rights given to peace officers under section 3303 do *not* apply to any interrogation in the normal course of duty, counseling, instruction, or informal verbal admonition by a supervisor. In addition, the requirements do not apply to an investigation concerned solely and directly with alleged criminal activities.[33]

Government Code section 3303, subdivision (a), establishes procedures for the timing and compensation of a peace officer subject to investigation and interrogation by an employer. This section requires that the interrogation be conducted at a reasonable hour, preferably at a time when the peace officer is on duty, or during the "normal waking hours" of the peace officer, unless the seriousness of the investigation requires otherwise. If the interrogation takes

[33] Gov. Code, § 3303, subd. (i).

place during the off-duty time of the peace officer, the peace officer "shall" be compensated for the off-duty time in accordance with regular department procedures.

The claimant contends that Government Code section 3303, subdivision (a), results in the payment of overtime to the investigated employee and, thus, imposes reimbursable state mandated activities. The claimant states the following:

> "If a typical police department works in three shifts, such as the Police Department for this City, two-thirds of the police force work hours [that are] not consistent with the work hours of Investigators in the Internal Affairs section. Even in a smaller department without such a section, hours conflict if command staff assigned to investigate works a shift different than the employees investigated. Payment of overtime occurs to the employees investigated or those performing the required investigation, or is at least a potential risk to an employer for the time an employee is interrogated pursuant to this section."[34]

Staff agrees. Conducting the investigation when the peace officer is on duty, and compensating the peace officer for off-duty time in accordance with regular department procedures are new requirements not previously imposed on local agencies and school districts.

Accordingly, staff finds that Government Code section 3303, subdivision (a), constitutes a new program or higher level of service under article XIII B, section 6 of the California Constitution and imposes "costs mandated by the state" under Government Code section 17514.

Notice Prior to Interrogation

Government Code section 3303, subdivisions (b) and (c), require the employer, prior to interrogation, to inform and provide notice of the nature of the investigation and the identity of all officers participating in the interrogation to the employee.

Under due process principles, an employee with a property interest is entitled to notice prior to the disciplinary action proposed by the employer.[35] Thus, an employee is required to receive notice prior to a dismissal, suspension, demotion, reduction in salary or receipt of a written reprimand. Due process, however, *does not* require notice prior to an investigation or interrogation since the employee has not yet been charged and the employee's salary and employment position have not changed.

Accordingly, staff finds that providing the employee with prior notice regarding the nature of the interrogation and identifying the investigating officers constitutes a new program or higher level of service under article XIII B, section 6 of the California Constitution and imposes "costs mandated by the state" under Government Code section 17514.

Tape Recording of Interrogation

Government Code section 3303, subdivision (g), provides, in relevant part:

> "The complete interrogation of a public safety officer *may* be recorded. *If* a tape recording is made of the interrogation, the public safety officer shall have

[34] Claimant filing dated September 5, 1997.

[35] *Skelly, supra,* 15 Cal.3d 194.

> access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. . . . The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation." (Emphasis added.)

The claimant contends that the activity of providing the peace officer with the tape recording of the interrogation as specified in section 3303, subdivision (g), constitutes a reimbursable state mandated activity.[36] The Department of Finance disagrees contending that the cost of providing recordings of interrogations is required under the due process clause.

For the reasons stated below, staff finds that providing a copy of the recording of the interrogation when further proceedings are contemplated or prior to further interrogation at a subsequent time is *not* a reimbursable state mandated activity.

One of the conditions imposed by the test claim statute requires employers to provide the tape recording to interrogated peace officers if further proceedings are contemplated. If the further proceeding is disciplinary action, then under certain circumstances, due process requires the employer to provide an employee who holds either a property or liberty interest in the job with the materials upon which the disciplinary action is based.

Accordingly, even in the absence of the test claim legislation, the due process clause requires employers to provide such materials, including the tape recording of the interrogation when:

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal.[37]

Under these circumstances, the requirement to produce the tape recording of the interrogation under the test claim legislation *does not* impose a new program or higher level of service because this activity was required under prior law through the due process clause.

Moreover, recent court decisions explain that when a local agency performs a permissive act or has alternatives other than performing the action under the test claim statute, the "downstream" or consequential activities, although statutorily required, are *not* state mandated.[38] For example, in *Lucia Mar,* the California Supreme Court found that a newly enacted ten percent payment by a school district was a "new program" when the district sent its disabled pupils to a state school for the severely handicapped. While the ten percent payment was required by the Education Code, the court did *not* find the sum was state mandated and, therefore, reimbursable. The court recognized that school districts may have several options for furnishing special education to its disabled pupils, only one of which is sending them to a state school. Thus, the court remanded to the Commission the question of whether the ten percent payment was state mandated.

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[36] Claimant filing dated December 6, 1996.

[37] *Skelly, supra*; *Ng, supra*; *Civil Service Assn., supra*; *Stanton, supra; Murden, supra.*

[38] *Lucia Mar Unified School Dist.* v. *Honig*, *supra*, 44 Cal.3d 830, 836-837; *County of Los Angeles* v. *Commission on State Mandates* (1995) 32 Cal.App.4th 805, 818.

Similarly, the test claim statute does *not* require employers to record an interrogation. Rather, recording the interrogation is within the discretion of the employer. Thus, staff finds that the downstream activity of providing the tape recording to the officer, if the employer chooses to record the interrogation, is also not mandated or required by the test claim statute.[39]

Documents Provided to the Employee

Government Code section 3303, subdivision (g), also provides that the peace officer "shall" be entitled to a transcribed copy of any interrogation notes made by a stenographer or any reports or complaints made by investigators or other persons, except those that are deemed to be confidential.

The Department of Finance contends that the cost of providing copies of transcripts, reports and recordings of interrogations are required under the due process clause and, thus, do not constitute a reimbursable state mandated program.

In *Pasadena Police Officers Association*, the California Supreme Court analyzed Government Code section 3303, noting that it does not specify when an officer is entitled to receive the reports and complaints. The court also recognized that section 3303 does not specifically address an officer's due process entitlement to discovery in the event the officer is *charged* with misconduct.[40] Nevertheless, the court determined that the Legislature intended to require law enforcement agencies to disclose the reports and complaints to an officer under investigation only *after* the officer's interrogation.[41]

The court's decision in *Pasadena Police Officers Association* is consistent with due process principles. Due process requires the employer to provide an employee who holds either a property or liberty interest in the job with a copy of the charges and materials upon which the disciplinary action is based *before* the disciplinary action becomes effective.[42]

Accordingly, even in the absence of the test claim legislation, the due process clause requires the employer to provide a copy of all investigative materials, including non-confidential complaints, reports and charges when, as a result of the interrogation,

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal.

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[39] This analysis is consistent with the Commission's findings in *Nonprofit, Special Use Property Requirements* (CSM – 97-TC-01, decided December 17, 1998). There, the Commission *rejected* the argument that the provisions of former Revenue and Taxation Code section 2207, which required reimbursement for increased costs due to test claim legislation that added new requirements to an existing optional program if the local agency had no reasonable alternative other than to continue the optional program, were subsumed within the present statutory scheme in Government Code section 17500 and following. The Commission found that former Revenue and Taxation Code section 2207 was expressly repealed and replaced with Government Code section 17514, which does *not* require reimbursement for increased costs incurred in an optional program.

[40] *Pasadena Police Officers Assn.* v. *City of Pasadena* (1990) 51 Cal.3d 564, 575.

[41] *Id.* at 579.

[42] *Skelly, supra.*

Under these circumstances, the requirement to produce documents under the test claim legislation *does not* impose a new program or higher level of service because this activity was required under prior law through the due process clause. Moreover, pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing the investigative materials in the above circumstances would not constitute "costs mandated by the state" since producing such documentation merely implements the requirements of the United States constitution.

However, staff finds that the due process clause does not require employers to produce the charging documents and reports when requested by the officer in the following circumstances:

(a) When the investigation *does not* result in disciplinary action; and

(b) When the investigation results in:

- A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e.; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
- A transfer of a permanent, probationary or at-will employee for purposes of punishment;
- A denial of promotion for a permanent, probationary or at-will employees for reasons other than merit; and
- Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

Thus, in these situations, staff finds that producing the documents required by Government Code section 3303, subdivision (g), constitutes a new program or higher level of service and imposes "costs mandated by the state" under Government Code section 17514.

Representation at Interrogation

Government Code section 3303, subdivision (i), provides that the peace officer "shall" have the right to be represented during the interrogation when a formal written statement of charges has been filed or whenever the interrogation focuses on matters that are likely to result in punitive action.

The claimant contends that Government Code section 3303, subdivision (i), results in reimbursable state mandated activities since additional professional and clerical time is needed to schedule the interview when the peace officer asserts the right to representation.[43]

Staff disagrees with the claimant's contention. Before the enactment of the test claim legislation, peace officers had the same right to representation under Government Code sections 3500 to 3510, also known as the Meyers-Milias-Brown Act (MMBA). The MMBA governs labor management relations in California local governments, including labor relations between peace officers and employers.[44]

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[43] Claimant's filing dated September 5, 1997.

[44] *Santa Clara County Dist. Attorney Investigators Assn.* v. *County of Santa Clara* (1975) 51 Cal.App.3d 255.

Government Code section 3503, which was enacted in 1961, provides that employee organizations have the right to represent their members in their employment relations with public agencies. The California Supreme Court analyzed section 3503 in *Civil Service Association* v. *City and County of San Francisco*, a case involving the suspension of eight civil service employees. The court recognized an employee's right to representation under the MMBA in disciplinary actions:

> "We have long recognized the right of a public employee to have his counsel represent him at disciplinary hearings. (*Steen* v. *Board of Civil Service Commr.* (1945) 26 Cal.2d 716, 727; [Citations omitted.]) While *Steen* may have dealt with representation by a licensed attorney, the right to representation by a labor organization in the informal process here involved seems to follow from the right to representation contained in the Meyers-Milias-Brown Act and the right to representation recognized in *Steen*."[45]

Peace officers employed by school districts have similar rights under the Educational Employment Relations Act, beginning with Government Code section 3540.[46]

Based on the foregoing, staff finds that the right to representation at the interrogation under Government Code section 3303, subdivision (i), *does not* constitute a new program or higher level of service under article XIII B, section 6 of the California Constitution.

Adverse Comments in Personnel File

Government Code sections 3305 and 3306 provide that no peace officer "shall" have any adverse comment entered in the officer's personnel file without the peace officer having first read and signed the adverse comment.[47] If the peace officer refuses to sign the adverse comment, that fact "shall" be noted on the document and signed or initialed by the peace officer. In addition, the peace officer "shall" have 30 days to file a written response to any adverse comment entered in the personnel file. The response "shall" be attached to the adverse comment.

Thus, Government Code sections 3305 and 3306 impose the following requirements on employers:

- To provide notice of the adverse comment;[48]
- To provide an opportunity to review and sign the adverse comment;

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[45] *Civil Service Assn.*, *supra*, 22 Cal.3d 552, 568.

[46] Government Code section 3543.2, which was added in 1975 (Stats. 1975, c. 961) provides that school district employees are entitled to representation relating to wages, hours of employment, and other terms and conditions of employment.

[47] The court in *Aguilar* v. *Johnson* (1988) 202 Cal.App.3d 241, 249-252, held that an adverse comment under Government Code sections 3305 and 3306 include comments from law enforcement personnel and citizen complaints.

[48] Staff finds that notice is required since the test claim legislation states that "no peace officer shall have any adverse comment entered in the officer's personnel file *without the peace officer having first read and signed the adverse comment*." Thus, staff finds that the officer must receive notice of the comment before he or she can read or sign the document.

- To provide an opportunity to respond to the adverse comment within 30 days; and
- To note on the document that the peace officer refused to sign the adverse comment; or
- To obtain the peace officer's signature or initials under such circumstances.

The claimant contends that county employees have a pre-existing statutory right to inspect and respond to adverse comments contained in the officer's personnel file pursuant to Government Code section 31011. The claimant further states that Labor Code section 1198.5 provides city employees with a pre-existing right to review, but not respond to, adverse comments. Thus, the claimant contends that Government Code sections 3305 and 3306 constitute a new program or higher level of service under article XIII B, section 6 of the California Constitution.

As described below, staff finds that Government Code sections 3305 and 3306 constitute a *partial* reimbursable state mandated program.

Due Process

Under due process principles, an employee with a property or liberty interest is entitled to notice and an opportunity to respond, either orally or in writing, prior to the disciplinary action proposed by the employer.[49] If the adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer or harms the officer's reputation and opportunity to find future employment, then the provisions of the test claim legislation which require notice and an opportunity to review and file a written response are already guaranteed under the due process clause.[50] Under such circumstances, staff finds that the notice, review and response requirements of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution. Moreover, pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing notice and an opportunity to respond do not impose "costs mandated by the state".

However, under circumstances where the adverse comment affects the officer's property or liberty interest as described above, the following requirements imposed by the test claim legislation *are not* required by the due process clause:

- Obtaining the signature of the peace officer on the adverse comment, or
- Noting the peace officer's refusal to sign the adverse comment and to obtain the peace officer's signature or initials under such circumstances.

Thus, staff finds that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514.

The Legislature has also established protections for local public employees similar to the protections required by Government Code sections 3305 and 3306 in statutes enacted prior to the test claim legislation. These statutes are discussed below.

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[49] *Skelly, supra,* 15 Cal.3d 194.

[50] *Hopson, supra,* 139 Cal.App.3d 347.

Existing Statutory Law Relating to Counties

Government Code section 31011, enacted in 1974,[51] established review and response protections for county employees. That section provides the following:

> "Every county employee shall have the *right to inspect and review* any official record relating to his or her performance as an employee or to a grievance concerning the employee which is kept or maintained by the county; provided, however, that the board of supervisors of any county may exempt letters of reference from the provisions of this section.
>
> The contents of such records shall be made available to the employee for inspection and review at reasonable intervals during the regular business hours of the county.
>
> The county shall provide an opportunity for the employee to *respond* in writing, or personal interview, to any information about which he or she disagrees. Such response shall become a permanent part of the employee's personnel record. The employee shall be responsible for providing the written responses to be included as part of the employee's permanent personnel record.
>
> *This section does not apply to the records of an employee relating to the investigation of a possible criminal offense.*" (Emphasis added.)

Therefore, under existing law, counties are required to provide a peace officer with the opportunity to review and respond to an adverse comment *if* the comment *does not* relate to the investigation of a possible criminal offense.[52] Under such circumstances, staff finds that the review and response provisions of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service.

However, even if the adverse comment *does not* relate to the investigation of a possible criminal offense, the following activities required by the test claim legislation were not required under existing law:

- Providing notice of the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, staff finds that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514.

Furthermore, staff finds that when the adverse comment *does* relate to the investigation of a possible criminal offense, the following activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514:

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[51] Stats. 1974, c. 315.

[52] Staff finds that Government Code section 31011 does *not* impose a notice requirement on counties since section 31011 does not require the county employee to review the comment *before* the comment is placed in the personnel file.

