Hearing Date: December 1, 2011
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ITEM 4

TEST CLAIM
FINAL STAFF ANALYSIS
AND
PROPOSED STATEMENT OF DECISION

Government Code Sections 3304, 3306.5, 3309, and 3312

Statutes 1976, Chapter 465; Statutes 1994, Chapter 1259; Statutes 1997, Chapter 148; Statutes 1998, Chapter 786; Statutes 1998, Chapter 263; Statutes 1998, Chapter 112; Statutes 1999, Chapter 338; Statutes 2000, Chapter 209; Statutes 2002, Chapter 1156; and Statutes 2002, Chapter 170

Peace Officers Procedural Bill of Rights II
03-TC-18

City of Newport Beach, Claimant

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- *Los Angeles Police Protective League v. Gates* (1984) 579 F.Supp. 36
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- *People v. Bradley* (1969) 1 Cal.3d 80
- *Schneckloth v. Bustamonte* (1973) 412 U.S. 218
- *Skelly* v. *State Personnel Board* (1975) 15 Cal.3d 194
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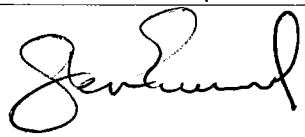
- *United States v. Bunkers* (9th Cir. 1975) 521 F.2d 1217
- *United States v. Speights* (3rd Cir. 1977) 557 F.2d 362

- Other:
  - 2006 reconsideration of *Peace Officer Bill of Rights* (CSM 4499) statement of decision (Case No. 05-RL-4499-01), adopted April 26, 2006
  - Parameters and guidelines, *Reconsideration of Peace Officers' Procedural Bill of Rights* (Case No. 05-RL-4499-01), amended July 31, 2009

State of California		
COMMISSION ON STATE MANDATES		**For Official Use Only**
980 Ninth Street, Suite 300		
Sacramento, CA 95814		
(916) 323-3562		
CSM 1 (2 91)		
	TEST CLAIM FORM	
		Claim No.
Local Agency or School District Submitting Claim		
City of Newport Beach		
Contact Person		Telephone No.
Allan P. Burdick/Juliana F. Gmur (MAXIMUS, INC.)		**(916) 485-8102**
		Fax (916) 485-0111
Address		
4320 Auburn Blvd., Suite 2000		
Sacramento, CA 95841		
Representative Organization to be Notified		
League of California Cities		
This test claim alleges the existence of a reimbursable state mandated program 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; Chapter 1259, Statutes of 1994; Chapter 148, Statutes of 1997; Chapter 786 Statutes of 1998; Chapter 263, Statutes of 1998; Chapter 112, Statutes of 1998; Chapter 338, Statutes of 1999; Chapter 209, Statutes of 2000; Chapter 1156, Statutes of 2002; and Chapter 170, Statutes of 2002		
IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING A TEST CLAIM ON THE REVERSE SIDE.		
Name and Title of Authorized Representative		Telephone No.
Glen Everroad, Revenue Manager		**(949) 644-3140**
Signature of Authorized Representative		Date:
		26 Sept 03

BEFORE THE
COMMISSION ON STATE MANDATES

Test Claim of:
The City of Newport Beach

Peace Officers Procedural Bill of Rights II

Chapter 465, Statutes of 1976; Chapter 1259, Statutes of 1994; Chapter 148, Statutes of 1997; Chapter 786, Statutes of 1998; Chapter 263, Statutes of 1998; Chapter 112, Statutes of 1998; Chapter 338, Statutes of 1999; Chapter 209, Statutes of 2000; Chapter 1156, Statutes of 2002; and Chapter 170, Statutes of 2002

STATEMENT OF THE CLAIM

A. MANDATE SUMMARY

In 1976, the Public Safety Officers Procedural Bill of Rights Act (Government Code §3300 *et seq.*) was passed adding Chapter 9.7 to the Government Code. In 1991, a test claim was filed on the majority of the legislation that created the Act and modified its provisions through 1990. Since that time, there have been further changes to the Act. This additional legislation and those areas not addressed by the original test claim are the subject matter of the instant test claim.

Chapter 148, Statutes of 1997, and Chapter 786, Statutes of 1998, amend Government Code §3304 to ensure that the chief of police is given written notice and an opportunity to appeal removal, that investigations into misconduct conclude within one year, and that cases can be reopened for further investigation upon the finding of new evidence. Chapter 209, Statutes of 2000, adds §3306.5 which sets forth a procedure whereby an officer may inspect his personnel file and request corrections or deletions. Chapter 465, Statutes of 1976, adds §3309 which provides for notice, a search warrant, consent or the presence of the officer before the officer's locker can be searched. Finally, Chapter 170, Statutes of 2002, adds §3312 which provides notice to an officer before punitive action can be taken against an officer for displaying an American flag pin and an opportunity to appeal any punitive action.

Government Code §3300 states the title of the Act. Sections 3301 and 3302 set forth definitions, legislative intent, and an allowance for political activity of peace officers. Section 3303 sets forth the parameters of any investigation or interrogation of an officer

that may lead to punitive action. Section 3303 subdivision (f), as amended by Chapter 1259, Statutes of 1994, provides that statements made during interrogation by an officer shall not be admissible in subsequent civil proceedings.

Government Code §3304 currently reads:

> (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 or her with insubordination.
> (b) No punitive action, nor denial of promotion on the grounds other than merit, shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period that may be required by his or her employing agency without providing the public safety officer with an opportunity for administrative appeal.
> (c) No chief of police may be removed by a public agency, or appointing authority, without providing the chief of police with written notice and the reason or reasons therefor and an opportunity for administrative appeal.
> For purposes of this subdivision, the removal of a chief of police by a public agency or appointing authority, for the purpose of implementing the goals or policies, or both, of the public agency or appointing authority, for reasons including, but not limited to, in compatibility of management styles or as a result of a change in administration, shall be sufficient to constitute "reason or reasons."
> Nothing in this subdivision shall be construed to create a property interest, where one does not exist by rule or law, in the job of Chief of Police.
> (d) Except as provided in this subdivision and subdivision (g), no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission , or other allegation of misconduct if the investigation of the allegation is not completed with one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct. This one-year limitation period shall only

apply if the act, omission, or other misconduct occurred on or after January 1, 1998. In the event that the public agency determines that discipline may be taken, it shall complete its investigation and notify the public safety officer of its proposed disciplinary action within that year, except in any of the following circumstances:

(1) If the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period.

(2) If the public safety officer waives the one-year time period in writing, the time period shall be tolled for the time specified in the written waiver.

(3) If the investigation is a multijurisdictional investigation that requires a reasonable extension for coordination of the involved agencies.

(4) If the investigation involves more than one employee and requires a reasonable extension.

(5) If the investigation involves an employee who is incapacitated or otherwise unavailable.

(6) If the investigation involves a matter in civil litigation where the public safety officer is named as a party defendant, the one-year time period shall be tolled while that civil action is pending.

(7) If the investigation involves a matter in criminal litigation where the complainant is a criminal defendant, the one-year time period shall be tolled during the period of that defendant's criminal investigation and prosecution.

(8) If the investigation involves an allegation of workers' compensation fraud on the part of the public safety officer.

(e) Where a predisciplinary response or grievance procedure is required or utilized, the time for this response or procedure shall not be governed or limited by this chapter.

(f) If, after investigation and any predisciplinary response or procedure, the public agency decides to impose discipline, the public agency shall notify the public safety officer in writing of its decision to impose discipline, including the date that the discipline will be imposed, within 30 days of its decision, except if the public safety officer is unavailable for discipline.

(g) Notwithstanding the one-year time period specified in subdivision (c), an investigation may be reopened against a public safety officer if both of the following circumstances exist:

(1) Significant new evidence has been discovered that is likely to affect the outcome of the investigation.
(2) One of the following conditions exist:
(A) The evidence could not reasonably have been discovered in the normal course of investigation without resorting to extraordinary measures by the agency.
(B) The evidence resulted from the public safety officer's predisciplinary response or procedure.
(h) For those members listed in subdivision (a) of Section 830.2 of the Penal Code, the 30-day time period provided for in subdivision (e) shall not commence with the service of a preliminary notice of adverse action, should the public agency elect to provide the public safety officer with such a notice.

This section originally addressed the fact that an officer cannot be threatened by or subjected to punitive action for the exercise of his rights under this chapter. Two amendments, however, expanded this section considerably. First, there is now a provision that a chief of police cannot be removed without written notice and an opportunity for an administrative appeal. This is the case even when the removal is for such common reasons as change in administration and incompatibility of management styles. As a result, local government administrations are mandated to draft written notices prior to removing a chief of police for any reason. In addition, the chief must be afforded an opportunity to appeal the decision to remove. This inclusion of chiefs of police will necessitate the drafting, review and establishment of policies, procedures, forms, and protocols and the training to implement them for chiefs, investigators, employers, counsel and staff, as well as increase time spent on investigations, appeals and hearings. Second, the process set forth in the previous section regarding investigations of officers, is now mandated to be completed within one year otherwise discipline cannot be undertaken. As a result, local agency investigators will be required to put in more hours or the hiring additional personnel may be necessary. Also, to ensure that cases are completely investigated within one year will necessitate the drafting, review and establishment of policies, procedures, forms, protocols, and file tracking systems and the training to implement them for officers, investigators, supervisors, employers, clerical, counsel and staff. Finally, this section allows, under certain circumstances, the reopening of investigations, even beyond the one year time period. This will also require additional work hours or additional personnel and will necessitate the drafting, review and establishment of policies, procedures, forms, protocols, and file tracking systems and the training to implement them for officers, investigators, supervisors, employers, clerical, counsel and staff.

Section 3304.5, added by Chapter 263, Statutes of 1998, directs that administrative appeals be conducted in a manner consistent with the local agency's rules and procedures. Sections 3305 and 3306 address the handling of comments adverse to interest.

Section 3306.5 currently reads:

> (a) Every employer shall, at reasonable times and at reasonable intervals, upon the request of a public safety officer, during usual business hours, with no loss of compensation to that officer, permit that officer to inspect personnel files that are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.
> (b) Each employer shall keep each public safety officer's personnel file or a true and correct copy thereof, and shall make the file or copy thereof available within a reasonable period of time after a request therefor by the officer.
> (c) If, after examination of the officer's personnel file, the officer believes that any portion of the material is mistakenly or unlawfully placed in the file, the officer may request, in writing, that the mistaken or unlawful portion be corrected or deleted. Any request made pursuant to this subdivision shall include a statement by the officer describing the corrections or deletions from the personnel file requested and the reasons supporting those corrections or deletions. A statement submitted pursuant to this subdivision shall become part of the personnel file of the officer.
> (d) Within 30 calendar days of receipt of a request made pursuant to subdivision (c), the employer shall either grant the officer's request or notify the officer of the decision to refuse to grant the request. If the employer refuses to grant the request, in whole or in part, the employer shall state in writing the reasons for refusing the request, and that written statement shall become part of the personnel file of the officer.

This section mandates that employers maintain officers' personnel records or a copy where they can be inspected and pay the officer during the inspection time. Employers must also respond in writing to requests for corrections or deletions within 30 days. In the case where a request is wholly or partially denied, the denial must also set forth reasons. The requests, as well as the responses where the request is denied, must be filed in the officer's personnel file. This process will necessitate the drafting, review and establishment of policies, procedures, forms and protocols and the training to implement them for the officers, supervisors, employers, clerical, counsel and staff.

Section 3007, as amended by Chapter 112, Statutes of 1998, provides that an officer cannot be compelled to take any type of lie detector test. Section 3007.5, as added by Chapter 338, Statutes of 1999, addresses the use of an officer's image on the internet and

the remedies an officer can seek to prevent such use. Section 3008 ensures that an officer need not make any type of financial disclosure without proper legal procedure.

Section 3309 currently reads:

> 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 storage space that are owned or leased by the employing agency.

This section mandates notice or legal process before an officer's locker can be searched. Thus a notice will have to be drafted, reviewed and presented to the officer or a request for a search warrant and supporting documentation will have to be drafted and review by a judge sought. This requirement will necessitate the drafting, review and establishment of policies, procedures, forms and protocols and the training to implement them for officers, supervisors, investigators, employers, counsel and staff.

Section 3309.5, as amended by Chapter 148, Statutes of 1997 and Chapter 1156, Statutes of 2002, sets forth the applicability of chapter, jurisdiction, violations of the provisions of the chapter and remedies. Sections 3310 and 3311 address the applicability of existing departmental procedures and mutual aid agreements.

Section 3312 currently reads:

> Notwithstanding any other provision of law, the employer of a public safety officer may not take any punitive action against an officer for wearing a pin or displaying any other item containing the American flag, unless the employer gives the officer written notice that includes all of the following:
> (a) A statement that the officer's pin or other item violates an existing rule, regulation, policy, or local agency agreement or contract regarding the wearing of a pin, or the displaying of any other item, containing the American flag.
> (b) A citation to the specific rule, regulation, policy, or local agency agreement or contract that the pin or other item violates.
> (c) A statement that the officer may file an appeal against the employer challenging the alleged violation pursuant to the applicable grievance or appeal procedures adopted by the department or public agency that otherwise comply with existing law.

This section mandates that prior to subjecting an officer to discipline for the displaying of an American flag, there must be written notice and an opportunity to appeal the discipline. This section will increase the number of appeals handled within a jurisdiction. This process will necessitate the drafting, review and establishment of policies, procedures, forms and protocols and the training to implement them for officers, supervisors, investigators, employers, counsel and staff.

The net effect of this legislation is to ensure officers cannot be subjected to discipline without procedural safeguards. In so doing, the legislation creates an increase in notices, written requests, written responses, search warrants, appeals, the speed at which an investigation proceeds, access to personnel records, reopened cases, and extends some of the safeguards to chiefs of police. Thus, the total costs of this program are reimbursable.

The City of Newport Beach does not have complete estimates on the cost of discharging this program, but estimates that the costs will exceed $1000.00 per year.

B. LEGISLATIVE HISTORY PRIOR TO 1975

There was no requirement prior to 1975, until the passage of Chapter 465, Statutes of 1976, which added Government Code, Chapter 9.7, §3300 *et seq.* creating the Public Safety Officers Procedural Bill of Rights Act. A test claim was filed with this Commission. *See* Peace Officers Procedural Bill of Rights, CSM-4499. The matter was resolved with a finding of a reimbursable state mandate..

Now, the passage of Chapter 148, Statutes of 1997, Chapter 786, Statutes of 1998, Chapter 209, Statutes of 2000, Chapter 465, Statutes of 1976, and Chapter 170, Statutes of 2002, filed on July 28, 1997, September 23, 1998, July 24, 2000, July 1, 1976, and July 12, 2002, respectively, mandate the additional programs for public safety officers and chiefs of police as described above.

C. SPECIFIC STATUTORY SECTIONS THAT CONTAIN THE MANDATED ACTIVITIES

As related above, the mandated activities are contained in Government Code §§3304, 3306.5, 3309 and 3312. These sections directly relate to the reimbursable provisions of this test claim.

D. COST ESTIMATES

The City of Newport Beach does not have complete estimates on the cost of discharging this program, but estimates that the costs exceed $1000.00 per year.

E. REIMBURSABLE COSTS MANDATED BY THE STATE

The costs incurred by the City of Newport Beach as a result of the statute on which this test claim is based are all reimbursable costs as such costs are "costs mandated by the

State" under Article XIII B (6) of the California Constitution, and Government Code §17500 *et seq.* of the Government Code. Section 17514 of the Government Code defines "costs mandated by the state", and specifies the following three requirements:

1. There are "increased costs which a local agency is required to incur after July 1, 1980."

2. The costs are incurred "as a result of any statute enacted on or after January 1, 1975."

3. The costs are the result of "a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution."

All three of the above requirements for finding costs mandated by the State are met as described previously herein.

MANDATE MEETS BOTH SUPREME COURT TESTS

The mandate created by this statute clearly meets both tests that the Supreme Court in the *County of Los Angeles* v. *State of California* (1987) created for determining what constitutes a reimbursable state mandated local program. Those two tests, which the Commission on State Mandates relies upon to determine if a reimbursable mandate exists, are the "unique to government" and the "carry out a state policy" tests. Their application to this test claim is discussed below.

Mandate Is Unique to Local Government

The sections of the law claimed involve public safety officers, chiefs of police and local government counsel. Only local government employs public safety officers and chiefs of police to maintain order and enforce law in their jurisdictions. And, only local government employs county counsels and city attorneys for legal advice and services for public entities. Thus, this requirement is unique to government.

Mandate Carries Out a State Policy

From the legislation, it is clear that the Legislature wishes ensure that procedural safeguards are in place to protect the Constitutional rights of public safety officers and chiefs of police. The protection of Constitutional rights is a fundamental state policy.

In summary, these statutes mandate that local government bear the burden of an expansion of the Public Safety Officers Procedural Bill of Rights Act. This expansion increases the time spent drafting notices, written requests, written responses, search warrants, policies and procedures, as well as the time spent preparing for and putting

forth appeals, reopening and investigating cases, and training. The City of Newport Beach believes that the amendments to the Public Safety Officers Procedural Bill of Rights Act as set forth above satisfies the constitutional requirements for a mandate.

STATE FUNDING DISCLAIMERS ARE NOT APPLICABLE

There are seven disclaimers specified in Government Code §17556 which could serve to bar recovery of "costs mandated by the State", as defined in Government Code §17556. None of the seven disclaimers apply to this test claim:

1. The claim is submitted by a local agency or school district which requests legislative authority for that local agency or school district to implement the Program specified in the statutes, and that statute imposes costs upon the local agency or school district requesting the legislative authority.

2. The statute or executive order affirmed for the State that which had been declared existing law or regulation by action of the courts.

3. The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.

4. The local agency or school district has the authority to levy service charges, fees or assessments sufficient to pay for the mandated program or increased level of service.

5. The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the State mandate in an amount sufficient to fund the cost of the State mandate.

6. The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a Statewide election.

7. The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

None of the above disclaimers have any application to the test claim herein stated by the City of Newport Beach.

CONCLUSION

The enactment of Chapter 148, Statutes of 1997, Chapter 786, Statutes of 1998, Chapter 209, Statutes of 2000, Chapter 465, Statutes of 1976, and Chapter 170, Statutes of 2002, imposed a new state mandated program and cost on the City of Newport Beach by establishing a program to expand the Public Safety Officers Procedural Bill of Rights Act which resulted in additional burdens on local government. The mandated program meets all of the criteria and tests for the Commission on State Mandates to find a reimbursable state mandated program. None of the so-called disclaimers or other statutory or constitutional provisions that would relieve the State from its constitutional obligation to provide reimbursement have any application to this claim.

G. CLAIM REQUIREMENTS

The following elements of this test claim are provided pursuant to Section 1183, Title 2, of the California Code of Regulations:

Exhibit 1:	Chapter 465, Statutes of 1976
Exhibit 2:	Chapter 1259, Statutes of 1994
Exhibit 3:	Chapter 148, Statutes of 1997
Exhibit 4:	Chapter 786, Statutes of 1998
Exhibit 5:	Chapter 263, Statutes of 1998
Exhibit 6:	Chapter 112, Statutes of 1998
Exhibit 7:	Chapter 338, Statutes of 1999
Exhibit 8:	Chapter 209, Statutes of 2000
Exhibit 9:	Chapter 1156, Statutes of 2002
Exhibit 10:	Chapter 170, Statutes of 2002

DECLARATION OF GLEN EVERROAD

I, Glen Everroad, make the following declaration under oath:

I am the Revenue Manager for City of Newport Beach. As part of my duties, I am responsible for the complete and timely recovery of costs mandated by the State.

I declare that I have examined the City of Newport Beach's State mandated duties and resulting costs, in implementing the subject law, and find that such costs are, in my opinion, "costs mandated by the State", as defined 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, 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."

I am personally conversant with the foregoing facts, and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are stated upon information or belief, and as to those matters, I believe them to be true.

Executed this 26 day of September, 2003 at Newport Beach, California.

Glen Everroad
Revenue Manager
City of Newport Beach

CLAIM CERTIFICATION

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Executed this 26 day of September, 2003, at Newport Beach, California, by:

Glen Everroad
Revenue Manager
City of Newport Beach

SECTION 1. Section 27202 of the Vehicle Code is amended to read:

27202. For the purposes of Section 27200, the following noise limits shall apply to any motorcycle, other than a motor-driven cycle, manufactured:

(1) After 1969, and before 1973	88 dbA
(2) After 1972, and before 1975	86 dbA
(3) After 1974, and before 1981	83 dbA
(4) After 1980 and before 1986	80 dbA
(5) After 1985 and before 1990	75 dbA
(6) After 1989	70 dbA

CHAPTER 465

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.

[Approved by Governor August 18, 1976. Filed with Secretary of State August 18, 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 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. 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.

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 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.

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.

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.

3305. 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.

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 or required under state law or 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 are owned or leased by the employing agency.

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 the same rights or protections as provided pursuant to this chapter shall not be subject to this chapter with regard to such a procedure.

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 deed necessary or desirable by the jurisdictions or the agencies involved.

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.

BILL NUMBER: SB 1860 CHAPTERED 09/30/94
BILL TEXT

CHAPTER 1259
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AMENDED IN SENATE MAY 17, 1994

INTRODUCED BY Senator Leslie

FEBRUARY 24, 1994

An act to amend Section 3303 of the Government Code, relating to public safety officers.

LEGISLATIVE COUNSEL'S DIGEST

SB 1860, Leslie. Public safety officers: interrogation.

Existing law requires that certain conditions be met 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.

This bill would prohibit any statement made during interrogation by a public safety officer under duress, coercion, or threat of punitive action from being admissible in any subsequent civil proceeding, subject to specified qualifications.

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 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.

Assembly Bill No. 1436

CHAPTER 148

An act to amend Sections 3304 and 3309.5 of the Government Code, relating to public safety officers.

[Approved by Governor July 27, 1997. Filed with Secretary of State July 28, 1997.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1436, Cardoza. Public safety officers: Procedural Bill of Rights.

(1) The Public Safety Officers Procedural Bill of Rights Act 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.

This bill would prohibit any punitive action, or denial of promotion on grounds other than merit, from being undertaken for any act, omission, or other allegation of misconduct occurring on or after January 1, 1998, if the investigation of the allegation is not completed within one year of the public agency's discovery of the allegation of an act, omission, or other misconduct, except in specified circumstances. It would also provide that if, after investigation and any predisciplinary response or procedure, the public agency decides to impose discipline on a public safety officer, the public agency shall notify the public safety officer in writing of its intent to impose discipline, including the date the intended discipline will be imposed, within 30 days of its decision.

(2) Existing law provides that 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 the Public Safety Officers Procedural Bill of Rights Act.

This bill would make a clarifying change in this provision.

To the extent that these new requirements would apply to local government employers, the bill would impose a state-mandated local program.

(3) 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 that 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 the bill contains costs mandated by the state,

reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 3304 of the Government Code is amended to read:

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 or her 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.

(c) Except as provided in this subdivision and subdivision (f), no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct. This one-year limitation period shall apply only if the act, omission, or other misconduct occurred on or after January 1, 1998. In the event that the public agency determines that discipline may be taken, it shall complete its investigation and notify the public safety officer of its proposed disciplinary action within that year, except in any of the following circumstances:

(1) If the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period.

(2) If the public safety officer waives the one-year time period in writing, the time period shall be tolled for the period of time specified in the written waiver.

(3) If the investigation is a multijurisdictional investigation that requires a reasonable extension for coordination of the involved agencies.

(4) If the investigation involves more than one employee and requires a reasonable extension.

(5) If the investigation involves an employee who is incapacitated or otherwise unavailable.

(6) If the investigation involves a matter in civil litigation where the public safety officer is named as a party defendant, the one-year time period shall be tolled while that civil action is pending.

(7) If the investigation involves a matter in criminal litigation where the complainant is a criminal defendant, the one-year time period shall be tolled during the period of that defendant's criminal investigation and prosecution.

(8) If the investigation involves an allegation of workers' compensation fraud on the part of the public safety officer.

(d) Where a predisciplinary response or grievance procedure is required or utilized, the time for this response or procedure shall not be governed or limited by this chapter.

(e) If, after investigation and any predisciplinary response or procedure, the public agency decides to impose discipline, the public agency shall notify the public safety officer in writing of its decision to impose discipline, including the date that the discipline will be imposed, within 30 days of its decision, except if the public safety officer is unavailable for discipline.

(f) Notwithstanding the one-year time period specified in subdivision (c), an investigation may be reopened against a public safety officer if both of the following circumstances exist:

(1) Significant new evidence has been discovered that is likely to affect the outcome of the investigation.

(2) One of the following conditions exist:

(A) The evidence could not reasonably have been discovered in the normal course of investigation without resorting to extraordinary measures by the agency.

(B) The evidence resulted from the public safety officer's predisciplinary response or procedure.

(g) For those members listed in subdivision (a) of Section 830.2 of the Penal Code, the 30-day time period provided for in subdivision (e) shall not commence with the service of a preliminary notice of adverse action, should the public agency elect to provide the public safety officer with such a notice.

SEC. 2. 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 chapter.

(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.

SEC. 3. 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, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

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Senate Bill No. 2215

CHAPTER 786

An act to amend Section 3304 of the Government Code, relating to public safety officers.

[Approved by Governor September 22, 1998. Filed with Secretary of State September 23, 1998.]

LEGISLATIVE COUNSEL'S DIGEST

SB 2215, Lockyer. Public safety officers: procedural bill of rights.

The Public Safety Officers Procedural Bill of Rights Act prohibits any punitive action, or denial of promotion on grounds other than merit of a public safety officer, as defined, without providing the public safety officer with an opportunity for administrative appeal.

This bill also would prohibit a punitive action or denial of probation on grounds other than merit with respect to a public safety officer who has successfully completed probation without providing the public safety officer with an opportunity for administrative appeal. The bill additionally would prohibit a public agency or appointing authority from removing a chief of police without providing that official with written notice and the reason or reasons therefor and an opportunity for administrative appeal. The bill would provide that for purposes of these provisions, the removal of a chief of police by a public agency or appointing authority, for the purpose of implementing the goals or policies, or both, of the public agency or appointing authority, for reasons including incompatibility of management styles, or as a result of a change in administration, would be sufficient to constitute "reason or reasons." These additional requirements on local government 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 that 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 the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 3304 of the Government Code is amended to read:

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 or her with insubordination.

(b) No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period that may be required by his or her employing agency without providing the public safety officer with an opportunity for administrative appeal.

(c) No chief of police may be removed by a public agency, or appointing authority, without providing the chief of police with written notice and the reason or reasons therefor and an opportunity for administrative appeal.

For purposes of this subdivision, the removal of a chief of police by a public agency or appointing authority, for the purpose of implementing the goals or policies, or both, of the public agency or appointing authority, for reasons including, but not limited to, incompatibility of management styles or as a result of a change in administration, shall be sufficient to constitute "reason or reasons."

Nothing in this subdivision shall be construed to create a property interest, where one does not exist by rule or law, in the job of Chief of Police.

(d) Except as provided in this subdivision and subdivision (g), no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct. This one-year limitation period shall apply only if the act, omission, or other misconduct occurred on or after January 1, 1998. In the event that the public agency determines that discipline may be taken, it shall complete its investigation and notify the public safety officer of its proposed disciplinary action within that year, except in any of the following circumstances:

(1) If the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time

during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period.

(2) If the public safety officer waives the one-year time period in writing, the time period shall be tolled for the period of time specified in the written waiver.

(3) If the investigation is a multijurisdictional investigation that requires a reasonable extension for coordination of the involved agencies.

(4) If the investigation involves more than one employee and requires a reasonable extension.

(5) If the investigation involves an employee who is incapacitated or otherwise unavailable.

(6) If the investigation involves a matter in civil litigation where the public safety officer is named as a party defendant, the one-year time period shall be tolled while that civil action is pending.

(7) If the investigation involves a matter in criminal litigation where the complainant is a criminal defendant, the one-year time period shall be tolled during the period of that defendant's criminal investigation and prosecution.

(8) If the investigation involves an allegation of workers' compensation fraud on the part of the public safety officer.

(e) Where a predisciplinary response or grievance procedure is required or utilized, the time for this response or procedure shall not be governed or limited by this chapter.

(f) If, after investigation and any predisciplinary response or procedure, the public agency decides to impose discipline, the public agency shall notify the public safety officer in writing of its decision to impose discipline, including the date that the discipline will be imposed, within 30 days of its decision, except if the public safety officer is unavailable for discipline.

(g) Notwithstanding the one-year time period specified in subdivision (c), an investigation may be reopened against a public safety officer if both of the following circumstances exist:

(1) Significant new evidence has been discovered that is likely to affect the outcome of the investigation.

(2) One of the following conditions exist:

(A) The evidence could not reasonably have been discovered in the normal course of investigation without resorting to extraordinary measures by the agency.

(B) The evidence resulted from the public safety officer's predisciplinary response or procedure.

(h) For those members listed in subdivision (a) of Section 830.2 of the Penal Code, the 30-day time period provided for in subdivision (e) shall not commence with the service of a preliminary notice of adverse action, should the public agency elect to provide the public safety officer with such a notice.

SEC. 2. 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, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

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Senate Bill No. 1662

CHAPTER 263

An act to add Section 3304.5 to the Government Code, relating to public safety officers.

[Approved by Governor August 5, 1998. Filed with Secretary of State August 6, 1998.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1662, Ayala. Public safety officers: Procedural Bill of Rights.

The Public Safety Officers Procedural Bill of Rights Act provides that no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by a public agency without providing the public safety officer with an opportunity for administrative appeal.

This bill would provide that the administrative appeal shall be conducted in conformance with rules and procedures adopted by the local public agency. To the extent that these new requirements would apply to local government employers, 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 that 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 the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 3304.5 is added to the Government Code, to read:

3304.5. An administrative appeal instituted by a public safety officer under this chapter shall be conducted in conformance with rules and procedures adopted by the local public agency.