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Existing Statutory Law Relating to Cities and Special Districts

Labor Code section 1198.5, enacted in 1975,[53] established review procedures for public employees, including peace officers employed by a city or special district. At the time the test claim legislation was enacted, Labor Code section 1198.5 provided the following:

> "(a) Every employer shall at reasonable times, and at reasonable intervals as determined by the Labor Commissioner, upon the request of an employee, permit that employee to inspect such personnel files which are used or have been used to determine that employee's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.
>
> (b) Each employer subject to this section shall keep a copy of each employee's personnel file at the place the employee reports to work, or shall make such file available at such place within a reasonable period of time after a request therefor by the employee. *A public employer shall, at the request of a public employee, permit the employee to inspect the original personnel files* at the location where they are stored at no loss of compensation to the employee.
>
> (c) *This section does not apply to the records of an employee relating to the investigation of a possible criminal offense.* It shall not apply to letters of reference.
>
> (d) If a local agency has established an independent employee relations board or commission, any matter or dispute pertaining to this section shall be under the jurisdiction of that board or commission, but an employee shall not be prohibited from pursuing any available judicial remedy, whether or not relief has first been sought from a board or commission.
>
> (e) This section shall apply to public employers, including, but not limited to, every city, county, city and county, district, and every public and quasi-public agency. This section shall not apply to the state or any state agency, and shall not apply to public school districts with respect to employees covered by Section 44031 of the Education Code. Nothing in this section shall be construed to limit the rights of employees pursuant to Section 31011 of the Government Code or Section 87031 of the Education Code, or to provide access by a public safety employee to confidential preemployment information."[54] (Emphasis added.)

[53] Stats. 1975, c. 908, § 1.

[54] Labor Code section 1198.5 was amended in 1993 to delete all provisions relating to local public employers (Stats. 1993, c. 59.) The Legislature expressed its intent when enacting the 1993 amendment "to relieve local entities of the duty to incur unnecessary expenses..."

Therefore, under existing law, cities and special districts are required to provide a peace officer the opportunity to review the adverse comment *if* the comment *does not* relate to the investigation of a possible criminal offense.[55] Under such circumstances, staff finds that the review provisions of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service.

However, even if the adverse comment *does not* relate to the investigation of a possible criminal offense, the following activities required by the test claim legislation were not required under existing law:

- Providing notice of the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, staff finds that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514.

Furthermore, staff finds that when the adverse comment *does* relate to the investigation of a possible criminal offense, the following activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Existing Statutory Law Relating to School Districts

Education Code section 44031 establishes notice, review and response protections to peace officers employed by school districts. Section 44031 provides in relevant part the following:

> "(a) Materials in personnel files of employees that may serve as a basis for affecting the status of their employment are to be made available for the inspection of the person involved.
>
> "(d) *Information of a derogatory nature, except [ratings, reports, or records that were obtained in connection with a promotional examination], shall not be entered or filed unless and until the employee is given notice and an opportunity to review and comment thereon.* An employee shall have the right

[55] Staff finds that Labor Code section 1198.5 does *not* impose a notice requirement on counties since section 1198.5 does not require the city or special district employee to review the comment *before* the comment is placed in the personnel file.

to enter, and have attached to any derogatory statement, his own comments thereon...." (Emphasis added.)

Education Code section 87031 provides the same protections to community college district employees.[56]

Therefore, existing law, codified in Education Code sections 44031 and 87031, requires school districts and community college districts to provide a peace officer with notice and the opportunity to review and respond to an adverse comment *if* the comment *was not* obtained in connection with a promotional examination. Under such circumstances, staff finds that the notice, review and response provisions of Government Code sections 3305 and 3306 do *not* constitute a new program or higher level of service.

However, even when Education Code sections 44031 and 87031 apply, if the adverse comment *was not* obtained in connection with a promotional examination, the following activities required by the test claim legislation were not required under existing law:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, staff finds that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514.

Furthermore, staff finds that when the adverse comment is obtained in connection with a promotional examination, the following activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Conclusion and Staff Recommendation

Based on the foregoing analysis, staff finds that the test claim legislation constitutes a partial reimbursable state mandated program pursuant to article XIII B, section 6 of the California Constitution for the following reimbursable activities:

1. Providing the opportunity for an administrative appeal for the following disciplinary actions (Government Code section 3304, subdivision (b)):
   - Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest *are not* affected (i.e.; the

[56] Education Code sections 44031 and 87031 were derived from Education Code section 13001.5, which was originally added by Statutes of 1968, Chapter 433.

charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);

- Transfer of permanent, probationary and at-will employees for purposes of punishment;
- Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and
- Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

2. Conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures. (Government Code section 3303, subdivision (a).)

3. Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Government Code section 3303, subdivisions (b) and (c).)

4. Producing transcribed copies of any notes made by a stenographer at an interrogation, and reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer in the following circumstances (Government Code section 3303, subdivision (g)):

   (a) When the investigation *does not* result in disciplinary action; and

   (b) When the investigation results in:

   - A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e., the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
   - A transfer of a permanent, probationary or at-will employees for purposes of punishment;
   - A denial of promotion for a permanent, probationary or at-will employee for reasons other than merit; and
   - Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career of the employee.

5. Performing the following activities upon receipt of an adverse comment (Government Code sections 3305 and 3306):

   School Districts

   (a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then schools are entitled to reimbursement for:

   - Obtaining the signature of the peace officer on the adverse comment; or

- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Counties

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then counties are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Cities and Special Districts

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then cities and special districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Staff Recommendation

Staff recommends that the Commission approve this test claim accordingly.

EXHIBIT C

APPENDIX E

State of California
COMMISSION ON STATE MANDATES
1414 K Street, Suite 315
Sacramento, CA 95814
(916) 323-3562
CSM 1 (12/89)

For Official Use Only

DEC 21 1995

TEST CLAIM FORM

Claim No. CSM-4499

Local Agency or School District Submitting Claim

City of Sacramento

Contact Person

Telephone No.

Dee Contreras

(916) 264-5424

Address Department of Employee Relations
926 J Street, Room 201
Sacramento, CA 95814-2716

Representative Organization to be Notified

League of California Cities

This test claim alleges the existence of "costs mandated by the state" within the meaning of section 17514 of the Government Code and section 6, article XIIIB of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code section(s) within the chaptered bill, if applicable. Chapter 465, Statutes of 1976; Chapters 775, 1173, 1174, 1175, Statutes of 1978; Chapter 405, Statutes of 1979; Chapter 1367, Statutes of 1980; Chapter 944, Statutes of 1982; Chapter 964, Statutes of 1983; Chapter 1165, Statutes of 1989; Chapter 675, Statutes of 1990, adding and amending Sections 3300-3310 of the Government Code.

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING A TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative

Telephone No.

X Dee Contreras, Director of Labor Relations

(916) 264-5424

Signature of Authorized Representative

Date

X Dee Contreras

12/19/95

CITY OF SACRAMENTO
TEST CLAIM

Chapter 465, Statutes of 1976; Chapters 775, 1173,1174,1175, Statutes of 1978; Chapter 405, Statutes of 1979; Chapter 1367, Statutes of 1980; Chapter 944, Statutes of 1982; Chapter 964, Statutes of 1983; Chapter 1165, Statutes of 1989; Chapter 675, Statutes of 1990.

PEACE OFFICERS PROCEDURAL BILL OF RIGHTS

NARRATIVE

The city of Sacramento hereby submits this test claim to the Commission on State Mandates claiming reimbursement for the state mandated costs imposed on local agencies by the above referenced statutes.

Peace Officers Procedural Bill of Rights Act Is A Reimbursable State Mandate

Chapter 465, Statutes of 1976 added Chapter 9.7 (commencing with Section 3300) to Division 4 of Title I of the Government Code, thereby establishing the Public Safety Officers Procedural Bill of Rights Act. It prescribes various rights of public safety officers under investigation with respect to the time of interrogation, nature of the investigation, length of the interrogating session, transcription to the interrogation, and nature of any representation, and specifies other rights of such officers with regard to discrimination and discipline. Chapters 1174/78, 1175/78, 944/82, 964/83, 1165/89, and 675/90 all amended section 3301 of this act by further defining the term "public safety officer" for purposes of this chapter. Chapter 775/78 amended section 3303 by allowing an officer's representative to keep the officer's information confidential. Chapter 405/79 added section 3309.5, making it unlawful to violate this act, thereby relieving the officer of any requirement to exhaust administrative remedies before seeking "appropriate injunctive or other extraordinary relief" before superior court if violations are alleged.

Prior to the enactment of Chapter 465/76 any procedures for governing peace officer personnel investigations were developed and implemented at the option of the local agency. Together the above statutes constitute a reimbursable program by mandating uniform statewide procedures governing disciplinary procedures for local peace officers.

Increased Level Of Service Contained In G.C. Sections 3304(b) And 3303 (f).

Specifically new G.C. Section 3304(b) requires that any officers facing punitive action be provided with the option of an administrative hearing as follows:

"(b) No dismissal or demotion, nor denial of promotion, shall be undertaken by any

public agency without providing the public safety officer with an opportunity for administrative appeal."

Government Code section 3303 specifies that:

> "For the purposes of this chapter, punitive action is defined as any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment."

The Supreme Court in *White v. Co. of Sacramento,* 31 Cal.3d676, 183 Cal.Rptr. 520 (1982) held that the modifier, "for purposes of punishment," relates only to a "transfer", therefor a peace officer is entitled to an opportunity for administrative appeal for any reduction in salary resulting from an administrative decision including loss of skill pay, pay grade, rank, or probationary rank. (1)

Additionally new G.C. section 3303(f) requires that the officers have access to records of any interrogation and are entitled to any existing written documentation:

> "(f)The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. 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. No notes or reports which are deemed to be confidential may be entered in the officer's file. The public safety officer being interrogated shall have the right to bring his own recording device and record any and all aspects of the interrogation."

The administrative hearings and additional transcribed copies of interrogations have resulted in increased costs to local government. Neither of the above provisions apply to non-peace officer public employees, nor were they required prior to the passage of Chapter 465.

Legislature Recognized Statute Contains Reimbursable Mandate

Section 2. of Chapter 465, Statutes of 1976 states:

> "...there are state-mandated local costs in this act in the 1976-77 fiscal year and subsequent years that require reimbursement under Section 2231 of the Revenue and Taxation Code..."

Section 2231 of the R&T Code was the governing law at the time this statute was passed. It has since been repealed and replaced by sections 17514 and 17561 of the Government Code, among others, which require reimbursement under the same circumstances.

Annual Costs exceed $200 Per Year

The costs for the city of Sacramento resulting from this act are incurred in conducting the administrative reviews at the officers' option. The administrative review procedure may involve several letters and responses as well as the hearing itself which takes 4 to 12 hours of City employee relations and police department staff time. In addition, it takes an average of eight hours of clerical time for the City's Office of Internal Affairs to process each of the approximately 100 cases in a typical fiscal year. The professional and clerical staff costs to provide the mandated hearings, transcriptions and related services are estimated to have ranged between $20,000 and $25,000 in the 1994-1995 fiscal year.

No State Mandate Disclaimers Are Applicable

The following disclaimers available to the State to deny the existence of a State mandate are not an issue in this case.

1. No Crimes, Criminal Infractions or Penalties are Created, Eliminated, or Modified Chapter 465, Statutes of 1976 and its modifiers do not create a new crime or infraction and do not change the definition of a crime or infraction. While the addition of Sec. 3309.5 in 1979 makes violation of this act unlawful, it does not create a new responsibility for the city police and enforce this law in other jurisdictions which would cause the city to incur new costs.

2. The Law Does Not Affirm a Court Action
Chapter 465, Statutes of 1976 and its modifiers were not the result of a court mandate and no reference to costs mandated by the courts is made in these statutes. Although there have been numerous lawsuits regarding implementation and enforcement of the POBR act subsequent to the passage of Chapter 465, these cases are not relevant to the issue of the existence of a reimbursable mandate. One case, *Baggett v. Gates*,32 Cal.3d 128,185 Cal.Rptr.232 (1982) affirmed that the act applies to all peace officers including those employed by chartered cities.

3. A Federal Mandate is Not Implemented
Chapter 465, Statutes of 1976 and its modifiers were not the result of a Federal mandate and no reference to Federal standards or requirements or costs associated with meeting federal standards is made in these statutes.

4. A Voter Approved Mandate is Not Implemented
Chapter 465, Statutes of 1976 and its modifiers were not the result of a voter approved mandate or ballot measure and no reference to a voter approved mandate or requirements or costs associated with meeting a voter approved mandate is made in these statutes.

5. The Law Addresses a Unique Governmental Function

Chapter 465, Statutes of 1976 and its modifiers apply uniquely to governmental agencies in that they govern the rights of peace officers, a classification of employee unique to government agencies, in interrogations and disciplinary actions.

6. The Statute Was Not Requested by Local Government

Chapter 465, Statutes of 1976 was not requested by the City of Sacramento. It was, in fact, opposed by a number of cities and the League of California Cities. The City cannot, therefore, be represented as having voluntarily assumed the performance of this mandate.

7. No Fees are Authorized to Cover Costs of This Mandate

The State disclaimer to reimbursement of its mandates that local government has been given the authority to levy a charge, fee, or assessment is not available in the POBR act. There is no mention or reference to such authority in Chapter 465, Statutes of 1976 or its modifiers.

Conclusion

The City of Sacramento hereby does claim full and prompt payment from the State in implementing the State mandate contained in Chapter 465, Statutes of 1976 and its modifiers as identified for all of the reasons listed above.

Endnote(1). This construction was taken from *Pocket Guide to the Public Safety Officers Procedural Bill of Rights Act*, April 1991 edition. Published by California Public Employee Relations Program, Institute of Industrial Relations, University of California, Berkeley.

CITY OF SACRAMENTO
TEST CLAIM

Chapter 465, Statutes of 1976
Peace Officers Procedural Rights

DECLARATION

I, Dee Contreras, Director of Labor Relations, Office of Labor Relations, City of Sacramento, am responsible for recovering City costs incurred in complying with the Peace Officers Bill of Rights Act.

For approximately the last 5 years, I have been responsible for insuring that the City is in compliance with Chapter 465, Statutes of 1976 and subsequent modifying legislation.

Chapter 465, Statutes of 1976 added Chapter 9.7 to Division 4 of Title I of the Government Code, requiring, in part, that:

> "No dismissal or demotion, nor denial of promotion, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."[Sec. 3304(b)]
>
> and
>
> "The complete interrogation of a public safety officer shall be recorded where practical. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports made by investigators, except those which are deemed by the agency to be confidential. No notes or reports which are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his own recording device and record any and all aspects of the interrogation." [Sec. 3303(f)].

In complying with the above requirements of Chapter 465, Statutes of 1976, during the 1994-95 fiscal year, the city of Sacramento incurred costs in excess of $20,000.

I believe that the costs incurred in complying with the above referenced provisions of the Government Code as added by Chapter 465, Statutes of 1976 should be reimbursed to the City of Sacramento by the State of California as these costs clearly fall within the definition of "costs mandated by the State" found in Government Code Section 17514:

> " 'Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service

of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I certify under penalty of perjury that the foregoing is true and correct of my own knowledge, except as to the matters which are therein stated as information or belief, and as to those matters I believe them to be true.

12/20/95 Sacramento, CA D Centrella

Date and Place Signature

APPENDIX E

State of California
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1414 K Street, Suite 315
Sacramento, CA 95814
(916) 323-3562
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For Official Use Only
Claim No.

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Name and Title of Authorized Representative — Telephone No.

X Dee Contreras, Director of Labor Relations — (916) 2645424

Signature of Authorized Representative — Date

X Dee Contreras — 12/19/95

CITY OF SACRAMENTO
TEST CLAIM

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I, Dee Contreras, Director of Labor Relations, Office of Labor Relations, City of Sacramento, am responsible for recovering City costs incurred in complying with the Peace Officers Bill of Rights Act.

For approximately the last 5 years, I have been responsible for insuring that the City is in compliance with Chapter 465, Statutes of 1976 and subsequent modifying legislation.

Chapter 465, Statutes of 1976 added Chapter 9.7 to Division 4 of Title I of the Government Code, requiring, in part, that:

> "No dismissal or demotion, nor denial of promotion, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."[Sec. 3304(b)]
>
> and
>
> "The complete interrogation of a public safety officer shall be recorded where practical. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports made by investigators, except those which are deemed by the agency to be confidential. No notes or reports which are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his own recording device and record any and all aspects of the interrogation." [Sec. 3303(f)].