SEC. 2. 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, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

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Assembly Bill No. 2293

CHAPTER 112

An act to amend Section 3307 of the Government Code, relating to public safety officers.

[Approved by Governor July 3, 1998. Filed with Secretary of State July 6, 1998.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2293, Scott. Public safety officers.

Under existing law, the Public Safety Officers Procedural Bill of Rights Act, no public safety officer may be compelled to submit to a polygraph examination against his or her will.

This bill instead would provide that no public safety officer may be compelled to submit to a lie detector test, as defined, against his or her will.

The people of the State of California do enact as follows:

SECTION 1. Section 3307 of the Government Code is amended to read:

3307. (a) No public safety officer shall be compelled to submit to a lie detector test against his or her will. No disciplinary action or other recrimination shall be taken against a public safety officer refusing to submit to a lie detector test, nor shall any comment be entered anywhere in the investigator's notes or anywhere else that the public safety officer refused to take, or did not take, a lie detector test, 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, or was subjected to, a lie detector test.

(b) For the purpose of this section, "lie detector" means a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device, whether mechanical or electrical, that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

O

Assembly Bill No. 1586

CHAPTER 338

An act to add Section 3307.5 to the Government Code, relating to public safety officers.

[Approved by Governor September 7, 1999. Filed with Secretary of State September 7, 1999.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1586, Florez. Public safety officers: Procedural Bill of Rights.

The Public Safety Officers Procedural Bill of Rights Act 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.

This bill would prohibit a public safety officer from being required by his or her employing public safety department or any other public agency, as a condition of employment, to consent to the use of his or her photograph or identity as a public safety officer on the Internet for any purpose if the officer reasonably believes that the disclosure may result in a threat, harassment, intimidation, or harm to that officer or his or her family. The bill would permit the officer to notify the department or agency to cease or desist from that disclosure and to seek an injunction and a civil penalty for unauthorized use after receipt of the notice to cease and desist.

The people of the State of California do enact as follows:

SECTION 1. Section 3307.5 is added to the Government Code, to read:

3307.5. (a) No public safety officer shall be required as a condition of employment by his or her employing public safety department or other public agency to consent to the use of his or her photograph or identity as a public safety officer on the Internet for any purpose if that officer reasonably believes that the disclosure may result in a threat, harassment, intimidation, or harm to that officer or his or her family.

(b) Based upon his or her reasonable belief that the disclosure of his or her photograph or identity as a public safety officer on the Internet as described in subdivision (a) may result in a threat, harassment, intimidation, or harm, the officer may notify the department or other public agency to cease and desist from that disclosure. After the notification to cease and desist, the officer, a district attorney, or a United States Attorney may seek an injunction

prohibiting any official or unofficial use by the department or other public agency on the Internet of his or her photograph or identity as a public safety officer. The court may impose a civil penalty in an amount not to exceed five hundred dollars ($500) per day commencing two working days after the date of receipt of the notification to cease and desist.

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Assembly Bill No. 2267

CHAPTER 209

An act to add Section 3306.5 to the Government Code, relating to personnel records.

[Approved by Governor July 24, 2000. Filed with Secretary of State July 24, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2267, Cedillo. Public safety officers: personnel records.

(1) Existing law requires employers to make employee personnel files available for inspection by employees, but exempts from this requirement the state, school districts, and other specified public employers. The Public Safety Officers Procedural Bill of Rights requires that a public safety officer have read, and have the opportunity to respond to, any comment adverse to his or her interest before it is placed in his or her personnel file.

This bill would require employers of public safety officers to permit an officer to inspect his or her personnel file or a copy during usual business hours, with no loss of compensation. The bill would specify a procedure by which the officer could request correction or deletion of material that is mistakenly or unlawfully placed in his or her personnel file and would require employers, within 30 days of receiving the request, to either make the requested corrections or deletions or place a written explanation of the reasons for not granting the request in the file. The bill would create a state-mandated local program by imposing new duties on local agencies.

(2) 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 that 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 the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 3306.5 is added to the Government Code, to read:

3306.5. (a) Every employer shall, at reasonable times and at reasonable intervals, upon the request of a public safety officer, during usual business hours, with no loss of compensation to the officer, permit that officer to inspect personnel files that are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.

(b) Each employer shall keep each public safety officer's personnel file or a true and correct copy thereof , and shall make the file or copy thereof available within a reasonable period of time after a request therefor by the officer.

(c) If, after examination of the officer's personnel file, the officer believes that any portion of the material is mistakenly or unlawfully placed in the file, the officer may request, in writing, that the mistaken or unlawful portion be corrected or deleted. Any request made pursuant to this subdivision shall include a statement by the officer describing the corrections or deletions from the personnel file requested and the reasons supporting those corrections or deletions. A statement submitted pursuant to this subdivision shall become part of the personnel file of the officer.

(d) Within 30 calendar days of receipt of a request made pursuant to subdivision (c), the employer shall either grant the officer's request or notify the officer of the decision to refuse to grant the request. If the employer refuses to grant the request, in whole or in part, the employer shall state in writing the reasons for refusing the request, and that written statement shall become part of the personnel file of the officer.

SEC. 2. 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.

O

Senate Bill No. 1516

CHAPTER 1156

An act to amend Section 3309.5 of the Government Code, relating to public safety officers.

[Approved by Governor September 30, 2002. Filed with Secretary of State September 30, 2002.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1516, Romero. Public safety officers: procedural bill of rights.

The Public Safety Officers Procedural Bill of Rights Act makes it unlawful for any public safety department to deny or refuse to public safety officers the rights and protections guaranteed to them by the act.

This bill would provide that, upon a finding by a superior court, any public safety department, its employees, agents, or assigns, acting within the scope of employment, who maliciously violates any provision of the act with intent to injure a public safety officer, shall be liable to the public safety officer whose right or protection was denied for a civil penalty and attorney's fees. The department would also be liable for actual and exemplary damages if the court finds that actual damages are established. This bill would specifically authorize a court to order specified sanctions if the court finds that a bad faith or frivolous action or a filing for an improper purpose has been brought pursuant to the act.

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 him or her 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 chapter.

(c) (1) 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.

(2) If the court finds that a bad faith or frivolous action or a filing for an improper purpose has been brought pursuant to this chapter, the court may order sanctions against the party filing the action, the parties attorney, or both pursuant to Sections 128.6 and 128.7 of the Code of Civil Procedure. Those sanctions may include, but not be limited to, reasonable expenses, including attorney's fees, incurred by a public safety department, as the court deems appropriate. Nothing in this paragraph is intended to subject actions or filings under this section to rules or standards that are different from those applicable to other civil actions or filings subject to Section 128.6 or 128.7 of the Code of Civil Procedure.

(d) In addition to the extraordinary relief afforded by this chapter, upon a finding by a superior court that a public safety department, its employees, agents, or assigns, with respect to acts taken within the scope of employment, maliciously violated any provision of this chapter with the intent to injure the public safety officer, the public safety department shall, for each and every violation, be liable for a civil penalty not to exceed twenty-five thousand dollars ($25,000) to be awarded to the public safety officer whose right or protection was denied and for reasonable attorney's fees as may be determined by the court. If the court so finds, and there is sufficient evidence to establish actual damages suffered by the officer whose right or protection was denied, the public safety department shall also be liable for the amount of the actual damages. Notwithstanding these provisions, a public safety department may not be required to indemnify a contractor for the contractor's liability pursuant to this subdivision if there is, within the contract between the public safety department and the contractor, a "hold harmless" or similar provision that protects the public safety department from liability for the actions of the contractor. An individual shall not be liable for any act for which a public safety department is liable under this section.

O

Assembly Bill No. 2846

CHAPTER 170

An act to add Section 3312 to the Government Code, relating to public safety officers.

[Approved by Governor July 11, 2002. Filed with Secretary of State July 12, 2002.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2846, Frommer. Public safety officers: American flag.

The Public Safety Officers Procedural Bill of Rights Act provides that no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by a public agency without providing the public safety officer with an opportunity for an administrative appeal. The act specifies, among other matters, procedures that are required in connection with an interrogation and investigation of a public safety officer.

This bill would provide that, notwithstanding any other provision of law, the employer of a public safety officer may not take any punitive action against an officer for wearing a pin or displaying any other item containing the American flag, unless the employer gives the officer written notice stating that the pin or other item violates an existing rule, regulation, policy, or local agency agreement or contract identifying that rule, regulation, policy, or local agency agreement or contract, and stating that the officer may file an appeal against the employer challenging the alleged violation.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares both of the following:

(a) In the aftermath of the terrorist attacks on the World Trade Center in New York City and on the Pentagon in Washington, D.C., on September 11, 2001, police and other public safety officers wish to join with other Americans in expressing their grief over this horrific tragedy by wearing pins or displaying other items containing the American flag.

(b) The Legislature, by enacting this act, intends to prohibit punitive action against a public safety officer for wearing a pin or displaying any other item containing the American flag unless the officer has been given specified notice and warning that this action violates an existing rule, regulation, policy, or local agency agreement or contract.

SEC. 2. Section 3312 is added to the Government Code, to read:

3312. Notwithstanding any other provision of law, the employer of a public safety officer may not take any punitive action against an officer for wearing a pin or displaying any other item containing the American flag, unless the employer gives the officer written notice that includes all of the following:

(a) A statement that the officer's pin or other item violates an existing rule, regulation, policy, or local agency agreement or contract regarding the wearing of a pin, or the displaying of any other item, containing the American flag.

(b) A citation to the specific rule, regulation, policy, or local agency agreement or contract that the pin or other item violates.

(c) A statement that the officer may file an appeal against the employer challenging the alleged violation pursuant to applicable grievance or appeal procedures adopted by the department or public agency that otherwise comply with existing law.

O

EXHIBIT B

DEPARTMENT OF FINANCE

GRAY DAVIS, GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

November 14, 2003

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of October 15, 2003, the Department of Finance has reviewed the test claim submitted by the City of Newport Beach (claimant) asking the Commission to determine whether specified costs incurred under Chapter 465, Statutes of 1976; Chapter 1259, Statutes of 1994; Chapter 148, Statutes of 1997; Chapter 786, Statutes of 1988; Chapter 263, Statutes of 1998; Chapter 112, Statutes of 1998; Chapter 338, Statutes of 1999; Chapter 209, Statutes of 2000; Chapter 1156, Statutes of 2002; and Chapter 170, Statutes of 2002, are reimbursable state mandated costs (Claim No. CSM-03-TC-18 "Peace Officers Procedural Bill of Rights II"). The claimant has identified the following duties, which it asserts create reimbursable state mandated costs. These duties arise from statutes enacted subsequent to the original Peace Officers Procedural Bill of Rights test claim, or from statutes not addressed by the original test claim:

- The requirement to provide notice, a reason, and an opportunity for hearing to police chiefs being removed from office, necessitating the need to draft, review, and establish policies, procedures, forms, protocols and training to provide same.

- The requirement to add work hours for investigations and to draft, review and establish policies, procedures, forms, protocols, tracking systems and training, in order that no punitive action be taken for any misconduct if an investigation of the allegation is not completed within one year of discovery except as provided.

- The requirement to add additional work hours and to draft, review and establish policies, procedures, forms, protocols, tracking systems and training when cases are reopened, as provided.

- The requirement that employers maintain officers' personnel records where they can be inspected and pay the officer during the inspection time; respond in writing to requests for corrections and provide reasons when changes are denied; and the need to draft, review, and establish policies, procedures, forms, protocols and training to implement same.

- The requirement to provide notice or a legal process before searching an officer's locker and need to draft, review and establish policies, procedures, forms, protocols, and training, to provide same.

- The requirement to provide notice and an opportunity to appeal proposed disciplinary action for wearing a pin or displaying any other item containing the American flag, and the need to draft, review, and establish policies, procedures, forms, protocols and training to provide same.

As the result of our review, we have the following concerns with the activities asserted by the claimant:

- When a permanent or an at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed, then an administrative appeal would already be required pursuant to the due process clauses of the United States and California Constitutions; and as such, would not constitute a new program or higher level of service. However, in the original test claim, the Commission found that United States and California Constitutions do not require an administrative appeal when dismissal or other disciplinary action is received by at-will employees whose liberty interests are not affected. Therefore, in some situations, the requirement to provide notice, a reason and an opportunity for a hearing may constitute a reimbursable state mandate. The other activities, to draft, review, and establish policies, procedures, forms, protocols and training to provide notices and hearings, exist already; nothing in the amended law requires special rules to apply to at-will (police chief) employees.

- While the 1997 amendments provide that a punitive action may only be pursued when an investigation is completed within one year, the amendments also provide numerous exceptions to this rule, as well as numerous conditions under which closed cases may be reopened. Claimants assert that the requirement will necessitate the drafting, review and establishment of policies, procedures, forms, protocols, file tracking systems and training to implement the practices for officers, investigators, supervisors, employers, clericals, counsel and staff. We note that current law for state peace officers requires completion and prosecution of state peace officers within three years. Current law for local peace officers has no time limit. Even in the latter case, investigative procedures exist. The establishment of a timeframe, by itself, does not create the need to have procedures for conducting an investigation. In addition, since there is no level of punitive actions prescribed by current law, the one-year timeframe does not, by itself, require more work on the part of the police offices. We also note that a long list of police officer political organizations supported the legislation that enacted this change.

- The 1997 amendment to the law allows, but does not require, an investigation to be reopened against a public safety officer beyond the one-year time period under certain conditions; therefore, the discretionary authority does not constitute a reimbursable state mandate.

- Government Code Section 31011, enacted in 1974, and Labor Code Section 1198.5, enacted in 1975, provide personnel review and response procedures for county, city and special district employees, thus the new requirement set forth in section 3306.5 does not constitute a new state program, with the possible exception of the explanation an employer must provide if a requested change is denied. Claimants assert that employers must pay the officer during the time the officer elects to review his or her record; however, the law only provides that there be no loss of compensation to the officer.

- Claimants assert that the requirement to provide notice or adhere to a legal process before searching an officer's locker creates the need to draft, review and establish policies, procedures, forms, protocols and training. We note that since their existing practices have gone unchallenged since 1976 when this statute was enacted, no new procedures are expected or necessary.

- Claimants assert that the requirement to provide written notice, and an opportunity to appeal proposed discipline for displaying an American flag is a new state mandated program. This statute was passed in the aftermath of September 11, 2001, to prohibit punitive action against a public safety officer for wearing a pin or displaying any other item containing the American flag. This is an example of a specific reason for disciplinary action. In the unlikely event this authority for disciplinary action was exercised, existing procedures and relief are addressed pursuant to the original POBOR test claim.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your October 15, 2003, letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Jennifer Osborn, Principal Program Budget Analyst at (916) 445-8913 or Keith Gmeinder, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

James E. Tilton
Program Budget Manager

Attachments

DECLARATION OF JENNIFER OSBORN
DEPARTMENT OF FINANCE
CLAIM NO. CMS-03-TC-18

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the Chapter 465, Statutes of 1976; Chapter 1259, Statutes of 1994; Chapter 148, Statutes of 1997; Chapter 786, Statutes of 1988; Chapter 263, Statutes of 1998; Chapter 112, Statutes of 1998; Chapter 338, Statutes of 1999; Chapter 209, Statutes of 2000; Chapter 1156, Statutes of 2002; and Chapter 170, Statutes of 2002 relevant to this claim are accurately quoted in the test claim submitted by the claimant and, therefore, we do not restate them in this declaration.

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.

November 14, 2003
at Sacramento

Jennifer Osborn

PROOF OF SERVICE

Test Claim Name: Peace Officers Procedural Bill of Rights II
Test Claim Number: CSM-03-TC-18

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, eighth Floor, Sacramento, CA 95814.

On November 14, 2003, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, eighth Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: Michael Havey
3301 C Street, Suite 500
Sacramento, CA 95816

B-29
Legislative Analyst's Office
Attention: Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

Cost Recovery Systems
Attention: Annette Chinn
705-2 East Bidwell Street, #294
Folsom, CA 95630

David Wellhouse & Associates
Attention: David Wellhouse
9175 Kiefer Boulevard, Suite 121
Sacramento, CA 95826

The City of Newport Beach
Attention: Glen Everroad
3300 Newport Blvd.
P.O. Box 1768
Newport Beach, CA 92659-1768

MAXIMUS
Attention: Mr. Allan Burdick
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

SixTen & Associates
Attention: Keith B. Peterson
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Mandated Cost Systems, Inc.
Attention: Steve Smith
11130 Sun Center Drive, Suite 100
Rancho Cordova, CA 95670

Mandate Resource Services
Attention: Harmeet Barkschat
5325 Elkhorn Blvd., #307
Sacramento, CA 95842

County of Los Angeles
Attention: Leonard Kaye, Esq.
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Spector, Middleton, Young & Minney, LLP
Attention: Paul Minney
7 Park Center Drive
Sacramento, CA 95825

Department of Finance
Attention: Keith Gmeinder
915 L Street, 8th Floor
Sacramento, CA 95814

Centration, Inc.
Attention: Cindy Sconce
12150 Tributary Point Drive, Suite 140
Gold River, CA 95670

E-09
State Personnel Board
Attention: Walter Vaughn
801 Capitol Mall, Suite 504
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on November 14, 2003, at Sacramento, California.

Mary Latorre

CALIFORNIA STATE PERSONNEL BOARD
801 Capitol Mall • Sacramento, California 95814 • www.spb.ca.gov
GRAY DAVIS, Governor

November 14, 2003

Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

NOTICE TO COMPLETE TEST CLAIM FILING AND SCHEDULE FOR COMMENTS
PEACE OFFICERS PROCEDURAL BILL OF RIGHTS II, 03-TC-18

Dear Ms. Higashi:

In response to your letter dated October 15, 2003, the State Personnel Board will not be participating in the above referenced claim.

If you have any questions, please contact me at (916) 653-1403.

Sincerely

ELISE S. ROSE
Chief Counsel

cc: Walter Vaughn, Executive Officer

RESPONSE TO DEPARTMENT OF FINANCE

On Original Test Claim

Chapter 465, Statutes of 1976; Chapter 1259, Statutes of 1994; Chapter 148, Statutes of 1997; Chapter 786, Statutes of 1998; Chapter 263, Statutes of 1998; Chapter 112, Statutes of 1998; Chapter 338, Statutes of 1999; Chapter 209, Statutes of 2000; Chapter 1156, Statutes of 2002; and Chapter 170, Statutes of 2002

RECEIVED

JAN 3 0 2004

COMMISSION ON STATE MANDATES

Claim no. CSM-03-TC-18

Peace Officers Procedural Bill of Rights II

The following are comments and responses to the letter of the Department of Finance, dated November 14, 2003, regarding the original test claim as submitted by the City of Newport Beach.

A. Department of Finance's Comments

"As the result of our review, we have the following concerns with the activities asserted by the claimant:

- When a permanent or an at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed, the an administrative appeal would already be required pursuant to the due process clauses of the United States and California Constitutions; and as such, would not constitute a new program or higher level of service. However, in the original test claim, the Commission found that United States and California Constitutions do not require an administrative appeal when dismissal or other disciplinary action is received by at-will employees whose liberty interests are not affected. Therefore, in some situations, the requirement to provide notice, a reason and an opportunity to a hearing may constitutes reimbursable state mandate. The other activities, to draft, review, and establish policies, procedures, forms, protocols and training to provide notices and hearings, exist already; nothing in the amended law requires special rules to apply to at-will (police chief) employees."

The position of the Department of Finance rests on the lesser issue of the activities and their costs rather than the larger issue of whether this is a new state-mandated program or a higher level of service. As this initial issue was left unaddressed, claimant concludes that the Department concedes that there is indeed a new state-mandated program or higher level of service.

As stated in the test claim, claimant does not have complete estimates on the costs of discharging the program. So, the Department's conclusion that there have been no costs is premature. Moreover, although this test claim was brought by the City of Newport Beach, the outcome of the test claim will impact peace officers and agencies in

jurisdictions statewide. To burden those jurisdictions with the conclusions made by the Department is premature.

- "While the 1997 amendments provide that a punitive action may only be pursued when an investigation is completed within one year, the amendments also provide numerous exceptions to this rule, as well as numerous conditions under which closed cases may be reopened. Claimants assert that the requirement will necessitate the drafting, review and establishment of policies, procedures, forms, protocols, file tracking systems and training to implement the practices for officers, investigators, supervisors, employers, clerical, counsel and staff. We note that current law for state peace officers requires completion and prosecution of state police officers within three years. Current law for local police officers has no time limit. Even in the latter case, investigative procedures exist. The establishment of a timeframe, by itself, does not create the need to have procedure for conducting an investigation. In addition, since there is no level of punitive actions prescribed by current law, the one-year timeframe does not, by itself, require more work on the part of the police offices. We also note that a long list of police officer political organizations supported the legislation that enacted this change."

The Department appears to take the position that since there is no punishment for violating the law, the peace officers are free to do so. Further, the Department argues that the one-year time frame was supported by police officer political groups. Both positions are untenable. First, agencies charged with law enforcement would be wont to violate the law, with or without stated consequences. Second, whether police political groups supported the legislation is insufficient to rise to the level of that in Government Code section 17556, subdivision (a), which states, in pertinent part, that the Commission shall not find costs mandated by the state if there is a finding that:

> "The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority."

The mere support of political organizations does not affect the finding of a state-mandated program or higher level of service.

Indeed, the position of the Department that this statute does not affect the speed of the investigation or necessitate changes within local agencies is disingenuous at best. The Department notes that there already exists investigative procedures. To ensure, however, that such investigations are completed in a timely manner, requires adjustments by the local agencies.

- "The 1997 amendment to the law allows, but does not require, an investigation to be reopened against a public safety officer beyond the one-year time period under

certain conditions; therefore, the discretionary authority does not constitute a reimbursable state mandate."

The Department relies on the discretionary nature of the language in the statute regarding the reopening of cases. Although the statute uses the term "may", the discretionary nature of that term seems to dissolve in the next sentence. Government Code section 3304, subdivision (g), reads in pertinent part:

> Notwithstanding the one-year time period specified in subdivision (c), an investigation may be reopened against a public safety officer if both of the following circumstances exist:
> (1) Significant new evidence has been discovered that is likely to affect the outcome of the investigation.

The statute does not call for a reopening of case merely in the light of new evidence but only if that evidence is likely to change the outcome. Looking at that more closely, if the evidence would clear the charges against a peace officer, there is really no choice for the agency than to reopen. Conversely, if the evidence would support charges and discipline against a peace officer, then again, there is no real choice but to reopen. Without a real option, the statute cannot be considered voluntary.

- "Government Code Section 31011, enacted in 1974, and Labor Code Section 1198.5, enacted in 1975, provide personnel review and response procedures for county, city and special district employees, thus the new requirement set forth in section 3306.5 does not constitute a new state program, with the possible exception of the explanation an employer must provide if a requested change is denied. Claimants assert that employers must pay the officer during the time the officer elects to review his or her record; however, the law only provides that there be no loss of compensation to the officer."

The position of the Department is that the new program or higher level of service is only a small portion of the statute. To the extent that this statute requires more of an agency that any pre-existing statute, there is a new program or higher level of service, even if, as the Department argues, there activities are limited or the costs small.

The Department also argues that the statute does not call for the peace officer to be paid while inspecting records, only that there be no loss of compensation. Yet, for inspections that occur during on-duty hours, the concept of "must pay" and "no loss of compensation" are one in the same. The Department is correct, however, if on the off chance that an officer opts to inspect his records off-duty, he will not be compensated.

- "Claimants assert that the requirement to provide notice or adhere to a legal process before searching an officer's locker creates the need to draft, review and establish policies, procedures, forms, protocols and training. We note that since their existing practices have gone unchallenged since 1976 when this statute was enacted, no new procedures are expected or necessary."

The position of the Department is that the age of the statute precludes the establishment of new polices and such. As noted above, although this test claim was brought by the City of Newport Beach, the outcome of the test claim will impact peace officers and agencies in jurisdictions statewide. New procedures may be necessary in those jurisdictions for a variety of reasons. It is premature for the Department to close the door on such claims without the opportunity for those jurisdictions to put forward facts for consideration.

- "Claimants assert that the requirement to provide written notice, and an opportunity to appeal proposed discipline for displaying an American flag is a new state mandated program, The statute was passed in the aftermath of September 11, 2001, to prohibit punitive action against a public safety officer for wearing a pin or displaying any other item containing the American flag. This is an example of a specific reason for disciplinary action. In the unlikely event this authority for disciplinary action was exercised, existing procedures and relief are addressed pursuant to the original POBOR test claim."

The position of the Department is that any claims under this statute will be properly addressed under the prior POBOR test claim. While that may be true, claimants are loath to rely on the prior Parameters and Guidelines as a strict interpretation of them may preclude a claim under this statute. Claimants believe that clarity on this issue will be appreciated by all departments that will have to deal with claims on this statute in the future.

CERTIFICATION

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Executed this 28 day of January, 2004, at Newport Beach, California, by:

Glen Everroad
Revenue Manager
City of Newport Beach

PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento, and I am over the age of 18 years and not a party to the within action. My place of employment is 4320 Auburn Blvd., Suite 2000, Sacramento, CA 95841.

On January 30, 2004, I served:

RESPONSE TO DEPARTMENT OF FINANCE
On Original Test Claim

Chapter 465, Statutes of 1976; Chapter 1259, Statutes of 1994; Chapter 148, Statutes of 1997; Chapter 786, Statutes of 1998; Chapter 263, Statutes of 1998; Chapter 112, Statutes of 1998; Chapter 338, Statutes of 1999; Chapter 209, Statutes of 2000; Chapter 1156, Statutes of 2002; and Chapter 170, Statutes of 2002

Claim no. CSM-03-TC-18

Peace Officers Procedural Bill of Rights II

by placing a true copy thereof in an envelope addressed to each of the persons listed on the mailing list attached hereto, and by sealing and depositing said envelope in the Untied States mail at Sacramento, California, with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed this 30th day of January, 2004, at Sacramento, California.

Declarant

Legislative Analyst's Office
Attention: Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

State Controller's Office
Division of Accounting & Reporting
Attn: Michael Havey
3301 C Street, Suite 500
Sacramento, CA 95816

Mr. Keith Gmeinder
Department of Finance
915 L Street, 8th Floor
Sacramento, CA 95814

Mr. Walter Vaughn
State Personnel Board
801 Capitol Mall, Suite 504
Sacramento, CA 95814

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 West Temple Street, Room 603
Los Angeles, CA 90012

Mr. Keith B. Peterson, President
Six Ten and Associates
5252 Balboa Avenue; Suite 807
San Diego, CA 92117

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkhorn Blvd. #307
Sacramento, CA 95842

Mr. Paul Minney
Spector, Middleton, Young & Minney
7 Park Center Drive
Sacramento, CA 95825

Mr. David Wellhouse
David Wellhouse & Associates
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826

Ms. Annette Chinn
Cost Recovery Systems
705-2 East Bidwell Street, #294
Folsom, CA 95630

Mr. Steve Smith
Mandated Cost Systems
11130 Sun Center Drive, Suite 100
Rancho Cordova, CA 95670

Ms. Cindy Sconce
Centration
12150 Tributary Point Drive, Suite 140
Gold River, CA 95670

Ms. Bonnie Ter Keurst
222 West Hospitality Lane
San Bernardino, CA 92415-0018

DEPARTMENT OF FINANCE

EDMUND G. BROWN JR. • GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

November 9, 2011

Ms. Nancy Patton
Acting Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Patton:

Draft Staff Analysis on the City of Newport Beach Test Claim—Peace Officers Procedural Bill of Rights II Mandate (03-TC-18)

The Department of Finance (Finance) has reviewed the draft staff analysis for the test claim on the Peace Officers Procedural Bill of Rights II mandate submitted by the City of Newport Beach (claimant). Finance does not have any significant concerns with the draft staff analysis recommending partial approval of the claimant's test claim.

Pursuant to section 1181.2, subdivision (c)(1)(E) of the California Code of Regulations, "documents that are e-filed with the Commission on State Mandates need not be otherwise served on persons that have provided an e-mail address for the mailing list."

If you have any questions regarding this letter, please contact Jeff Carosone, Principal Program Budget Analyst at (916) 445-8913.

Sincerely,

Nona Martinez

NONA MARTINEZ
Assistant Program Budget Manager

Enclosure

Enclosure A

DECLARATION OF JEFF CAROSONE
DEPARTMENT OF FINANCE
CLAIM NO. 03-TC-18

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

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.

11-8-11
at Sacramento, CA

Jeff Carosone

LAWRENCE L. BAGGETT et al., Plaintiffs and Appellants,
v.
DARYL GATES, as Chief of Police, etc., et al., Defendants and Appellants.
DAVID B. ZELHART, Plaintiff and Appellant,
v.
DARYL GATES, as Chief of Police, etc., et al., Defendants and Appellants

L.A. No. 31533.

Supreme Court of California
Aug 23, 1982.

SUMMARY

Police officers employed by a charter city petitioned the trial court for a writ of mandate and other relief after they had been reassigned to lower paying positions pursuant to departmental findings that their performance had been negligent and unsatisfactory, alleging that they had not been afforded their rights under the Public Safety Officers' Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). The trial court granted the requested writ of mandate and permanently enjoined defendant department from transferring or reassigning any officers to lower paygrades without first affording them an opportunity for an administrative appeal. The trial court also denied plaintiffs' motion for attorney fees. (Superior Court of Los Angeles County, Nos. C 308353 and C 314138, Jerry Pacht, Judge.)

The Supreme Court reversed and remanded with respect to the denial of attorney fees and affirmed in all other respects. The court first held that the home rule provisions of the California Constitution (Cal. Const., art. XI, § 5) did not preclude application of the Public Safety Officers' Procedural Bill of Rights Act to charter cities, since the maintenance of stable labor relations was a matter of statewide concern, and since the total effect of the legislation was not to deprive local governments of the right to manage and control their police departments, but to secure basic rights and protections to a segment of public employees. The court also held that a decision to reassign a peace officer to a lower paying position is per se disciplinary or punitive in nature, for purposes of the act, and that plaintiffs were thus entitled to an administrative appeal (Gov. Code, § 3304, subd. (b)), notwithstanding the assertion that the salary reductions were not imposed for purposes of punishment and were thus excluded from the reach of the statute. As to attorney fees, the court held plaintiffs were entitled to an award under the private attorney general doctrine (Code Civ. Proc., § 1021.5), since the action resulted in securing for plaintiffs and many others the basic rights and protections of the act, which were matters of statewide concern, since a significant benefit had been conferred on the general public, and since the financial burden placed on plaintiffs was out of proportion to their personal stake in the case. (Opinion by Bird, C. J., with Mosk, Newman, Broussard and Reynoso, JJ., concurring. Separate concurring and dissenting opinion by Kaus, J. Separate dissenting opinion by Richardson, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Law Enforcement Officers § 11--Police--Disciplinary Proceedings--Public Safety Officers' Procedural Bill of Rights Act--Applicability to Charter Cities.

The home rule provisions of the California Constitution (Cal. Const., art. XI, § 5) did not preclude application of the Public Safety Officers' Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) to charter cities, where the maintenance of stable labor relations was a matter of statewide concern and where the total effect of the legislation was not to deprive local governments of the right to manage and control their police departments, but to secure basic rights and protections to a segment of public employees. General laws seeking to assure fair labor practices may be applied to police departments, even though they impinge on local control to a limited extent.

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

(2) Law Enforcement Officers § 11--Police--Disciplinary Proceedings-- Public Safety Officers' Procedural Bill of Rights Act--Applicability to Reassignments to Lower Paying Positions.

A decision to reassign a peace officer to a lower

paying position is per se disciplinary or punitive in nature, for purposes of the Public Safety Officers' Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). Accordingly, police officers who were subjected to such action were entitled to an administrative appeal (Gov. Code, § 3304, subd. (b)), notwithstanding the assertion that the salary reductions were not imposed for purposes of punishment and were thus excluded from the reach of the statute. In any event, it was evident that the reassignments were the result of alleged improper prior conduct by the officers and thus were for purposes of punishment.

(3) Costs § 7--Amount and Items Allowable--Attorney Fees--Under Private Attorney General Doctrine.

Police officers who successfully challenged their reassignments to lower paying positions on grounds that they had not been afforded their appeal rights under the Public Safety Officers' Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) were entitled to recover attorney fees under the private attorney general doctrine (Code Civ. Proc., § 1021.5), where the action resulted in securing for plaintiffs and many others the basic rights and protections of the act, which were matters of statewide concern, where a significant benefit had been conferred on the general public, and where the financial burden placed on plaintiffs was out of proportion to their personal stake in the case.

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BIRD, C. J.

The primary issue presented by this case is whether the Public Safety Officers' Procedural Bill of Rights Act (Bill of Rights Act) applies to chartered cities. (See Gov. Code, §§ 3300-3311.)

I.

Plaintiffs, Lawrence Baggett, David Butler, John Spencer and David Zelhart, are police officers employed by the Los Angeles Police Department (Department). Defendants are the chief of police, the board of police commissioners and the City of Los Angeles.

Under the Department's salary structure, known as the Jacobs Plan, each of the several civil service job classes - i.e., police officer, sergeant, lieutenant, captain and deputy chief - may have more than one "paygrade" or salary level. (L.A. Admin. Code, § 4.140(n).) Officers "appointed ... to a class having more than one pay grade may be assigned and reassigned within that class" in accord with the regulations promulgated by the board of police commissioners. (*Ibid*.) These regulations are set forth in the Los Angeles Police Department Manual (Department Manual).

The paygrades within the civil service class of police officer, the class held by plaintiffs here, are police officers I, II, and III. (See L.A. Admin. Code, § 4.140(n).) Police officer I is the entry-level paygrade. Police officer II applies to officers who have completed one and one-half years of service. Police officer III applies to officers assigned to certain specialized positions involving increased responsibilities or calling for special qualifications. Such assignments are called "advanced paygrade assignments" and are compensated at higher rates. (See generally, 3 Department Manual, § 763 et seq.)

The Jacobs Plan also provides for additional compensation, over and above that attached to class and paygrade, for those officers assigned to positions involving particularly hazardous duties. (L.A. Admin. Code, § 4.159(g)(2), pt. B.)

Until July 1979, plaintiffs worked in the firearms and explosives unit of the Department's scientific investigation division. All four of them had been assigned to the unit for a number of years and had acquired extensive, specialized training and experience in the handling of firearms ***132** and explosives. Since positions in this unit are classified as "advanced pay-

grade assignments" and as particularly hazardous, plaintiffs received extra compensation for both. That is, they were compensated at the rate of a "Police Officer III 3." The extra salary received totaled approximately $5,000 per year.

In July 1979, the Department received information that plaintiffs and several others had engaged in misconduct during work hours. The alleged misconduct included: drinking while on duty or while on police premises; shooting pellet and/or BB rifles inside police premises and into the streets; mishandling evidence, including explosives; and various "pranks." Shortly thereafter, the Department's internal affairs division began an investigation.

Early in the course of the investigation, each plaintiff was interrogated at some length. The Department told plaintiffs of the nature of the investigation prior to questioning them. They were also warned that it could lead to formal charges of misconduct. [FN1]

> FN1 Officers Spencer, Baggett, and Zelhart were questioned at the Department on July 11, 1979, for periods ranging from four to eleven hours. Baggett and Zelhart's interrogation did not end until several hours after their watch was over. Spencer's interrogation took place during the evening hours after his watch.
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> Although he was on vacation, Officer Butler was questioned at home on July 13, 1979. He had been asked to come to the Department but was unable to do so due to the illness of a family member. The interrogation ended after only a few hours due to the death of the family member.

Each officer was asked to consent to a search of his home. Baggett and Butler did so, but only Baggett's home was searched. Spencer and Zelhart refused to give their consent. The Department searched plaintiffs' personal desks on July 11, 1979. No effort was made to obtain plaintiffs' consent to these searches.

On July 12, 1979, the commanding officer of the scientific investigation division, Captain Brennan, placed Officers Baggett, Spencer and Zelhart on temporary loan to other divisions within the Department. Officer Butler was placed on temporary loan outside the division when he returned from vacation on August 2, 1979. While on temporary loan, plaintiffs received the same salary as before.

The investigation failed to substantiate some of the alleged acts of misconduct and revealed that the remaining acts had occurred over a ***133** year earlier. As a result, no formal charges were brought against plaintiffs. [FN2] However, under the Department's regulations, "An officer below the rank of lieutenant in an advanced paygrade position may be reassigned to a lower paygrade position within his classification when ... [such] officer clearly demonstrates his failure or inability to satisfactorily perform the duties of the position." (3 Department Manual, § 763.55.) [FN3] Based on the investigation, Captain Brennan concluded that plaintiffs' performance had been negligent and unsatisfactory. Accordingly, in December 1979, he formally recommended that plaintiffs be reassigned to lower-paying police officer II positions outside the firearms and explosives unit.

> FN2 Section 202, subdivision (1), of the Los Angeles City Charter provides, in pertinent part, that "charges [against an officer] must be based upon some act committed or omitted by such officer ... within one (1) year prior to the filing of [a] complaint" against him or her.
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> FN3 Section 763.55 provides that "An officer below the rank of lieutenant in an advanced paygrade position may be reassigned to a lower paygrade position within his classification when one of the following conditions exists:
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> "An officer requests reassignment, OR
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> "An officer completes a fixed tour of duty in a position, OR
>
> "A position is eliminated, OR
>
> "When an officer clearly demonstrates his failure or inability to satisfactorily perform the duties of the position."

The Department approved Brennan's recommendation and notified plaintiffs that they would be

reassigned to police officer II positions in January and February of 1980. [FN4] Their request for a hearing or administrative appeal was denied. Departmental regulations provide for a hearing only when a formal personnel complaint is also filed against an officer. (See 3 Department Manual, § 763.60; see also L.A. City Charter, § 202.)

FN4 Under the Department's regulations, although the commanding officer may temporarily reassign an officer to a lower paygrade position, as was done here, the officer's compensation is not reduced until a formal recommendation is forwarded to and approved by the director of the office of administrative services. (3 Department Manual, § 763.60.)

Seeking to prevent their reassignment, plaintiffs filed a petition for writ of mandate and complaint for declaratory and injunctive relief in Los Angeles Superior Court. [FN5] Relying primarily on the Bill of Rights Act (Gov. Code, §§ 3300-3311), [FN6] plaintiffs contended that defendants could not reassign them to lower paying positions without affording ***134** them an administrative appeal as provided in section 3304, subdivision (b) of the act. [FN7]

FN5 Officers Baggett, Spencer and Butler filed their action in December 1979. Officer Zelhart filed his in February 1980. The trial court ordered the actions consolidated since they raised identical issues. (See Code Civ. Proc., § 1048.)

FN6 All statutory references are to the Government Code unless otherwise indicated.

FN7 Section 3304, subdivision (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."

The term "punitive action" is defined in section 3303 as "any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment."

In their answer, defendants asserted that the act could not constitutionally be applied to a charter city such as Los Angeles. Defendants further asserted that plaintiffs had no right to an administrative appeal under the act. According to defendants, the transfer or downgrading of plaintiffs did not constitute "punitive action" since it was not undertaken "for purposes of punishment."

After the hearing, the trial court granted plaintiffs the relief they requested. The court's judgment and order, entered July 23, 1980, directed issuance of a peremptory writ of mandate ordering defendants (1) to give plaintiffs an administrative appeal before taking any action which would reduce their salary and (2) to otherwise comply fully with the provisions of the Bill of Rights Act. In addition, the court permanently enjoined defendants "from transferring or reassigning any officer(s) from advanced paygrade assignments to duties at lower paygrades until such officer(s) have been afforded an opportunity for an administrative appeal." Subsequently, the court denied plaintiffs' motion for attorney fees.

Defendants appealed. Although agreeing that the act applies to charter cities, the Court of Appeal held that the right to an administrative appeal provided by section 3304, subdivision (b) arises only when an officer is reassigned to a lower paygrade assignment "solely or substantially for purposes of punishment."

Plaintiffs also appealed from the trial court's denial of their motion to recover attorney fees under section 1021.5 of the Code of Civil Procedure.

This court granted hearing to consider the case in connection with *White v. County of Sacramento* (1982) 31 Cal.3d 676 [183 Cal.Rptr. 520, 646 P.2d 191]. ***135**

II.

(1) The first issue this court must decide is whether application of the Bill of Rights Act to charter cities violates the home rule provisions of the California Constitution. (Cal. Const., art. XI, § 5.)

As its title suggests, the act sets forth a list of basic rights and protections which must be afforded all peace officers (see § 3301) by the public entities

which employ them. It is a catalogue of the minimum rights (§ 3310) the Legislature deems necessary to secure stable employer-employee relations (§ 3301).

In brief, the act (1) secures to officers the right to engage in political activity, if they so desire, when off-duty and out of uniform, "[e]xcept as otherwise provided by law" (§ 3302); (2) prescribes certain protections that must be afforded officers during interrogations which could lead to punitive action against them (§ 3303); [FN8] (3) gives officers the right to review and respond in writing to adverse comments entered in their personnel files (§§ 3305, 3306); (4) allows officers to refuse to submit to a lie-detector test (§ 3307); (5) prohibits searches of officers' personal storage spaces or lockers except when they are present, or have been notified, or give their consent, or a valid warrant is obtained (§ 3309); (6) limits the circumstances in which officers may be compelled to disclose their personal financial status (§ 3308); (7) gives officers the right to an 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 from retaliation for the exercise of their rights under the act (*ibid.*).

> FN8 For example, before being interrogated an officer must be told of the nature of the investigation (§ 3303, subd. (c)), the name of the officer in command, and the names of the interrogating officers (§ 3303, subd. (b)). Both the agency and the officer have the right to record interrogation sessions. (§ 3303, subd. (f).)
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> Unless the seriousness of the investigation requires otherwise, interrogations must be conducted at a reasonable hour (§ 3303, subd. (a)) and for a reasonable time (§ 3303, subd. (d)). There must be no browbeating, or threat of punitive action, or promise of reward used to induce an officer to answer questions. (§ 3303, subd. (e).) An officer may, however, be told that his or her failure to answer may result in punitive action. (*Ibid.*)
>
> An officer has a right to be represented by a person of his choice when it appears likely that punitive action may be taken against him. (§ 3303, subd. (h).) If it appears that an officer may be charged with a criminal offense, he must be informed of his constitutional rights. (§ 3303, subd. (g).)

The general home rule provision of the Constitution gives chartered cities the power to "make and enforce all ordinances and regulations in ***136** respect to municipal affairs, subject only to [the] restrictions and limitations provided in their several charters ...." (Cal. Const., art. XI, § 5, subd. (a).) [FN9] Further, charter provisions, ordinances or regulations "relating to matters which are purely 'municipal affairs'" prevail over state laws covering the same subject. (*Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 539 [86 Cal.Rptr. 673, 469 P.2d 353, 42 A.L.R.3d 1036]; Cal. Const., art. XI, § 5, subd. (a).)

> FN9 The cited text reads: "(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."

"As to matters which are of statewide concern, however, home rule charter cities remain subject to and controlled by applicable general state laws regardless of the provisions of their charters ...." (*Bishop* v. *City of San Jose* (1969) 1 Cal.3d 56, 61 [81 Cal.Rptr. 465, 460 P.2d 137].) Accordingly, the applicability of the Bill of Rights Act to charter cities turns on whether the matters it addresses are of statewide concern or are "strictly" a municipal affair. (*Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 315-316 [152 Cal.Rptr. 903, 591 P.2d 1] [*Sonoma County*].)

Although what constitutes a matter of statewide concern is ultimately an issue for the courts to decide, [FN10] it is well settled that this court will accord "great weight" to the Legislature's evaluation of this question. (*Bishop* v. *City of San Jose*, *supra*, 1 Cal.3d at p. 63.) Therefore, it is significant that the Legislature has expressly declared that "the rights and protections provided to peace officers [by the Bill of Rights Act]

constitute a matter of statewide concern." (§ 3301.)

> FN10 "Because the various sections of article XI fail to define municipal affairs, it becomes necessary for the courts to decide, under the facts of each case, whether the subject matter under discussion is of municipal or statewide concern."' (*Bishop v. City of San Jose, supra*, 1 Cal.3d at p. 62, quoting from *Professional Fire Fighters, Inc.* v. *City of Los Angeles* (1963) 60 Cal.2d 276, 294 [32 Cal.Rptr. 830, 384 P.2d 158].)

Moreover, this is not the usual case in which the Legislature has left the courts to divine why this is so. (See, e.g., *Sonoma County, supra*, 23 Cal.3d at p. 316 and fn. 20.) Instead, the Legislature has set forth the findings underlying its conclusion: "[E]ffective law enforcement depends upon the maintenance of stable employer-employee relations, between ***137** 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 ... wherever situated within the State of California." (§ 3301.)

Defendants, however, argue vigorously that the Bill of Rights Act is nothing more than an attempt by the Legislature to impose rigid rules regarding the internal affairs of city police departments. That this is a province the Legislature cannot invade is established, they contend, by section 5, subdivision (b) of article XI. That subdivision provides in pertinent part: "It shall be competent in all city charters to provide ... for: (1) the constitution, regulation, and government of the city police force ...." Moreover, cities are granted "plenary authority" to provide in their charters for the "compensation, method of appointment, qualifications, tenure of office and removal" of their employees. (Cal. Const., art. XI, § 5, subd. (b)(4).) [FN11]

> FN11 The cited text reads: "(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 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."

Superficially, these provisions raise some doubt as to whether the Bill of Rights Act may be applied to charter cities. On closer scrutiny, however, it becomes clear that it may. In the first place, the act impinges only minimally on the specific directives of section 5, subdivision (b). Review of the act's provisions (see *ante*, at p. 135) demonstrates that the act does not interfere with the setting of peace officers' compensation. [FN12] (Compare *Sonoma County, supra*, 23 Cal.3d at pp. 316-318 [invalidating legislative attempt to impose a pay freeze on municipal employees]; see also *San Francisco Labor Council* v. *Regents of University of California* (1980) 26 Cal.3d 785, 790-791 [163 Cal.Rptr. 460, 608 P.2d 277] [invalidating legislative attempt to impose ***138** a prevailing wage requirement].) Nor does the act purport to regulate their qualifications for employment (compare *Ector v. City of Torrance* (1973) 10 Cal.3d 129, 132-133 [109 Cal.Rptr. 849, 514 P.2d 433] [invalidating legislative attempt to prohibit charter cities from imposing residency requirements]), nor "the manner in which," or "the method by which," or "the times at which," or "the terms for which" peace officers "shall be elected or appointed." (Cal. Const., art. XI, § 5, subd. (b)(4).) Similarly, it does not affect their tenure of office or purport to regulate or specify the causes for which they may be removed. (Compare *Pearson v. County of Los Angeles* (1957) 49 Cal.2d 523, 533, 536 [319 P.2d 624] [holding state statute providing for removal of peace officers convicted of a felony inapplicable to a charter county].)

> FN12 The only place compensation is mentioned is in section 3303, subdivision (a) which provides: "If [the] interrogation [of a public safety officer] ... occur[s] during

> off-duty time ... the public safety officer shall be compensated for such off-duty time in accordance with regular department procedures ....”

The act does, however, impinge on the city's implied power to determine the manner in which its employees may be removed. Although the act in no way interferes with the city's exclusive jurisdiction over removal of its employees (compare *Curphey v. Superior Court* (1959) 169 Cal.App.2d 261, 268 [337 P.2d 169] [holding state statute providing for removal of employees by action of a grand jury inapplicable to a charter county]), it does require the city to provide peace officers “an opportunity for administrative appeal.” (§ 3304, subd. (b).) [FN13] And, of course, it cannot be gainsaid that other provisions impinge to a limited extent on the city's general regulatory power over the department.

> FN13 Of course, to the extent this right is coextensive with the requirements of due process, it cannot be said to impinge upon the city's powers.
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> It should be noted that a number of the act's provisions have a constitutional basis, including: (1) the right to engage in political activity provided by section 3302 (see, e.g., *Kinnear v. San Francisco* (1964) 61 Cal.2d 341 [38 Cal.Rptr. 631, 392 P.2d 391]); and (2) the limitations on financial disclosures provided by section 3308 (see, e.g., *City of Carmel-by-the-Sea* v. *Young* (1970) 2 Cal.3d 259 [85 Cal.Rptr. 1, 466 P.2d 225, 37 A.L.R.3d 1313]).

However, in *Professional Fire Fighters Inc. v. City of Los Angeles, supra*, 60 Cal.2d 276, this court specifically rejected the notion that any intrusion upon matters connected with public employment is necessarily an intrusion upon “municipal affairs.” (*Id.*, at p. 291.) *Professional Fire Fighters* involved the right of Los Angeles firemen to join a labor union. Relying on the home rule provisions of the Constitution, the city there contended that the statutes purporting to confer this right on its fire department employees unlawfully interfered with its exclusive and ***139** plenary authority over all matters bearing on its relation with its public employees. (*Id.*, at pp. 280, 291; see Cal. Const., art. XI, § 5, subd. (b)(4).) [FN14]

> FN14 The home rule provisions of the Constitution were revised in 1970. The provisions in effect at the time *Professional Fire Fighters* was decided were set forth in former article XI, sections 6, 8 and 8 1/2.
>
> As relevant here, the 1970 revision effected no substantive change in these provisions. Article XI, section 13 declares, “The provisions of Section[ ] ... 5 of this article relating to matters affecting the distribution of powers between the Legislature and cities ... shall be construed as a restatement of all related provisions of the Constitution in effect immediately prior to the effective date of this amendment [June 2, 1970], and as making no substantive change.”

In rejecting the city's contention, this court observed that general laws seeking to accomplish an objective of statewide concern may prevail over conflicting local regulations even if they impinge to a limited extent upon some phase of local control. (*Professional Fire Fighters, supra*, 60 Cal.2d at pp. 292, 295.) Accordingly, this court held that the state statutes which gave firemen the right to join a labor union were applicable to charter cities. “The total effect of all this legislation was not to deprive local government (chartered city or otherwise) of the right to manage and control its fire departments but to create uniform fair labor practices throughout the state. As such, the legislation may impinge upon local control to a limited extent, but it is nonetheless a matter of state concern.” (*Id.*, at pp. 294-295.)

Of course, the matter is no different when it comes to the police departments of chartered cities. General laws seeking to assure fair labor practices may be applied to police departments, just as they may be applied to fire departments, even though they impinge upon local control to a limited extent. (*Huntington Beach Police Officers' Assn.* v. *City of Huntington Beach* (1976) 58 Cal.App.3d 492, 500-502 [129 Cal.Rptr. 893]; see also *Los Angeles County Civil Service Com.* v. *Superior Court* (1978) 23 Cal.3d 55, 65-66 and fn. 12 [151 Cal.Rptr. 547, 588 P.2d 249].) [FN15]

> FN15 It has long been recognized that the home rule provisions of the Constitution do

> not place the police departments of charter cities beyond the reach of state laws addressing matters of statewide concern, even where such laws intrude upon local regulation. (E.g., *Healy v. Industrial Acc. Com.* (1953) 41 Cal.2d 118, 121-122 [258 P.2d 1]; *Long Beach Police Officers Assn. v. City of Long Beach* (1976) 61 Cal.App.3d 364, 371 [132 Cal.Rptr. 348]; *Lossman v. City of Stockton* (1935) 6 Cal.App.2d 324, 332-333 [44 P.2d 397].)

Finally, it can hardly be disputed that the maintenance of stable employment relations between police officers and their employers is a ***140** matter of statewide concern. The consequences of a breakdown in such relations are not confined to a city's borders. These employees provide an essential service. Its absence would create a clear and present threat not only to the health, safety and welfare of the citizens of the city, but also to the hundreds, if not thousands, of nonresidents who daily visit there. Its effect would also be felt by the many nonresident owners of property and businesses located within the city's borders. Our society is no longer a collection of insular local communities. Communities today are highly interdependent. The inevitable result is that labor unrest and strikes produce consequences which extend far beyond local boundaries.

Moreover, there is a direct, substantial connection between the rights provided by the Bill of Rights Act and the Legislature's asserted purpose. To give but one example, the administrative appeal provided is akin to a grievance system. It allows an officer who believes that his conduct or performance does not warrant punitive action an opportunity to present his side of the matter. Grievance systems have proved to be highly successful devices for helping to maintain labor peace. (Final Rep. Assem. Advisory Council on Public Employee Relations (Mar. 1973) at p. 186.)

In sum, here, as in *Professional Fire Fighters*, the total effect of this legislation is not to deprive local governments of the right to manage and control their police departments but to secure basic rights and protections to a segment of public employees who were thought unable to secure them for themselves.

"[T]he constitutional concept of municipal affairs is not a fixed or static quantity. It changes with the changing conditions upon which it is to operate." (*Pac. Tel. & Tel. Co. v. City & County of S. F.* (1959) 51 Cal.2d 766, 771 [336 P.2d 514].) There must always be doubt whether a matter which is of concern to both municipalities and the state is of sufficient statewide concern to justify a new legislative intrusion into an area traditionally regarded as "strictly a municipal affair." Such doubt, however, "must be resolved in favor of the legislative authority of the state." (*Abbott v. City of Los Angeles* (1960) 53 Cal.2d 674, 681 [3 Cal.Rptr. 158, 349 P.2d 974], citations omitted.)

For these reasons, this court holds that the Bill of Rights Act may constitutionally be applied to charter cities. ***141**

III.

(2) The next issue this court must decide is whether the right to an administrative appeal provided by the Bill of Rights Act extends to peace officers who, like plaintiffs, are reassigned to lower paying positions.

Section 3304, subdivision (b) of the 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." The term "punitive action" is defined in section 3303 as "any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment."

Plaintiffs assert that their reassignments will result in a loss in pay and are, therefore, punitive actions giving rise to a right of appeal under sections 3303 and 3304. Defendants, however, contend that the phrase "for purposes of punishment" qualifies each of the preceding terms in section 3303. Therefore, they argue that "reductions in salary" which are not imposed "for purposes of punishment" are excluded from the reach of the statute. Since defendants argue that plaintiffs' reassignments were not imposed for purposes of punishment, they contend that plaintiffs are not entitled to a hearing under section 3304.

For the reasons set forth in *White v. County of Sacramento*, *supra*, 31 Cal.3d 676, at pages 679-684, this court has concluded that the phrase "for purposes of punishment" qualifies only the term "transfer."

"[A] decision to reassign a peace officer to a lower paying position is per se disciplinary, or punitive in nature ...." (*Id*., at pp. 683-684.) Accordingly, under section 3304 an officer subject to such action must be accorded the opportunity for an administrative appeal. (*Ibid*.) It follows that plaintiffs here are entitled to an administrative appeal.

Moreover, "looking through form to substance," it is evident that plaintiffs' reassignments came about because of their alleged improper prior conduct. (*Heyenga v. City of San Diego* (1979) 94 Cal.App.3d 756, 759 [156 Cal.Rptr. 496].) The record before this court compels the conclusion that plaintiffs were reassigned "for purposes of punishment." ***142**

IV.

(3) As to plaintiffs' appeal, the only question to be decided is whether the trial court abused its discretion in denying their motion for attorney fees under section 1021.5 of the Code of Civil Procedure. [FN16]

FN16 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."

Section 1021.5 provides for court-awarded attorney fees under a private attorney general theory. (See also *Serrano v. Priest* (1977) 20 Cal.3d 25 [141 Cal.Rptr. 315, 569 P.2d 1303].) As this court explained in *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933 [154 Cal.Rptr. 503, 593 P.2d 200], the private attorney general doctrine "rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions .... [W]ithout some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible. [Citations.]"

The decision as to whether an award of attorney fees is warranted rests initially with the trial court. (*Id*., at pp. 938, 940-941, 942.) "[U]tilizing its traditional equitable discretion," that court "must realistically assess the litigation and determine, from a practical perspective" (*id*., at p. 938) whether or not the statutory criteria have been met. In this case, the trial court had to evaluate whether plaintiffs' action: (1) served to vindicate an important public right; (2) conferred a significant benefit on the general public or a large class of persons; and (3) imposed a financial burden on plaintiffs which was out of proportion to their individual stake in the matter. (See Code Civ. Proc., § 1021.5; *Woodland Hills*, *supra*, at pp. 935-942.) [FN17]

FN17 Since plaintiffs' action did not produce any monetary recovery, factor "(c)" of Code of Civil Procedure section 1021.5 is not applicable. In addition, no one contested the need for private, as compared with public, enforcement in this case, which is one of the criteria under factor "(b)." (See *ante*, fn. 16.)

Where, as here, a trial court has discretionary power to decide an issue, its decision will be reversed only if there has been a prejudicial ***143** abuse of discretion. "'To be entitled to relief on appeal ... it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice ....'" (6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 242, p. 4234, citations omitted.) However, "discretion may not be exercised whimsically and, accordingly, reversal is appropriate 'where no reasonable basis for the action is shown.' [Citation.]" (*Marini v. Municipal Court* (1979) 99 Cal.App.3d 829, 835-837 [160 Cal.Rptr. 465]; see generally, 6 Witkin, Cal. Procedure, *supra*, § 244, pp. 4235-4236.)

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. (See *Woodland Hills, supra*, 23 Cal.3d at p. 936.)

Moreover, it can 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. (See *ante*, at pp. 139-140.) No one can be heard to protest that effective law enforcement is not a "significant benefit."

Finally, although this is a closer question, the record before this court indicates that the financial burden this suit placed on plaintiffs was out of proportion to their personal stake in the case. By their action, plaintiffs have secured the enforcement of basic procedural rights, including the right to an administrative appeal of disciplinary actions. However, enforcement of these procedural rights may well not result in any pecuniary benefit to plaintiffs themselves. (See *Serrano v. Priest, supra*, 20 Cal.3d 25, 45.) For example, plaintiffs' newly won right to an administrative appeal of the Department's decision to reassign them to lower paying positions will not necessarily result in the reversal of that decision. Plaintiffs' reassignment and consequent reduction in salary may be approved.

This court is satisfied that plaintiffs' action meets the requirements of section 1021.5 of the Code of Civil Procedure. Therefore, plaintiffs are entitled to recover their attorney fees. ***144**

V.

Since no reasonable basis for denying plaintiffs' motion for attorney fees appears in the record, the trial court's refusal to award fees was an abuse of discretion and its denial order must be reversed. In all other respects, the judgment is affirmed. The case is remanded for further proceedings consistent with this opinion. Plaintiffs-appellants shall recover their costs on appeal.

Mosk, J., Newman, J., Broussard, J., and Reynoso, J., concurred.

KAUS, J.,
Concurring and Dissenting.

I concur in parts II and III of the court's opinion, but dissent from the court's conclusion in part IV that the trial court abused its discretion in denying plaintiffs' motion for attorney fees under Code of Civil Procedure section 1021.5. On the facts of this case, I believe the trial court could very reasonably conclude that a "private attorney general" attorney fee award was not warranted because the financial burden of the lawsuit did not transcend plaintiffs' personal interest in the litigation.