In complying with the above requirements of Chapter 465, Statutes of 1976, during the 1994-95 fiscal year, the city of Sacramento incurred costs in excess of $20,000.

I believe that the costs incurred in complying with the above referenced provisions of the Government Code as added by Chapter 465, Statutes of 1976 should be reimbursed to the City of Sacramento by the State of California as these costs clearly fall within the definition of "costs mandated by the State" found in Government Code Section 17514:

> " 'Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service

of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I certify under penalty of perjury that the foregoing is true and correct of my own knowledge, except as to the matters which are therein stated as information or belief, and as to those matters I believe them to be true.

12/20/95 Sacramento CA

Date and Place

Signature

PUBLIC SAFETY OFFICERS—PROCEDURAL RIGHTS

CHAPTER 465

ASSEMBLY BILL NO. 301

An act to add Chapter 9.7 (commencing with Section 3300) to Division 4 of Title 1 of the Government Code, relating to public safety officers.

LEGISLATIVE COUNSEL'S DIGEST

This bill would establish the Public Safety Officers Procedural Bill of Rights Act to provide state statutes with respect to matters that are now regulated by local ordinances and regulations. It would define "public safety officers" to include all peace officers and firemen including employees of a charter city or county, prescribes various rights of public safety officers under investigation with respect to the time of interrogation, nature of the investigation, length of the interrogating session, transcription of the interrogation, and representation and specify other rights of such public safety officers with regard to discrimination and discipline.

The bill would also provide that neither appropriation is made nor obligation created for the reimbursement of any local entity for any costs incurred by it pursuant to the bill for a specified reason.

The bill would become operative on July 1, 1976.

The people of the State of California do enact as follows:

SECTION 1. Chapter 9.7 (commencing with Section 3300) is added to Division 4 of Title 1 of the Government Code, to read:

CHAPTER 9.7 PUBLIC SAFETY OFFICERS

3300.

This chapter is known and may be cited as the Public Safety Officers Procedural Bill of Rights Act.

3301.

For purposes of this chapter, the term public safety officer includes all peace officers and firemen, including peace officers or firemen who are employees of a charter city or county. The Legislature hereby finds and declares that the rights and protections provided to peace officers or firemen under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement and fire protection depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that such stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety employees wherever situated within the State of California.

3302.

Except as otherwise provided by law, or whenever on duty or in uniform, no public safety officer shall be prohibited from engaging, or be coerced or required to engage, in political activity.

3303.

When for any reason any public safety officer is under investigation or subjected to interrogation by his commanding officer, or any other member of a police department, which could lead to disciplinary action, demotion, dismissal, transfer

or administrative charges, such investigation or interrogation shall be conducted under the following conditions:

(a) The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise. If such interrogation does occur during off-duty time of the public safety officer being interrogated, the public safety officer shall be compensated for such off-duty time in accordance with regular department procedures, and the public safety officer shall not be released from employment for any work missed.

(b) The public safety officer under investigation shall be informed prior to such interrogation of the rank, name and command of the officer in charge of the investigation, the interrogating officers, and all other persons to be present during the interrogation. All questions directed to the public safety officer under interrogation shall be asked by and through no more than two interrogators at one time.

(c) The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation.

(d) The interrogating session shall be for a reasonable period taking into consideration gravity and complexity of the issue being investigated. The person under interrogation shall be allowed to attend to his own personal basic necessities when necessary.

(e) The public safety officer under interrogation shall not be subjected to offensive language or threatened with transfer or disciplinary action, or loss of his job. No promise of reward shall be made as an inducement to answering any question. The public safety officer under interrogation shall not be subjected to visits by the press or news media without his express consent nor shall his home address or photograph be given to the press or news media without his express consent.

(f) The complete interrogation of a public safety officer shall be recorded where practical. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports made by investigators, except those which are deemed by the agency to be confidential. No notes or reports which are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his own recording device and record any and all aspects of the interrogation.

(g) If the public safety officer under interrogation is likely to be placed under arrest as a result of the interrogation, he shall be completely informed of all his rights prior to the commencement of the interrogation.

(h) At the request of any public safety officer under interrogation, he shall have the right to be represented by any representative of his choice who shall be present at all times during such interrogation whenever such interrogation may result in disciplinary action or criminal charges against the public safety officer.

No public safety officer shall be loaned or temporarily reassigned to a location or duty assignment if a sworn member of his department would not normally be sent to that location or would not normally be given that duty assignment.

This section shall not apply to any investigation or interrogation of a public safety officer in the course of counseling, instruction, or informal verbal admonishment by, or other routine contact with, a supervisor.

3304.

(a) No public safety officer shall be discharged, disciplined, demoted, transferred or denied promotion or reassignment or otherwise discriminated against in regard to his employment, or be threatened with any such treatment, by reason of his lawful exercise of his constitutional rights, the rights granted under this chapter, or the exercise of any rights under any existing administrative grievance procedure.

Nothing in this section shall preclude a head of an agency from ordering a public safety officer to cooperate with other agencies involved in criminal investigations. If an officer fails to comply with such an order, the agency may officially charge him with insubordination.

(b) No dismissal or demotion, nor denial of promotion, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal.

3305.

No public safety officer shall have any comment adverse to his interest entered in his personnel file, or any record kept at his place or unit of employment or any other place recording such comments by any person, without the public safety officer having first read and signed the instrument containing the adverse comment indicating he is aware that such comment is being placed in his personnel file or other place of recordation of such comments, except that such entry may be made if after reading such instrument containing any adverse comment the public safety officer refuses to sign it. A witness shall thereafter note that such officer was presented with the opportunity to read and sign such instrument and refused to do so.

3306.

A public safety officer shall have 30 days within which to file a written response to any adverse comment entered in his personnel file. Such written response shall be attached to, and shall accompany, the adverse comment.

3307.

No public safety officer shall be compelled to submit to a polygraph examination against his will. No disciplinary action or other recrimination shall be taken against a public safety officer refusing to submit to a polygraph examination, nor shall any comment be entered anywhere in the investigator's notes or anywhere else that the public safety officer refused to take a polygraph examination, nor shall any testimony or evidence be admissible at a subsequent hearing, trial, or proceeding, judicial or administrative, to the effect that the public safety officer refused to take a polygraph examination.

3308.

No public safety officer shall be required or requested for purposes of job assignment or other personnel action to disclose any item of his property, income, assets, source of income, debts or personal or domestic expenditures (including those of any member of his family or household) unless such information is obtained under proper legal procedure, tends to indicate a conflict of interest with respect to the performance of his official duties, or is necessary for the employing agency to ascertain the desirability of assigning the public safety officer to a specialized unit in which there is a strong possibility that bribes or other improper inducements may be offered.

3309.

No public safety officer shall have his locker, or other space for storage that may be assigned to him searched except in his presence, or with his consent, or unless a valid search warrant has been obtained or where he has been notified that a search will be conducted. This section shall apply only to lockers or other space for storage that is owned by the employing agency. Any person from whom consent is requested shall be told that he has the right to deny the consent.

3310.

Any public agency which has adopted, through action of its governing body or its official designee, any procedure which at a minimum provides to peace officers or firemen the same rights or protections as provided pursuant to this chapter shall be subject to this chapter with regard to such a procedure.

SEC. 2. There are no local costs in this act that require reimbursement under Section 2231 of the Revenue and Taxation Code because there are no duties, obligations or responsibilities imposed on local entities in the 1975-76 fiscal year by this act. However there are state-mandated local costs in this act in the 1976-77 fiscal

year and subsequent years that require reimbursement under Section 2231 of the Revenue and Taxation Code which can be handled in the regular budget process.

SEC. 3. This act shall become operative on July 1, 1976.

Approved and filed Aug. 18, 1976.

WORKERS' COMPENSATION—PUBLIC EMPLOYEES

CHAPTER 466

SENATE BILL NO. 639

An act to amend Sections 3212, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, and 3213 of, and to add Section 4450 to, the Labor Code, relating to workers' compensation.

LEGISLATIVE COUNSEL'S DIGEST

The existing law provides that certain specified "injuries" suffered by specified public employees are presumed to arise out of and in the course of the employment.

This bill would provide that the presumption that the injury arises out of and in the course of employment shall be extended to such employees following termination of service for a period of three calendar months for each full year of service, commencing with the last date actually worked, but not to exceed 60 months.

The bill would also specify that the average weekly earnings for such employees shall be taken at the maximum.

This bill would also provide that neither appropriation is made nor obligation created for the reimbursement of any local agency for any costs incurred by it pursuant to the bill.

The people of the State of California do enact as follows:

SECTION 1. Section 3212 of the Labor Code is amended to read:

3212.

In the case of members of a sheriff's office, district attorney's staff of inspectors and investigators or of police or fire departments of cities, counties, cities and counties, districts or other public or municipal corporations or political subdivisions, whether such members are volunteer, partly paid, or fully paid, and in the case of active firefighting members of the Division of Forestry of the State Department of Natural Resources whose duties require firefighting or of any county forestry or firefighting department or unit, whether voluntary, fully paid, or partly paid, and in the case of members of the warden service of the Wildlife Protection Branch of the Department of Fish and Game whose principal duties consist of active law enforcement service, excepting those whose principal duties are clerical or otherwise do not clearly fall within the scope of active law enforcement service such as stenographer, telephone operators, and other officeworkers, the term "injury" as used in this act includes hernia when any part of the hernia develops or manifests itself during a period while such member is in the service in such office, staff, division, department or unit, and in the case of members of such fire departments, except those whose principal duties are clerical, such as stenographers, telephone operators and other officeworkers, and in the case of county forestry or firefighting departments, except those whose principal duties are clerical, such as stenographers,

No. 619 are both chaptered and become effective January 1, 1978, both amend Section 51202, and this bill is chaptered after Assembly Bill No. 610, in which case Section 1.5 of this act shall not become operative.

SEC. 3. Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to that section nor shall there be an appropriation made by this act because the duties, obligations, or responsibilities imposed on local governmental entities or school districts by this act are such that related costs are incurred as part of their normal operating procedures.

ITEM VETO

SEC. 4. The sum of one hundred fifty thousand dollars ($150,000)[1] is appropriated from the General Fund to the Department of Education to conduct workshops and in-service training clinics for teachers and administrators in the methods and materials for venereal disease education, and the development and distribution of teaching material for use by teachers and pupils in such courses.

ITEM VETO

[1] In vetoing Section 4 the Governor stated:
"I am reducing the appropriation contained in Section 4 of Assembly Bill No. 1209 from $150,000 to $70,000.
"The reduced appropriation will be sufficient to fund this program through June 30, 1978. Future funding can more appropriately be addressed through the normal budget process.
"With this deletion, I approve Assembly Bill No. 1209."

Approved Sept. 2, 1977.

Filed Sept. 3, 1977.

CALIFORNIA CODES—MAINTENANCE AND RESTATEMENT

CHAPTER 579

SENATE BILL NO. 633

An act to amend Sections 1202, 1207, 1209, 1210, 1212, 1220, 1221, 1222, 1224, 1242, 1260, 1261, 1261.5, 1262, 1263, 1264, 1265, 1269, 1270, 1300, 1320, 1321, 4905, 5209, 9089.61, 19414.5, 19491.5, and 23428.25 of, to repeal Section 2727.3 of, and to repeal Article 9 (commencing with Section 1820) of Chapter 4 of Division 2 of, the Business and Professions Code, to amend Sections 1706.26, 2954.9, 2905.71, and 3052 of the Civil Code, to amend Sections 690.50, 1501, and 1824 of the Code of Civil Procedure, to amend Section 25100 of, and to repeal Sections 15006.1 and 15501.1 of, the Corporations Code, to amend Sections 1330, 60130, 89067, 90400, 90404, 90405, and 90406 of, and to amend the heading of Article 1 (commencing with Section 90400) of Chapter 10 of Part 55 of Division 8 of, the Education Code, to amend Sections 6329 and 9700 of the Elections Code, to amend Section 10292 of the Financial Code, to amend Sections 33732, 38703, and 56316, to amend and renumber the heading of Chapter 11 (commencing with Section 6101) of Part 1 of Division 4 of, to amend and renumber the heading of Chapter 4 (commencing with Section 63081) of Part 3 of Division 21 of, and to repeal Chapter 10 (commencing with Section 6051) of Part 1 of Division 4 of, the Food and Agricultural Code, to amend Sections 3311, 6103.1, 6254, 6546.1, 9766, 11093, 11554, 14379, 16475, 18974, 29707.1, 53090, 53950, 69894.4, and 74924 of, to amend and renumber Sections 7801 and 20022.2, as added by Chapter 1115 of the Statutes of 1976, of, to amend and renumber the heading of Chapter 19 (commencing with Section 7500) of Division 7 of Title 1, as added by Chapter 1478 of the Statutes of 1974, of, to amend and renumber the heading of Chapter 20 (commencing with Section 7525) of Division 7 of Title 1, as added by Chapter 1079 of the Statutes of 1976, of, to add Chapter 3.1 (commencing with Section 8220) to Division 1 of Title 2 of, to repeal Sections 15275, as added by Chapter 170

of the Statutes of 1953, 31550.6, and 65906.5 of, and to repeal Part 6 (commencing with Section 17300) of Division 4 of Title 2 of, the Government Code, to amend Section 6309.6 of, and to repeal Section 6066 of, the Harbors and Navigation Code, to amend Sections 405, 1250.1, 1357, 3751, 13131.3, 13904, 14896, 18906, 26013, 26025, 26522, 26531, 26575, 27000, 27002, 27030, 28361, 28801, 28802, 28810, 32108, 33328.4, 34142 and 36509 of, to amend the heading immediately preceding Section 37683 of, to amend and renumber Sections 306, 306.5, 306.7, 307, 307.3, 308, 308.4, 308.5, 308.6, 308.8, 308.9, 25490.5, 33675, as added by Chapter 1162 of the Statutes of 1976, and 33675, as added by Chapter 1338 of the Statutes of 1976, of, to add Section 10000 to, and to repeal Sections 320, 320.5, 321, 321.2, 321.7, 322.5, 323.2, 323.5, 323.7, 10000, as amended by Chapter 1893 of the Statutes of 1965, and 13143.1 of, the Health and Safety Code, to amend Sections 1063.1, 1200.7, 1750, 1751, 4090, 10123, 11500.2, 11759 of, and to amend and renumber Sections 10123.1, as added by Chapter 1225 of the Statutes of 1975, 10124, as added by Chapter 522 of the Statutes of 1972, and 10127.1 (formerly Section 10127 of, amended and renumbered by Chapter 1079 of the Statutes of 1976) of, the Insurance Code, to amend Sections 1136.2 and 6144 of, and to add Section 3729 to, the Labor Code, to amend Sections 800 and 1269b of the Penal Code, to amend Section 1240 of the Probate Code, to amend Sections 3358, 3412, 3419, 3426, 3420, 3744, 3770, 3775, 4551.5, 6091, and 25507 of, and to repeal Section 3278 of, the Public Resources Code, to amend Sections 100252, 103352, and 130053.5 of, to amend and renumber Sections 2701, 2702, and 2703, as added by Chapter 451 of the Statutes of 1975, of, to amend and renumber the heading of Chapter 5 (commencing with Section 2701) of Part 2 of Division 1, as added by Chapter 1202 of the Statutes of 1975, of, and to amend and renumber the heading of Chapter 4.5 (commencing with Section 2001) of Part 2 of Division 1, as added by Chapter 915 of the Statutes of 1976, of, the Public Utilities Code, to amend Sections 434.5, 2191.3, 17001, 40024, and 40031 of, and to repeal Section 9157 of, the Revenue and Taxation Code, to amend the heading of Article 3 (commencing with Section 90) of Chapter 1 of Division 1 of the Streets and Highways Code, to amend Sections 9250.7, 11514, 11713, 11902, 12509, 12650, 13201.5, 21051, 23102, 27150, and 41603 of the Vehicle Code, to amend Sections 13142.5 and 71670 of, to amend and renumber Section 31014, as added by Chapter 1052 of the Statutes of 1976, of, and to repeal Sections 71673 and 71681 of, the Water Code, to amend Sections 628, 701, 701.1, 701.2, 701.3, 701.4, 701.5, 701.7, 702, 727, 7375, 9303, 9312, 11008.9, 11063 and 11470.5 of, to amend the heading of Chapter 2.3 (commencing with Section 16140) of Part 4 of Division 9 of, to amend and renumber Sections 6325.1, as added by Chapter 1274 of the Statutes of 1975, 10053.7, as added by Chapter 405 of the Statutes of 1973, 10544.3, 10602.5, as added by Chapter 171 of the Statutes of 1975, 14019.3, as added by Chapter 672 of the Statutes of 1976, 15053.5, as added by Chapter 1619 of the Statutes of 1970, 18951, 10952, and 10953, as added by Chapter 504 of the Statutes of 1976, of, to amend and renumber the heading of Article 13.1 (commencing with Section 840) of Chapter 2 of Part 1 of Division 2 of, to amend and renumber the heading of Chapter 8 (commencing with Section 14500) of Part 3 of Division 9 of, and to repeal Sections 4026 and 14150.9 of, the Welfare and Institutions Code, and to repeal Chapter 1378 of the Statutes of 1965, to repeal Section 22 of Chapter 1036 of the Statutes of 1976, and to amend Section 9 of Chapter 12 of the Statutes of 1976, relating to maintenance of the codes.