In establishing the parameters of this state's private attorney general doctrine, section 1021.5 provides that a trial court may award attorneys fees against a losing party in an action resulting in the enforcement of an important right if, inter alia, "the necessity and financial burden of private enforcement are such as to make the award appropriate." In analyzing this requirement in *Woodland Hills Resident Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 941-942 [154 Cal.Rptr. 503, 593 P.2d 200], we explained that this limitation was intended to reserve a private attorney general fee award for those cases in which such an award is needed to effectuate an important public policy, i.e., those cases in which a private plaintiff's personal interest alone is insufficient to make it likely that he would have incurred the attorney fees to bring the action. Quoting from the Court of Appeal decision in *County of Inyo v. City of Los Angeles* (1978) 78 Cal.App.3d 82, 89 [144 Cal.Rptr. 71], we held: "'An award on the "private attorney general " theory is appropriate when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff "out of proportion to his individual stake in the matter.'"' (23 Cal.3d at p. 941; see also *Serrano v. Priest* (1977) 20 Cal.3d 25, 45-46 & fn. 18 [141 Cal.Rptr. 315, 569 P.2d 1303].) ***145**

On the facts of this case, the trial court could well have determined that a statutory fee award was not needed as an incentive to insure that plaintiff's statutory rights would be vindicated and that the cost of the lawsuit did not place a burden on plaintiffs "out of proportion to [their] individual stake in the matter."

The attorney fees at issue total about $8,400. As the court's opinion notes, each of the four plaintiffs is challenging the validity of a disciplinary sanction which threatens to reduce his salary by $5,000 a year. Although there is, of course, no guarantee that plaintiffs will prevail on the merits once they are afforded an administrative hearing, assuming - as we must - that plaintiffs believe in the validity of their case, the total amount of money at stake in this proceeding - $20,000 every year - certainly provided the plaintiffs with a substantial financial incentive to pursue this litigation.

Furthermore, contrary to the court's suggestion (*ante*, p. 143), this litigation will provide a substantial monetary benefit to the individual officers even if they do not ultimately prevail on the merits after an administrative hearing. The reduction in the officers' salaries proposed by the city was scheduled to take effect early in 1980, but that reduction has been stayed during the course of this litigation by an injunction issued by the trial court. As a consequence, the lawsuit to date has apparently permitted plaintiffs to receive more than $40,000 in additional income. Thus, even if we consider the matter solely from the point of view of the individual plaintiffs' financial interest, I do not see how we can conclude that the trial court *abused its discretion* in finding that in light of their personal stake in the litigation, the cost of the litigation - $8,400 in attorney fees - did not place a disproportionate burden on plaintiffs. [FN1]

> FN1 The fact that other persons may gain the benefit of the general legal principle established in this case cannot, of course, in itself justify a fee award. As we explained in *Woodland Hills, supra*, 23 Cal.3d 917, 946: "Although 'it is a built-in consequence of [the Anglo-American principle of] stare decisis that "a legal doctrine established in a case involving a single litigant characteristically benefits all others similarly situated"' [citations], the doctrine of stare decisis has never been viewed as sufficient justification for permitting an attorney to obtain fees from all those who may, in future cases, utilize a precedent he has helped to secure. [Citations.] As the Second Circuit Court of Appeals stated in rejecting a plea for attorney fees based on a comparable theory: 'It is a novel assertion that attorneys who are victorious in one case may, like the holder of a copyright, claim fees from all subsequent litigants who might rely on or use it in one way or another.' [Citation.]"

In addition, it is not at all clear to me that the trial court - in conducting the "realistic assessment" of the situation mandated by ***146***Woodland Hills* (see 23 Cal.3d at pp. 938, 940, 941-942 & fn. 13) - was required to confine its consideration to the financial costs and benefits of the four individual plaintiffs. The record discloses that the attorney fees at issue have not been paid by the individual plaintiffs; instead, this litigation has been financed by plaintiffs' employee association - the Los Angeles Police Protection League. There is, of course, absolutely nothing improper in such an arrangement. (See, e.g., *Mine Workers v. Illinois Bar Assn.* (1967) 389 U.S. 217 [19 L.Ed.2d 426, 88 S.Ct. 353]; *Railroad Trainmen v. Virginia Bar* (1964) 377 U.S. 1 [12 L.Ed.2d 89, 84 S.Ct. 1113, 11 A.L.R.3d 1196].) Nonetheless, in determining whether a private attorney general fee award is needed to insure that lawsuits will be brought to enforce a particular statutory policy, it seems eminently reasonable for a trial court to consider whether the existence of such an organization means that - as a practical matter - private lawsuits to enforce the enactment will in fact be forthcoming even without the promise of a private attorney general award. [FN2] Surely, when the role of the employees' association is taken into account, there can be no question but that the trial court did not abuse its discretion in concluding that an attorney fee award under section 1021.5 was not warranted in this case.

> FN2 Unlike the legal aid offices and "public interest" law firms discussed in *Serrano v. Priest, supra*, 20 Cal.3d 25, 47-48, an employee organization - like the homeowners' association involved in *Woodland Hills* - is an organization which exists, in large measure, in order to further the common personal interests of its members. Insofar as a particular lawsuit is likely to provide direct benefits to a large number of members who are contributing to the legal fees, it would belie reality to ignore the members' collective interest in assessing whether the financial burden imposed by the lawsuit is "out of proportion" to the personal interests at stake in the matter.

> Although the Court of Appeal decision in *County of Inyo v. City of Los Angeles*, *supra*, involved a public, rather than a private, entity, its reasoning is instructive on this point: "Inyo County went to court as champion of local environmental values, which it sought to preserve for the benefit of its present and future inhabitants. This action is not a 'public interest' lawsuit in the sense that it is waged for values other than the petitioner's. The litigation is self-serving. The victory won by the county in 1977 bulked large enough to warrant the cost of winning it. The necessity for enforcement by Inyo County did not place on it 'a burden out of proportion to [its] individual stake in the matter.' [Citation.]" (78 Cal.App.3d at p. 90.)

I would affirm the trial court judgment in its entirety.

RICHARDSON, J.

I respectfully dissent. In my view, matters relating to the employment, compensation and discipline of police officers are municipal affairs. Accordingly, chartered cities such as Los Angeles may make and enforce ordinances on these subjects without limitation or restriction by any contrary state law. This seems to me to be mandated ***147** by article XI, section 5, subdivision (a), of the California Constitution which provides that "City charters ... shall supersede any existing charter, and with respect to municipal affairs shall supersede *all laws* inconsistent therewith." (Italics added.)

The majority concedes that the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) "impinge[s] on the city's implied power to determine the manner in which its employees may be removed," as well as the city's "general regulatory power over the [police] department." (*Ante*, p. 138.) The act contains numerous restrictions upon the city's power to discipline its police officers, including provision for an administrative appeal following any "punitive action," broadly defined to include even mere reprimands or transfers. (Gov. Code, §§ 3303, 3304.)

Notwithstanding the breadth of article XI, section 5, subdivision (a), the majority concludes that "the maintenance of stable employment relations between police officers and their employers is a matter of statewide concern." (*Ante*, pp. 139-140.) The majority fails to appreciate that if "stable employment relations" with public employees were the dispositive factor, *every* state law which called for terms or conditions of public employment less restrictive than those required by municipal charter would override all conflicting local ordinances on the subject. We have previously rejected any such approach. (See, e.g., *Ector v. City of Torrance* (1973) 10 Cal.3d 129, 132-133 [109 Cal.Rptr. 849, 514 P.2d 433] [local residence requirement for city employees overrides contrary state law]; *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 62-63 [81 Cal.Rptr. 465, 460 P.2d 137] [state prevailing wage law inapplicable to charter city employees].)

In the context of employment relations, the state Constitution seems to me to be quite explicit in establishing supervision of city police as a "municipal affair." Not only does the Constitution provide that charter provisions regarding municipal affairs "shall supersede" any contrary state laws, but *the very next subdivision* of article XI empowers cities to provide by charter for "the constitution, regulation, and government of the city police force ...." (*Id*., § 5, subd. (b).) *That same subdivision* also recites that "*plenary authority* is hereby granted [charter cities] ... to provide ... the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees ... shall be elected and appointed, and for their removal, and for their compensation, and for the number of ... employees ***148** that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such ... employees." (*Ibid*., italics added.)

It is difficult for me to see how the framers of our Constitution could have been more explicit in declaring their intention that the employment and regulation of local police officers be considered "municipal affairs."

The express constitutional grant of "plenary authority" to charter cities furnishes conclusive "constitutional guidance" in this regard. (See *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 316-317 [152 Cal.Rptr. 903, 591 P.2d 1]; *Ector v. City of Torrance*,

supra, 10 Cal.3d 129, 132.) As was recently expressed in *Brown v. City of Berkeley* (1976) 57 Cal.App.3d 223, 236 [129 Cal.Rptr. 1], "'It has been uniformly held that the organization, maintenance and operation of a police and fire department by a chartered city is a municipal affair and as such not subject to the control of the legislature.' [Citation.] Moreover, under article XI, section 5(b), of the California Constitution chartered cities are specifically provided the authority to constitute, regulate and govern city police departments."

The majority relies for its contrary conclusion almost exclusively upon *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276 [32 Cal.Rptr. 830, 384 P.2d 158], but that case is inapposite. It held only that the right of municipal employees to join a labor union was a matter of statewide rather than municipal concern. This holding is correct, but I see no inconsistency between it and the views which I herein express. Union activities neither directly nor inevitably conflict with nor infringe upon the cities' constitutional power to employ, compensate and discipline its own municipal employees.

I would reverse the judgment. ***149**

Cal.
Baggett v. Gates
32 Cal.3d 128, 649 P.2d 874, 185 Cal.Rptr. 232

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Supreme Court of the United States
The BOARD OF REGENTS OF STATE COLLEGES et al., Petitioners,
v.
David F. ROTH, etc.

No. 71-162.
Argued Jan. 18, 1972.
Decided June 29, 1972.

Action by assistant professor at state university, who had no tenure rights to continued employment and who was informed that he would not be rehired after first academic year, alleging that decision not to rehire him infringed his Fourteenth Amendment rights. The United States District Court for the Western District of Wisconsin, 310 F.Supp. 972, granted summary judgment for assistant professor on procedural issue, ordering university officials to provide him with reasons and a hearing, and appeal was taken. The Court of Appeals, 446 F.2d 806, affirmed the partial summary judgment, and certiorari was granted. The Supreme Court, Mr. Justice Stewart, held that where state did not make any charge against assistant professor that might seriously damage his standing and associations in his community and there was no suggestion that state imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities, he was not deprived of 'liberty' protected by the Fourteenth Amendment when he simply was not rehired in the job but remained as free as before to seek another. The Court further held that where terms of appointment of assistant professor secured absolutely no interest in reemployment for the next year and there was no state statute or university rule or policy that secured his interest in reemployment or that created any legitimate claim to it, he did not have a property interest protected by Fourteenth Amendment that was sufficient to require university authorities to give him a hearing when they declined to renew his contract of employment.

Judgment of Court of Appeals reversed and case remanded.

Mr. Justice Douglas filed a dissenting opinion.

Mr. Justice Marshall filed a dissenting opinion.

For concurring opinion of Mr. Chief Justice Burger, see 92 S.Ct. 2717.

For dissenting opinion of Mr. Justice Brennan in which Mr. Justice Douglas joined, see 92 S.Ct. 2717.

Mr. Justice Powell took no part in decision of case.

West Headnotes

[1] Constitutional Law 92 3869

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3868 Rights, Interests, Benefits, or Privileges Involved in General
92k3869 k. In general. Most Cited Cases
(Formerly 92k252.5, 92k277(1), 92k255(1))

Constitutional Law 92 3879

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3878 Notice and Hearing
92k3879 k. In general. Most Cited Cases
(Formerly 92k255(1))

Requirements of procedural due process apply only to deprivation of interests encompassed by Fourteenth Amendment's protection of liberty and property, and when protected interests are implicated the right to some kind of prior hearing is paramount. U.S.C.A.Const. Amend. 14.

[2] Constitutional Law 92 3869

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3868 Rights, Interests, Benefits, or Privileges Involved in General
92k3869 k. In general. Most Cited Cases
(Formerly 92k252.5, 92k277(1), 92k255(1))

To determine whether due process requirements apply in the first place, court must look not to the "weight" but to the nature of the interest at stake and must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property. U.S.C.A.Const. Amend. 14.

[3] Constitutional Law 92 3873

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3868 Rights, Interests, Benefits, or Privileges Involved in General
92k3873 k. Liberties and liberty interests. Most Cited Cases
(Formerly 92k254.1, 92k255(1))

Constitutional Law 92 3874(1)

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3868 Rights, Interests, Benefits, or Privileges Involved in General
92k3874 Property Rights and Interests
92k3874(1) k. In general. Most Cited Cases
(Formerly 92k277(1))

Property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels or money, and due process protection is required for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process. U.S.C.A.Const. Amend. 14.

[4] Constitutional Law 92 4040

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)1 In General
92k4040 k. Reputation; defamation. Most Cited Cases
(Formerly 92k251.6, 92k251)

Where 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. U.S.C.A.Const. Amend. 14.

[5] Constitutional Law 92 2017

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Q) Education
92XVIII(Q)2 Post-Secondary Institutions
92k2016 Employees
92k2017 k. In general. Most Cited Cases
(Formerly 92k90(2))

Whatever may be a teacher's right of free speech, interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest.

[6] Constitutional Law 92 4223(7)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)8 Education
92k4218 Post-Secondary Education
92k4223 Employment Relationships
92k4223(7) k. Reputational interests, protection and deprivation of. Most Cited Cases
(Formerly 92k278.5(3), 92k255(2))

Where state in declining to rehire assistant professor at state university, who had no tenure rights to continued employment, did not make any charge against him that might seriously damage his standing and associations in his community and there was no suggestion that state imposed on him a stigma or other

disability that foreclosed his freedom to take advantage of other employment opportunities, he was not deprived of "liberty" protected by the Fourteenth Amendment when he simply was not rehired but remained as free as before to seek another. U.S.C.A.Const. Amend. 14; W.S.A. 37.31(1).

[7] Constitutional Law 92 3874(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3868 Rights, Interests, Benefits, or Privileges Involved in General
92k3874 Property Rights and Interests
92k3874(3) k. Benefits, rights and interests in. Most Cited Cases
(Formerly 92k277(1))

Fourteenth Amendment's procedural protection of property is a safeguard of security of interests that a person has already acquired in specific benefits. U.S.C.A.Const. Amend. 14.

[8] Constitutional Law 92 3874(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3868 Rights, Interests, Benefits, or Privileges Involved in General
92k3874 Property Rights and Interests
92k3874(3) k. Benefits, rights and interests in. Most Cited Cases
(Formerly 92k277(1))

Constitutional Law 92 3879

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3878 Notice and Hearing
92k3879 k. In general. Most Cited Cases
(Formerly 92k277(1))

To have a property interest in a benefit, a person must have more than an abstract need or desire for it or a unilateral expectation of it, and he must have a legitimate claim of entitlement to it, it is a purpose of ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined, and it is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims. U.S.C.A.Const. Amend. 14.

[9] Constitutional Law 92 3874(2)

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3868 Rights, Interests, Benefits, or Privileges Involved in General
92k3874 Property Rights and Interests
92k3874(2) k. Source of right or interest. Most Cited Cases
(Formerly 92k277(1))

Constitutional Law 92 3874(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3868 Rights, Interests, Benefits, or Privileges Involved in General
92k3874 Property Rights and Interests
92k3874(3) k. Benefits, rights and interests in. Most Cited Cases
(Formerly 92k277(1))

Property interests 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. U.S.C.A.Const. Amend. 14.

[10] Constitutional Law 92 4223(5)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)8 Education

92k4218 Post-Secondary Education
92k4223 Employment Relationships
92k4223(5) k. Tenure. Most Cited Cases
(Formerly 92k277(2))

Where terms of appointment of assistant professor at state university, who had no tenure rights to continued employment and who was informed that he would not be rehired after first academic year, secured absolutely no interest in reemployment for the next year and there was no state statute or university rule or policy that secured his interest in reemployment or that created any legitimate claim to it, he did not have a property interest protected by Fourteenth Amendment that was sufficient to require university authorities to give him a hearing when they declined to renew his contract of employment. U.S.C.A.Const. Amend. 14; W.S.A. 37.31(1).

****2702** Syllabus[FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***564** Respondent, hired for a fixed term of one academic year to teach at a state ****2703** university, was informed without explanation that he would not be rehired for the ensuing year. A statute provided that all state university teachers would be employed initially on probation and that only after four years' continuous service would teachers achieve permanent employment 'during efficiency and good behavior,' with procedural protection against separation. University rules gave a nontenured teacher 'dismissed' before the end of the year some opportunity for review of the 'dismissal,' but provided that no reason need be given for nonretention of a nontenured teacher, and no standards were specified for reemployment. Respondent brought this action claiming deprivation of his Fourteenth Amendment rights, alleging infringement of (1) his free speech right because the true reason for his nonretention was his criticism of the university administration, and (2) his procedural due process right because of the university's failure to advise him of the reason for its decision. The District Court granted summary judgment for the respondent on the procedural issue. The Court of Appeals affirmed. Held: The Fourteenth Amendment does not require opportunity for a hearing prior to the nonrenewal of a nontenured state teacher's contract, unless he can show that the nonrenewal deprived him of an interest in 'liberty' or that he had a 'property' interest in continued employment, despite the lack of tenure or a formal contract. Here the nonretention of respondent, absent any charges against him or stigma or disability foreclosing other employment, is not tantamount to a deprivation of 'liberty,' and the terms of respondent's employment accorded him no 'property' interest protected by procedural due process. The courts below therefore erred in granting summary judgment for the respondent on the procedural due process issue. Pp. 2705-2710.

446 F.2d 806, reversed and remanded.

***565** Charles A. Bleck, Asst. Atty. Gen., Madison, Wis., for petitioners.

Steven H. Steinglass, Milwaukee, Wis., for respondent.

***566** Mr. Justice STEWART delivered the opinion of the Court.

In 1968 the respondent, David Roth, was hired for his first teaching job as assistant professor of political science at Wisconsin State University-Oshkosh. He was hired for a fixed term of one academic year. The notice of his faculty appointment specified that his employment would begin on September 1, 1968, and would end on June 30, 1969.[FN1] The respondent completed that term. But he was informed that he would not be rehired for the next academic year.

FN1. The respondent had no contract of employment. Rather, his formal notice of appointment was the equivalent of an employment contract.

The notice of his appointment provided that: 'David F. Roth is hereby appointed to the faculty of the Wisconsin State University Position number 0262. (Location:) Oshkosh as (Rank:) Assistant Professor of (Department:) Political Science this (Date:) first day of (Month:) September (Year:) 1968.' The notice went on to specify that the respondent's 'appointment basis' was for the 'academic year.' And it provided that

> '(r)egulations governing tenure are in accord with Chapter 37.31, Wisconsin Statutes. The employment of any staff member for an academic year shall not be for a term beyond June 30th of the fiscal year in which the appointment is made.' See n. 2, infra.

The respondent had no tenure rights to continued employment. Under Wisconsin statutory law a state university teacher can acquire tenure as a 'permanent' employee only after four years of year-to-year employment. Having acquired tenure, a teacher is entitled to continued employment 'during efficiency and good behavior.' A relatively new teacher without tenure, however, is under Wisconsin law entitled to nothing****2704** beyond his one-year appointment. [FN2] There are no statutory***567** or administrative standards defining eligibility for re-employment. State law thus clearly leaves the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials.

> FN2. Wis.Stat. s 37.31(1) (1967), in force at the time, provided in pertinent part that:
>
> 'All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher.'

The procedural protection afforded a Wisconsin State University teacher before he is separated from the University corresponds to his job security. As a matter of statutory law, a tenured teacher cannot be 'discharged except for cause upon written charges' and pursuant to certain procedures.[FN3] A nontenured teacher, similarly, is protected to some extent during his one-year term. Rules promulgated by the Board of Regents provide that a nontenured teacher 'dismissed' before the end of the year may have some opportunity for review of the 'dismissal.' But the Rules provide no real protection for a nontenured teacher who simply is not re-employed for the next year. He must be informed by February 1 'concerning retention or non-retention for the ensuing year.' But 'no reason for non-retention need be given. No review or appeal is provided in such case.'[FN4]

> FN3. Wis.Stat. s 37.31(1) further provided that:
>
> 'No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges. Within 30 days of receiving the written charges, such teacher may appeal the discharge by a written notice to the president of the board of regents of state colleges. The board shall cause the charges to be investigated, hear the case and provide such teacher with a written statement as to their decision.'

> FN4. The Rules, promulgated by the Board of Regents in 1967, provide:
>
> 'RULE I-February first is established throughout the State University system as the deadline for written notification of non-tenured faculty concerning retention or non-retention for the ensuing year. The President of each University shall give such notice each year on or before this date.'
>
> 'RULE II-During the time a faculty member is on probation, no reason for non-retention need be given. No review or appeal is provided in such case.
>
> 'RULE III-'Dismissal' as opposed to 'Non-Retention' means termination of responsibilities during an academic year. When a non-tenure faculty member is dismissed he has no right under Wisconsin Statutes to a review of his case or to appeal. The President may, however, in his discretion, grant a request for a review within the institution, either by a faculty committee or by the President, or both. Any such review would be informal in nature and would be advisory only.
>
> 'RULE IV-When a non-tenure faculty member is dismissed he may request a review by or hearing before the Board of Regents. Each such request will be considered separately and the Board will, in its discretion, grant or deny same in each individual case.'

***568** In conformance with these Rules, the Pres-

ident of Wisconsin State University-Oshkosh informed the respondent before February 1, 1969, that he would not be rehired for the 1969-1970 academic year. He gave the respondent no reason for the decision and no opportunity to challenge it at any sort of hearing.

The respondent then brought this action in Federal District Court alleging that the decision not to rehire him for the next year infringed his Fourteenth Amendment rights. He attacked the decision both in substance and procedure. First, he alleged that the true reason for the decision was to punish him for certain statements critical of the University administration, and that it therefore violated his right to freedom of speech.[FN5] ****2705 *569** Second, he alleged that the failure of University officials to give him notice of any reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law.

> FN5. While the respondent alleged that he was not rehired because of his exercise of free speech, the petitioners insisted that the non-retention decision was based on other, constitutionally valid grounds. The District Court came to no conclusion whatever regarding the true reason for the University President's decision. 'In the present case,' it stated, 'it appears that a determination as to the actual bases of (the) decision must await amplification of the facts at trial. . . . Summary judgment is inappropriate.' 310 F.Supp. 972, 982.

The District Court granted summary judgment for the respondent on the procedural issue, ordering the University officials to provide him with reasons and a hearing. 310 F.Supp. 972. The Court of Appeals, with one judge dissenting, affirmed this partial summary judgment. 446 F.2d 806. We granted certiorari. 404 U.S. 909, 92 S.Ct. 227, 30 L.Ed.2d 181. The only question presented to us at this stage in the case is whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year.[FN6] We hold that he did not.

> FN6. The courts that have had to decide whether a nontenured public employee has a right to a statement of reasons or a hearing upon nonrenewal of his contract have come to varying conclusions. Some have held that neither procedural safeguard is required. E.g., Orr v. Trinter, 444 F.2d 128 (CA6); Jones v. Hopper, 410 F.2d 1323 (CA10); Freeman v. Gould Special School District, 405 F.2d 1153 (CA8). At least one court has held that there is a right to a statement of reasons but not a hearing. Drown v. Portsmouth School District, 435 F.2d 1182 (CA1). And another has held that both requirements depend on whether the employee has an 'expectancy' of continued employment. Ferguson v. Thomas, 430 F.2d 852, 856 (CA5).

I

[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 ***570** to some kind of prior hearing is paramount.[FN7] But the range of interests protected by procedural due process is not infinite.

> FN7. Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' Boddie v. Connecticut, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113. 'While '(m)any controversies have raged about . . . the Due Process Clause,' . . . it is fundamental that except in emergency situations (and this is not one) 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.' Bell v. Burson, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90. For the rare and extraordinary situations in which we have held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing, see, e.g., Central Union Trust Co. v. Garvan, 254 U.S. 554, 566, 41 S.Ct. 214, 215, 65 L.Ed. 403; Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 597, 51 S.Ct. 608,

611, 75 L.Ed. 1289; Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088.

[2] The District Court decided that procedural due process guarantees apply in this case by assessing and balancing the weights of the particular interests involved. It concluded that the respondent's interest in re-employment at Wisconsin State University-Oshkosh outweighed the University's interest in denying him re-employment summarily. 310 F.Supp., at 977-979. Undeniably, the respondent's re-employment prospects were of major concern to him-concern that we surely cannot say was insignificant. And a weighing process has long been a part of any determination of the form of hearing required in particular situations by procedural due process.[FN8] But, to determine whether ***571** due ****2706** process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake. See Morrissey v. Brewer, 408 U.S. 471, at 481, 92 S.Ct. 2593, at 2600, 33 L.Ed.2d 484. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

FN8. 'The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.' Boddie v. Connecticut, supra, 401 U.S., at 378, 91 S.Ct., at 786. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287; Hannah v. Larche, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307. The constitutional requirement of opportunity for some form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process. See n. 7, supra.

[3] 'Liberty' and 'property' are broad and majestic terms. They are among the '(g)reat (constitutional) concepts . . . purposely left to gather meaning from experience. . . . (T)hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.' National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646, 69 S.Ct. 1173, 1195, 93 L.Ed. 1556 (Frankfurter, J., dissenting). For that reason, the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights. [FN9] The Court has also made clear that the property interests protected by ***572** procedural due process extend well beyond actual ownership of real estate, chattels, or money.[FN10] By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.[FN11]

FN9. In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that public employment in general was a 'privilege,' not a 'right,' and that procedural due process guarantees therefore were ble. Bailey v. Richardson, 86 U.S.App.D.C. 248, 182 F.2d 46, aff'd by an equally divided Court, 341 U.S. 918, 71 S.Ct. 669, 95 L.Ed. 1352. The basis of this holding has been thoroughly undermined in the ensuing years. For, as Mr. Justice Blackmun wrote for the Court only last year, 'this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'' Graham v. Richardson, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534. See, e.g., Morrissey v. Brewer, supra, 408 U.S., at 482, 92 S.Ct., at 2600; Bell v. Burson, supra, 402 U.S., at 539, 91 S.Ct., at 1589; Goldberg v. Kelly, supra, 397 U.S., at 262, 90 S.Ct., at 1017; Shapiro v. Thompson, 394 U.S. 618, 627 n. 6, 89 S.Ct. 1322, 1329, 22 L.Ed.2d 600; Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811; Sherbert v. Verner, 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965.

FN10. See, e.g., Connell v. Higginbotham, 403 U.S. 207, 208, 91 S.Ct. 1772, 1773, 29 L.Ed.2d 418; Bell v. Burson, supra; Goldberg v. Kelly, supra.

FN11. 'Although the Court has not assumed to define 'liberty' (in the Fifth Amendment's Due Process Clause) with any great precision, that term is not confined to mere freedom from bodily restraint.' Bolling v. Sharpe, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98

L.Ed. 884. See, e.g., Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551.

Yet, while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words 'liberty' and 'property' in the Due Process Clause of the Fourteenth Amendment must be given some meaning.

II

'While this court has not attempted to define with exactness the liberty . . . guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely ****2707** freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.' Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042. In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 499-500, 74 S.Ct. 693, 694, 98 L.Ed. 884; Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551.

***573** There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated. But this is not such a case.

[4] The State, in 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.' Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515; Wieman v. Updegraff, 344 U.S. 183, 191, 73 S.Ct. 215, 219, 97 L.Ed. 216; Joint Anti- Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817; United States v. Lovett, 328 U.S. 303, 316-317, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252; Peters v. Hobby, 349 U.S. 331, 352, 75 S.Ct. 790, 801, 99 L.Ed. 1129 (Douglas, J., concurring). See Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 898, 81 S.Ct. 1743, 1750, 6 L.Ed.2d 1230. In such a case, due process would accord an opportunity to refute the charge before University officials.[FN12] In the present case, however, there is no suggestion whatever that the respondent's 'good name, reputation, honor, or integrity' is at stake.

FN12. The purpose of such notice and hearing is to provide the person an opportunity to clear his name. 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.

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 ***574** 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 . . ..' Joint Anti-Fascist Refugee Committee v. McGrath, supra, 341 U.S. at 185, 71 S.Ct. at 655 (Jackson, J., concurring). See Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131. The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities 'in a manner . . . that contravene(s) . . . Due Process,' Schware v. Board of Bar Examiners, 353 U.S. 232, 238, 77 S.Ct. 752, 756, 1 L.Ed.2d 796, and, specifically, in a manner that denies the right to a full prior hearing. Willner v. Committee on Character, 373 U.S. 96, 103, 83 S.Ct. 1175, 1180, 10 L.Ed.2d 224. See Cafeteria Workers v. McElroy, supra, 367 U.S. at 898, 81 S.Ct. at 1750. In the present case, however, this principle does not come into play.[FN13]

FN13. The District Court made an assumption 'that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career.' 310 F.Supp., at 979. And

the Court of Appeals based its affirmance of the summary judgment largely on the premise that 'the substantial adverse effect non-retention is likely to have upon the career interests of an individual professor' amounts to a limitation on future employment opportunities sufficient invoke procedural due process guarantees. 446 F.2d, at 809. But even assuming, arguendo, that such a 'substantial adverse effect' under these circumstances would constitute a state-imposed restriction on liberty, the record contains no support for these assumptions. There is no suggestion of how nonretention might affect the respondent's future employment prospects. Mere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.' Cf. Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796.

****2708** [5] To be sure, the respondent has alleged that the nonrenewal of his contract was based on his exercise of his right to freedom of speech. But this allegation is not now before us. The District Court stayed proceedings on this issue, and the respondent has yet to prove that ***575** the decision not to rehire him was, in fact, based on his free speech activities.[FN14]

FN14. See n. 5, supra. The Court of Appeals, nonetheless, argued that opportunity for a hearing and a statement of reasons were required here 'as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights.' 446 F.2d, at 810 (emphasis supplied). While the Court of Appeals recognized the lack of a finding that the respondent's nonretention was based on exercise of the right of free speech, it felt that the respondent's interest in liberty was sufficiently implicated here because the decision not to rehire him was made 'with a background of controversy and unwelcome expressions of opinion.' Ibid.

When a State would directly impinge upon interests in free speech or free press, this Court has on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards. Thus, we have required fair notice and opportunity for an adversary hearing before an injunction is issued against the holding of rallies and public meetings. Carroll v. President and Com'rs of Princess Anne, 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325. Similarly, we have indicated the necessity of procedural safeguards before a State makes a large-scale seizure of a person's allegedly obscene books, magazines, and so forth. A Quantity of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809; Marcus v. Search Warrant, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127. See Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649; Bantam Books v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584. See generally Monaghan, First Amendment 'Due Process', 83 Harv.L.Rev. 518.

In the respondent's case, however, the State has not directly impinged upon interests in free speech or free press in any way comparable to a seizure of books or an injunction against meetings. Whatever may be a teacher's rights of free speech, the interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest.

[6] Hence, on the record before us, all that clearly appears is that the respondent was not rehired for one year at one university. It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another. Cafeteria Workers v. McElroy, supra, 367 U.S. at 895-896, 81 S.Ct. at 1748-1749, 6 L.Ed.2d 1230.

***576** III

[7] The 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.

Thus, the Court has held that a person receiving

welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287.[FN15] ****2709** See Flemming v. Nestor, 363 U.S. 603, 611, 80 S.Ct. 1367, 1373, 4 L.Ed.2d 1435. Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, Slochower v. Board of Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692, and college professors and ***577** staff members dismissed during the terms of their contracts, Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle 'proscribing summary dismissal from public employment without hearing or inquiry required by due process' also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. Connell v. Higginbotham, 403 U.S. 207, 208, 91 S.Ct. 1772, 1773, 29 L.Ed.2d 418.

FN15. Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 46 S.Ct. 215, 70 L.Ed. 494, is a related case. There, the petitioner was a lawyer who had been refused admission to practice before the Board of Tax Appeals. The Board had 'published rules for admission of persons entitled to practice before it, by which attorneys at law admitted to courts of the United States and the states, and the District of Columbia, as well as certified public accountants duly qualified under the law of any state or the District are made eligible. . . . The rules further provide that the Board may in its discretion deny admission to any applicant, or suspend or disbar any person after admission.' Id., at 119, 46 S.Ct., at 216. The Board denied admission to the petitioner under its discretionary power, without a prior hearing and a statement of the reasons for the denial. Although this Court disposed of the case on other grounds, it stated, in an opinion by Mr. Chief Justice Taft, that the existence of the Board's eligibility rules gave the petitioner an interest and claim to practice before the Board to which procedural due process requirements applied. It said that the Board's discretionary power 'must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process.' Id., at 123, 46 S.Ct., at 217.

[8] Certain attributes of 'property' interests protected by procedural due process emerge from these decisions. 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. It is a purpose of the ancient institution of property to protect those 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 vendicate those claims.

[9] 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. Thus, the welfare recipients in Goldberg v. Kelly, supra, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

***578** Just as the welfare recipients' 'property' interest in welfare payments was created and defined by statutory terms, so the respondent's 'property' interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent 'sufficient cause.' Indeed, they made no provision for renewal whatsoever.

****2710** [10] Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to

re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it.[FN16] In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

FN16. To be sure, the respondent does suggest that most teachers hired on a year-to-year basis by Wisconsin State University-Oshkosh are, in fact, rehired. But the District Court has not found that there is anything approaching a 'common law' of re-employment, see Perry v. Sindermann, 408 U.S. 593, at 602, 92 S.Ct. 2694, at 2705, 33 L.Ed.2d 570, so strong as to require University officials to give the respondent a statement of reasons and a hearing on their decision not to rehire him.

IV

Our analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public ***579** colleges and universities.[FN17] For it is a written Constitution that we apply. Our role is confined to interpretation of that Constitution.

FN17. See, e.g., Report of Committee A on Academic Freedom and Tenure, Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments, 56 AAUP Bulletin No. 1, p. 21 (Spring 1970).

We must conclude that the summary judgment for the respondent should not have been granted, since the respondent has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment. The judgment of the Court of Appeals, accordingly, is reversed and the case is remanded for further proceedings consistent with this opinion. It is so ordered. Reversed and remanded.

Mr. Justice POWELL took no part in the decision of this case.

Mr. Justice DOUGLAS, dissenting.

Respondent Roth, like Sindermann in the companion case, had no tenure under Wisconsin law and, unlike Sindermann, he had had only one year of teaching at Wisconsin State University-Oshkosh-where during 1968-1969 he had been Assistant Professor of Political Science and International Studies. Though Roth was rated by the faculty as an excellent teacher, he had publicly criticized the administration for suspending an entire group of 94 black students without determining individual guilt. He also criticized the university's regime as being authoritarian and autocratic. He used his classroom to discuss what was being done about the ***580** black episode; and one day, instead of meeting his class, he went to the meeting of the Board of Regents.

In this case, as in Sindermann, an action was started in Federal District Court under 42 U.S.C. s 1983[FN1] claiming in part that the decision of the school authorities not to rehire was in retaliation for his expression of opinion. The District Court, in partially granting Roth's motion for summary judgment, held that the Fourteenth Amendment required the university to give a hearing ****2711** to teachers whose contracts were not to be renewed and to give reasons for its action. 310 F.Supp. 972, 983. The Court of Appeals affirmed. 446 F.2d 806.

FN1. Section 1983 reads as follows:

'Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.'

Professor Will Herberg, of Drew University, in writing of 'academic freedom' recently said:

'(I)t is sometimes conceived as a basic constitutional right guaranteed and protected under the First Amendment.

'But, of course, this is not the case. Whereas a man's right to speak out on this or that may be guaranteed and protected, he can have no imaginable hu-

man or constitutional right to remain a member of a university faculty. Clearly, the right to academic freedom is an acquired one, yet an acquired right of such value to society that in the minds of many it has verged upon the constitutional.'

Washington Sunday Star, Jan. 23, 1972, B-3, col. 1.

***581** There may not be a constitutional right to continued employment if private schools and colleges are involved. But Prof. Herberg's view is not correct when public schools move against faculty members. For the First Amendment, applicable to the States by reason of the Fourteenth Amendment, protects the individual against state action when it comes to freedom of speech and of press and the related freedoms guaranteed by the First Amendment; and the Fourteenth protects 'liberty' and 'property' as stated by the Court in Sindermann.

No more direct assault on academic freedom can be imagined than for the school authorities to be allowed to discharge a teacher because of his or her philosophical, political, or ideological beliefs. The same may well be true of private schools, if through the device of financing or other umbilical cords they become instrumentalities of the State. Mr. Justice Frankfurther stated the constitutional theory in Sweezy v. New Hampshire, 354 U.S. 234, 261-262, 77 S.Ct. 1203, 1217, 1 L.Ed.2d 1311 (concurring in result):

'Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good-if understanding be an essential need of society-inquires into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered ***582** as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.'

We repeated that warning in Keyishian v. Board of Regents, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629:

'Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.'

When a violation of First Amendment rights is alleged, the reasons for dismissal or for nonrenewal of an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution. A statutory analogy is present under the National Labor Relations Act, 29 U.S.C. s 151 et seq. While discharges of employees for 'cause' are ****2712** permissible (Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 217, 85 S.Ct. 398, 406, 13 L.Ed.2d 233), discharges because of an employee's union activities are banned by s 8(a)(3), 29 U.S.C. s 158(c)(3). So the search is to ascertain whether the stated ground was the real one or only a pretext. See J. P. Stevens & Co. v. NLRB, 380 F.2d 292, 300 (2 Cir.).

In the case of teachers whose contracts are not renewed, tenure is not the critical issue. In the Sweezy case, the teacher, whose First Amendment rights we honored, had no tenure but was only a guest lecturer. In the Keyishian case, one of the petitioners (Keyishian himself) had only a 'one-year-term contract' that was not renewed. 385 U.S., at 592, 87 S.Ct., at 678. In Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231, one of the petitioners was ***583** a teacher whose 'contract for the ensuing school year was not renewed' (id., at 483, 81 S.Ct., at 249) and two others who refused to comply were advised that it made 'impossible their re-employment as teachers for the following school year.' Id., at 484, 81 S.Ct., at 250. The oath required in Keyishian and the affidavit listing memberships required in Shelton were both, in our view, in violation of First Amendment rights. Those cases mean that conditioning renewal of a teacher's contract upon surrender of First Amendment rights is beyond the power of a State.

There is sometimes a conflict between a claim for First Amendment protection and the need for orderly administration of the school ststem, as we noted in Pickering v. Board of Education, 391 U.S. 563, 569, 88 S.Ct. 1731, 1735, 20 L.Ed.2d 811. That is one reason why summary judgments in this class of cases are seldom appropriate. Another reason is that careful factfinding is often necessary to know whether the given reason for nonrenewal of a teacher's contract is the real reason or a feigned one.

It is said that since teaching in a public school is a privilege, the State can grant it or withhold it on conditions. We have, however, rejected that thesis in numerous cases, e.g., Graham v. Richardson, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534. See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv.L.Rev. 1439 (1968). In Hannegan v. Esquire, Inc., 327 U.S. 146, 156, 66 S.Ct. 456, 461, 90 L.Ed. 586, we said that Congress may not by withdrawal of mailing privileges place limitations on freedom of speech which it could not do constitutionally if done directly. We said in American Communications Ass'n v. Douds, 339 U.S. 382, 402, 70 S.Ct. 674, 685, 94 L.Ed. 925, that freedom of speech was abridged when the only restraint on its exercise was withdrawal of the privilege to invoke the facilities of the National Labor Relations Board. In Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216, we held that an applicant could not be denied the opportunity ***584** for public employment because he had exercised his First Amendment rights. And in Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460, we held that a denial of a tax exemption unless one gave up his First Amendment rights was an abridgment of Fourteenth Amendment rights.

As we held in Speiser v. Randall, supra, when a State proposes to deny a privilege to one who it alleges has engaged in unprotected speech, Due Process requires that the State bear the burden of proving that the speech was not protected. '(T)he 'protection of the individual against arbitrary action' . . . (is) the very essence of due process,' Slochower v. Board of Higher Education, 350 U.S. 551, 559, 76 S.Ct. 637, 641, 100 L.Ed. 692, but where the State is allowed to act secretly behind closed doors and without any notice to those who are affected by its actions, there is no check against the possibility of such 'arbitrary action.'

****2713** Moreover, where 'important interests' of the citizen are implicated (Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90) they are not to be denied or taken away without due process. Ibid. Bell v. Burson involved a driver's license. But also included are disqualification for unemployment compensation (Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965), discharge from public employment (Slochower v. Board of Education, supra), denial of tax exemption (Speiser v. Randall, supra), and withdrawal of welfare benefits (Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287). And see Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515. We should now add that nonrenewal of a teacher's contract, whether or not he has tenure, is an entitlement of the same importance and dignity.

Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230, is not opposed. It held that a cook employed in a cafeteria in a military installation was not entitled to a hearing prior ***585** to the withdrawal of her access to the facility. Her employer was prepared to employ her at another of its restaurants, the withdrawal was not likely to injure her reputation, and her employment opportunities elsewhere were not impaired. The Court held that the very limited individual interest in this one job did not outweigh the Government's authority over an important federal military establishment. Nonrenewal of a teacher's contract is tantamount in effect to a dismissal and the consequences may be enormous. Nonrenewal can be a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher, at least in his State.

If this nonrenewal implicated the First Amendment, then Roth was deprived of constitutional rights because his employment was conditioned on a surrender of First Amendment rights; and, apart from the First Amendment, he was denied due process when he received no notice and hearing of the adverse action contemplated against him. Without a statement of the reasons for the discharge and an opportunity to rebut those reasons-both of which were refused by petitioners-there is no means short of a lawsuit to safeguard the right not to be discharged for the exercise of First Amendment guarantees.

The District Court held, 310 F.Supp., at 979-980:

'Substantive constitutional protection for a university professor against non-retention in violation of his First Amendment rights or arbitrary non-retention is useless without procedural safeguards. I hold that minimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed ***586** time and place. At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact.'

It was that procedure that the Court of Appeals approved. 446 F.2d, at 809-810. The Court of Appeals also concluded that though the s 1983 action was pending in court, the court should stay its hand until the academic procedures****2714** had been completed.[FN1a] As stated by the Court of Appeals in Sindermann v. Perry, 430 F.2d 939 (CA5):

> FN1a. Such a procedure would not be contrary to the well-settled rule that s 1983 actions do not require exhaustion of other remedies. See, e.g., Wilwording v. Swenson, 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 419 (1971); Damico v. California, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed.2d 647 (1967); McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). One of the allegations in the complaint was that respondent was denied any effective sate remedy, and the District Court's staying its hand thus furthered rather than thwarted the purposes of s 1983.

'School-constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper determination.' Id., at 944-945.

That is a permissible course for district courts to take, though it does not relieve them of the final determination ***587** whether nonrenewal of the teacher's contract was in retaliation for the exercise of First Amendment rights or a denial of due process.

Accordingly I would affirm the judgment of the Court of Appeals.

Mr. Justice MARSHALL, dissenting.

Respondent was hired as an assistant professor of political science at Wisconsin State University-Oshkosh for the 1968-1969 academic year. During the course of that year he was told that he would not be rehired for the next academic term, but he was never told why. In this case, he asserts that the Due Process Clause of the Fourteenth Amendment to the United States Constitution entitled him to a statement of reasons and a hearing on the University's decision not to rehire him for another year.[FN1] This claim was sustained by the District Court, which granted respondent summary judgment, 310 F.Supp. 972, and by the Court of Appeals which affirmed the judgment of the District Court. 446 F.2d 806. This Court today reverses the judgment of the Court of Appeals and rejects respondent's claim. I dissent.

> FN1. Respondent has also alleged that the true reason for the decision not to rehire him was to punish him for certain statements critical of the University. As the Court points out, this issue is not before us the present time.

While I agree with Part I of the Court's opinion, setting forth the proper framework for consideration of the issue presented, and also with those portions of Parts II and III of the Court's opinion that assert that a public employee is entitled to procedural due process whenever a State stigmatizes him by denying employment, or injures his future employment prospects severely, or whenever the State deprives him of a property***588** interest. I would go further than the Court does in defining the terms 'liberty' and 'property.'

The prior decisions of this Court, discussed at length in the opinion of the Court, establish a principle

that is as obvious as it is compelling-i.e., federal and state governments and governmental agencies are restrained by the Constitution from acting arbitrarily with respect employment opportunities that they either offer or control. Hence, it is now firmly established that whether or not a private employer is free to act capriciously or unreasonably with respect to employment practices, at least absent statutory[FN2] or contractual [FN3] controls, a government employer is different. The government may only act fairly and reasonably.

FN2. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); 42 U.S.C. s 2000e.

FN3. Cf. Note, Procedural 'Due Process' in Union Disciplinary Proceedings, 57 Yale L.J. 1302 (1948).

****2715** This Court has long maintained that 'the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the (Fourteenth) Amendment to secure.' Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915) (Hughes, J.). See also Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). It has also established that the fact that an employee has no contract guaranteeing work for a specific future period does not mean that as the result of action by the government he may be 'discharged at any time, for any reason or for no reason.' Truax v. Raich, supra, 239 U.S., at 38, 36 S.Ct., at 9.

In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment. This is the 'property' right that I believe is protected by the Fourteenth Amendment and that cannot be denied 'without due process of law.' And it is also liberty-***589** liberty to work-which is the 'very essence of the personal freedom and opportunity' secured by the Fourteenth Amendment.

This Court has often had occasion to note that the denial of public employment is a serious blow to any citizen. See, e.g., Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 185, 71 S.Ct. 624, 655, 95 L.Ed. 817 (1951) (Jackson, J., concurring); United States v. Lovett, 328 U.S. 303, 316-317, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252 (1946). Thus, when an application for public employment is denied or the contract of a government employee is not renewed, the government must say why, for it is only when the reasons underlying government action are known that citizens feel secure and protected against arbitrary government action.

Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life. When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action.

Mr. Justice Douglas has written that:

'It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.' Joint Anti-Fascist Refugee Committee v. McGrath, supra, 341 U.S., at 179, 71 S.Ct., at 652 (concurring opinion).

And Mr. Justice Frankfurter has said that '(t)he history of American freedom is, in no small measure, the ***590** history of procedure.' Malinski v. New York, 324 U.S. 401, 414, 65 S.Ct. 781, 787, 89 L.Ed. 1029 (1945) (separate opinion). With respect to occupations controlled by the government, one lower court has said that '(t)he public has the right to expect its officers . . . to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse.' Hornsby v. Allen, 326 F.2d 605, 610 (CA5 1964).

We have often noted that procedural due process means many different things in the numerous contexts in which it applies. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). Prior decisions have held that an applicant for admission to practice as an attorney before the United

States Board of Tax Appeals may not be rejected without a statement of reasons****2716** and a chance for a hearing on disputed issues of fact; [FN4] that a tenured teacher could not be summarily dismissed without notice of the reasons and a hearing; [FN5] that an applicant for admission to a state bar could not be denied the opportunity to practice law without notice of the reasons for the rejection of his application and a hearing; [FN6] and even that a substitute teacher who had been employed only two months could not be dismissed merely because she refused to take a loyalty oath without an inquiry into the specific facts of her case and a hearing on those in dispute.[FN7] I would follow these cases and hold that respondent was denied due process when his contract was not renewed and he was not informed of the reasons and given an opportunity to respond.

FN4. Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 46 S.Ct. 215, 70 L.Ed. 494 (1926).

FN5. Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956).

FN6. Willner v. Committee on Character, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963).

FN7. Connell v. Higginbotham, 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed.2d 418 (1971).

***591** It may be argued that to provide procedural due process to all public employees or prospective employees would place an intolerable burden on the machinery of government. Cf. Goldberg v. Kelly, supra. The short answer to that argument is that it is not burdensome to give reasons when reasons exist. Whenever an application for employment is denied, an employee is discharged, or a decision not to rehire an employee is made, there should be some reason for the decision. It can scarcely be argued that government would be crippled by a requirement that the reason be communicated to the person most directly affected by the government's action.

Where there are numerous applicants for jobs, it is likely that few will choose to demand reasons for not being hired. But, if the demand for reasons is exceptionally great, summary procedures can be devised that would provide fair and adequate information to all persons. As long as the government has a good reason for its actions it need not fear disclosure. It is only where the government acts improperly that procedural due process is truly burdensome. And that is precisely when it is most necessary.

It might also be argued that to require a hearing and a statement of reasons is to require a useless act, because a government bent on denying employment to one or more persons will do so regardless of the procedural hurdles that are placed in its path. Perhaps this is so, but a requirement of procedural regularity at least renders arbitrary action more difficult. Moreover, proper procedures will surely eliminate some of the arbitrariness that results, not from malice, but from innocent error. 'Experience teaches . . . that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits ***592** from occurring.' Silver v. New York Stock Exchange, 373 U.S. 341, 366, 83 S.Ct. 1246, 1262, 10 L.Ed.2d 389 (1963). When the government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful, and correct.

Professor Gellhorn put the argument well:

'In my judgment, there is no basic division of interest between the citizenry on the one hand and officialdom on the other. Both should be interested equally in the quest for procedural safeguards. I echo the late Justice Jackson in saying: 'Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice'-blunders which are ****2717** likely to occur when reasons need not be given and when the reasonableness and indeed legality of judgments need not be subjected to any appraisal other than one's own. . . .' Summary of Colloquy on Administrative Law, 6 J. Soc. Pub. Teachers of Law, 70, 73 (1961).

Accordingly, I dissent.

U.S.Wis. 1972.
Board of Regents of State Colleges v. Roth
408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548, 1 IER Cases 23

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209 Cal.App.3d 568, 257 Cal.Rptr. 427
(Cite as: 209 Cal.App.3d 568)

ROGER BURRELL, Plaintiff and Appellant,
v.
CITY OF LOS ANGELES et al., Defendants and Appellants.
LOS ANGELES CITY EMPLOYEES UNION et al., Plaintiffs and Respondents,
v.
BOARD OF CIVIL SERVICE COMMISSIONERS, Defendants and Appellants

No. B027696.

Court of Appeal, Second District, Division 5, California.
Apr 10, 1989.

SUMMARY

In two unrelated proceedings, the superior court found a section of the Charter of the City of Los Angeles unconstitutional and issued writs of mandate ordering the city's board of civil service commissioners to set aside and reduce disciplinary measures imposed against city employees. In the first action, the aquatic director for the Pacific region of the department of recreation and parks was ordered suspended for two weeks by his department's general manager because of a mishandling of money resulting in the loss of parking revenues. The employee appealed the decision to the board pursuant to § 112 of the city Charter. A hearing examiner recommended the penalty be reduced, but the department manager objected; although the board unanimously agreed that a shorter suspension period was warranted, it felt constrained by the dictates of § 112 and sustained the suspension. The employee then sought writ relief. In the second matter, a rehabilitation construction specialist was terminated by his department on a charge of violating his employment contract by engaging in activities constituting a conflict of interest. The employee appealed this decision to the board but, without awaiting a hearing, immediately sought a writ of mandate in the superior court, seeking reinstatement on the ground the board's hearing procedure was constitutionally defective in light of the judge's decision in the earlier matter. The court took judicial notice of that decision and arrived at the same conclusion, i.e., that § 112 as drafted violated state and federal due process rights insofar as it required the board to obtain the consent of the departmental authority to reduce a disciplinary penalty. (Superior Court of Los Angeles County, No. C603176, Jerry K. Fields and Warren H. Deering, Judges; No. C633835, Kurt J. Lewin, Judge.)

On consolidated appeals, the Court of Appeal reversed, holding that § 112 of the Charter of the City of Los Angeles is constitutional, since it provides for independent review by the board of the sufficiency of evidence supporting charges against the employee and requires reinstatement if the grounds are inadequate, and merely limits the board's power to reduce the penalty where adequate basis for discipline exists. The court also held the section did not violate equal protection in treating ordinary city employees differently from sworn police and fire department employees. (Opinion by Boren, J., with Lucas, P. J., and Kennard, J., [FN*] concurring.)

FN* Assigned by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1) Constitutional Law § 111--Substantive Due Process--Government Employment--Continuation Absent Cause for Termination.

When the government has conferred on a person a legally enforceable right or entitlement to a government benefit, such as an interest in continued employment by the government absent sufficient cause for termination, this right constitutes a property interest protected by due process principles.

[See **Cal.Jur.3d,** Constitutional Law, §§ 236, 238; **Am.Jur.2d,** Constitutional Law, § 580 et seq.]

(2) Constitutional Law § 109--Procedural Due Process--Hearing--Before Deprivation of Property Interest.

Due process generally requires that an individual be given an opportunity for a hearing before being deprived of any significant property interest.

[See **Cal.Jur.3d,** Constitutional Law, § 358 et seq.]

(3) Constitutional Law § 105--Due Process--Operation and Scope--As Dependent on Circumstances.

Due process, the opportunity to be heard at a meaningful time and in a meaningful manner, is a

flexible concept requiring accommodation of the competing interests involved, and its procedural requisites necessarily vary depending on the importance of the interests involved and the nature of the controversy.
[See **Cal.Jur.3d,** Constitutional Law, § 343.]
(4) Constitutional Law § 67--Property and Occupation--Due Process-- Government Entitlement--Diminishment--Minimum Federal Protections.

Although the state (or one of its subdivisions) has the prerogative to create a property interest in an entitlement in the first instance, it does not have the prerogative to diminish the minimum procedural guaranties of the United States Constitution once the property interests it created have attached. In other words, state and local governments cannot mandate which procedures they unilaterally deem adequate to protect an individual's due process rights; the minimum requisite procedures are federally mandated.
[See **Cal.Jur.3d,** Constitutional Law, § 348.]
(5) Constitutional Law § 107--Procedural Due Process--Minimal Guaranties-- Government Employee--Disciplinary Proceedings.

At a minimum, an individual entitled to procedural due process in disciplinary proceedings should be accorded: written notice of the grounds for the disciplinary measures; disclosure of the evidence supporting the disciplinary grounds; the right to present witnesses and to confront adverse witnesses; the right to be represented by counsel; a fair and impartial decisionmaker; and a written statement from the fact finder listing the evidence relied on and the reasons for the determination made.
[See **Cal.Jur.3d,** Constitutional Law, § 349 et seq.]
(6) Constitutional Law § 109--Procedural Due Process--Hearing--Fair Tribunal--Administrative Agencies.

The right to a fair trial by a fair tribunal is a basic requirement of due process applying to administrative agencies that adjudicate, as well as to courts.
[See **Cal.Jur.3d,** Constitutional Law, § 346.]
(7a, 7b, 7c) Constitutional Law § 677--Property and Occupation--Due Process--Government Entitlement--Government Employment--Postdeprivation Administrative Review.

A city charter requirement that the board of civil service commissioners obtain the consent of a disciplined city employee's departmental chief before reducing the level of his punishment on review did not deprive the employee of his property interest in the job in violation of his federal and state constitutional rights to due process. The charter provided for independent review by the board of the sufficiency of evidence supporting charges against the employee, and required reinstatement if the grounds were inadequate, and merely limited the board's power to reduce the penalty where adequate basis for discipline existed. Insofar as trial courts looked to their own beliefs concerning the amount of process due and invalidated the system approved by the local electorate, they misperceived the purpose of the administrative appeal and erred.

(8a, 8b) Constitutional Law § 109--Procedural Due Process--Hearing--Fair Tribunal--Disqualification.

Mere familiarity with the facts of a case gained by an administrative agency in the performance of its statutory role does not disqualify a decisionmaker, nor is he disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, absent a showing he is incapable of judging a particular controversy fairly on the basis of its own circumstances. Bias and inability to judge fairly might be demonstrated if the decisionmaker is shown to have a personal or financial stake in the outcome of the decision, or shows animosity toward a party. These predilections on the part of a decisionmaker must be shown to overcome the presumption of honesty and integrity in policymakers with decisionmaking power.
[Due process clause of Fourteenth Amendment as requiring disqualification of state or local judge from participation in particular litigation-Supreme Court cases, note, 89 **L.Ed.2d** 1066. See also **Am.Jur.2d,** Constitutional Law, §§ 855, 856.]
(9) Constitutional Law § 10--Operation, Effect and Construction-- Construction of Constitutions--Interpretation of State Constitution by State Courts.

The scope of rights secured to the people of California by their Constitution is to be determined by the state courts, informed but untrammeled by the United States Supreme Court's reading of parallel federal provisions.
[See **Cal.Jur.3d,** Constitutional Law, § 10.]
(10a, 10b) Constitutional Law § 89--Equal Protection--Classification-- Reasonableness in Light of Legislative Purpose--Public Employees-- Postdisciplinary Administrative Review Procedures.

A city had a legitimate government purpose for providing a special administrative review procedure (different from that afforded other city employees) in disciplinary matters for regular police officers and members of the fire department. This distinction did not violate the equal protection rights of the city's

other civil service employees, even though sworn police and fire employees disciplined could have their punishment reduced by the review board and other city employees could not. Certain factors make it imperative for a peace officer or fireman to have alleged misconduct in the line of duty reviewed by officers within his department rather than by an outside administrative review panel whose members would be unfamiliar with the dangers inherent in this type of work.

(11) Constitutional Law § 85--Equal Protection--Classification--Judicial Review--Presumptions--Regulations Affecting Protected Property Rights.

The courts must presume that substantive legislation creating classifications restricting or regulating protected property rights is constitutional, and determine only whether the distinctions drawn bear some rational relationship to a conceivable legitimate state purpose. In other words, the classification must be found to rest on some reasonable differentiation fairly related to the object of regulation.

COUNSEL

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

Marr & Marchant, Cecil Marr and Diane Marchant for Plaintiffs, Respondents and Appellant.

BOREN, J.

In this consolidated appeal, we consider the constitutionality of a portion of section 112 of the City Charter of Los Angeles. Section 112 gives a city employee the right to have the disciplinary measures ordered by an official in his or her department reviewed by the board of civil service commissioners (the Board). However, this charter provision limits the ability of the Board to reduce the disciplinary penalty by requiring that any reduction in the penalty recommended by the Board be consented to by the same official who originally imposed the discipline. In both of the cases before us, the trial courts declared unconstitutional the consent requirement of section 112, finding that it amounts to a denial of the due process rights of city employees to a fair and impartial hearing.

Facts

This appeal consolidates two separate trial court actions: Los Angeles City Employees Union v. Board of Civil Service Commissioners (Super. Ct. ***573** L.A. County, No. C603176) (the Godino case) and Burrell v. City of Los Angeles (Super. Ct. L.A. County, No. C633835) (the Burrell case).

a. *The Godino Case*

The City of Los Angeles employed Richard Godino as the aquatic director of the department of recreation and parks' Pacific Region. In 1985, Godino was accused of failing to follow proper departmental procedures for the handling of money, resulting in the loss of some $2,017 in parking revenues. James Hadaway, the department's general manager, ordered a 10-working day disciplinary suspension of Godino. Godino appealed Hadaway's decision to the Board pursuant to section 112 of the city charter.

Godino appeared before a civil service hearing examiner on November 20, 1985, for a hearing in which written evidence was offered and testimony was taken. Based on the evidence, the hearing examiner stated in her report to the Board that the charge of improper money handling was insufficient to warrant a two-week suspension, and recommended that the penalty be reduced to a "Notice to Correct." The department of recreation and parks objected to the hearing examiner's recommendation of a lesser penalty and requested that the Board sustain the charges, as well as the suspension. In its objection, the department introduced new evidence of instances of improper money handling by other employees, and the penalties imposed for those infractions. The hearing examiner had not considered this evidence. The Board then met on February 7, 1986, to decide the Godino appeal. All the commissioners present agreed that the 10-day punishment was too harsh, and unanimously requested that the department consider a shorter suspension period. At a second meeting of the Board held the following month, general manager Hadaway refused to diminish the punishment he had ordered; and the Board - feeling constrained by the dictates of section 112 - reluctantly sustained the penalty which Hadaway wanted.