LEGISLATIVE COUNSEL'S DIGEST

Existing law directs the Legislative Counsel to advise the Legislature from time to time as to legislation necessary to maintain the codes and legislation necessary to codify such statutes as are enacted from time to time subsequent to the enactment of the codes.

This bill would restate existing provisions of law to effectuate the recommendations made by the Legislative Counsel to the Legislature for consideration during 1977, and would not make any substantive change in the law.

(g) Every statement which is filed shall be accompanied by the fees required by Chapter 4 (commencing with Section 9401) of Division 9 of the Commercial Code in the case of a financing statement not on the standard form and shall remain effective for a period of five years from the date of filing.

SEC. 57. The heading of Chapter 4 (commencing with Section 63001) of Part 3 of Division 21 of the Food and Agricultural Code is amended and renumbered to read:

CHAPTER * * * 5. MARKETING OF AVOCADOS

SEC. 58. Section 3311 of the Government Code is amended to read:

3311.

Nothing in this chapter shall in any way be construed to limit the use of any public safety agency or any public safety officer in the fulfilling of mutual aid agreements with other jurisdictions or agencies, nor shall this chapter be construed in any way to limit any jurisdictional or interagency cooperation under any circumstances where such activity is * * * deemed necessary or desirable by the jurisdictions or the agencies involved.

SEC. 59. Section 6103.1 of the Government Code is amended to read:

6103.1.

Section 6103 does not apply to * * * any fee or charge for official services required by Parts 2 (commencing with Section 1200) 3 (commencing with Section 2000) and 4 (commencing with Section 4000) of Division 2 of the Water Code. * * *

SEC. 60. Section 6254 of the Government Code is amended to read:

6254.

Except as provided in Section 6254.7, nothing in this chapter shall be construed to require disclosure of records that are:

(a) Preliminary drafts, notes, or interagency or intra-agency memoranda which are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding such records clearly outweighs the public interest in disclosure;

(b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810) of Title 1 of the Government Code, until such litigation or claim has been finally adjudicated or otherwise settled;

(c) Personnel, medical, or similar files, the disclosure of which would constitute and unwarranted invasion of personal privacy;

(d) Contained in or related to:

(1) Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies;

(2) Examinations, operating, or condition reports prepared by, on behalf of, or for the use of any state agency referred to in subdivision (1);

(3) Preliminary drafts, notes, or interagency or intra-agency communications prepared by, on behalf of, or for the use of any state agency referred to in subdivision (1); or

(4) Information received in confidence by any state agency referred to in subdivision (1).

(e) Geological and geophysical data, plant production data and similar information relating to utility systems development, or market or crop reports, which are obtained in confidence from any person;

(f) Records of complaints to or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General

and the Department of Justice, and any state or local police agency, or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement or licensing purposes, except that local police agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the persons involved in an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage as the result of the incident caused by arson, burglary, fire, explosion, robbery, vandalism, or a crime of violence as defined by subdivision (b) of Section 13960, unless the disclosure would endanger the safety of a witness or other person involved in the investigation * * * or disclosure would endanger the successful completion of the investigation or a related investigation;

(g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination;

(h) The contents of real estate appraisals, engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property, or to prospective public supply and construction contracts, until such time as all of the property has been acquired or all of the contract agreement obtained, provided, however, the law of eminent domain shall not be affected by this provision;

(i) Information received from any taxpayer in connection with the collection of local taxes which is received in confidence and the disclosure of the information to other persons would result in unfair competitive disadvantage to the person supplying such information;

(j) Library and museum materials made or acquired and presented solely for reference or exhibition purposes;

(k) Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege;

(l) Correspondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's legal affairs secretary, provided public records shall not be transferred to the custody of the Governor's legal affairs secretary to evade the disclosure provisions of this chapter;

(m) In the custody or maintained by the Legislative Counsel;

(n) Statements of personal worth or personal financial data required by a licensing agency and filed by an applicant with such licensing agency to establish his personal qualification for the license, certificate, or permit applied for; and

Nothing in this section is to be construed as preventing any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.

SEC. 61. Section 6546.1 of the Government Code is amended to read:

6546.1.

In the County of Los Angeles, any agency, commission, or board provided for by joint powers agreement entered into by cities pursuant to Article 1 (commencing with Section 6500) of this chapter for the purpose of the acquisition, operation, repair, maintenance and administration of the Hollywood-Burbank Airport as a public airport, pursuant to the Federal Aviation Act of 1958, as amended, may carry out such purpose and may authorize the issuance of revenue bonds, pursuant to this article, to pay for acquiring, repairing, and financing such project including all facilities and improvements and all expenses incidental thereto or connected therewith. Property tax revenues accruing to, levied by, or collected by any local agency which is a party to such a joint powers agreement shall not be used to redeem such revenue bonds unless an ordinance authorizing the use of such property tax revenues

reimbursement for, services provided pursuant to subdivisions (a), (b), (g), and (h) of Section 16603 and Sections 16010 and 16630.5 of the Education Code.

SEC. 221. The heading of Chapter 2.3 (commencing with Section 10140) of Part 4 of Division 9 of the Welfare and Institutions Code is amended to read:

CHAPTER 2.3. * * * INTERCOUNTRY ADOPTIONS * * *

SEC. 222. Section 18951 of the Welfare and Institutions Code, as added by Chapter 501 of the Statutes of 1976, is amended and renumbered to read:

* * * 10950.1.

This chapter * * * shall be known as the California Child Abuse Prevention Act of 1974.

SEC. 223. Section 18952 of the Welfare and Institutions Code, as added by Chapter 501 of the Statutes of 1976, is amended and renumbered to read:

* * * 10950.2.

The provisions of this chapter * * * shall be operative only for and during such times as federal funds are provided or made available for the purposes of such provisions.

SEC. 224. Section 18953 of the Welfare and Institutions Code, as added by Chapter 501 of the Statutes of 1976, is amended and renumbered to read:

* * * 10950.3.

The provisions of this chapter * * * shall remain in effect only until December 31, 1979, and as of such date is repealed, unless a later enacted statute which is chaptered before December 31, 1979, deletes or extends such date.

SEC. 225. Chapter 1378 of the Statutes of 1965 is repealed.

SEC. 226. Section 22 of Chapter 1036 of the Statutes of 1976 is repealed.

SEC. 227. Section 9 of Chapter 1208 of the Statutes of 1976 is amended to read:

SEC. 9. The sum of seven hundred ninety-six thousand dollars ($790,000) is hereby appropriated from the General Fund to the State Department of Health, in augmentation of subitem (j) of Item 293 of the Budget Act of 1976 (Ch. 329, Stats. 1976), to be expended for the purposes specified in Chapter 1208 of the Statutes of 1976 and to provide additional resources for the Child Health Disability Prevention Program (Art. 3.4 (commencing with Sec. 329) Ch. 2, Pt. 1, Div. 1, H. & S. C.).

SEC. 228. Any section of any act enacted by the Legislature during the 1977 portion of the 1977-78 Regular Session, which takes effect on or before January 1, 1978, and which amends, amends and renumbers, or repeals a section amended, amended and renumbered, or repealed by this act, shall prevail over this act, whether such act is enacted prior or subsequent to this act.

Approved Sept. 2, 1977.

Filed Sept. 3, 1977.

JURY—COUNTIES OF THIRD CLASS—FEES AND PAYMENT OF EXPENSES

CHAPTER 580

ASSEMBLY BILL NO. 970

An act to amend Section 76003 of the Government Code, relating to jurors.

LEGISLATIVE COUNSEL'S DIGEST

Under existing law, trial jurors in San Diego County receive $5 for each day's attendance and $0.15 for each mile necessarily traveled one way in attending court as a juror.

This bill would authorize the board of supervisors to establish the daily rate to be paid trial jurors and the amount to be allowed for reimbursement of expenses, including transportation necessarily incurred in attending court, but would provide that such daily rate shall not be less than $5 per day and that the amount allowed for expenses shall not be less than an amount equal to $0.15 per mile one way.

The bill would also provide that no appropriation or reimbursement shall be made because the act is in accordance with the request of a local government entity or entities which desired authority to act pursuant to the act.

The people of the State of California do enact as follows:

SECTION 1. Section 76003 of the Government Code is amended to read:

76003.

In a county of the third class the fees of the grand jurors shall be not less than ten dollars ($10) and not more than twenty-five dollars ($25), as determined by the county board of supervisors, for each day's attendance and mileage at the rate of ten cents ($0.10) a mile necessarily traveled in attending court, in going and returning, unless otherwise determined at a higher amount by the county board of supervisors.

The board of supervisors shall establish the fees of trial jurors in the superior and municipal courts * * * and the amount to be allowed for reimbursement of expenses including transportation necessarily incurred in attending court; provided, that such fee shall not be less than five dollars ($5) for each day's attendance and that the amount allowed for reimbursement of expenses shall not be less than an amount equal to fifteen cents ($0.15) a mile * * *, one way. In criminal cases fees and * * * reimbursement for expenses of trial jurors in the superior and municipal * * * courts shall be paid by the treasurer of that county out of the general fund of the county upon warrants drawn by the county auditor upon the written order of the judge of the court in which the juror was in attendance, and the treasurer of the county shall pay the warrants.

SEC. 2. Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to that section nor shall there be any appropriation made by this act because this act is in accordance with the request of a local government entity or entities which desired legislative authority to act to carry out the program specified in this act.

Approved Sept. 3, 1977.

Filed Sept. 3, 1977.

West's
CALIFORNIA
LEGISLATIVE SERVICE

STATUTE AND CODE AMENDMENTS
1977–1978 REGULAR SESSION
(STATUTES OF 1978)

PUBLIC SAFETY OFFICERS—CONFIDENTIAL INFORMATION

CHAPTER 775

ASSEMBLY BILL NO. 2010

An act to amend Section 3303 of the Government Code, relating to public safety officers.

LEGISLATIVE COUNSEL'S DIGEST

Existing law provides that a public safety officer, which includes specified peace officers, under investigation has specified rights relating to the investigation and interrogation, including the right to a representative of his choice. Existing law makes no specific provision for the confidentiality of information received by such a representative from a public safety officer under investigation for noncriminal matters.

The bill would provide that such a representative shall not be required to disclose, nor be subject to punitive action for refusing to disclose, any information received from the officer under investigation.

Additions in text are indicated by underline; deletions by asterisks * * *

The people of the State of California do enact as follows:

SECTION 1. Section 3303 of the Government Code is amended to read:

3303.

When any public safety officer is under investigation and subjected to interrogation by his commanding officer, or any other member of the employing public safety department, which could lead to punitive action, such interrogation shall be conducted under the following conditions. For the purpose of this chapter, punitive action is defined as any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.

(a) The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise. If such interrogation does occur during off-duty time of the public safety officer being interrogated, the public safety officer shall be compensated for such off-duty time in accordance with regular department procedures, and the public safety officer shall not be released from employment for any work missed.

(b) The public safety officer under investigation shall be informed prior to such interrogation of the rank, name and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation. All questions directed to the public safety officer under interrogation shall be asked by and through no more than two interrogators at one time.

(c) The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation.

(d) The interrogating session shall be for a reasonable period taking into consideration gravity and complexity of the issue being investigated. The person under interrogation shall be allowed to attend to his own personal physical necessities.

(e) The public safety officer under interrogation shall not be subjected to offensive language or threatened with punitive action, except that an officer refusing to respond to questions or submit to interrogations shall be informed that failure to answer questions directly related to the investigation or interrogation may result in punitive action. No promise of reward shall be made as an inducement to answering any question. The employer shall not cause the public safety officer under interrogation to be subjected to visits by the press or news media without his express consent nor shall his home address or photograph be given to the press or news media without his express consent.

(f) The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. 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. No notes or reports which are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his own recording device and record any and all aspects of the interrogation.

(g) If prior to or during the interrogation of a public safety officer it is deemed that he may be charged with a criminal offense, he shall be immediately informed of his constitutional rights.

(h) Upon the filing of a formal written statement of charges, or whenever an interrogation focuses on matters which are likely to result in punitive action against any public safety officer, that officer, at his request, shall have the right to be represented by a representative of his choice who may be present at all times during such interrogation. The representative shall not be a person subject to the same investigation. The representative shall not be required to disclose, nor

Changes or additions in text are indicated by underline

be subject to any punitive action for refusing to disclose, any information received from the officer under investigation for noncriminal matters.

This section shall not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer, nor shall this section apply to an investigation concerned solely and directly with alleged criminal activities.

(i) No public safety officer shall be loaned or temporarily reassigned to a location or duty assignment if a sworn member of his department would not normally be sent to that location or would not normally be given that duty assignment under similar circumstances.

Approved Sept. 15, 1978.

Filed Sept. 18, 1978.

STATE EMPLOYMENT RELATIONS

CHAPTER 776

ASSEMBLY BILL NO. 3053

An act to amend Sections 3513, 3515, 3515.6, 3516.5, 3517.6, 3520.5, 3521, 3523, 3526, 3541, 13920, 13924, 14076, 18001, 18005, 18005.5, 18006, 18007, 18020, 18021, 18021.5, 18021.6, 18021.7, 18022, 18023, 18024, 18025, 18025.1, 18026, 18050, 18051, 18051.5, 18100, 18100.5, 18101, 18101.5, 18102, 18102.5, 18103, 18105, 18120, 18121, 18122, 18122.1, 18123, 18124, 18125, 18126, 18127, 18128, 18129, 18135, 18135.5, 18136, 18137, 18137.5, 18138, 18139, 18140, 18141, 18142, 18300, 18301, 18302, 18310, 18705, 18714, 18730, 18731, 18732, 18850, 18850.1, 18851, 18852, 18853, 18853.5, 18854, 18855, 18856, 18857, 18859, 18860, 18861, 19080.5, 19100, 19120, 19251, 19252, 19261, 19300, 19301, 19302, 19303, 19304, 19330, 19330.5, 19331, 19332, 19333, 19334, 19335, 19360, 19360.5, 19361, 19362, 19450, 19451, 19452, 19455, 19460, 19161, 19162, 19463, 19464, 19465, 19502, 19503, 19532, 19533, 19535, 19536, 19536.5, 19537, 19538, 19540, 19541, 19555, 19556, 20750.11, 21400, 21402, 21404, 21405, 22754, 22790, 22813, 22814, 22815, 22816, 22825, and 22825.1 of, and to add Sections 19100.5 and 19120.5 to, the Government Code, relating to state employment relations.