Godino next sought declaratory judgment and a writ of mandate from the superior court. He requested that the court find section 112 unconstitutional on its face, that it set aside the 10-day suspension and enter a

new decision based upon the Board's determination of an appropriate penalty, and that it restore to him all backpay and other benefits to which he might be entitled following the Board's redetermination of his penalty. The court (Warren Deering, J., presiding) granted the writ on October 14, 1986, but subsequently refused to issue it until a judgment was entered on all causes of action. A summary judgment motion was then pursued, and the court (Kurt Lewin, J., presiding) declared section 112 unconstitutional, reasoning that the power of the top departmental official to override the Board on employee discipline matters amounted to a denial of due process as to all ***574** city employees. The court also ordered that the writ of mandate be issued. Defendants appealed from this judgment. Finally, the matter was returned to Judge Deering, who signed plaintiff's mandamus order on July 2, 1987.

b. *The Burrell Case*

Burrell had been employed by the city for five years as a rehabilitation construction specialist when, in 1986, he was charged with violating his employment contract by engaging in activities which constituted a conflict of interest. The official having the power of appointment in Burrell's department, Douglas Ford, ordered that Burrell's employment with the city be terminated. Burrell appealed this decision to the Board. Unlike Godino, Burrell did not have a hearing before a Board examiner nor did the Board make a determination in the matter. Instead, Burrell immediately sought a writ of mandate in the superior court, alleging that the Board had suspended review of pending disciplinary appeals because its hearing procedure was constitutionally defective in light of the decision in the Godino matter. Burrell asked the court to reinstate his employment until the city adopted adjudicatory procedures which would afford him a full due process hearing on the issue of the charges against him and the penalty ordered by the departmental official. Burrell based his petition on Judge Deering's statement of decision in the Godino case.

In opposition, the city argued that Burrell had not exhausted his administrative remedies because the Board had not yet acted upon his appeal from Ford's decision to discharge him. The city also argued in favor of the constitutionality of section 112. The trial court (Jerry Fields, J., presiding disagreed. After taking judicial notice of Judge Deering's decision in the Godino case, the court arrived at substantially the same conclusion. Namely, it concluded that section 112, as drafted, violated state and federal due process rights. The court also found that the charter provision's requirement that the Board obtain the consent of the departmental authority in order to reduce a disciplinary penalty was severable from the rest of section 112. Accordingly, it ordered the Board to conduct a hearing in the Burrell matter pursuant to section 112 without giving effect to that section's consent language. The court also ordered that the city give Burrell backpay and benefits retroactive to the date of his discharge. [FN1]

FN1 The city represents in its reply brief that Burrell went through the administrative appeal process after the judicial appeal was filed in this case. The Board, following a full hearing, sustained the charges against Burrell and recommended a six-month suspension. The department officials in Burrell's department consented to this recommendation and reduced Burrell's discipline to a six-month suspension.

The city appealed the judgments in favor of respondents in both cases. Burrell cross-appealed, seeking backpay. ***575**

Discussion

1. *Due Process*

The Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 15 of the California Constitution guarantee that no one may be deprived of his property without due process of law. (1) When the government has conferred upon a person a legally enforceable right or entitlement to a government benefit, such as an interest in continued employment by the government absent sufficient cause for termination, this right constitutes a property interest protected by due process principles. (*Perry v. Sindermann* (1972) 408 U.S. 593, 602-603 [33 L.Ed.2d 570, 580-581, 92 S.Ct. 2694]; *Board of Regents* v. *Roth* (1972) 408 U.S. 564, 576-578 [33 L.Ed.2d 548, 560-561, 92 S.Ct. 2701]; *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 206-207 [124 Cal.Rptr. 14, 539 P.2d 774].)

Appellants readily concede that Godino and Burrell possessed property rights in their continued employment by the city because section 112 of the city charter expressly states that permanent employees

may not be suspended or discharged except for written cause. [FN2] Accepting the concession that ***576** the due process clause applies to these employees, the question remains whether the particular procedures mandated by section 112 satisfy the constitutional guaranty of a full and fair disciplinary hearing. Respondents contend that section 112, as presently drafted, unfairly deprives them of their property inasmuch as it fails to afford them all the process which they believe is constitutionally "due."

FN2 Section 112 provides: "(a) Any board or officer having the power of appointment of officers, members and employees in any department of the government of the city shall have the power to remove, discharge or suspend any officer, member or employee of such department; but no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended except for cause, which shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the Board of Civil Service Commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged or suspended, personally, or by leaving a copy thereof at his last known place of residence if he cannot be found. Upon such filing such removal, discharge or suspension shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing, that the grounds stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person so removed, discharged or suspended to be reinstated or restored to duty. *The board with the consent of the appointing authority may also order a reduction in the length of the suspension, or substitution of a suspension for a removal or discharge, if the board finds, in writing that such action is warranted.* The order of said board with respect to such removal, discharge or suspension shall be forthwith certified to the appointing board or officer, and shall be final and conclusive; provided, that the order of any appointing board or officer suspending any person because of lack of funds in such department shall be final, and shall not be subject to review by said Board of Civil Service Commissioners. If the Board of Civil Service Commissioners shall order that any person removed, discharged or suspended under the provisions of this section be reinstated or restored as above provided, the person so removed, discharged or suspended shall be entitled to receive compensation from the city the same as if he had not been removed, discharged or suspended by the appointing board or officer.

"(b) The provisions of this section shall not apply to those members of the Police Department appointed under civil service rules and regulations and sworn in, as provided by law, to perform the duties of regular police officers, nor to those members of the Fire Department appointed under civil service rules and regulations to perform the duties of regular firemen; notwithstanding anything contained in sections 135 and 202 of this charter, all other employees of both departments shall be subject to the provisions of this section.

"(c) The provisions of subsection (a) hereof shall not apply to any suspension of five working days or less in any twelve-month period for personal delinquency. The reasons stated in writing for any such suspension shall be furnished to the suspended employee and promptly filed with the board. Any such suspension which results in an employee having a total suspended time by reason of the exercise of authority under this subsection in excess of five working days in any twelve-month period shall be subject to all of the provisions of subsection (a) hereof." (Italics of contested provision added.)

a. *Analysis of Federal Law*

The Supreme Court has stated that due process is the opportunity to be heard at a meaningful time and in a meaningful manner. (2)**(See fn. 3.)** (*Parratt v. Taylor* (1981) 451 U.S. 527, 540 [68 L.Ed.2d 420, 432, 101 S.Ct. 1908], overruled on other grounds *Daniels* v. *Williams* (1986) 474 U.S. 327, 330-331 [88 L.Ed.2d 662, 667-668, 106 S.Ct. 662].) [FN3] (3) It is a flexible concept requiring accommodation of the competing interests involved, and its procedural requisites necessarily vary depending on the importance of the interests involved and the nature of the controversy. (*Cleveland Board of Education v. Loudermill, supra*, 470 U.S. 532, 542-543 [84 L.Ed.2d at p. 504]; *Mathews v. Eldridge* (1976) 424 U.S. 319, 335 [47 L.Ed.2d 18, 33-34, 96 S.Ct. 893]; *Board of Regents* v. *Roth, supra*, 408 U.S. at p. 570, fn. 8 [33 L.Ed.2d at p. 557].) (4) Although the state (or one of its subdivisions) has the prerogative to create a property interest in an entitlement in the first instance, it does not have the prerogative to diminish the minimum procedural guarantees of the Constitution once the property interests it created have attached. In other words state and local governments cannot mandate which procedures they unilaterally deem ***577** adequate to protect an individual's due process rights; the minimum requisite procedures are *federally* mandated. (*Cleveland Board of Education v. Loudermill, supra*, 470 U.S. at p. 541 [84 L.Ed.2d at p. 503].)

FN3 Respondents have not questioned the timing of the hearings held in their cases. Due process generally requires that an individual be given an opportunity for a hearing *before* being deprived of any significant property interest. (*Cleveland Board of Education v. Loudermill* (1985) 470 U.S. 532, 542-544 [84 L.Ed.2d 494, 503-505, 105 S.Ct. 1487]; *Dwyer* v. *Regan* (2d Cir. 1985) 777 F.2d 825, 831-834, as mod. 793 F.2d 457.)

(5) At a minimum, an individual entitled to procedural due process should be accorded: written notice of the grounds for the disciplinary measures; disclosure of the evidence supporting the disciplinary grounds; the right to present witnesses and to confront adverse witnesses; the right to be represented by counsel; a fair and impartial decisionmaker; and a written statement from the fact finder listing the evidence relied upon and the reasons for the determination made. (*Goldberg v. Kelly* (1970) 397 U.S. 254, 267-270 [25 L.Ed.2d 287, 298-300, 90 S.Ct. 1011]; *Morrissey* v. *Brewer* (1972) 408 U.S. 471, 489 [33 L.Ed.2d 484, 499, 92 S.Ct. 2593]; *Withrow* v. *Larkin* (1975) 421 U.S. 35, 46-47 [43 L.Ed.2d 712, 723, 95 S.Ct. 1456]. See *Serafin* v. *City of Lexington, Neb.* (D.Neb. 1982) 547 F.Supp. 1118, 1125 for detailed discussion of the elements of due process.) Of these elements of due process, respondents have singled out only one - the right to a fair and impartial decisionmaker - as being violated by section 112.

(6) The right to a fair trial by a fair tribunal is a basic requirement of due process applying to administrative agencies which adjudicate, as well as to courts. (*Withrow v. Larkin, supra*, 421 U.S. 35, 46 [43 L.Ed.2d 712, 723].) (7a) Respondents contend that their right to a fair tribunal - and the right of all permanent city employees - is violated by the provision in section 112 which prevents the Board from reducing the discipline imposed by the disciplined employee's department manager unless the manager's consent is obtained first. Respondents and the trial courts find this procedure constitutionally objectionable because it, in essence, permits the same official who instituted and investigated the disciplinary proceedings, and recommended a particular penalty, to have the final say on the severity of the penalty which is ultimately imposed.

The trial judges and respondents in this case have relied on language contained in the Supreme Court's opinion in *In re Murchison* (1955) 349 U.S. 133, 136 [99 L.Ed. 942, 946, 75 S.Ct. 623], stating that our legal system endeavors to prevent even the probability of unfairness. The courts in the instant cases found that there was a high probability of unfairness in section 112's consent requirement. In the *Murchison* case, a state judge was empowered by state law to compel witnesses to testify before him in secret about possible crimes. The judge in question charged two such witnesses with criminal contempt, then tried and convicted them himself. Unsurprisingly, the Supreme Court found a high probability of unfairness and a due process violation in this procedure because it allowed the judge to act as prosecutor and assume an adversary position, and also because the judge's impartiality ***578** would be tainted by personal knowledge obtained in the earlier, clandestine proceedings. (*Id.* at p. 138 [99 L.Ed. at p. 947].)

The Supreme Court has, however, distinguished the due process required in an administrative hearing from that required in a judicial proceeding. The court has written, "Plainly enough, *Murchison* has not been understood to stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications." (*Withrow v. Larkin, supra*, 421 U.S. at p. 53 [43 L.Ed.2d at p. 727].) The court observed that it is "very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate ... due process of law. We should also remember that it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around." (*d*. at pp. 56-57 [43 L.Ed.2d at p. 729].) The court was not troubled that the same administrative body which investigated Larkin also issued formal findings against him, because "[t]he risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position." (*Id*. at p. 57 [43 L.Ed.2d at p. 729].) The court did not, however, decide the constitutionality of allowing a decisionmaker to review and evaluate his own prior decisions. (*Id*. at p. 58, fn. 25 [43 L.Ed.2d at p. 730].)

The next Supreme Court case to address the impartiality of an administrative decisionmaker was *Hortonville Dist*. v. *Hortonville Ed. Assn*. (1976) 426 U.S. 482 [49 L.Ed.2d 1, 96 S.Ct. 2308]. In the *Hortonville* case, a number of striking public school teachers were fired by the same administrative body - the local school board - which had been involved in the negotiations preceding and precipitating the strike. The Supreme Court held that this pretermination involvement by the board, without more, did not infect its ability to serve as an impartial decisionmaker in terminating the teachers. (8a) Said the court, "[m]ere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not ... disqualify a decisionmaker. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *FTC* v. *Cement Institute*, 333 U.S. 683, 700-703 (1948). Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.' *United States v. Morgan*, 313 U.S. 409, 421 (1941)." (***579**426 U.S. at p. 493 [49 L.Ed.2d at p. 9].) The court suggested that bias and inability to judge fairly might be demonstrated if the decisionmaker is shown to have a personal or financial stake in the outcome of the decision, or shows animosity toward the employee. (*Id*. at pp. 492, 497 [49 L.Ed.2d at pp. 9, 11-12].) These predilections on the part of a decisionmaker must be shown to overcome the presumption of honesty and integrity in policymakers with decisionmaking power. (*Ibid*.)

An objectionable personal and financial stake in the outcome of a case was demonstrated in *Aetna Life Insurance Co. v. Lavoie* (1986) 475 U.S. 813 [89 L.Ed.2d 823, 106 S.Ct. 1580], in which a justice of the Alabama Supreme Court failed to recuse himself from an appeal brought by an insurer at a time when the justice himself was suing another insurer on similar grounds. He cast the deciding vote in the appeal and authored an opinion which soon resulted in his receipt of a "tidy sum" in his own lawsuit. The Supreme Court concluded that this conduct amounted to a violation of appellant's constitutional rights because the judge in question was not impartial.

Applying these Supreme Court decisions to facts more analogous to the ones before us in this appeal, the lower and intermediate federal courts have concluded 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.

The case of *Brasslett v. Cota* (1st Cir. 1985) 761 F.2d 827 illustrates this conclusion. Brasslett, a municipal fire chief, was discharged by Cota, the town manager, after Cota investigated Brasslett's conduct. Under established grievance procedures, disciplined employees had the right to seek review of the action by a personnel appeals board. After hearing the appeal, the board recommended that Brasslett be reinstated and that Cota consider more lenient disciplinary alternatives. Cota's decision not to follow the recommendation was discretionary and final under the grievance rules. Brasslett contended that "because the

recommendation of the Appeals Board was merely advisory, the evidentiary hearing on which it was based is a nullity. Consequently he argues that the fact that the ultimate decision rests with the Manager who made the initial personnel decision, renders the hearing procedurally deficient for lack of an impartial decisionmaker." (761 F.2d at pp. 836-837.) The circuit court of appeals rejected the contention, reasoning that the rendering of an advisory opinion to an ultimate decisionmaker does not make the entire hearing process nugatory. The critical question, the court found, was whether Cota, the ultimate decisionmaker, was impartial. Absent a showing of bias by Cota - either personal animosity ***580** or financial interest in the outcome of the decision - Brasslett could not complain that his due process rights were violated. (*Id.* at p. 837.)

A similar conclusion was reached in *Nevels v. Hanlon* (8th Cir. 1981) 656 F.2d 372, in which a state employee was terminated by a deputy commissioner of his department for a number of different reasons. Nevels appealed this decision to a personnel appeal board, which found that some of the alleged misconduct was true, but nonetheless believed that dismissal was not warranted. The commissioner rejected the appeal board's recommendation and finalized Nevels's dismissal. Nevels argued that his due process rights were violated because the commissioner was "predisposed to uphold his original decision and is, therefore, not an impartial decisionmaker." (656 F.2d at p. 376.) The court of appeals disagreed, finding no due process violation.

Echoing this conclusion, which is derived from the Supreme Court's statements in *Withrow*, other federal courts have reiterated the presumption that government officials can and will decide particular controversies conscientiously and fairly despite earlier involvement in them. These decisions include *Boston v. Webb* (4th Cir. 1986) 783 F.2d 1163, 1166 (court approves procedure permitting administrator who instituted the investigation of a city policeman to make the ultimate disciplinary decision in the matter); *DeSarno v. Department of Commerce* (Fed. Cir. 1985) 761 F.2d 657, 660 (supervisor who proposes termination of an employee is permitted to conduct full, impartial review of the matter and to make the final decision so long as the employee receives notice of the charges, an explanation of the employer's evidence and an opportunity to present his side of the story); *Frumkin* v. *Board of Trustees, Kent State* (6th Cir. 1980) 626 F.2d 19, 21-22 (no due process violation in having a university president, who had decided to dismiss a tenured professor, override the recommendation of a hearing committee not to terminate the professor's employment); and *Beard v. General Services Admin.* (Fed. Cir. 1986) 801 F.2d 1318, 1323 (there is no constitutional requirement that an administrative panel reviewing agency disciplinary actions must independently select a penalty it feels is appropriate for the misconduct charged).

(7b) The cited federal decisions support the distinction between the due process required in a judicial proceeding and that required in an administrative hearing. This is a distinction which applies in the instant case. The proceeding involved here is an administrative and not a judicial proceeding, and the relevant federal decisions we have cited do not support respondents' contention that a panel reviewing a departmental disciplinary decision must be able to override the department's selection of what it believes is an appropriate penalty. ***581**

What *is* owing to the disciplined employee is the right to have the reviewing body determine whether there is sufficient evidence to uphold the charges of misconduct. Section 112 provides for this type of review. Section 112 also permits the board reviewing the matter to render what amounts to an advisory opinion regarding imposition of a penalty, once it has determined that there is sufficient evidence to support the grounds for taking disciplinary action. That the reviewing body cannot force its notion of what is an appropriate penalty on the agency does not, without more, offend the federal Constitution. The Constitution is offended, according to the Supreme Court, by an ultimate decisionmaker who exhibits personal animosity toward the employee or who is financially interested in the outcome of the proceedings. In this appeal, there is no evidence, nor even argument, suggesting that the decisionmaker who ultimately decided the appropriate penalty was in any way biased or improperly interested. Respondents are thus left to argue that the agency officials involved in the decisionmaking process *might* be wedded to their original conclusions, or that the entire process *appears to be* unfair. These speculations are not sufficient to overcome the presumption that public officials will act fairly and conscientiously in discharging their duties.

Our analysis of the relevant federal authorities leads us to conclude that the requirement contained in section 112 of the Los Angeles City Charter that the Board obtain the consent of a disciplined employee's departmental chief before reducing the level of the employee's punishment does not violate the minimum due process guaranties of the federal Constitution.

b. *Analysis of State Law*

Though the wording of the California Constitution parallels in part that contained in the federal Constitution, the rights guaranteed by the state's Constitution are not dependent on those guaranteed by the United States Constitution (Cal. Const., art. I, § 24). (9) The scope of rights secured to the people of California by their Constitution are to be determined by the state courts, "informed but untrammelled by the United States Supreme Court's reading of parallel federal provisions." (*Reynolds v. Superior Court* (1974) 12 Cal.3d 834, 842 [117 Cal.Rptr. 437, 528 P.2d 45].)

Our Supreme Court has said that procedural due process in an administrative setting requires notice of the proposed action; the reasons therefor; a copy of the charges and materials on which the action is based; and the right to respond to the authority initially imposing the discipline "before a reasonably impartial, noninvolved reviewer." (*Williams* v. *County of Los Angeles* (1978) 22 Cal.3d 731, 736-737 [150 Cal.Rptr. 475, 586 P.2d 956].) The court has found that allowing a single decisionmaker to undertake both ***582** the investigative and the adjudicative functions in an administrative proceeding does not, by itself, constitute a denial of due process. (*Griggs v. Board of Trustees* (1964) 61 Cal.2d 93, 98 [37 Cal.Rptr. 194, 389 P.2d 722].)

Rather, as in the federal courts, our Supreme Court requires a party seeking to show bias or prejudice on the part of an administrative decisionmaker to prove the same with concrete facts: "'Bias and prejudice are never implied and must be established by clear averments.' [Citation.] Indeed, a party's unilateral perception of an appearance of bias cannot be a ground for disqualification unless we are ready to tolerate a system in which disgruntled or dilatory litigants can wreak havoc with the orderly administration of dispute-resolving tribunals." (*Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 792 [171 Cal.Rptr. 590, 623 P.2d 151]; accord *Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 910-911 [245 Cal.Rptr. 304]; *American Isuzu Motors, Inc. v. New Motor Vehicle Bd.* (1986) 186 Cal.App.3d 464, 472-473 [230 Cal.Rptr. 769].) The court added, "[O]ur courts have never required the disqualification of a judge unless the moving party has been able to demonstrate concretely the actual existence of bias. We cannot now exchange this established principle for one as vague, unmanageable and laden with potential mischief as an 'appearance of bias' standard, despite our deep concern for the objective and impartial discharge of all judicial duties in this state. [¶] The foregoing considerations, of course, are equally applicable to the disqualification of a judicial officer in the administrative system. Indeed, the appearance of bias standard may be particularly untenable in certain administrative settings." (*Andrews v. Agricultural Labor Relations Bd., supra*, 28 Cal.3d at pp. 793-794.) In a footnote, the court observed that there were some situations in which a decisionmaker should be disqualified because of the "probability" of bias, such as when he has a personal or financial interest in the outcome, or is either familially or professionally related to the litigant. (*Id*. at p. 793, fn. 5.)

(8b) Thus, it appears that the highest court of this state construes the state Constitution's due process guaranty of a fair and impartial administrative decisionmaker in the same manner as the federal courts have interpreted parallel provisions in the federal Constitution. In other words, mere involvement in ongoing disciplinary proceedings does not, per se, violate due process principles. Those principles are violated, conversely, if the official or officials who take part in the proceedings are demonstrably biased or if, in the least, circumstances such as personal or financial interest strongly suggest a lack of impartiality. Our Supreme Court has emphatically rejected the notion that a subjective "appearance of bias" is enough to taint an entire legislatively created system of handling disciplinary matters.

The California intermediate appellate decisions relied upon by respondents are distinguishable. In ***583***Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648 [163 Cal.Rptr. 831], the court found a lack of procedural fairness where nearly one-half of the members of the panel reviewing a decision to suspend a physician's staff privileges were also members of the committee which had made the original suspension decision. That is not the case here:

there is nothing in the record suggesting that there is an overlap between the departmental officials responsible for Godino's and Burrell's punishment and the members of the Board which reviews the sufficiency of the grounds for the discipline imposed by the departmental officials. In *American Motors Sales Corp. v. New Motor Vehicle Bd.* (1977) 69 Cal.App.3d 983 [138 Cal.Rptr. 594], the court arrived at the "unavoidable" conclusion that "dealer-members of the Board have an economic stake in every franchise termination case that comes before them." (*Id.* at p. 987.) The court reached the same conclusion in *Nissan Motor Corp. v. New Motor Vehicle Bd.* (1984) 153 Cal.App.3d 109 [202 Cal.Rptr. 1]. Respondents have offered no such evidence of a financial interest by either the departmental officials or the Board in the outcomes of the disciplinary proceedings at issue here.

A number of the cases relied upon by the trial courts are likewise inapposite. In *International Brotherhood of Electrical Workers* v. *City of Gridley* (1983) 34 Cal.3d 191 [193 Cal.Rptr. 518, 666 P.2d 960], the disciplined city employees were dismissed "summarily without any predismissal procedures." (*Id.* at p. 196.) The Supreme Court found that this was improper, because the terminated employees had a property interest in their continued employment, which required, in the least, some sort of hearing to determine the nature and extent of the appropriate disciplinary action. (*Id.* at p. 208.) Here, by contrast, neither Godino nor Burrell was "summarily" dismissed or suspended. Indeed, the transcript from the Godino matter indicates that Godino was given a hearing and an opportunity to refute the charges before a "*Skelly* hearing committee" within his department. [FN4] It was that committee's decision which led to his appeal to the Board.

> FN4 Referring to *Skelly v. State Personnel Bd., supra*, 15 Cal.3d 194, giving permanent public employees the right to a pretermination hearing.

The case of *Mennig v. City Council* (1978) 86 Cal.App.3d 341 [150 Cal.Rptr. 207] contains facts somewhat similar to our own, but is distinguishable on several grounds. In *Mennig*, a city procedural rule permitted disciplined employees to appeal their punishment to a municipal civil service commission. The commission could make recommendations which could be overruled by a unanimous vote of the city council. A local police chief, Mennig, became embroiled in a political dispute with the city council, which then voted to dismiss him. Mennig appealed to the municipal civil service commission, which found that none of the charges against him were ***584** supported by substantial evidence and recommended that he be reinstated. The city council disapproved of the commission's findings and refused to reinstate Mennig, prompting him to seek a writ of mandate. In the Court of Appeal, Division One of this District acknowledged that an administrator's prior knowledge of the facts bearing upon his decision, or even his prehearing expression of opinion on the result does not, of itself, disqualify him from acting on a matter. (86 Cal.App.3d at p. 350.) Citing *Withrow v. Larkin, supra*, 421 U.S. 35, the court found that, on the other hand, the administrative decisionmaker in the case before it - the city council - should be disqualified because its members were "personally embroiled in the controversy with Mennig" and "if not fighting for their collective political lives, were nevertheless impelled to seek vindication. They in fact did so in their resolution increasing the penalty against Mennig by recording as true facts to which they had testified [those] which the commission had found to be unsubstantiated." (86 Cal.App.3d at p. 351.)

There are thus at least two distinguishing factors in *Mennig*: first, the administrative appellate panel found that the charges against Mennig were unsubstantiated, and second, the ultimate decisionmaker was obviously biased with personal animosity toward the disciplined employee. Neither of those factors is present in our case. We note that the court in *Mennig* was not troubled by the city's system per se, even though that system permitted the city council which had originally dismissed the employee to make the ultimate decision overruling the civil service commission's findings and recommendations. What troubled the court was the ultimate decisionmaker's demonstrable bias, which is constitutionally unacceptable.

(7c) The trial courts in this consolidated appeal, though undoubtedly well-intentioned, should not have invalidated a system approved by the electorate merely because they believe city employees should be given more procedural process than they are constitutionally due. The record reflects that the trial judges here misperceived the purpose of the administrative appeal. The purpose of the administrative appeal is to

ensure that an employee has not been disciplined by his department supervisors for trivial or invidious reasons. The Board accomplishes this task by independently reviewing the sufficiency of the evidence supporting the charges against the employee. If it finds an inadequate basis for the charges, and that the employee is fit to fill his position, the Board is *required* by section 112 to reinstate the disciplined employee. The only limitation on the Board's powers occurs after it has already determined that the charges against the employee are substantiated. At that point, the local electorate has decided that the department itself may be better equipped than the Board to determine an appropriate penalty, presumably consistent with the penalties it has imposed in the past for similar misconduct in countless other cases. (See ***585** *Beard v. General Services Admin., supra*, 801 F.2d 1318, 1321-1322.) This procedure should not be invalidated because there could possibly be some undocumented and unproved bias in the ultimate decisionmaker. The Supreme Courts of the United States and this state require more than this as a reason for declaring charter provisions unconstitutional on due process grounds.

2. *Equal Protection*

(10a) Respondents contend that the city provides what they consider to be "more protection" to sworn firemen and police officers because charter sections 135 and 202 (unlike section 112, subdivision (a)) prevent police and fire department managers from imposing a greater disciplinary penalty than that recommended by the board of rights to which disciplinary decisions are appealed. [FN5] This leads respondents to conclude that the treatment given to policemen and firemen, because it differs from the treatment afforded to all other civil service employees, amounts to a denial of equal protection. Judge Deering rejected this contention, and so do we.

FN5 Much like section 112, section 135 provides that officers and employees of the fire department may only be disciplined "for good and sufficient cause" after a full hearing before a board of rights. The board of rights is comprised of three high ranking fire department chiefs, none of whom are permitted to sit if they were material witnesses to the misconduct charged. Section 202 is virtually identical to section 135, except that it applies to the police department. Section 112, subdivision (b) states that the procedures prescribed by section 112, subdivision (a), which we have discussed at length above, apply to all police and fire department employees except those who are sworn to perform the duties of regular police officers and firemen.

Respondents erroneously announce that the city's differing treatment of policemen and firemen is subject to strict scrutiny and can only be justified by a compelling government interest because a "fundamental right to due process" is implicated. Our Supreme Court has considered and rejected a similar contention, observing that it "appears to rest upon an assumption that whenever a 'property' or 'liberty' interest is accorded the protections of procedural due process, that interest becomes a 'fundamental constitutional right' so that legislative measures regulating such an interest are necessarily subject to strict scrutiny. This assumption is totally unfounded. (11) Recent decisions have established that the whole panoply of ordinary property rights are generally protected from summary termination or deprivation by procedural due process [citations] but no case has even remotely suggested that the constitutionality of substantive legislative measures regulating or restricting such 'protected property' rights are to judged under a 'strict scrutiny standard.'" (*Hernandez v. Department of Motor Vehicles* (1981) 30 Cal.3d 70, 81 [177 Cal.Rptr. 566, 634 P.2d 917].) Rather, we must presume that the legislation creating the classification is constitutional, ***586** and determine only whether the distinctions drawn bear some rational relationship to a conceivable legitimate state purpose. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 16 [112 Cal.Rptr. 786, 520 P.2d 10].) In other words, the classification must be found to rest upon "some reasonable differentiation fairly related to the object of regulation." (*Hays v. Wood* (1979) 25 Cal.3d 772, 787 [160 Cal.Rptr. 102, 603 P.2d 19].) [FN6]

FN6 The case relied upon by respondents, *Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937 [227 Cal.Rptr. 90, 719 P.2d 660], is inapposite. There, the court applied a strict scrutiny analysis because a public employee's fundamental right to privacy was impinged by the defendant's polygraph test requirement. No privacy right is implicated by the legislative classification in this appeal.

(10b) Although the city has not deigned to provide us with one, we can nonetheless conceive of a legitimate government purpose for the distinction between firemen and policemen and other municipal civil service employees. Unlike most other Los Angeles civil service employees, policemen and firemen are responsible for ensuring the physical safety of the city's citizenry. This responsibility not only embodies a far higher level of public trust, but also requires these officers to make split-second life-and-death decisions in the course and scope of their employment. Thus, they are obliged to function more independently than, for example, an employee of the department of parks and recreation or municipal construction worker, with far less direct supervision. These factors make it imperative for a peace officer or fireman to have alleged misconduct in the line of duty reviewed by officers within his department rather than by an outside administrative review panel whose members would be unfamiliar with the dangers inherent in this type of work.

It is equally reasonable to have this internal review panel set a limit on the penalty which may be imposed by the officer's supervisor (without first obtaining the supervisor's consent): we can conceive of a situation in which a supervisor determines that a fireman should be terminated for refusing to enter a burning building, a determination which is repudiated by members of a reviewing panel who have faced similar circumstances and who believe that the fireman's conduct did not merit such a harsh penalty. The difference between this scenario and that faced by Godino, for example, is that Godino was not confronted with the prospect of losing his life when he decided not to follow departmental money handling procedures. The determination of whether a policeman or fireman acted properly is, in other words, a far more subjective determination than most; therefore it is reasonable and rational that the uppermost penalties for these individuals should be decided by the reviewing panel. ***587**

In sum, we find that there is a legitimate government purpose for providing a separate administrative review procedure for regular police officers and members of the fire department, and that this distinction does not violate the equal protection rights of other civil service employees.

Disposition

The judgments of the trial courts in these cases declaring Los Angeles City Charter section 112 unconstitutional are reversed. Burrell's "cross-appeal" seeking backpay during the pendency of this appeal is not properly before this court as it concerns a matter not decided by the trial court. Each party to bear its own costs on appeal.

Lucas, P. J., and Kennard, J., [FN*] concurred.

FN* Assigned by the Chairperson of the Judicial Council.

Appellant's petition for review by the Supreme Court was denied July 20, 1989. Kennard, J., did not participate therein. Mosk, J., was of the opinion that the petition should be granted. ***588**

Cal.App.2.Dist.
Burrell v. City of Los Angeles
209 Cal.App.3d 568, 257 Cal.Rptr. 427

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717 F.Supp. 1314, 58 USLW 2147, 4 IER Cases 970
(Cite as: 717 F.Supp. 1314)

C

United States District Court, N.D. Illinois, Eastern Division.
CHICAGO FIRE FIGHTERS UNION, LOCAL 2, Claude Norwood, John Fitzgerald, Julius Stanley, James Butler, Eli Richardson, Raymond Chambers, Hassan Abdurrahman, Cedric Young, John Abramski, Todd Anderson, and Joe Elmore, Plaintiffs,
v.
CITY OF CHICAGO, Louis T. Galante, Richard Fitzpatrick, Jack Sterling, Frank Szwedo, and John Does, I through X, Being Sued Individually and in Their Official Capacities, Defendants.

No. 87 C 0865.
July 13, 1989.

Fire fighters brought action against city and fire department officials challenging order authorizing warrantless searches of lockers assigned to them. On defendants' motion for partial summary judgment, the District Court, Norgle, J., held that fire fighters did not have reasonable expectation of privacy in storage lockers assigned to them, making unannounced searches of those lockers permissible under Fourth Amendment.

Motion granted.

West Headnotes

[1] Searches and Seizures 349 26

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k26 k. Expectation of Privacy. Most Cited Cases

Fire fighters did not have reasonable expectation of privacy in storage lockers assigned to them, making unannounced searches of those lockers permissible under Fourth Amendment; working conditions at firehouses were strictly regulated and controlled by fire department, and order authorizing such searches was issued and distributed throughout fire department. U.S.C.A. Const.Amend. 4.

[2] Searches and Seizures 349 26

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k26 k. Expectation of Privacy. Most Cited Cases

For purposes of determining whether fire fighters had reasonable expectation of privacy in storage lockers assigned to them, fire fighters were charged with constructive knowledge of rules and orders promulgated and disseminated by city fire commissioner, including order authorizing unannounced searches of such lockers, even if they were subjectively unaware of the order. U.S.C.A. Const.Amend. 4.

[3] Searches and Seizures 349 26

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k26 k. Expectation of Privacy. Most Cited Cases

Fire department's interest in assuring that its employees remain sober and drug free while on the job outweighed any privacy expectations that fire fighters had in storage lockers assigned to them, making unannounced searches of those lockers reasonable under Fourth Amendment. U.S.C.A. Const.Amend. 4.

***1315** Stephen B. Horwitz, Robert S. Sugarman, Jacobs, Burns, Sugarman & Orlove, Chicago, Ill., for plaintiffs.

Jonathan P. Siner, Judson H. Miner, Corp. Counsel, Darka Papushkewych, Charles E. Ex, Sarah Vanderwicken, Chicago, Ill., for defendants.

ORDER

NORGLE, District Judge.

Before the court is the defendants' motion for

partial summary judgment on Count II of the plaintiff's complaint, pursuant to Fed.R.Civ.P. 56. For the reasons set forth below, the motion is granted.

FACTS

The plaintiffs in this case are eleven fire fighters and the union to which they belong. They are suing the City of Chicago, as well as various officers and officials of the Chicago Fire Department (CFD), for violation of their Fourth and Fourteenth Amendment rights.

The suit concerns General Order 85-007, dated November 7, 1985. This order, promulgated by the CFD, read aloud at roll calls and posted on station house bulletin boards, allows for unannounced, warrantless searches of lockers assigned to and routinely used by fire fighters. The order was promulgated in response to CFD concerns that fire fighters had engaged in alcohol and drug use while on duty. The CFD prohibits the possession, sale or use of alcohol on fire department premises. In spite of this prohibition, inspections of lockers in one CFD station uncovered a cooler of beer. As well, CFD officials and Fire Fighter's Union officials have stated that there is a definite problem with alcohol and drug abuse among fire fighters.

The CFD drafted and announced General Order 85-007 pursuant to a previous district court order which required them to delineate the rights of fire fighters during administrative searches. The order was submitted to the Firefighters Union for discussion and suggestions. The Union suggested several changes, filed a grievance concerning that 1985 order but took no further action prior to filing this lawsuit in 1987. The order states in pertinent part;

A. Access to assigned lockers shall be limited to the individual member, subject to the following.

1. Semi-annual locker inspection;

2. Inspection, in the presence of member, at any time by a company officer or above, to determine whether contents are in violation of rules or regulations;

3. Inspection, in the presence of member, by Company Officer or above, pursuant routine inspection of quarters;

4. Access by a properly identified sworn member of any law enforcement agency, pursuant warrant or upon command of said law enforcement officer;

5. Company Officer, upon the death of member, to secure member's personal belongings for the benefit of deceased member's family. Such access shall be in the presence of other officers and/or witnesses, and an inventory of recovered property recorded and witnessed.

On December 16, 1986, CFD officials conducted a locker search at the firehouse located at 3421 South Calumet in Chicago. The plaintiffs were among those whose lockers had been searched. After the search, the plaintiffs filed this suit to have General Order 85-007 and searches conducted under it declared unconstitutional.

***1316** Both parties have complied with Local Rule 12. The court adopts the defendant's relevant facts as set out below:

1. On-duty firefighters have used alcohol and illegal drugs. (Brennan Aff., par. 6 and Tully Aff., par. 8);

2. Alcohol has been occasionally stored in firehouse lockers. (Brennan Aff., par. 5 and Tully Aff., par. 7);

3. All lockers located in CFD firehouses are the property of the CFD. (Wilkinson Aff., par. 18);

4. Since 1985, the CFD's Employee Assistance Program received 264 new cases related to drug and alcohol abuse. (Tully Aff., par 5);

5. The head of the CFD Employee Assistance Program, Captain Paul Brennan, estimates that at least 10% of all firefighters suffer from substance or alcohol abuse problems. (Brennan Aff., par. 4);

6. The President of Firefighters Local 2, Martin Holland, admits that the Union recognizes that there are some real problems among firefighters in dealing with alcohol and drugs. (*See,* Holland Dep. at 32-33);

7. A Steward of Firefighters Local 2, and a member of the Union's Rules and Regulations Committee, Charles O'Donnell, states that there definitely is an alcohol and drug abuse problem in the CFD. (*See*, O'Donnell Dep. at 12);

8. Before issuing the locker inspection order, CFD officials submitted a draft for discussion to Local 2's Rules and Regulations Committee which existed pursuant to the firefighters' collective bargaining contract. (Exhibits K & L and Wilkinson Aff., at par. 5, 6);

9. Local 2's Committee reviewed the draft locker order, met with CFD representatives and made several recommendations for changes. (Exhibit M and Wilkinson Aff., at par. 7);

10. The CFD advised the Union well before the locker order was finally issued, as to its contents and rationale. (Wilkinson Aff., at par. 8);

11. In April 1980, an inspection of lockers in the fire station housing Engine Number 26, at 10 North Leavitt Street, Chicago, uncovered beer and a cooler. (*See*, O'Donnell Stipulation, par. 3 and Wilkinson Aff., par. 2);

12. After several employees assigned to that firehouse sued the City and officials involved in the inspection (*O'Donnell v. Ryan,* 81 L 0084,) Judge William Hart entered an order, requiring, *inter alia*, the Fire Commissioner to issue orders that would "delineate the rights of Chicago Fire Department members during administrative investigations.... and ... the rights of members of the CFD in the use of lockers owned by the Chicago Fire Department." (Judgment Order, par A);

13. On November 7, 1985, General Order 85-007, regarding Locker Privileges was issued by the CFD and distributed throughout the department. (Complaint, par. 33, Wilkinson Aff., par. 10)

14. General Order 85-007 was distributed on November 7, 1985 to each fire company in each fire house. (Wilkinson Aff., par. 11);

15. When an order is received by a fire company, General Order 84-007 requires that any Order received be read and explained by the Company Officer at a roll call to every company member reporting for duty. (Wilkinson Aff., par 12);

16. A Steward of Firefighters Local 2, and member of the Union Rules and Regulations Committee, Lt. Charles O'Donnell, states that he read and summarized General Order 85-007 at roll call and posted it on the bulletin board of his fire house and in the binder for records or for orders. (*See*, O'Donnell Dep. at 29-30);

17. Under the Municipal Code [of the City of Chicago], the Fire Commissioner is responsible for the "management and control of all matters and things pertaining to the fire department and of all of the persons employed therein." (Municipal Code of Chicago, Ch. 12, sec. 12-4, Wilkinson Aff., par. 13);

***1317** 18. By the authority granted him in the Municipal Code, the Fire Commissioner prescribes and publishes rules, regulations, practices and procedures and general orders and special directives for the Fire department. (Wilkinson Aff., par. 13);

19. The CFD Rules and Regulations forbid the possession or drinking of intoxicating liquors on or about Fire Department premises. (Rule 61.003, Wilkinson Aff., par. 15);

20. General Order 87-008, a substance abuse order, issued on February 1, 1987, forbids use or positive presence while on duty, of illegal drugs or alcoholic beverages as well as possession, sale or delivery of illegal drugs or alcoholic beverages while on duty. (General Order 87-008, Wilkinson Aff., par. 15);

21. CFD officials promulgated the locker inspection order largely in response to the alcohol and drug problem in the department. (Wilkinson Aff., par. 16);

22. On December 16, 1986, CFD officials inspected the lockers of on-duty personnel at the firehouse located at 3421 S. Calumet, Chicago, Illinois. (Complaint, Par. 25-26). This inspection occurred after complaints from neighbors of the firehouse and subsequent surveillance operations which lead CFD officials to reasonably suspect that alcohol and/or drug use or possession, in violation of Department Rules and Regulations, was occurring at 3421 S. Calumet.

(*See*, Richard Julian Dep. at 3, 13-26);

23. Those persons whose lockers were inspected on December 16, 1986 and Local 2 of the Chicago Firefighters Union brought suit against the City of Chicago and various fire department personnel. (Complaint);

24. In Count I of this Complaint, Plaintiffs allege that the inspection as carried out violated their Fourth and Fourteenth Amendment rights. (Complaint);

25. In Count II, Plaintiffs claim that the locker order itself violates the same rights because, under the order, locker inspections "can be compelled without a warrant and without probable cause or reasonable cause to believe that any illegal activity has occurred." (Complaint, par. 34).

DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure provides that a summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A plaintiff cannot rest on mere allegations of a claim without any significant probative evidence which supports his complaint. *Id.; see First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569, reh. den., 393 U.S. 901, 89 S.Ct. 63, 21 L.Ed.2d 188 (1968). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims and defenses." *Celotex Corp. v. Cartrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Accordingly, the non-moving party is required to go beyond the pleadings, affidavits, depositions, answers to interrogatories and admissions on file to designate specific facts showing a genuine issue for trial. *Id.*

The plaintiff has claimed few issues of material fact in its 12(f) statement. All of the issues raised are either non-responsive to the defendant's stated facts or not an issue material to the decision in this case. Paragraph 3 is non-responsive, in that because fire fighters are given the lockers to store personal belongings does not challenge that the lockers are property of the CFD. Paragraph 11 is likewise unresponsive, as the defendants state that the court in 1985 entered an order mandating ***1318** delineation of locker inspections and not that the court had approved of the Locker Order. Further, paragraphs 12, 13, 14, and 15 do not raise genuine issues of material fact as they are either non-responsive or insufficiently supported. These paragraphs claim that plaintiffs were never made aware of the existence of the Locker Order. Contrary to their assertions, paragraph 33 of Count II of the plaintiff's complaint admits that plaintiffs were advised of the existence of General Order 85-007. Also, the assertion that plaintiffs were unaware of the existence of the order does not respond to the statement that the order was distributed, announced and posted. Moreover, plaintiffs have wholly failed to support these statements with references to affidavits or the record, as is required by Local Rule 12(f). Because of this, the defendant's facts are deemed admitted under the rule. Likewise, paragraphs 22, 23 and 24 are non-responsive to the assertions of fact in the 12(e) statement. Therefore, no genuine issues of material fact are raised. The court now turns to the constitutionality of General Order 85-007.

A

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized. U.S. Const. amend. IV

The Fourth Amendment applies to the states through the Fourteenth Amendment, and has also been applied to cover conduct by government officials in various civil activities. *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987). Thus, it has been applied to conduct by school teachers, *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), building inspectors, *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), and OSHA inspectors, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978). Therefore, the actions of the CFD

and its officers are restricted by the Fourth Amendment.

I.

[1] The Fourth Amendment is implicated in a case only if the plaintiff can show that the conduct of the defendant has infringed "an expectation of privacy that society is prepared to consider reasonable." *O'Connor*, 480 U.S. at 715, 107 S.Ct. at 1497. Generally, public employees have an expectation of privacy in their places of employment. *O'Connor*, 480 U.S. at 716-17, 107 S.Ct. at 1497-98, *but see*, *Shields v. Burge*, 874 F.2d 1201, 1206 (7th Cir.1989) (a public employee might not have any reasonable expectation of privacy against his superiors). However, the operational realities of the work place may make some expectations of privacy unreasonable. *Id.* A public employee's expectation of privacy can be reduced by virtue of office practices or by legitimate regulation. *Id.* Therefore, the court must look to the work conditions present at CFD firehouses to determine if the fire fighters have a legitimate expectation of privacy that society would consider reasonable. Employee's expectations of privacy are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of the employees. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), *see also* *New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) (junkyard owner engaged in heavily regulated industry had little expectation of privacy); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.1986), *cert.den.*, 479 U.S. 986, 107 S.Ct. 577, 93 L.Ed.2d 580 (1986) (breathalyzer and urine testing permissible for jockeys). In the case before the court, the highly regulated nature of the fire department serves to lower the expectation of privacy of individual fire fighters.

As was stated above, fire fighters work in 24 hour shifts. During their tours of duty, fire fighters are subject to various rules and regulations which govern the operating***1319** of the fire department. Regulations cover apparel, hours beds may be occupied, facial hair and freedom of movement about the fire house. Fire fighters are also bound by general orders and special directives issued by the Fire Commissioner. These commands have the same affect as rules and regulations. Such discipline and the chain of command are extremely important in the military type structure of the fire department. Consequently, the working conditions at the fire houses are strictly regulated and controlled. Therefore, the individual fire fighter's expectation of privacy is diminished due to the pervasive regulation in the industry. The strict regulation and control in this case make the fire fighter's expectation of privacy unreasonable. Accordingly, the locker searches do not infringe on a valid expectation of privacy.

II.

[2] Moreover, the plaintiffs in this case knew or should have known of General Order 85-007. The fire department has stated that Order 85-007 was issued and distributed throughout the fire department. General Order 84-007 requires that all orders received by each fire company be read and explained at roll call to all fire fighters reporting for duty and then posted at the firehouse. The plaintiff's claims that they were unaware of the existence of General Order 85-007 does not negate the affect of that order. Despite repeated allegations to the contrary in their 12(f) statement, plaintiffs admit that they were advised of General Order 85-007 by District Chief Fitzpatrick on or about November 7, 1985. Plaintiff's Complaint, Count II, par. 33.

Moreover, as stated previously, the facts set forth in the defendants' 12(e) statement are deemed admitted unless properly controverted by the opposing party. Therefore, the court assumes that General Order 85-007 was distributed to all fire companies, was read and summarized at roll call by Lt. Charles O'Donnell, a steward of Fire Fighters Local 2, and was posted on the bulletin board of his firehouse. The plaintiffs' subjective unawareness of that order does not shelter their expectation of privacy from a legitimate regulation. We are all bound by the law, even if we are subjectively unaware of the existence of a law. *U.S. v. Mansavage*, 178 F.2d 812 (7th Cir.1949), *cert. denied*, 339 U.S. 931, 70 S.Ct. 665, 94 L.Ed. 1351 (1950) (ignorance of the law is no defense); *United States v. Moore*, 627 F.2d 830 (7th Cir.1980), *cert. den.*, 450 U.S. 916, 101 S.Ct. 1360, 67 L.Ed.2d 342 (1981) (mistake of law must be objectively reasonable). By analogy, the plaintiffs are charged with constructive knowledge of the rules and orders promulgated and disseminated by the Fire Commissioner, especially after their union representatives were involved in the preparation of the locker search order in conjunction with the CFD. Accordingly, the fire fighters reasona-

ble expectation of privacy has been reduced by virtue of a legitimate regulation. The plaintiffs were aware that their lockers were subject to warrantless searches to discover violations of rules and regulations. In the face of announcements and postings of General Order 85-007, it cannot be said that the plaintiffs had a legitimate expectation of privacy that society would consider reasonable.

B

[3] Furthermore, assuming arguendo that the plaintiffs did have a reasonable expectation of privacy, this expectation is outweighed by the substantial interest the CFD has in assuring that its employees remain sober and drug free while on the job.

The Fourth Amendment does not prohibit all searches, only those that are unreasonable. *Schmerber v. California*, 384 U.S. 757, 768, 86 S.Ct. 1826, 1834, 16 L.Ed.2d 908 (1966). The determination of reasonableness requires balancing the need to search against the invasion which the search entails. *T.L.O.*, 469 U.S. at 337, 105 S.Ct. at 740, *Shields*, 874 F.2d at 1206. On one side of the balance, we place the individual's legitimate expectations of privacy; on the other, the government's need for effective methods to deal with legitimate governmental interests. ***1320***Skinner v. Railway Labor Executives' Ass'n*, 109 S.Ct. at 1414.

One of the touchstones of the Fourth Amendment is that a search must be supported by a warrant issued upon probable cause. *Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). However, when a Fourth Amendment intrusion serves a special governmental need, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the government's interest to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context. *Id.*, 109 S.Ct. at 1390.

Two recent Supreme Court Cases, *Skinner* and *Von Raab*, clearly show how this balancing test is to be carried out. In *Skinner*, the Federal Railroad Administration promulgated a rule which called for blood and urine testing, without probable cause, of railway employees involved in major train accidents. The court held that;

The government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school or prison, likewise presents special needs beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements.

Skinner, 109 S.Ct. at 1414.

The court went on to hold that, where privacy interests implicated by the search are minimal and the governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search can be reasonable despite the absence of such suspicion. *Id.* at 1447.

That same day, the court also decided *Von Raab*. In this case, the United States Customs Service instituted a regulation requiring drug testing for placement or employment in areas that required carrying firearms, drug interdiction and handling of classified materials. Referring to its decision in *Skinner*, the court stated that the traditional criteria used to analyze reasonableness in the probable cause standard would not be helpful in analyzing the reasonableness of routine administrative functions, especially where the government seeks to prevent the development of hazardous conditions or detect violations that rarely generate articulable grounds for searching a particular person or place. *Von Raab*, 109 S.Ct. at 1391-92. The court stressed that;

[T]he public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force."

Id. at 1393.

Most importantly, the court held that, in certain circumstances, the need to discover latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion. *Id.* at 1392. Moreover, this compelling interest extends not only to the place to be searched, but to closed containers within those places. *Shields*, 874 F.2d at 1208 (closed containers may be searched during a lawful workplace search).

When this analysis is applied to the case before the court, the balance tips strongly in favor of the CFD. Fire fighting is a job that entails incredible levels of stress and exertion. Fire fighters are called upon to deal with emergencies on a moment's notice. Perhaps even more than railway employees, they "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Skinner*, 109 S.Ct. at 1419. The plaintiffs have not disputed that on duty fire fighters have used alcohol and drugs. The CFD has promulgated rules and regulations prohibiting even the mere possession of alcohol or drugs on fire department property. Public safety justifies prohibiting employees from using alcohol or drugs while on duty or while subject to a call to duty. This also justifies the exercise of supervision to assure that restrictions are in fact observed. *Skinner*, 109 S.Ct. at 1415. Likewise, the ***1321** CFD has a substantial interest in assuring that their fire fighters comply with this order. As in *Skinner* and *Von Raab*, the purpose of the regulation is not to assist in the prosecution of employees but to prevent accidents and casualties resulting from impairment of employees by alcohol or drugs. The public interest in assuring that fire fighters are alert and fully able to carry out their duties while on the job is certainly compelling.

In comparison, the intrusion on the fire fighters' privacy expectations is minimal. The level of intrusion is relevant to a search's reasonableness. *Shields*, 874 F.2d at 1209. The type of search to be conducted here is minimally intrusive. The Supreme Court has allowed urinalysis and blood testing to be conducted without a warrant or probable cause in order to further governmental aims. Such tests necessitate intimate intrusions into one's own body, by way of a needle in a blood test, or performance on command of a very private bodily function, as in urinalysis. The intrusion of a locker search, by way of comparison, is slight. The fire fighters are assigned the lockers by the CFD, but are not required to use them. The lockers remain the property of the CFD. The searches in this case were carried out in the presence of the plaintiffs, and merely examine the contents of the locker for evidence of alcohol or drug use. Therefore, the searches fall far short of the intrusiveness that the Supreme Court has allowed the government to conduct in order to carry out significant governmental objectives. The substantial interest of the CFD, on behalf of the public at large which it serves, in assuring that all fire fighters are able to perform their jobs safely and effectively greatly outweighs the fire fighters expectation of privacy in their station house wall lockers.

Accordingly, the defendants' motion for summary judgment on Count II of the complaint is granted.

IT IS SO ORDERED.

N.D.Ill.,1989.
Chicago Fire Fighters Union, Local 2 v. City of Chicago
717 F.Supp. 1314, 58 USLW 2147, 4 IER Cases 970

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CIVIL SERVICE ASSOCIATION, LOCAL 400 et al., Plaintiffs and Appellants,
v.
CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents

S.F. No. 23621.

Supreme Court of California
October 26, 1978.

SUMMARY

Eight individuals employed in civil service positions, and two labor organizations, sought a writ of mandate challenging the legality of short term suspensions imposed on the employees for disciplinary reasons. The petition alleged that in none of the suspensions were the individuals permitted full union representation and none of the employees were given a copy of the charges and an opportunity to respond in advance of the discipline imposed. It was further alleged the denial of union representation and of prediscipline rights was a denial of due process and the statutory protection of the Meyers-Milias-Brown Act (Gov. Code, §§ 3500-3510), governing union representation of public employees. The trial court denied the petition. (Superior Court of the City and County of San Francisco, No. 696317, Byron Arnold, Judge. FN*)

The Supreme Court reversed and remanded, except as to one of the petitioners who was employed by the police department, who had an opportunity for a postdisciplinary hearing but did not allege a demand for a hearing nor a denial of such demand. As to her, the court affirmed for failure to exhaust her administrative remedies. The court held that while plaintiffs may not in fact have been deprived of a salary earned, but only of the opportunity to earn it, they had the expectation of earning it free from arbitrary administrative action, and that expectancy was entitled to some due process protection. The court held such protection would be adequately provided by a procedure that would apprise the employee of the proposed action, the reasons therefor, provide them with a copy of the charges including materials on which the action was based, and the right to respond either orally or in writing, to the authority imposing the discipline either during the suspension or within a reasonable time thereafter. The court rejected the contention that in the case of short term suspensions of five days or less, such procedures had to be implemented before the suspension. The court further held that plaintiffs' right of representation by a labor organization in the informal hearing followed from the right to representation contained in the Meyers-Milias-Brown Act and the right to representation by counsel. Thus, the court held the labor organization could participate in the hearing if requested by the employee, provided it was a ‘recognized‘ organization.

FN* Retired judge of the superior court sitting under assignment by the Chairperson of the Judicial Council.(Opinion by Manuel, J., with Mosk, Clark and Richardson, JJ., concurring. Separate concurring and dissenting opinion by Tobriner, J., with Bird, C. J., and Newman, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Constitutional Law § 107--Procedural Due Process--Temporary Deprivation.

Suspension of a right or of a temporary right of enjoyment may amount to a ‘taking‘ for due process purposes. Thus, due process applied to the five-day suspension of civil service employees for disciplinary reasons.

(2) Civil Service § 9--Discharge, Demotion, Suspension and Dismissal-- Administrative Hearing and Decision--Short Term Suspension--Pretermination Procedures.

Due process of law does not require that governmental employees be given an opportunity in advance of the imposition of discipline to rebut the charges made against them where the discipline consists of a suspension of five days or less.

(3) Civil Service § 9--Discharge, Demotion, Suspension, and Dismissal-- Administrative Hearing and Decision--Short Term Suspension.

City civil service employees suspended for five days without pay for disciplinary reasons, while they may not have been deprived of a salary earned but

only of the opportunity to earn it, had the expectation of earning it free from arbitrary administrative action, which expectancy was entitled to some due process protection. Accordingly, the employees had the right to be apprised of the proposed action, the reasons therefor, provided with a copy of the charges, including materials on which the action was based, and the right to respond either orally or in writing to the authority imposing the discipline either during the suspension or within a reasonable time thereafter.
[See **Cal.Jur.2d,** Public Officers, § 239; **Am.Jur.2d,** Civil Service, § 68.]
(4) Civil Service § 11--Discharge, Demotion, Suspension, and Dismissal-- Judicial Review--Suspension--Exhaustion of Administrative Remedies.

A civil service employee suspended for five days without pay was not entitled to judicial relief for alleged violation of her rights of due process, where she had an opportunity for a postdisciplinary hearing but did not allege a demand for a hearing nor a denial of such a demand. Under these circumstances, the employee did not exhaust her administrative remedies, which was a prerequisite to seeking judicial relief.

(5) Civil Service § 9--Discharge, Demotion, Suspension, and Dismissal-- Administrative Hearing and Decision--Union Representation.

Under Gov. Code, § 3503, providing that employee organizations have a right to represent their members in connection with all matters coming within the scope of representation, including disciplinary matters, a public employees' labor organization had the right to participate in disciplinary proceedings against suspended civil service employees, provided the labor organization was recognized, and the employee requested such representation. However, where the suspension was for no more than five days, and the employees had not right to a hearing prior to the suspension, they were not entitled to presuspension union representation.

COUNSEL

Van Bourg, Allen, Weinberg & Roger and Stewart Weinberg for Plaintiffs and Appellants.

Carroll, Burdick & McDonough, Christopher D. Burdick, Silver & Wells, Stephen H. Silver and George W. Shaeffer, Jr., as Amici Curiae on behalf of Plaintiffs and Appellants.

Thomas M. O'Connor, City Attorney, Milton H. Mares and Burk E. Delventhal, Deputy City Attorneys, for Defendants and Respondents. ***555**

MANUEL, J.

Appellants are eight individuals who are employed in civil service positions by respondent City and County of San Francisco, and two labor organizations of which the employees, among them, are members. They appeal from a judgment denying their petition for a writ of mandate challenging the legality of short term suspensions imposed upon them for disciplinary reasons. We affirm the judgment as to appellant Jacqueline Robinson and reverse as to the remaining appellants.

Each of the employees is alleged to be a permanent employee in the civil service system. The two labor unions are both labor organizations within the meaning of the Meyers-Milias-Brown Act. Each of the eight employees incurred a short-term suspension of five days or less from employment imposed for disciplinary reasons by his or her respective department. The allegations of the petition filed in the trial court describing the various suspensions are as follows:

'IX. In none of the [eight] suspensions ... were the individuals permitted full Union representation, and in none of the suspensions were the employees *given a copy of the charges and an opportunity to respond in advance of the discipline imposed*.

'X. In all of the suspensions, the employee and the Union demanded hearings and the right of Union representation of the disciplined employee. In each case, these rights were denied.

'XI. The denial of Union representation and *the denial of pre-discipline rights* is a *denial of due process of law* and the statutory protection of the Meyers-Milias-Brown Act.' [FN1] ***556**

FN1 While the proceedings may indicate that some of the appellants base their claims upon lack of any hearing (whether before or after their suspension), their briefs have approached this matter simply as a case where predisciplinary procedures of the kind explained in *Skelly v. State Personnel Bd.*

(1975) 15 Cal.3d 194 [124 Cal.Rptr. 14, 539 P.2d 774] are sought rather than a complaint that no hearing at all was afforded them. We note here in addition to paragraphs IX, X, and XI of the complaint the following portions of the complaint:

'IV.