LEGISLATIVE COUNSEL'S DIGEST

Existing provisions of the State Employer-Employee Relations Act (SEERA) provide that in any case where specified provisions of the law relating to state civil service are in conflict with the provisions of a memorandum of understanding entered into pursuant to the act, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

This bill would delete from those provisions specified to be superseded by the memorandum of understanding provisions relating to state officers and employees authorizing deductions from their salaries and wages for the payment of specified items, and provisions of the State Civil Service Act relating to limited-term employees, layoffs and demotions, the authority of ap-

situation and shall go into immediate effect. The facts constituting such necessity are:

Due to the recent adoption of endorsements to standard fidelity bonds issued in this state, which endorsements are unacceptable to the Department of Insurance, underwritten title companies are encountering extreme difficulty in obtaining fidelity coverage which is a necessary prerequisite to their conducting an escrow business. This inability to obtain coverage which is satisfactory to the Department of Insurance has resulted in the issuance of cease and desist orders by the department and may result in the future issuance of similar orders affecting the right of underwritten title companies to continue to do business in this state. It is therefore necessary to provide an alternative to a fidelity bond so as to permit underwritten title companies to continue to conduct their business in this state. It is therefore necessary that this act take effect immediately.

Approved and filed July 27, 1979.

PUBLIC OFFICERS—LOCAL SAFETY OFFICERS—RIGHTS

CHAPTER 405

ASSEMBLY BILL NO. 1807

An act to add Section 3309.5 to the Government Code, relating to local public safety officers.

LEGISLATIVE COUNSEL'S DIGEST

Existing law contains the Public Safety Officers Procedural Bill of Rights Act, which prescribes various rights of specified state and local public safety officers under investigation with respect to the time of interrogation, nature of the investigation, length of the interrogating session, transcription of the interrogation, and representation, and specifies other rights of such state and local public safety officers with regard to discrimination and discipline.

This bill would make it unlawful for any local public safety department to deny or refuse to any local public safety officer such rights and protections, and would give the superior court initial jurisdiction over any proceeding by a local public safety officer against a local public safety department for violations of such rights.

This bill would also permit the superior court to grant appropriate injunctive or other extraordinary relief to remedy violations and to prevent future violations with regard to local public safety officers.

This bill would specify that it shall apply only to local public safety officers, and not to state public safety officers.

The people of the State of California do enact as follows:

SECTION 1. Section 3309.5 is added to the Government Code, to read:

3309.5.

(a) It shall be unlawful for any local public safety department to deny or refuse to any local public safety officer the rights and protections guaranteed to them by this chapter.

(b) The superior court shall have initial jurisdiction over any proceeding brought by any local public safety officer against any local public safety department for alleged violations of this section.

(c) In any case where the superior court finds that a local public safety department has violated any of the provisions of this chapter, the court shall render appropriate injunctive or other extraordinary relief to remedy the violation and to prevent future violations of a like or similar nature, including, but not limited to, the granting of a temporary restraining order, preliminary, or permanent injunction prohibiting the local public safety department from taking any punitive action against the local public safety officer.

(d) This section shall apply only to local public safety officers who are peace officers as defined in Section 830.1 of the Penal Code, and shall not apply to public safety officers who are peace officers as defined in subdivisions (a) and (b) of Section 830.2 of the Penal Code.

Approved July 27, 1979.

Filed July 30, 1979.

MUNICIPAL AND SUPERIOR COURTS—ORANGE COUNTY

CHAPTER 406

ASSEMBLY BILL NO. 291

An act to amend Sections 69899.5, 74003, 74004, and 74005 of the Government Code, relating to courts.

LEGISLATIVE COUNSEL'S DIGEST

Existing law specifies the salaries, number, and classification of the officers and employees of the municipal and superior courts in Orange County.

This bill would revise the salaries, number, and classification of specified officers and employees of the municipal and superior courts in Orange County.

Under existing law, Sections 2231 and 2234 of the Revenue and Taxation Code require the state to reimburse local agencies and school districts for certain costs mandated by the state. Other provisions require the Department of Finance to review statutes disclaiming these costs and provide, in certain cases, for making claims to the State Board of Control for reimbursement.

This bill provides that no appropriation is made by this act pursuant to Section 2231 or 2234 for a specified reason, but recognizes that local agencies and school districts may pursue their other available remedies to seek reimbursement for these costs.

Re: Public Safety Officer

PUBLIC SAFETY OFFICERS—POWERS AND DUTIES

CHAPTER 1367

ASSEMBLY BILL NO. 2977

An act to amend Section 3309.5 of the Government Code, relating to public safety officers.

LEGISLATIVE COUNSEL'S DIGEST

Existing law makes it unlawful for any local public safety department to deny or refuse to any local public safety officer the rights and protections of the act, gives the superior court initial jurisdiction over any proceeding by a local public safety officer against a local public safety department for violations of such rights, and also permits the superior court to grant appropriate injunctive or other extraordinary relief to remedy violations and to prevent future violations with regard to local public safety officers.

This bill would extend such provisions to state public safety officers as well as local public safety officers.

The people of the State of California do enact as follows:

SECTION 1. Section 3309.5 of the Government Code is amended to read:

3309.5.

(a) It shall be unlawful for any * * * public safety department to deny or refuse to any * * * public safety officer the rights and protections guaranteed to them by this chapter.

(b) The superior court shall have initial jurisdiction over any proceeding brought by any * * * public safety officer against any * * * public safety department for alleged violations of this section.

(c) In any case where the superior court finds that a * * * public safety department has violated any of the provisions of this chapter, the court shall render appropriate injunctive or other extraordinary relief to remedy the violation and to prevent future violations of a like or similar nature, including, but not limited to, the granting of a temporary restraining order, preliminary, or permanent injunction prohibiting the * * * public safety department from taking any punitive action against the * * * public safety officer. * * *

[Became law without Governor's approval. Filed Oct. 1, 1980.]

PUBLIC OFFICERS AND EMPLOYEES—PUBLIC SAFETY—PEACE OFFICERS

Assembly Bill No. 2641

CHAPTER 944

An act to amend Section 3301 of the Government Code, relating to public safety officers.

[Approved by Governor September 10, 1982. Filed with Secretary of State September 13, 1982.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2641, Cortese. Public safety officers: peace officers.

Existing law provides for the Public Safety Officers Procedural Bill of Rights and defines a public safety officer as including sheriffs, policemen, marshals, constables, district attorney investigators, and all state employees who are peace officers.

This bill would include in the definition of public safety officers, for the purposes of the bill of rights, specified local government agency employees who are peace officers.

Article XIII B of the California Constitution and Sections 2231 and 2234 of the Revenue and Taxation Code require the state to reimburse local agencies and school districts for certain costs mandated by the state. Other provisions require the Department of Finance to review statutes disclaiming these costs and provide, in certain cases, for making claims to the State Board of Control for reimbursement.

This bill would provide that no appropriation is made by this act for the purpose of making reimbursement pursuant to the constitutional mandate or Section 2231 or 2234, but would recognize that local agencies and school districts may pursue their other available remedies to seek reimbursement for these costs.

This bill would provide that notwithstanding Section 2231.5 of the Revenue and Taxation Code, this act does not contain a repealer, as required by that section; therefore, the provisions of the act would remain in effect unless and until they are amended or repealed by a later enacted act.

The people of the State of California do enact as follows:

SECTION 1. Section 3301 of the Government Code is amended to read:

3301. For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31 except subdivisions (f) and (i), 830.4 except subdivision (f), and 830.5 of the Penal Code.

The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations between public safety employees and their employers. In order to assure that such stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California.

SEC. 2. Notwithstanding Section 6 of Article XIII B of the California Constitution and Section 2231 or 2234 of the Revenue and Taxation Code, no appropriation is made by this act for the purpose of making reimbursement pursuant to these sections. It is recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Chapter 3 (commencing with Section 2201) of Part 4 of Division 1 of that code.

SEC. 3. Notwithstanding Section 2231.5 of the Revenue and Taxation Code, this act does not contain a repealer, as required by that section; therefore, the provisions of this act shall remain in effect unless and until they are amended or repealed by a later enacted act.

SCHOOL DISTRICTS—POLICE DEPARTMENTS—ESTABLISHMENT

Assembly Bill No. 3764

CHAPTER 945

An act to amend Sections 39670, 39671, 39672, 39673, and 72330 of the Education Code, relating to police departments.

[Approved by Governor September 10, 1982. Filed with Secretary of State September 13, 1982.]

LEGISLATIVE COUNSEL'S DIGEST

AB 3764, Kapiloff. School and community college districts: police departments.

Existing law permits the governing board of any school district to establish a security department and employ, as specified, such personnel as may be necessary to ensure the security of school district personnel and pupils and the security of district property, and to cooperate with the local law enforcement agencies in matters involving those concerns. Persons employed and compensated as members of a school district security department, when appointed

PUBLIC SAFETY OFFICERS—BILL OF RIGHTS—INCLUSION OF PEACE OFFICERS

Assembly Bill No. 1216

CHAPTER 964

An act to amend Section 3301 of the Government Code, relating to public safety officers and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 20, 1983. Filed with Secretary of State September 21, 1983.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1216, Cortese. Public safety officers: peace officers.

Existing law provides for the Public Safety Officers Procedural Bill of Rights and defines a public safety officer as including specified peace officers.

This bill would include in the definition of peace officers, for the purposes of the Bill of Rights, security officers of a municipal utility district.

Article XIII B of the California Constitution and Sections 2231 and 2234 of the Revenue and Taxation Code require the state to reimburse local agencies and school districts for certain costs mandated by the state. Other provisions require the Department of Finance to review statutes disclaiming these costs and provide, in certain cases, for making claims to the State Board of Control for reimbursement.

This bill would create a state-mandated local program by imposing new duties on specified local agencies.

However, this bill would provide that no appropriation is made and no reimbursement is required by this act for a specified reason.

The bill would take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 3301 of the Government Code is amended to read:

3301. For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31 except subdivision (f), 830.4 except subdivision (f), and 830.5 of the Penal Code.

The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public

safety employees and their employers. In order to assure that such stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California.

SEC. 2. No appropriation is made and no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution or Section 2231 or 2234 of the Revenue and Taxation Code because the local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act.

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

It is in the interest of public safety to insure the continuance of stable relations between public safety employees and their employers which this act will provide.

MOTOR VEHICLES—RECKLESS DRIVING—PUNISHMENT

Assembly Bill No. 1616

CHAPTER 965

An act to amend Section 23104 of the Vehicle Code, relating to traffic offenses.

[Approved by Governor September 20, 1983. Filed with Secretary of State September 21, 1983.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1616, Chute. Vehicles: reckless driving.

Under existing law, the penalty for reckless driving causing bodily injury is imprisonment in the county jail for not less than 30 days nor more than 6 months, or a fine of not less than $220 nor more than $500, or both the fine and imprisonment.

This bill would authorize a sentencing court to impose in lieu of the prescribed jail term, a felony sentence of imprisonment in the state prison for 16 months, or 2 or 3 years, on any person convicted of reckless driving which proximately causes great bodily injury, as defined, who previously has been convicted of violating designated provisions dealing with reckless driving, speed contests, or driving under the influence of alcohol or drugs, or both.

SEC. 65. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

HIGHWAYS—SAN PABLO AVENUE—MAINTENANCE AND OPERATION COSTS

CHAPTER 1164

S.B.No. 1716

AN ACT to add and repeal Section 380.3 of the Streets and Highways Code, relating to highways, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 29, 1989.]

[Filed with Secretary of State September 30, 1989.]

LEGISLATIVE COUNSEL'S DIGEST

428 SB 1716, Boatwright. Highways: San Pablo Avenue.

Under existing law, the Department of Transportation is required to improve and maintain state highways, and funds are appropriated to the department for these purposes.

This bill would authorize the department to pay annually to Contra Costa County and each of the Cities of El Cerrito, Richmond, San Pablo, Pinole, and Hercules the added costs of maintenance and operation of San Pablo Avenue caused by increased traffic detoured onto that avenue because of specified construction work on State Route 80, thereby making an appropriation. These provisions would be repealed as of the date the department certifies to the Secretary of State that the construction is complete.

The bill would provide that it becomes effective only if AB 488 is enacted and becomes effective.

The bill would declare that it is to take effect immediately as an urgency statute.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 380.3 is added to the Streets and Highways Code, to read:

380.3. There will be increased motor vehicle traffic on San Pablo Avenue in the County of Contra Costa and the Cities of El Cerrito, Richmond, San Pablo, Pinole, and Hercules because traffic will be detoured onto San Pablo Avenue during construction work on State Route 80 to convert the existing shoulder to additional traffic lanes. Because of the increased traffic caused by the detour, the department may pay annually to that county and each of those cities the added costs of maintenance and operation of San Pablo Avenue.

This section shall remain in effect only until the department certifies to the Secretary of State that construction is complete on the project on State Route 80 in Contra Costa County to convert the existing shoulder to additional traffic lanes, and as of the date of that certification is repealed.

SEC. 2. Section 380.3 of the Streets and Highways Code shall become effective only if Assembly Bill 488 of the 1989-90 Regular Session is enacted and becomes effective.

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order that repairs to San Pablo Avenue caused by the increased traffic detoured from State Route 80 may commence as soon as possible, it is necessary that this act take effect immediately.

PEACE OFFICERS

CHAPTER 1165

S.B.No. 353

AN ACT to amend Section 25755 of the Business and Professions Code, to amend Sections 39671 and 72330 of the Education Code, to amend Section 3332 of the Food and Agricultural Code, to amend Sections 3301, 9194.5, 14613, and 74368 of the Government Code, to amend Section 12020 of the Health and Safety Code, to amend Sections 488.5, 557.5, 557.6, and 669.5 of the Insurance Code, to amend Section 3600.3 of the Labor Code, to amend Sections 148.5, 190.2, 409.5, 409.6, 830, 830.1, 830.2, 830.3, 830.5, 830.6, 830.7, 830.8, 830.9, 830.10, and 12028.5 of, to add Sections 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.38, and 13526 to, to amend and renumber Section 830.32, to repeal and add Sections 830.31 and 830.4 of, and to add Article 4 (commencing with Section 13510) to Chapter 1 of Title 4 of Part 4 of, the Penal Code, to amend Section 10334 of the Public Contract Code, to amend Section 4156 of the Public Resources Code, to amend Sections 8226, 12820, 22558, and 30501 of the Public Utilities Code, to amend Section 25258 of the Vehicle Code, and to amend Sections 4313 and 4493 of the Welfare and Institutions Code, relating to peace officers.

[Approved by Governor September 30, 1989.]

[Filed with Secretary of State September 30, 1989.]

LEGISLATIVE COUNSEL'S DIGEST

SB 353, Presley. Peace officers.

(1) Under existing law, several code sections in the Penal Code classify various officers and employees of state and local agencies as peace officers.

This bill would recast those sections by designating peace officers in the several sections of the Penal Code according, in part, to the officers' and employees' occupation. The bill would add to the listing of peace officers security officers of the California State Police Division and security officers of the Hastings College of the Law. The bill would also make numerous conforming and technical changes.

(2) Existing law requires the Commission on Peace Officer Standards and Training to pay from the Peace Officers' Training Fund to each eligible local government agency state aid for training expenses of full-time regular paid employees of the eligible agencies.

This bill would prohibit an allocation from the fund to a local governmental agency if the agency was not entitled to receive funding from the fund in accordance with the law as it read on December 31, 1989.

(3) Existing law requires the Commission on Peace Officer Standards and Training to undertake certain training programs regarding peace officers.

This bill would require any person or persons desiring peace officer status under the law who, on January 1, 1990, were not entitled to be designated as peace officers to request the Commission on Peace Officer Standards and Training to undertake a feasibility study, as specified, regarding designating the person or persons as peace officers. It would require the request and study to be undertaken in accordance with regulations

adopted by the commission. The bill would authorize the commission to charge any person requesting a study, a fee, not to exceed the actual cost of undertaking the study. It would require the commission to issue its study and recommendations within 18 months of the request and to provide a copy of the same to the Legislature.

The bill would provide that a section included in the Briggs Death Penalty Initiative Act, proposed to be amended by this bill, shall become effective only when approved by the voters.

This bill would incorporate changes in Section 25755 of the Business and Professions Code and Sections 830.1, 830.2, 830.3, 830.6, 830.7, and 12028.5 of the Penal Code to be operative only if specified applicable bills (e.g. SB 352, SB 1351, SB 1578, AB 1506, AB 1688, and AB 2089) are chaptered, as provided, and this bill is chaptered last.

The bill would also incorporate changes in Section 25258 of the Vehicle Code made by Chapter 245 of the Statutes of 1989.

The people of the State of California do enact as follows:

SECTION 1. Section 25755 of the Business and Professions Code is amended to read:

25755. The director and the persons employed by the department for the administration and enforcement of this division are peace officers in the enforcement of the penal provisions of this division, the rules of the department adopted under the provisions of this division, and any other penal provisions of law of this state prohibiting or regulating the sale, exposing for sale, use, possession, giving away, adulteration, dilution, misbranding, or mislabeling of alcoholic beverages or intoxicating liquors, and such persons are authorized, while acting as peace officers, to enforce any penal provisions of law while they are in, on, or about any licensed premises in the course of their employment.

The director, the persons employed by the department for the administration and enforcement of this division, and peace officers listed in Section 830.1 of the Penal Code may, in enforcing the provisions of this division, visit and inspect the premises of any licensee at any time during which the licensee is exercising the privileges authorized by his or her license on the premises.

Members of the California State Police and peace officers of the Department of Parks and Recreation, as defined in subdivisions (b) and (g) of Section 830.2 of the Penal Code may, in enforcing the provisions of this division, visit and inspect the premises of any licensee located on state property at any time during which the licensee is exercising the privileges authorized by his or her license on the premises.

SEC. 1.1. Section 25755 of the Business and Professions Code is amended to read:

25755. The director and the persons employed by the department for the administration and enforcement of this division are peace officers in the enforcement of the penal provisions of this division, the rules of the department adopted under the provisions of this division, and any other penal provisions of law of this state prohibiting or regulating the sale, exposing for sale, use, possession, giving away, adulteration, dilution, misbranding, or mislabeling of alcoholic beverages or intoxicating liquors, and such persons are authorized, while acting as peace officers, to enforce any penal provisions of law while * * * in the course of their employment.

The director, the persons employed by the department for the administration and enforcement of this division, and peace officers listed in Section 830.1 of the Penal Code may, in enforcing the provisions of this division, visit and inspect the premises of any licensee at any time during which the licensee is exercising the privileges authorized by his or her license on the premises.

Members of the California State Police and peace officers of the Department of Parks and Recreation, as defined in subdivisions (b) and (g) of Section 830.2 of the Penal Code may, in enforcing the provisions of this division, visit and inspect the premises of any licensee located on state property at any time during which the licensee is exercising the privileges authorized by his or her license on the premises.

SEC. 2. Section 39671 of the Education Code is amended to read:

39671. Persons employed and compensated as members of a police department of a school district, when appointed and duly sworn, are peace officers, for the purposes of carrying out their duties of employment pursuant to Section 830.32 of the Penal Code.

SEC. 3. Section 72330 of the Education Code is amended to read:

72330. The governing board of a community college district may establish a community college police department, under the supervision of a community college chief of police, and employ, in accordance with the provisions of Chapter 4 (commencing with Section 88000) of Part 51 that personnel as may be necessary to enforce the law on or near the campus of the community college and on or near other grounds or properties owned, operated, controlled, or administered by the community college or by the state acting on behalf of the community college. Each campus of a multicampus community college district may designate a chief of police.

Persons employed and compensated as members of a community college police department, when so appointed and duly sworn, are peace officers as defined * * * in Chapter 4.5 (commencing with Section * * * 830) of Title 3 of Part 2 of the Penal Code.

SEC. 4. Section 3332 of the Food and Agricultural Code is amended to read:

3332. The board has authority to do any of the following:

(a) Contract.

(b) Accept funds or gifts of value from the United States or any person to aid in carrying out the purposes of this part.

(c) Conduct or contract for programs, either independently or in cooperation with any individual, public or private organization, or federal, state, or local governmental agency.

(d) Establish and maintain a bank checking account or a savings and loan association account, approved by the Director of Finance in accordance with Sections 16506 and 16605 of the Government Code, for depositing funds appropriated to the California Exposition and State Fair pursuant to subdivision (a) of Section 19622 of the Business and Professions Code. The Department of Finance shall audit the account at the end of each fiscal year.

(e) Make or adopt all necessary orders, rules, or regulations for governing the activities of the California Exposition and State Fair.

(f) Delegate to the officers and employees of the California Exposition and State Fair the authority to appoint civil service personnel according to state civil service procedures.

(g) Delegate to the officers and employees of the California Exposition and State Fair the exercise of powers vested in the board as the board may deem desirable for the orderly management and operation of the California Exposition and State Fair.

(h) Appoint all necessary marshals and police to keep order and preserve peace at the California Exposition and State Fair premises on a year-round basis who shall have the powers of peace officers specified in Section 830.2 of the Penal Code. A member of the California State Police Division may be employed as * * * a marshal or police officer while off duty from his or her regular employment, subject to those conditions as may be set forth by the Chief of the California State Police. At least 75 percent of the persons appointed pursuant to this subdivision shall possess the basic certificate issued by the Commission on Peace Officers Standards and Training. The remaining 25 percent may be appointed if the person has completed a Peace Officer Standards and Training certified academy or possesses a Level One Reserve Certificate (as defined in Section 832.6 of the Penal Code).

(i) Lease, with the approval of the Department of General Services, any of its property for any purpose for any period of time.

(j) Use or manage any of its property, with the approval of the Department of General Services, jointly or in connection with any lessee or sublessee, for any purpose approved by the board.

SEC. 5. Section 3301 of the Government Code is amended to read:

3301. For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision

* * * (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.4 * * *, and 830.5 of the Penal Code.

The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that such stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California.

SEC. 6. Section 9194.5 of the Government Code is amended to read:

9194.5. The Sergeant at Arms and Assistant Sergeants at Arms of each house shall have the powers and authority conferred by law upon peace officers listed in * * * Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code in all parts of the state in carrying out their duties, and shall not be liable to civil action for their acts in carrying out the orders of a Member of the Legislature presiding over any legislative proceeding, including sessions of the Legislature or either house thereof and hearings of legislative committees, or in carrying out the orders of a member to have any person removed from the office of the member, if the Sergeant at Arms or Assistant Sergeant at Arms acts without malice and in the reasonable belief that the member has the authority to issue the order.

SEC. 7. Section 14613 of the Government Code is amended to read:

14613. There is in the Department of General Services the California State Police Division.

The director shall appoint members and employees of the California State Police Division as may be necessary to protect and provide police services for the state buildings and grounds and occupants thereof. Members * * * of the California State Police Division have the powers of peace officers as defined in the Penal Code.

Members of the California State Police Division consist of the following: the chief, inspectors, captains, lieutenants, sergeants, * * * officers, and security officers. All other persons in the California State Police Division are considered employees.

The California State Police Division may provide for the physical security of any current or former constitutional officer of the state and any current or former legislator of the state.

Upon the request of the Chief Justice, the director, through the California State Police Division, may provide appropriate protective services to any current or former member of the state courts of appeal and the California Supreme Court.

SEC. 8. Section 74368 of the Government Code is amended to read:

74368. The marshal may make the following appointments:

(a) One assistant marshal.

(b) Four captains.

(c) Four lieutenants.

(d) Nineteen sergeants.

(e) One hundred sixty-three deputy marshals.

Any deputy marshal who may be assigned by the marshal to one of seven positions designated as lead deputy shall receive, while serving in that capacity, biweekly compensation at a rate 5 percent higher than that received by the deputy.

The marshal may, at his or her discretion, fill a deputy marshal or court service officer position by accepting a lateral transfer from another California peace officer agency. The transferee shall have completed a California P.O.S.T. certified basic academy and been employed for at least one year in a position enumerated in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, or 830.4 of the Penal Code within the past three years.

(f) One administrative secretary I, II, or III.

(g) One administrative services manager I, II, or III or administrative assistant III.

(h) Twenty intermediate typists.

(i) Six senior typists.

(j) Thirty-five field service officers.

Notwithstanding any other provisions of this article, in no event shall a field service officer's salary be less than 65 percent of the salary of a deputy marshal at the corresponding pay step. The field service officer is a peace officer trainee position which requires appointees to be at least 18 years of age and meet the qualifications and standards prescribed for deputy marshals. At the time an incumbent in the class of field service officer attains the age of 21, he or she may be appointed by the marshal to a position in the class of deputy marshal or court service officer, provided such position is open, without further qualification or examination.

A field service officer shall receive 65 percent of the uniform allowance prescribed for deputy marshals. In the event that a field service officer is appointed to the class of deputy marshal or court service officer, he or she shall receive the amount of reimbursement of the cost of required uniforms and equipment prescribed for a newly hired deputy marshal or court service officer, less any reimbursement received by him or her for the cost of required field service officer uniforms and equipment.

(k) One junior typist. Each vacancy occurring in this class shall cause a corresponding reduction in the number of junior typists hereby authorized, provided, however, that such vacancy shall increase by one, a position in the class intermediate typist under subdivision (h).

(l) Nine legal procedures clerks III.

(m) Thirty legal procedures clerks II or I.

(n) Sixty court service officers. In no event shall a court service officer's salary be less than 80 percent of a deputy marshal at the corresponding pay step. A court service officer shall receive the same uniform allowance prescribed for a deputy marshal, under the same conditions prescribed for deputy marshals. The marshal may appoint a court service officer to a vacant position of deputy marshal without further qualification or examination. In the event that a court service officer is appointed to the class of deputy marshal, he or she shall receive the amount of reimbursement prescribed for a newly hired deputy marshal, less any reimbursement received by him or her for the cost of required court service officer uniforms and equipment. Court service officers shall be peace officers pursuant to Section 830.4 of the Penal Code. Notwithstanding any other provision of law, court service officers shall be general members of the county employees retirement system.

Any court service officer who meets length of service, educational and performance requirements established by the marshal and approved by the county personnel director may receive a biweekly compensation at a rate 7½ percent higher than that otherwise received by a court service officer. The number of court service officer positions so compensated shall not exceed one-half the total number of court service officers then employed by the marshal.

(o) Any person specified in subdivisions (f), (h), and (i), who may be assigned by the marshal to one of the positions designated as executive secretary or administrative personnel secretary shall receive, while serving in that capacity, biweekly compensation at a rate 10 percent higher than that specified for such person's class and step.

(p) Two supervising legal services clerks.

(q) Three communications dispatchers I or II.

(r) Two administrative assistants III, II, I, or trainee.

(s) One EDP coordinator, or senior systems analyst.

(t) Notwithstanding Section 74369, up to 15 extra help positions (hourly rate) to be appointed at a level as determined by and serve at the pleasure of the marshal. Such appointments shall be temporary for a period not to exceed six months, plus one

setting forth the surcharge or surcharges, and the manner in which such surcharge or surcharges shall be collected, and instructing the county clerk to transmit, on the next business day following the adoption of the resolution, a copy of the resolution to the clerk of the municipal court.

CONTROLLED SUBSTANCES—FEDERAL FUNDING—REPORT OF USE OF FUNDS

CHAPTER 674

S.B.No. 2739

AN ACT relating to controlled substances.

[Approved by Governor September 9, 1990.]

[Filed with Secretary of State September 12, 1990.]

LEGISLATIVE COUNSEL'S DIGEST

SB 2739, Roberti. Controlled substances: information.

Existing law does not contain provisions requiring state entities to submit reports concerning the goals to be achieved with the use of federal moneys which they receive in the war against the illegal manufacture, sale, smuggling, and use of controlled substances.

This bill would set forth legislative declarations and findings concerning illicit drug activity and the need to disseminate information concerning the war on drugs.

In addition, the bill would require certain state entities, when they receive federal moneys which are specifically earmarked as part of the President's "National Drug Control Strategy," to report to the Department of Finance, as specified, concerning the use of those moneys. The bill also would require the Department of Finance to analyze each of these reports and to submit its findings to the Legislature by a specified date.

The people of the State of California do enact as follows:

SECTION 1. (a) The Legislature hereby finds and declares all of the following:

(1) California is one of the leaders in the nation in the illegal manufacture, sale, smuggling, and use of controlled substances.

(2) It is estimated that the annual cost of this problem to California's society is $6 billion.

(3) Success in the war on drugs depends in no small part on having comprehensive information wherever it is needed in order to make sound policy and operational decisions.

(4) This information management challenge is particularly acute given the number and diversity of federal, state, and local agencies involved in the drug war.

(5) It is not only a question of having enough information, but also a question of making the information that is available and the information which will become available accessible to those who are involved in the fight against drugs.

(6) Except for the small fraction of information in government hands that is sensitive and must be closely held, wider access to drug-related information is essential.

(7) California's drug war policy must be to maximize the sharing and use of relevant information among appropriate agencies, upon which coherent and coordinated policymaking depends.

(b) Whenever any one of the following entities receives federal moneys which are specifically earmarked as part of the President's "National Drug Control Strategy," that

entity, within 30 days after receiving the moneys, shall submit a report to the Department of Finance on the proposed use of, and goals to be achieved with, those moneys:

(1) Department of Alcohol and Drug Programs.

(2) Department of Corrections.

(3) State Department of Education.

(4) Department of Justice.

(5) Department of the Youth Authority.

(6) Office of Criminal Justice Planning.

In addition, each entity shall submit a report to the Department of Finance within 30 days after the end of each federal fiscal year specifying the actual use and level of attainment of those specified goals.

(c) The Department of Finance shall analyze each report submitted pursuant to subdivision (b) and shall submit its findings to the Legislature no later than 30 days after receiving each report.

PEACE OFFICERS

CHAPTER 675

A.B.No. 389

AN ACT to amend Sections 3301, 20017.99, and 74368 of the Government Code, to amend Sections 488.5, 557.5, 667.6, and 669.5 of the Insurance Code, and to amend Section 148.5 of the Penal Code, relating to peace officers, and making an appropriation therefor.

[Approved by Governor September 10, 1990.]

[Filed with Secretary of State September 12, 1990.]

LEGISLATIVE COUNSEL'S DIGEST

AB 389, Peace. Peace officers.

(1) Existing law includes specified peace officers within the definition of a public safety officer for purposes of the "Public Safety Officers Procedural Bill of Rights Act."

Existing law permits persons who have been employed for at least one year in specified peace officer positions to make a lateral transfer to fill a position as a deputy marshal or court service officer.

Existing law prohibits an insurer, in issuing or renewing an insurance policy for the operation of a private motor vehicle, from increasing the premium on the policy of specified peace officers, because the peace officer was involved in an accident while operating an authorized emergency vehicle, as defined, in the performance of that peace officer's duty during the hours of employment.

Existing law also exempts specified peace officers from certain reporting requirements to the issuer of a private automobile insurance policy with regard to an accident under the above-described conditions.

Existing law requires, however, specified peace officers to submit, within 30 days, to the insurer, either a written declaration under penalty of perjury stating whether or not the peace officer was operating an authorized emergency vehicle in the performance of that peace officer's duty during the hours of employment or a copy of the incident report filed by the peace officer with his or her employer.

This bill would add to the list of specified peace officers subject to the above-described provisions, the officers of a state hospital under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services.

(2) Existing law prohibits any insurer from failing to renew a private automobile insurance policy, as defined, to a peace officer, member of the California Highway Patrol, or firefighter, with respect to his or her operation of a private motor vehicle, for the reason that the insured has been involved in an accident while operating an authorized emergency vehicle, as defined, in response to his or her duties during the hours of employment.

This bill would add specified peace officers to the definition of peace officer for the purposes of the above provision, and would also add to the list of authorized emergency vehicles, as defined, for the purposes of this provision.

(3) Existing law provides that it is a misdemeanor to falsely report to the employees of specified state or local agencies who are assigned to accept these reports from citizens that a felony or misdemeanor has been committed.

This bill would also make it a misdemeanor to falsely report to the officers of a state hospital under the jurisdiction of the State Department of Mental Health and the State Department of Developmental Services that a felony or misdemeanor has been committed, thereby imposing a state-mandated local program by changing the definition of a crime.

(4) Under existing law, the Public Employees' Retirement Law defines "state peace officer/firefighter member" in terms of specified job classifications and provides higher retirement benefit formulas and higher employer and employee contribution rates for state peace officer/firefighter members than for state miscellaneous members.

This bill would include within the definition of a "state peace officer/firefighter member" specified peace officers of a state hospital under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services. The inclusion of additional employees in that member category would increase the amount of the state's continuously appropriated monthly contributions, which would constitute a General Fund appropriation.

(5) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 3301 of the Government Code is amended to read:

3301. For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (c), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.38, 830.4, and 830.5 of the Penal Code.

The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that * * * stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California.

SEC. 2. Section 20017.99 of the Government Code is amended to read:

20017.99. "State peace officer/firefighter member" also includes state officers and employees who have been designated as a peace officer as defined in Sections 830.1, 830.2, 830.3, 830.38, 830.4, and 830.5 of the Penal Code, except patrol members, or a firefighter whose principal duties consist of active firefighting/fire suppression, who are either excluded from the definition of state employee in subdivision (c) of Section 3513 or is a supervisory employee as defined in Section 3522.1, or is a nonelected officer or employee of the executive branch of government who is not a member of the civil service, provided,

that those officers and employees have responsibility for the direct supervision of state peace officer/firefighter personnel specified in Sections 20017.95, 20017.96, 20017.97, and 20017.98. The Department of Personnel Administration shall, on an annual basis, determine which classes meet the above conditions and are not classes specified in Sections 20017.95, 20017.96, 20017.97, and 20017.98, and report its findings to the Legislature and to the Public Employees' Retirement System, to be effective July 1 of each year.

Any person so designated may elect, within 90 days of notification by the board, to remain subject to the service retirement benefit and the normal rate of contribution applicable prior to the effective date of this section by filing an irrevocable notice of election with the board. A member who so elects shall be subject to the reduced benefit factors specified in Section 21261.13 only for service also included in the federal system.

This section shall not become applicable to any member so designated until such time as a ruling or regulation authorizing the inclusion of persons so designated within the definition of "policeman or fireman" is issued by the federal agency for purposes of Section 218(d)(5)(A) of the Social Security Act.

SEC. 3. Section 74368 of the Government Code is amended to read:

74368. The marshal may make the following appointments:

(a) One assistant marshal.

(b) Four captains.

(c) Four lieutenants.

(d) Nineteen sergeants.

(e) One hundred sixty-three deputy marshals.

Any deputy marshal who may be assigned by the marshal to one of seven positions designated as lead deputy shall receive, while serving in that capacity, biweekly compensation at a rate 5 percent higher than that received by the deputy.

The marshal may, at his or her discretion, fill a deputy marshal or court service officer position by accepting a lateral transfer from another California peace officer agency. The transferee shall have completed a California P.O.S.T. certified basic academy and been employed for at least one year in a position enumerated in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.38, or 830.4 of the Penal Code within the past three years.

(f) One administrative secretary I, II, or III.

(g) One administrative services manager I, II, or III or administrative assistant III.

(h) Twenty intermediate typists.

(i) Six senior typists.

(j) Thirty-five field service officers.

Notwithstanding any other provisions of this article, in no event shall a field service officer's salary be less than 65 percent of the salary of a deputy marshal at the corresponding pay step. The field service officer is a peace officer trainee position which requires appointees to be at least 18 years of age and meet the qualifications and standards prescribed for deputy marshals. At the time an incumbent in the class of field service officer attains the age of 21, he or she may be appointed by the marshal to a position in the class of deputy marshal or court service officer, provided the position is open, without further qualification or examination.

A field service officer shall receive 65 percent of the uniform allowance prescribed for deputy marshals. In the event that a field service officer is appointed to the class of deputy marshal or court service officer, he or she shall receive the amount of reimbursement of the cost of required uniforms and equipment prescribed for a newly hired deputy marshal or court service officer, less any reimbursement received by him or her for the cost of required field service officer uniforms and equipment.

(k) One junior typist. Each vacancy occurring in this class shall cause a corresponding reduction in the number of junior typists hereby authorized, provided, however, that the

vacancy shall increase by one, a position in the class intermediate typist under subdivision (h).

(l) Nine legal procedures clerks III.

(m) Thirty legal procedures clerks II or I.

(n) Sixty court service officers. In no event shall a court service officer's salary be less than 80 percent of a deputy marshal at the corresponding pay step. A court service officer shall receive the same uniform allowance prescribed for a deputy marshal, under the same conditions prescribed for deputy marshals. The marshal may appoint a court service officer to a vacant position of deputy marshal without further qualification or examination. In the event that a court service officer is appointed to the class of deputy marshal, he or she shall receive the amount of reimbursement prescribed for a newly hired deputy marshal, less any reimbursement received by him or her for the cost of required court service officer uniforms and equipment. Court service officers shall be peace officers pursuant to Section 830.4 of the Penal Code. Notwithstanding any other provision of law, court service officers shall be general members of the county employees retirement system.

Any court service officer who meets length of service, educational and performance requirements established by the marshal and approved by the county personnel director may receive a biweekly compensation at a rate 7½ percent higher than that otherwise received by a court service officer. The number of court service officer positions so compensated shall not exceed one-half the total number of court service officers then employed by the marshal.

(o) Any person specified in subdivisions (f), (h), and (i), who may be assigned by the marshal to one of the positions designated as executive secretary or administrative-personnel secretary shall receive, while serving in that capacity, biweekly compensation at a rate 10 percent higher than that specified for that person's class and step.

(p) Two supervising legal services clerks.

(q) Three communications dispatchers I or II.

(r) Two administrative assistants III, II, I, or trainee.

(s) One EDP coordinator, or senior systems analyst.

(t) Notwithstanding Section 74369, up to 15 extra help positions (hourly rate) to be appointed at a level as determined by and serve at the pleasure of the marshal. These appointments shall be temporary for a period not to exceed six months, plus one additional period at the marshal's option, not to exceed six months. Notwithstanding any other provisions of this section, the marshal may fill these positions with persons employed for less than 91 working days during a fiscal year on a part-time basis.

(u) Notwithstanding Section 74369, the marshal may appoint up to six temporary extra help marshal student workers I, II, or III who shall be paid at an hourly rate and shall serve at the pleasure of the marshal. A marshal student worker I, II, or III shall receive an hourly salary at the rate equal to that specified for the class of student worker I, II, or III, respectively, in the unclassified service of the County of San Diego. Persons who graduate and receive a degree in the field which qualified them for appointment to a marshal student worker class may remain in the class and be employed on a full-time basis for up to six months from the first day of the month following their date of graduation.

(v) Two associate systems analysts or assistant systems analysts.

(w) Notwithstanding Section 74369, up to five provisional workers may be appointed by and serve at the pleasure of the marshal. The class of provisional worker provides for temporary appointments to positions in classes not listed in Section 74370 pending a review and evaluation of the duties of these positions by the marshal, and the establishment of specific classes as provided in this subdivision. Prior to the establishment of those classes, the county personnel director shall conduct a classification review and make recommendations to the marshal as to the establishment of the classes. The rate of pay for each individual employed in this class shall be within the range proposed for the class pending establishment, at a rate determined by the marshal following consultation with

the county personnel director. The rules regarding appointment and compensation as they relate to appointments to provisional workers shall be the same as those applicable to the class that is pending establishment. Appointments shall be temporary and shall not exceed six months. Employee benefits, if applicable, shall be equal to those granted to the class in the service of the County of San Diego to which the pending class will be tied for benefit purposes. When * * * an appointment is made, the class, compensation (including salary and fringe benefits), and number of such positions may be established by joint action of the marshal and the board of supervisors in accordance with established county personnel and budgetary procedures. The marshal may then appoint additional attachés to the classes of positions in the same manner as those for which express provision is made, and they shall receive the compensation so provided. Persons occupying provisional worker positions shall have their appointments expire not later than 30 calendar days following promulgation of a list of certified eligibles for the new class. Appointments to the new class shall continue at the stated compensation or as thereafter modified by joint action of the marshal and the board of supervisors.

(x) Notwithstanding any other provision of law, the number of positions in classifications authorized under subdivisions (h) to (s), inclusive, (u), (v) and (w) of this section may be increased by up to 100 additional positions by joint action of the majority of the judges and the board of supervisors in accordance with established county personnel and budgetary procedures. The rules regarding appointment and compensation (including salary and fringe benefits) as they relate to appointments of persons to these positions shall be the same as those applicable to the class of the positions. The action of the majority of the judges and the resolution of the board of supervisors adjusting those positions shall designate the class title or titles and number of positions to be added to each respective class. Any adjustment made pursuant to this subdivision shall be effective on adoption of the resolution by the board of supervisors and shall remain in effect only until January 1 of the second year following the year in which this subdivision becomes effective, unless earlier ratified by the Legislature. This subdivision shall remain in operation only until January 1 of the second year following the year in which it becomes operative, and as of that date is inoperative.

SEC. 4. Section 488.5 of the Insurance Code, as amended by Chapter 82 of the Statutes of 1990, is amended to read:

488.5. No insurer shall, in issuing or renewing a private automobile insurance policy to a peace officer, member of the California Highway Patrol, or firefighter, with respect to his or her operation of a private motor vehicle, increase the premium on that policy for the reason that the insured or applicant for insurance has been involved in an accident while operating an authorized emergency vehicle, as defined in subdivision (a) of Section 165 of the Vehicle Code, in paragraph (1) or (2) of subdivision (b) of Section 165 of the Vehicle Code, or in subdivision (f) of Section 165 of the Vehicle Code, in the performance of his or her duty during the hours of his or her employment.

As used in this section:

(a) "Peace officer" means every person defined in Section 830.1, subdivisions (a), (b), (c), (d), (e), (g), and (h) of Section 830.2, subdivisions (a), (b), and (d) of Section 830.31, subdivisions (a) and (b) of Section 830.32, subdivisions (a), (b), (c), (d), and (e) of Section 830.33, subdivisions (a) and (b) of Section 830.5, and * * * Sections 830.98 and 830.6, of the Penal Code.

(b) "Policy" shall have the same meaning as defined in subdivision (a) of Section 660.

SEC. 5. Section 557.5 of the Insurance Code, as amended by Chapter 82 of the Statutes of 1990, is amended to read:

557.5. No peace officer, member of the California Highway Patrol, or firefighter shall be required to report any accident in which he or she is involved while operating an authorized emergency vehicle, as defined in subdivision (a) of Section 165 of the Vehicle Code, in paragraph (1) or (2) of subdivision (b) of Section 165 of the Vehicle Code, or in subdivision (f) of Section 165 of the Vehicle Code in performance of his or her duty during the hours of his or her employment, to any person who has issued that peace officer,

member of the California Highway Patrol, or firefighter a private automobile insurance policy.

As used in this section:

(a) "Peace officer" means every person defined in Section 830.1, subdivisions (a), (b), (c), (d), (e), (g), and (h) of Section 830.2, subdivisions (a), (b), and (d) of Section 830.31, subdivisions (a) and (b) of Section 830.32, subdivisions (a), (b), (c), (d), and (e) of Section 830.33, subdivisions (a) and (b) of Section 830.5, and * * * Sections 830.38 and 830.6, of the Penal Code.

(b) "Policy" shall have the same meaning as defined in subdivision (a) of Section 660.

SEC. 6. Section 557.6 of the Insurance Code, as amended by Chapter 82 of the Statutes of 1990, is amended to read:

557.6. Any peace officer as defined pursuant to this section who has been involved in an accident shall submit to his or her private automobile insurer within 30 days of the accident his or her written declaration under penalty of perjury stating whether or not at the time of the accident he or she was operating an authorized emergency vehicle, as defined in subdivision (a) of Section 165 of the Vehicle Code, in paragraph (1) or (2) of subdivision (b) of Section 165 of the Vehicle Code, or in subdivision (f) of Section 165 of the Vehicle Code in the performance of his or her duty during the hours of his or her employment. In lieu of a written declaration, the peace officer may submit to the private automobile insurer a copy of the incident report filed by the peace officer with his or her employer.

As used in this section, "peace officer" means every person defined in Section 830.1, subdivisions (a), (b), (c), (d), (e), (g), and (h) of Section 830.2, subdivisions (a), (b), and (d) of Section 830.31, subdivisions (a) and (b) of Section 830.32, subdivisions (a), (b), (c), (d), and (e) of Section 830.33, subdivisions (a) and (b) of Section 830.5, and * * * Sections 830.38 and 830.6, of the Penal Code.

SEC. 7. Section 669.5 of the Insurance Code is amended to read:

669.5. No insurer shall fail to renew any private automobile insurance policy of a peace officer, member of the California Highway Patrol, or firefighter, with respect to his or her operation of a private motor vehicle, for the reason that the insured has been involved in an accident while operating an authorized emergency vehicle, as defined in subdivision (a) of Section 165 of the Vehicle Code or in paragraph (1) or (2) of subdivision (b) of Section 165 of the Vehicle Code or in subdivision (f) of Section 165 of the Vehicle Code, in performance of his or her duty during the hours of his or her employment. As used in this section, "peace officer" shall have the same meaning as defined in Section 830.1 of the Penal Code, subdivisions (a), (b), (c), (d), (e), (g) and (h) of Section 830.2 of the Penal Code, subdivisions (a), (b), and (d) of Section 830.31 of the Penal Code, * * * subdivisions (a) and (b) of Section 830.32 of the Penal Code, subdivisions (a), (b), (c), (d), and (e) of Section 830.33 of the Penal Code, Section 830.38 of the Penal Code, subdivisions (a) and (b) of Section 830.5 of the Penal Code, and Section 830.6 of the Penal Code.

SEC. 8. Section 148.5 of the Penal Code is amended to read:

148.5. (a) Every person who reports to any peace officer listed in Section 830.1 or 830.2, district attorney, or deputy district attorney that a felony or misdemeanor has been committed, knowing the report to be false, is guilty of a misdemeanor.

(b) Every person who reports to any other peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, that a felony or misdemeanor has been committed, knowing the report to be false, is guilty of a misdemeanor if (1) the false information is given while the peace officer is engaged in the performance of his or her duties as a peace officer and (2) the person providing the false information knows or should have known that the person receiving the information is a peace officer.

(c) Except as provided in subdivisions (a) and (b), every person who reports to any employee who is assigned to accept reports from citizens, either directly or by telephone, and who is employed by a state or local agency which is designated in Section 830.1, 830.2, subdivision (e) of 830.3, Section 830.31, 830.32, 830.33, 830.34, 830.36, 830.37, 830.38, or 830.4, that a felony or misdemeanor has been committed, knowing the report to

be false, is guilty of a misdemeanor if (1) the false information is given while the employee is engaged in the performance of his or her duties as an agency employee and (2) the person providing the false information knows or should have known that the person receiving the information is an agency employee engaged in the performance of the duties described in this subdivision.

(d) This section does not apply to reports made by persons who are required by statute to report known or suspected instances of child abuse, dependent adult abuse, or elder abuse.

SEC. 9. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

VEHICLE LIENS—ENFORCEMENT PROCEDURES

CHAPTER 676

A.B.No. 1822

AN ACT to amend Section 9801 of, and to add Sections 9805, 9806, and 9808 to, the Vehicle Code, relating to vehicles.

[Approved by Governor September 10, 1990.]

[Filed with Secretary of State September 12, 1990.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1822, Katz. Vehicles: lien.

Existing law authorizes the Department of Motor Vehicles to collect the amount of a lien for delinquent registration by civil action and sale of the vehicle or another vehicle.

This bill would authorize the department to enforce the lien alternatively by the filing of a certificate with the county clerk requesting the entry of a judgment. The bill would prescribe the procedure for the filing of the certificate, entering of a judgment, and execution of a judgment. The bill would require the county clerk to enter a judgment, thus, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates which do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that this bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to those statutory procedures and, if the statewide cost does not exceed $1,000,000, shall be made from the State Mandates Claims Fund.

The people of the State of California do enact as follows:

SECTION 1. Section 9801 of the Vehicle Code is amended to read:

9801. (a) When the registration of a vehicle is delinquent, the department may collect the amount of the lien on the vehicle plus costs, not to exceed two hundred fifty dollars ($250), by the filing of a certificate requesting judgment pursuant to Section 9805, or by

STATE OF CALIFORNIA
DEPARTMENT OF FINANCE
915 L STREET
SACRAMENTO, CA 95814-3706

EXHIBIT D

RECEIVED
JUL 18 1996
COMMISSION ON
STATE MANDATES

July 17, 1996

Ms. Jolene Mado-Eveland
Program Analyst
Commission on State Mandates
1414 K Street, Suite 315
Sacramento, CA 95814

CLAIM NO. CSM-4499, "PEACE OFFICERS PROCEDURAL RIGHTS"

Dear Ms. Mado-Eveland:

As requested in your December 21, 1995 letter, the Department of Finance (DOF) has reviewed the test claim submitted by the City of Sacramento which alleges that specified costs incurred under Government Code Sections 3303(g) and 3304(b), as added by Chapter 465, Statutes of 1976, result in state mandated reimbursable expenses (Claim No. CSM-4499, "Peace Officers Procedural Rights"). We note that Government Code Section 3303(f), cited and quoted by the claimant, has been amended and should be referenced instead as Section 3303(g). In addition, Section 3304(b) as quoted by the claimant does not reflect the current text of that code section. We assume these discrepancies are an oversight by the claimant; we shall subsequently refer to Government Code Section 3303(g) instead of Section(f) and shall use the current text of Section 3304(b).

These statutes require that no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal. In addition, if a public safety officer is under investigation and subjected to interrogation by the commanding officer, or by any other member of the employing public safety department, which could lead to punitive action, the public safety officer shall be entitled to a transcribed copy of notes made by a stenographer or reports made by investigators, except those records that are deemed to be confidential by the investigating agency.

As a result of our review and analysis of this test claim, we have concluded that the statutes cited do not contain a reimbursable state mandate to local government. We believe that *Skelly v. State Personnel Board, 15 Cal.3d 194 (Cal 1975)*, which predates the enactment of Chapter 465, Statutes of 1976 would require local agencies to conduct the activities cited in Government Code Sections 3303(g) and 3304(b). Specifically, as noted in the attachments to this letter, "Skelly" effectively requires that a permanent civil service employee facing a proposed disciplinary action must, under the due process requirements of the state and federal

constitutions, be afforded specified procedural rights, including 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 to those charges, i.e. to have a hearing. Therefore, the costs associated with conducting administrative hearings and providing copies of transcripts or recordings of interrogations are required under case law, which predates the enactment of Chapter 465/1976, and are not reimbursable by the State.

Based on the foregoing, the Department of Finance recommends that this test claim be denied. If you have any questions regarding this letter, please contact Diana Alonzo, Principal Program Budget Analyst, at the address indicated in the letterhead, or at (916) 445-8913.

Sincerely,

Calvin Smith

S. CALVIN SMITH
Program Budget Manager

cc: League of California Cities
Mr. Walter Vaughn, Assistant Executive Officer, State Personnel Board

ATTACHMENT 1

DECLARATION OF DIANA ALONZO
DEPARTMENT OF FINANCE
CLAIM NO. CSM-4499

1. I am currently employed by the State of California, Department of Finance (DOF), am familiar with the duties of the DOF, am a Principal Program Budget Analyst for the DOF, and am authorized to make this declaration on behalf of the DOF.

2. We stipulate that the Government Code Section relevant to this claim has been amended, and that the accurate Section is 3303(g) not 3303(f), as evidenced by a copy of the current Government Code Section (Attachment 2). In addition, we note that Section 3304(b) as quoted by the claimant does not reflect the current text of that code section (the current text is also reflected in Attachment 2). We believe these discrepancies are an inadvertent oversight by the claimant.

3. Section 6 of Article XIIIB of the California Constitution reads, in pertinent part, as follows:

   "Whenever the Legislature or any State agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (exclusions not relevant to this test claim).

4. In Skelly v. State Personnel Board, 15 Cal.3d 194 (1975), the court said:

   "When a person has a legally enforceable right to receive a government benefit provided certain facts exist, such right constitutes a property interest protected by due process."

   "While some form of notice and hearing must precede a final depravation of property to meet due process, the time and content of the notice and the nature of the hearing will depend on an appropriate accommodation of the competing interests involved."

"Since preremoval safeguards for a permanent civil service employee must include, as a minimum 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, the California Civil Service Act, which affords a permanent employee not of these prior procedural rights, violates due process, even though a employee is entitled to a full evidentiary hearing..."

5. Attachment 3 is a true copy of materials related to Skelly v. State Personnel Board, 15 Cal.3d 194 (1975) faxed to DOF by the State Personnel Board.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge, except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

7/12/96 Sacramento, CA

Date and Place

Signature

C:\CORR\CSM18806.AL

ATTACHMENT 2

CALIFORNIA CODES: GOVERNMENT CODE SECTIONS 3300-3304

3300. This chapter is known and may be cited as the Public Safety Officers Procedural Bill of Rights Act.

3301. For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.38, 830.4, and 830.5 of the Penal Code. The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California.

3302. (a) Except as otherwise provided by law, or whenever on duty or in uniform, no public safety officer shall be prohibited from engaging, or be coerced or required to engage, in political activity.

(b) No public safety officer shall be prohibited from seeking election to, or serving as a member of, the governing board of a school district.

3303. When any public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action, the interrogation shall be conducted under the following conditions. For the purpose of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.

(a) The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise. If the interrogation does occur during off-duty time of the public safety officer being interrogated, the public safety officer shall be compensated for any off-duty time in accordance with regular department procedures, and the public safety officer shall not be released from employment for any work missed.

(b) The public safety officer under investigation shall be informed prior to the interrogation of the rank, name, and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation. All questions directed to the public safety officer under interrogation shall be asked by and through no more than two interrogators at one time.

(c) The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation.

(d) The interrogating session shall be for a reasonable period taking into consideration gravity and complexity of the issue being investigated. The person under interrogation shall be allowed to attend to his or her own personal physical necessities.

(e) The public safety officer under interrogation shall not be subjected to offensive language or threatened with punitive action, except that an officer refusing to respond to questions or submit to interrogations shall be informed that failure to answer questions directly related to the investigation or interrogation may result in punitive action. No promise of reward shall be made as an inducement to answering any question. The employer shall not cause the public safety officer under interrogation to be subjected to visits by the press or news media without his or her express consent nor shall his or her home address or photograph be given to the press or news media without his or her express consent.

(f) No statement made during interrogation by a public safety officer under duress, coercion, or threat of punitive action shall be admissible in any subsequent civil proceeding. This subdivision is subject to the following qualifications:

(1) This subdivision shall not limit the use of statements made by a public safety officer when the employing public safety department is seeking civil sanctions against any public safety officer, including disciplinary action brought under Section 19572.

(2) This subdivision shall not prevent the admissibility of statements made by the public safety officer under interrogation in any civil action, including administrative actions, brought by that public safety officer, or that officer's exclusive representative, arising out of a disciplinary action.

(3) This subdivision shall not prevent statements made by a public safety officer under interrogation from being used to impeach the testimony of that officer after an in camera review to determine whether the statements serve to impeach the testimony of the officer.

(4) This subdivision shall not otherwise prevent the admissibility of statements made by a public safety officer under interrogation if that officer subsequently is deceased.

(g) The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. 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. No notes or reports that are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation.

(h) If prior to or during the interrogation of a public safety officer it is deemed that he or she may be charged with a criminal offense, he or she shall be immediately informed of his or her constitutional rights.

(i) Upon the filing of a formal written statement of charges, or whenever an interrogation focuses on matters that are likely to result in punitive action against any public safety officer, that officer, at his or her request, shall have the right to be represented by a representative of his or her choice who may be present at all times during the interrogation. The representative shall not be a person subject to the same investigation. The representative shall not be required to disclose, nor be subject to any punitive action for refusing to disclose, any information received from the officer under investigation for noncriminal matters. This section shall not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer, nor shall this section apply to an investigation concerned solely and directly with alleged criminal activities.

(j) No public safety officer shall be loaned or temporarily reassigned to a location or duty assignment if a sworn member of his or her department would not normally be sent to that location or would not normally be given that duty assignment under similar circumstances.

3304. (a) No public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of the rights granted under this chapter, or the exercise of any rights under any existing administrative grievance procedure.

Nothing in this section shall preclude a head of an agency from ordering a public safety officer to cooperate with other agencies involved in criminal investigations. If an officer fails to comply with such an order, the agency may officially charge him with insubordination.

(b) No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal.

EXHIBIT E

DEC 10 1996
COMMISSION ON
STATE MANDATES

OFFICE OF
LABOR RELATIONS

CITY OF SACRAMENTO
CALIFORNIA

926 J STREET
ROOM 201
SACRAMENTO, CA
95814-2716

PH 916-264-5424
FAX 916-264-8110

December 6, 1996

Mr. Kirk G. Stewart
Executive Director
Commission on State Mandate
1414 K Street
Sacramento, CA 95814

RE: CSM - 4499 Police Officer Bill of Rights

Dear Mr. Stewart:

The City of Sacramento has filed a test claim which seeks a determination that Chapter 465, Statutes of 1976, together with Government Code Sections 3300-33004, generally referred to as the Police Officers Bill of Rights (POBAR), imposes a reimbursable state mandate on local agencies. The Department of Finance, following a review and analysis of our test claim which was requested by your Commission, has responded as follows:

> We have concluded that the statutes cited do not contain a reimbursable state mandate to local government. We believe that *Skelly v State Personnel Board, 15 Cal.3d194(Cal 1975*), which predates the enactment of Chapter 465, Statues of 1976 would require local agencies to conduct the activities cited in Government Code Sections 3303(g) and 3304(b). Specifically, as noted in the attachment to this letter, "Skelly" effectively requires that a permanent civil service employee facing a proposed disciplinary action must, under the due process requirement of the state and federal constitutions, be afforded specified procedural rights, including notice of a proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based and the right to respond to those charges, i.e. to have a hearing. Therefore the costs associated with conducting administrative hearings and providing copies of transcripts or recordings of interrogations are required under case law, which predates the enactment of Chapter 465/1976, and are not reimbursable by the State.

The Department of Finance is correct in citing "Skelly" as the basic law governing "due process requirements that govern what both California state and local governments must follow prior to a final deprivation of property to a permanent employee. The "Skelly"

case dealt with the dismissal of a State employee. As correctly stated in the Department of Finance's declaration by Diana Alonzo, the court said:

"While some form of notice and hearing must precede a final depravation of property to meet due process, the time and content of the notice and the nature of the hearing will depend on the appropriate accommodation of the competing interests involved."

"Since preremoval safeguards for a permanent civil service employee must include, as a minimum 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 the discipline, the California Civil Service Act, which affords a permanent employee none of these prior procedural rights, violates due process, even though a employee is entitled to a full evidentiary hearing ..."

The basic intent of the City's test claim is to seek reimbursement of **costs associated with activities specifically afforded peace officers that go beyond what the court has set as minimum requirements for public employees.** These are activities which the State put in place for labor relations purposes, not to comply with the minimum due process requirements of "Skelly". This is supported by the language in section 3301 of the act, in which the Legislature stated that it "finds and declares that effective law enforcement depends on the maintenance of stable employer-employee relations, between public safety employees and their employers." "In order to assure that stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated with the State of California."

There are at least two areas in which the POBAR goes beyond "Skelly". They are (1) activities that are outside of discipline, and (2) additional requirements for disciplinary actions.

POBAR is substantially broader than Skelly, in that it covers matters beyond of what is covered by Skelly . In addition to termination and discipline, it covers activities that are normally related to employee relations, such as transfers for non-disciplinary reasons and changes in status for non-disciplinary reasons. Typically these are areas where the employee does not want to accept the change in his or her assignment.

POBAR, in some cases adds notice and hearing requirements prior to any disciplinary action is taken (Skelly is limited to procedures after an action has occurred) and it also expands the scope of what constitutes punitive action. POBAR defines punitive action as any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment. As such, a peace office is entitled to an opportunity of administrative appeal for any reduction in salary resulting from an administrative decision including loss of skill pay, pay grade, rank, or probationary rank.

POBAR also affords peace officers additional procedural requirements in disciplinary cases which go beyond the minimum requirements needed to comply with Skelly and those granted to other public employees. One example is contained in section 3303 (g) which states, "the complete interrogation of a public safety officer may be recorded." "If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time."

At this point, we believe the most productive way to resolve any differences of opinion on what Skelly requires is to have a face to face meeting between the various interested parties. At that meeting we can attempt to agree on what Skelly covers, what is mandated by POBAR, and what are the differences. Once we conclude that exercise, we can provide you with what we believe to be the additional requirements local agencies must complete to comply with the state statutory scheme.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge, except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

Sincerely,

Dee Contreras

Dee Contrereas
Director of Labor Relations

DECLARATION OF SERVICE

I, Janice M. Beaman, do hereby declare under penalty of perjury as follows:

1. I am over the age of eighteen years old.

2. On December 9, 1996, I served the attached letter upon the following individuals by first class mail.

League of California Cities
1400 K Street, Suite 400
Sacramento, CA 95814

Mr. Kirk G. Stewart, Executive Director
Commission on State Mandate
1414 K Street
Sacramento, CA 95814

Mr. Jim Apps
Department of Finance
915 L Street, 8th Floor
Sacramento, CA 95814

Mr. Glenn Engle
Div. of Accounting & Reporting
State Controller's Office
3301 C Street, Room 501
Sacramento, CA 95816

Mr. Allan Burdick, Vice President
David M. Griffith & Assoc.
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

I declare under penalty of perjury that the above is true and correct.

Signed this 9th day of December, 1996, at Sacramento, California.

Janice M. Beaman