The City and County of San Francisco is a chartered City and County of the State of California which employs employees for the purpose of carrying out the functions set forth in the Charter of the City and County of San Francisco. The City and County of San Francisco has various departments through which employees are employed. The San Francisco Police Department employs many classifications of employees, including Parking Control Persons. Jacqueline Robinson was and is at all times material hereto an employee of the City and County of San Francisco in the classification of Parking Control Person. The Airport Commission employs many classifications of employees, including Airport Policeman. Robert Quinn, Gary Pierce, Larry Lottie, Dominic Tringali were and are at all times material hereto employees of the City and County of San Francisco in the classification of Airport Policemen. Pamela Nash was employed by the City and County of San Francisco in the Department of Public Health as a Clerk Typist, and Benny Cross was and is employed by the City and County of San Francisco in the Department of Public Health at all times material hereto, as was Pamela Nash. Thomas Fowler was employed by the City and County of San Francisco working in the San Francisco Public Library at all times material hereto.

'V.

'On or about April 2, 1975, Jacqueline Robinson was suspended by her immediate employer, the San Francisco Police Department for an alleged transgression. Ms. Robinson requested and was denied representation by her Employee Organization, Local 400.

'VI.

'Robert Quinn was suspended by the Airport Commission on October 22, 1974 for three working days. Garry Pierce, Larry Lottie and Dominic Tringali were each suspended on April 25, 1974. Employees Quinn, Pierce, Lottie and Tringali each requested but were denied Employee Organization representation by Local 400 prior to the suspensions and were denied a hearing on their suspensions.

'VII.

'In the Spring of 1975, Benny Cross was suspended for a period of five days and was transferred in his position without a prior hearing and without the right of Union representation by his Employee Organization, Local 250. On January 20, 1975, Pamela Nash was suspended for five days and was denied a full hearing and Union representation.

'VIII.

'In December of 1974 Thomas Fowler was suspended by the San Francisco Public Library for five days and was denied Union representation and a hearing.

'IX.

'In none of the suspensions set forth hereinabove were the individuals permitted full Union representation, and in none of the suspensions were the employees given a copy of the charges and all of the materials and an opportunity to respond in advance of the discipline imposed.

'X.

'In all of the suspensions, the employee and the Union demanded hearings and the right of Union representation of the disciplined employee. In each case, these rights were denied.

‘XI.

‘The denial of Union representation and the denial of pre-discipline rights is a denial of due process of law and the statutory protection of the Meyers-Milias-Brown Act.

‘XII.

‘The Unions and the employees have exhausted all of their administrative remedies and have no adequate remedy at law.‘

Appellants filed with their petition a declaration, by their attorney, which authenticated and incorporated several items of correspondence written by counsel of some of the respondents in connection with some of ***557** the suspensions alleged. [FN2] In a memorandum of points and authorities filed a few days later, appellants expressly stated that their claim to relief was based upon the decision in

FN2 The declaration and documentation were apparently intended to support the issuance of an alternative writ of mandate. *Skelly v. State Personnel Bd., supra*, 15 Cal.3d 194.

Following the issuance of the alternative writ of mandate respondents filed an ‘Answer And Return‘ to the petition in which they specifically denied several of its allegations, including those made in its paragraphs IX, X and XI (quoted above). They also filed a memorandum of points and authorities in which they opposed the petition, urging (1) that *Skelly* did not pertain to ‘minor‘ employee disciplinary action of the nature alleged; (2) that *Skelly* did not reach these eight suspensions, in any event, because it was not to be applied retroactively; and (3) that the Meyers-Milias-Brown Act did not support any part of the relief prayed for in the petition.

It would appear that all of the eight appellant employees except Jacqueline Robinson were suspended pursuant to section 8.342 of respondent city and county's charter; Robinson was suspended pursuant to section 8.343 thereof because she, alone among the eight, was employed in - and suspended by - respondent's police department. Section 8.342 provides: ‘Disciplinary Suspensions. The appointing officer may, for disciplinary purposes, suspend a subordinate for a period not exceeding thirty days; and suspension shall carry with it the loss of salary for the period of suspension. The suspended employee shall be notified in writing of the reason for such suspension, and if the suspension be for more than five days the employee shall, at his request, be given a hearing by the appointing officer. The decision of the appointing officer in all cases of suspension for disciplinary purposes shall be final.‘

Section 8.343 provides: ‘Fine, Suspension and Dismissal in Police and Fire Departments. Members of the fire or the police department guilty of any offense or violation of the rules and regulations of their respective departments, shall be liable to be punished by reprimand, or by fine not exceeding one month's salary for any offense, or by suspension for not to exceed three months, or by dismissal, after trial and hearing by the commissioners of their respective departments; provided, however, that the chief of each respective department for disciplinary purposes may suspend a member for a period not to exceed ten days for violation of the ***558** rules and regulations of his department. Any member so suspended shall have the right to appeal such suspension to the fire commission or to the police commission, as the case may be, and have a trial and hearing on such suspension. ...‘

In addition it is claimed that in none of the suspensions were the individual employees permitted full union representation; that while demanded, said representation was denied. It is thus claimed that the denial of union representation is a denial of the statutory protection of the Meyers-Milias-Brown Act (Gov. Code, §§ 3500-3510).

The trial court heard no evidence but considered the arguments of counsel and, as if a motion for judgment on the pleading had been filed by respondent, gave judgment for respondent.

Issues Presented

The issues presented by this appeal are (1) whether due process of law requires governmental employees be given an opportunity in advance of the imposition of discipline, consisting of suspension of *five days or less*, to rebut the charges made against them and (2) whether petitioners were denied rights guaranteed them under Government Code sections

3500-3510 (Meyers-Milias-Brown Act).

The first issue relates to the application of *Skelly v. State Personnel Bd., supra*, 15 Cal.3d 194, and *Barber v. State Personnel Bd.* (1977) 18 Cal.3d 395 [134 Cal.Rptr. 206, 556 P.2d 306], to these short-term suspensions. The second issue involves the application of *Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382 [113 Cal.Rptr. 461, 521 P.2d 453], upon which appellants rely.

Discussion

I

Application of Skelly v. State Personnel Bd.

Appellants base their claim to prediscipline rights upon *Skelly v. State Personnel Bd., supra*, 15 Cal.3d 194. In *Skelly* we held that before the employee therein involved could be terminated from his permanent civil service position with the State of California he was entitled to preremoval safeguards. After analyzing the opinion of the various justices in *Arnett v. Kennedy* (1973) 416 U.S. 134 [40 L.Ed.2d 15, 94 S.Ct. 1633], we concluded: 'It is clear that due process does not require the state to ***559** 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 therefore, 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.)

Both *Skelly* and *Arnett* involved discharges from employment of the employees therein involved. *Skelly* states at 15 Cal.3d 207-208: '... 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* [1972] *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 .... [Citation to various opinions in *Arnett*.]

'The California Act endows state employees who attain permanent status with substantially identical property interest. Such employees may not be dismissed or subjected to other disciplinary measures unless facts exist constituting 'cause' for such discipline. ... In the absence of sufficient cause, the permanent employee has a statutory right to continued employment free of these 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.' ***560**

The question before us today is the extent to which the above principles apply to the short-term suspensions here involved.

Prior to *Skelly* it was determined by our Court of Appeal that a two-day suspension pursuant to the charter provision not preceded by a hearing did not violate the employee's constitutional rights. (*Apostoli v. City etc., of San Francisco* (1969) 268 Cal.App.2d 728 [74 Cal.Rptr. 435].) In *Patton* v. *Board of Harbor Commissioners* (1970) 13 Cal.App.3d 536, 541 [91 Cal.Rptr. 832], another pre-*Skelly* case, it was concluded '... The detriment to an employee of no more than 5 days' suspension in a 12-month period, while not negligible, is, in our view, not sufficient to justify a holding that a hearing is in the employee's constitutional right. ... The employee is not deprived of a salary already earned, but merely of the opportunity to earn for several days.'

Respondent city and county, relying heavily on

these cases, contends that the punitive actions involved in this matter are minor actions not requiring predisciplinary action procedures of the kind required by *Skelly*. With this position we agree. However, our conclusion that *Skelly* itself is not controlling cannot lead us to ignore the principles expressed in formulating the rule to be applied in the instant case.

In agreeing with the respondent we do not mean to imply that a property right is not involved herein. We are of a contrary mind. (1) Suspension of a right or of a temporary right of enjoyment may amount to a 'taking' for 'due process purposes' (*Goss v. Lopez* (1975) 419 U.S. 565, 572-76 [42 L.Ed.2d 725, 733-736, 95 S.Ct. 729]; *Connolly Development, Inc. v. Superior Court* (1976) 17 Cal.3d 803, 811 [132 Cal.Rptr. 477, 553 P.2d 637]). We have no hesitancy in holding that 'due process' applies here; the question remains what process is due? (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481 [33 L.Ed.2d 484, 494, 92 S.Ct. 2593]; *In re Bye* (1974) 12 Cal.3d 96, 100-101 [115 Cal.Rptr. 382, 524 P.2d 854].)

Skelly recognized that due process requirements are not so inflexible as to require an evidentiary trial at the preliminary stage in every situation involving the taking of property. The majority of the United States Supreme Court was characterized as adhering to the principle that some form of notice and hearing must preclude a final deprivation of property, yet the timing and content of the notice as well as the nature of the hearing will depend upon appropriate accommodation of the competing ***561** interests involved. (15 Cal.3d at p. 209.) We then said: '... 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 proves to have been wrongful. ...' (15 Cal.3d at p. 209; italics in original.)

Subsequent to *Arnett* and *Skelly* the United States Supreme Court further acted in this area of the law. In *Mathews* v. *Eldridge* (1976) 424 U.S. 319 [47 L.Ed.2d 18, 96 S.Ct. 893] the court concluded that an evidentiary hearing is not required prior to terminating social security disability benefits. The court stated: '... '[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances' *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. *Arnett v. Kennedy, supra*, at 167-168 [40 L.Ed.2d 15, 94 S.Ct. 1633] (Powell, J. concurring in part); *Goldberg v. Kelly, supra*, at 263-266; *Cafeteria Workers v. McElroy, supra*, at 895. More precisely, our prior decisions indicate that identification 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*. See e.g., *Goldberg v. Kelly, supra*, at 263-271,' (424 U.S. at pp. 334-335 [47 L.Ed.2d at p. 33]; italics added.) [FN3]
***562**

FN3 Although the principles thus stated are clear, their application in particular cases by the high court has proved somewhat difficult to predict. Thus, in *Dixon v. Love* (1977) 431 U.S. 105 [52 L.Ed.2d 172, 97 S.Ct. 1723], decided soon after *Mathews*, it was held that an Illinois regulation providing for the automatic suspension of a driver who had been convicted repeatedly of traffic offenses was constitutionally valid, the court emphasizing inter alia that the driver had 'had the opportunity for a full judicial hearing in connection with each of the traffic convictions ...' (431 U.S. at p. 113 [52 L.Ed.2d at p. 181]), and that there was no dispute as to the factual basis for the administrator's decision (*id.*, at pp. 113-114 [52 L.Ed.2d at p. 181]). In *Oregon State Penitentiary v. Hammer* (1977) 434 U.S. 945 [54 L.Ed.2d 306, 98 S.Ct. 469],

however - a case decided six months later - a majority of the court in an opinion *per curiam* (Stevens, Brennan, Stewart, and Marshall, JJ., dis.) vacated and remanded for reconsideration in light of *Dixon* a judgment of the Oregon Supreme Court holding that a tenured corrections officer was improperly discharged for cause absent the affording of pretermination rights such as those required by *Skelly* (i.e., fair notice of the charges against him and an opportunity to respond). The dissenters, characterizing the action of the majority as 'cavalier' (434 U.S. at p. 945) [54 L.Ed.2d at p. 306, 98 S.Ct. at p. 469], pointed out that none of the factors held to be decisive in *Dixon* - notably the absence of factual dispute due to prior adjudication - was here present, and that therefore the court's action was unjustified.

(2) With the above principles stated we first explain our determination that pretermination procedures of the kind required by *Skelly* are not here required. In the case of suspensions of the magnitude involved here it would appear that while the risk of error may be just as great as in a termination case, the consequences are not. This fact tends to weigh against the need for predisciplinary procedures. Whether surrounding circumstances warrant the action taken here is not shown in the record. The promptness of the postdisciplinary hearing would be very important in a termination or long-term suspension. Obviously, the uncertain quality of an employee's status and other harm accruing to him is greater the longer the issues remain unresolved by hearing. In a short-term suspension the employee will usually be back at work while the postdisciplinary hearing remains pending.

The shortness of the suspension tends to demonstrate that the interim loss should not be deemed 'substantial' within the meaning of *Skelly* in the absence of special circumstances being indicated in any particular case. None are shown here. [FN4] A short suspension is not a destruction of the employee's employment but rather is an interruption. Usually in the event of a wrongful deprivation being shown the employee can be made whole by back wages for the period of wrongful suspension. We note in passing that historically the state has treated suspensions of 10 days or less as being somewhat minor with less procedural safeguards offered. (See ***563** Gov. Code, § 19576;

FN4 Absent the showing of exigent circumstances, nothing akin to the brutal need attendent in the termination of welfare payments and compelling a pretermination hearing in such cases seems to be present in these short-term suspension situations. Rather, the brevity of the period of suspension and remedy by way of hearing as hereinafter noted, likens the short-term suspension to the temporary taking of property upheld in *Mitchell v. W. T. Grant Co*. (1974) 416 U.S. 600 [40 L.Ed.2d 406, 94 S.Ct. 1895] and *Connolly Development, Inc. v. Superior Court, supra*, 17 Cal.3d 803. *Skelly, supra*, 15 Cal.3d 194, 203, fn. 16; *Keeler* v. *Superior Court* (1956) 46 Cal.2d 596, 599 [297 P.2d 967].)

We also note that, during the period pending hearing, the employee in the minor suspension case does not face the bleak prospect of being without a job and the need to seek other employment hindered by the charges against him. (See *Skelly, supra*, 15 Cal.3d 194, 213.)

It is true that in *Goss v. Lopez* (1975) 419 U.S. 565 [42 L.Ed.2d 725, 95 S.Ct. 729], the United States Supreme Court held that certain public high school students who had been suspended from school for 10 days without a hearing had interests qualifying for the due process protection, and that such protection required that as a general rule [FN5] oral or written notice of charges and an opportunity to respond be afforded prior to removal. It also indicated, however, that 'total exclusion from the educational process for more than a trivial period and certainly if the suspension is for 10 days' (

FN5 The high court recognized that in certain cases - namely in cases involving '[s]tudents whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process' (419 U.S. at p. 582 [42 L.Ed.2d at p. 739]) - immediate removal would be justified, the 'necessary notice and rudimentary hearing' in such cases to follow 'as soon as practicable.' (*Id.*, at pp. 582-583 [42 L.Ed.2d at p. 739].) *id.*, at p. 576 [42 L.Ed.2 at p. 736]) is a matter

which could have serious and long-lasting repercussions in the life of a child, especially when such exclusion was the result of disciplinary action. [FN6] (

FN6 The recent case of *Bd. of Curators, University of Mo.* v. *Horowitz* (1978) 431 U.S. 78 [55 L.Ed.2d 124, 98 S.Ct. 948], indicates that dismissal of a student for academic reasons is to be distinguished from disciplinary dismissals. '[W]e have frequently emphasized,' the high court there stated, 'that '[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' [Citation.] The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rule of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal.' (*Id.*, at p. 86 [55 L.Ed.2d at pp. 132-133]; fn. omitted.) *Id.*, at pp. 574-575 [42 L.Ed.2d at p. 735].) In any event, the court noted, 'the timing and content of the notice and the nature of the hearing will depend on appropriate accomodation of the competing interests involved.' (*Id.*, at p. 579 [42 L.Ed.2d at p. 737].) Here, for reasons we have stated, we are of the view that the employee's interest in continued employment, viewed in the context of the shortness of the suspensions here involved and the city's competing interest in prompt action for the maintenance of discipline, does not demand an accommodation of the nature we required in *Skelly*. (Cf. *Smith v. Organization of Foster Families* (1977) 431 U.S. 816 [53 L.Ed.2d 14, 97 S.Ct. 2094, 2113].) In light ***564** of this determination we need not further explore the question of the retroactive application of *Skelly* and *Barber* to this case.

(3) However, while the principles underlying *Skelly* do not here compel the granting of predisciplinary procedures there mentioned, it does not follow that the employees are totally without right to hearing. While due process does not guarantee to these appellants any *Skelly*-type predisciplinary hearing procedure, minimal concepts of fair play and justice embodied in the concept of due process require that there be a 'hearing,' of the type hereinafter explained. [FN7] The interest to be protected, i.e., the right to continuous employment, is accorded due process protection. While appellants may not in fact have been deprived of a salary earned but only of the opportunity to earn it, they had the expectancy of earning it free from arbitrary administrative action. (Compare *Patton v. Board of Harbor Commissioners, supra*, 13 Cal.App.3d 536, 541.) This expectancy is entitled to some modicum of due process protection. (*Perry v. Sindermann, supra*, 408 U.S. 593, 599-603 [33 L.Ed.2d 570, 578-581].)

FN7 Cf. *Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 308 [138 Cal.Rptr. 53, 562 P.2d 1302]; *Arroyo v. Regents of University of California* (1975) 48 Cal.App.3d, 793, 799 [121 Cal.Rptr. 918].

For the reason stated above, however, we believe that such protection will be adequately provided in circumstances such as these by procedure of the character outlined in *Skelly*, (i.e., one that will apprise the employee of the proposed action, the reasons therefor, provide for a copy of the charges including materials upon which the action is based, and the right to respond either orally or in writing, to the authority imposing the discipline) if provided either during the suspension or within a reasonable time thereafter. Such a procedure will, in our view, provide a meaningful hedge against erroneous action. Along with providing an opportunity to recover lost wages, it will also provide an opportunity for the employee to protect his reputation, honor and integrity - items of importance to him at any time but especially in case of later disciplinary action where the present action might be deemed to be in aggravation of the penalty then to be imposed, or in case of later promotional opportunities available but where the present disciplinary action would tend to have a harmful effect. (See *Codd v. Velger* (1977) 429 U.S. 624 [51 L.Ed.2d 92, 97 S.Ct. 882]; *Board of Regents* v. *Roth* (1971) 408 U.S. 564, 573 [33 L.Ed.2d 548, 558, 92 S.Ct. 2701].)
***565**

Appellants Quinn, Pierce, Lottie, Tringali, Nash and Fowler allege denial of hearings and are entitled to a hearing as described herein. [FN8] Appellant Cross alleges simply a five-day suspension, and transfer of position without a *prior* hearing. Because as we have

shown due process does not require for such employees a prior hearing in these short-term suspensions, Cross has not alleged any right to a prior hearing as such. However, it appears he is entitled to some type of hearing as should be accorded to Quinn, Pierce, Lottie, Tringali, Nash and Fowler.

> FN8 As noted above, section 8.342 affords these employees no right to hearing, their suspensions being five days or less.

(4) It appears that appellant Jacqueline Robinson, an employee of the police department, had an opportunity for a postdisciplinary hearing. (S.F. Charter, § 8.343.) The complaint does not allege a demand for a hearing nor a denial of such demand. Thus, it does not appear that appellant Robinson has exhausted her administrative remedies, a prerequisite to seeking judicial relief. (*Fiscus v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 234 [317 P.2d 993]; cf. *South Coast Regional Com. v. Gordon* (1977) 18 Cal.3d 832 [135 Cal.Rptr. 781, 558 P.2d 867].) As to appellant Robinson the complaint thus shows no ground for judicial intervention.

II

Meyers-Milias-Brown Act

Appellants next claim unlawful employer interference with the exercise of their rights under the Meyers-Milias-Brown Act (Gov. Code, §§ 3502-3504), prior to the imposition of the five-day suspensions. They observe that under section 3502 government employees have a right to join and participate in the affairs of employee organizations; that under section 3503 employee organizations have a right to represent their members in connection with all matters within the scope of representation including disciplinary matters. Citing *Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382 [113 Cal.Rptr. 461, 521 P.2d 453], for the proposition that 'in all matters involving discipline, employees were entitled to be represented by their employee organization,' they conclude that the representation in question must include the opportunity to discuss the employees' case and to represent the employee in advance of the imposition of discipline. ***566**

(5) We have, in the prior section of this opinion explained the employees' rights to a short-term suspension procedure. Since the employees have thus been held to have no rights under *Skelly v. State Personnel Board, supra*, 15 Cal.3d 194, to a hearing prior to the imposition of the five-day suspension imposed, the appellant's claims to presuspension representation must to that extent fall. However, our treatment of the matter has not left the appellant employees (with the exception of appellant Robinson) [FN9] entirely without a right to be heard. We analyze such appellants' claims to representation in light of the limited procedures recognized hereinabove.

> FN9 Hereafter the use of the term 'appellants' shall be used to exclude appellant Robinson from its coverage.

Appellants refer us to Government Code section 3503. That section reads in part as follows: '*Recognized* employee organizations shall have the right to represent their members in their employment relations with public agencies .... Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the public agency.' [FN10] (Italics in original.) Their sole case citation for the proposition they advanced is to *Social Workers' Union, Local 535*, which held that 'a public employee's right to union representation under section 3504 attaches to an employer-employee interview which an employee reasonably fears may investigate and sanction his union-related activities.'

> FN10 Government Code section 3504 provides: 'The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to wages, hours, and other terms and conditions of employment.' (11 Cal.3d at p. 390.)

We do not deem *Social Workers' Union, Local 535* entirely dispositive of the matter at bench. Appellants herein make no claim of fear of adverse action by respondent city by reason of union activity. We did, however, in *Social Workers' Union, Local 535* demonstrate our sensitivity to developments in the federal law in interpreting state legislation (11 Cal.3d 382, 391), noting that the phrase 'wages, hours and other terms and conditions of employment' as used in Government Code section 3504 seems to be taken from the federal Labor Management Relations Act (see also: *Service Employees' Internat. Union, Local No. 22 v. Roseville Community Hosp.* (1972) 24

Cal.App.3d 400, 408-409 [101 Cal.Rptr. 69]; see Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 749). ***567** Under the provisions of section 7 of the National Labor Relations Act, [FN11] an employee is entitled to the presence of his union representative during an investigatory interview according to recent United States Supreme Court cases. (*NLRB v. Weingarten, Inc.* (1975) 420 U.S. 251 [43 L.Ed.2d 171, 95 S.Ct. 959]; *Garment Workers v. Quality Mfg. Co.* (1975) 420 U.S. 276 [43 L.Ed.2d 189, 95 S.Ct. 972].) We note that in *Weingarten* the United States Supreme Court speaking through Justice Brennan stated

> FN11 Section 7 confers the right of the employees 'to engage in ... concerted activities ... for mutual aid or protection.' (420 U.S. 260-263 [43 L.Ed.2d 179-181]): 'The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7 that '[e]mployees shall have the right ... to engage in ... concerted activities for the purpose of ... mutual aid or protection.' *Mobil Oil Corp. v. NLRB*, 482 F.2d 842, 847 (CA7 1973). This is true even though the employee alone may have an immediate stake in the outcome; he seeks 'aid or protection' against a perceived threat to his employment security. The union representative whose participation he seeks is, however, safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly.
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> '

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'The Board's construction also gives recognition to the right when it is most useful to both employee and employer. A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest. Respondent suggests nonetheless that union representation at this stage is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final. ...'

Although the court's statement was made to justify representation at an investigational stage, because of the informal nature of the procedures ***568** recognized herein this statement has meaning and cogency in the circumstances here presented. 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 Commrs.* (1945) 26 Cal.2d 716, 727 [160 P.2d 816]; cf. *Borror* v. *Department of Investment* (1971) 15 Cal.App.3d 531, 540-544 [92 Cal.Rptr. 525].) While *Steen* may have dealt with representation by a licensed attorney, the right of representation by a labor organization in the informal process here involved seems to follow from the right to representation contained in the Meyer-Milias-Brown Act and the right to representation recognized in *Steen*. Thus, the labor organization may here participate if requested by the employee. However, we note that the labor organization entitled under the act must be 'recognized' (Gov. Code, §§ 3501, subd. (b), 3503), a point highly disputed by respondent city. On remand this factual issue may be clarified by the proofs of the parties.

III

It is clear from the record that the right to the procedures provided for herein were not considered by the trial court. The judgment is affirmed as to appellant Jacqueline Robinson and is reversed as to all other appellants. The trial court will then be in a position to determine if factually the procedures provided for here have been observed and if so whether the appellant labor organization has participated fully. In this latter connection appellants' declarations and documents filed below showing extensive correspondence may be of importance in determining the extent of union representation and whether and to what extent the procedural rights of appellant employees have been observed. [FN12] Accordingly, the cause is remanded to the trial court with directions to conduct further proceedings consistent with the views expressed herein. All appellants save Jacqueline Robinson to recover

costs on appeal. Respondents to bear their own costs.

FN12 The state of the record and briefing leaves resolution of these points too conjectural at this juncture.

Mosk, J., Clark, J., and Richardson, J., concurred.

TOBRINER, J.,
Concurring and Dissenting.

I concur in the majority's conclusion that under the Meyers-Milias-Brown Act the employees are entitled to union representation during the entire course of the employer-initiated disciplinary proceedings. In addition, I agree with the majority ***569** that a permanent employee's 'right to continuous employment' constitutes a 'legitimate claim of entitlement' under the relevant constitutional authorities so that such an employee must be accorded procedural due process whenever the government seeks to suspend him from employment without pay. (*Ante*, pp. 559-560.)

I cannot agree with the majority, however, that in this context the demands of due process are fully satisfied so long as the employer, within a reasonable time *after* the effective date of the employees' suspension without pay, gives the employee an opportunity to answer the charges against him. In my view, the governing authorities establish that, in the absence of an emergency, a public employee must be afforded notice of any charges and an opportunity informally to answer such charges *before* incurring a suspension without pay.

As the majority recognizes, in *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 [724 Cal.Rptr. 14, 539 P.2d 774], this court addressed the question of the procedures required by the Constitution in the case of the dismissal of a permanent public employee. *Skelly* held that 'due process ... mandate[s] that the employee be accorded certain procedural rights *before* the discipline becomes effective. As a minimum, these pre-removal 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.' (Italics added.) (15 Cal.3d 194, 215.)

Procedural protection prior to the imposition of discipline is important, the *Skelly* court pointed out, because even if postdiscipline proceedings ultimately vindicate the employee and provide a back-pay remedy, the employee is removed from the payroll pending such proceedings. Unless the employee has accumulated significant savings, he may be unable to support himself and his family during the interim. The suspension of an employee's regular earnings for as long as a week can impose a serious deprivation upon the worker and his family.

Pretermination procedures also serve the important, if more subtle, purpose of according the accused individual a measure of respect and dignity, assuring him that he is not so insignificant that the government may curtail his livelihood - even for relatively short periods of time - without giving him some opportunity to explain or rebut the ***570** charges against him. (Cf. Davis & Gilhool, *The Economics of Constitutionalized Repossession: A Critique of Professor Johnson, and a Partial Reply* (1975) 47 So.Cal.L.Rev. 116, 147-149; Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality* (1973) 46 So.Cal.L.Rev. 617, 631.)

The majority would distinguish *Skelly* on two grounds: 'the shortness of the suspensions here involved' and 'the city's competing interest in prompt action for the maintenance of discipline.' (*Ante*, p. 563.) In my view, neither of these considerations supports the majority's conclusion that absolutely no procedural safeguards need be afforded an employee prior to suspending him from his job without pay.

The city's interest in imposing prompt discipline does not distinguish *Skelly*. In fact, that interest is more compelling in termination cases such as *Skelly* because the alleged transgression is generally more serious than in suspension cases. Yet *Skelly* established the principle that, absent an emergency, notice and an opportunity to respond must precede termination; the same principle should apply in suspension cases.

Thus the majority's conclusion can only be based on its first ground: that the employee suffers a smaller deprivation when suspended rather than terminated. Certainly the severity of the deprivation is one element to be considered in determining how much process is

due. But *Goss* v. *Lopez* (1975) 419 U.S. 565 [42 L.Ed.2d 725, 95 S.Ct. 729] and subsequent cases refute the majority's contention that an employee has no right to respond to the charges against him before he is suspended without pay for as much as a week.

In *Goss* the Supreme Court ruled that, absent an emergency, public school authorities could not suspend pupils for 10 days without first affording the students a chance to respond to the charges against them. 'The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, this is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.' (*Id.*, at pp. 579-580 [42 L.Ed.2d at p. 738].) ***571**

Although *Goss* dealt with suspensions from school, the courts have applied its holding to public employment. In *Muscare* v. *Quinn* (7th Cir. 1975) 520 F.2d 1212, 1215, certiorari dismissed (1976) 425 U.S. 560 [48 L.Ed.2d 165, 96 S.Ct. 1752], the court, citing *Goss*, ruled that '[p]ublic employees facing temporary suspension for less than 30 days have interests qualifying for protection under the Due Process Clause, and due process requires at the minimum that they be granted a hearing prior to suspension where they may be fully informed of the reasons for the proposed suspension and where they may challenge their sufficiency.' (See also, *Waite v. Civil Service Commission* (1978) ___ W.Va. ___ [241 S.E.2d 164, 170]; *Bagby* v. *Beal* (M.D. Pa. 1977) 439 F.Supp. 1257, 1261 [two-week suspension]; *Eley v. Morris* (N.D. Ga. 1975) 390 F.Supp. 913, 923.)

The majority claims that *Goss* is inapposite here, but fails to point to any relevant distinction. The suspensions here not only deprive the employees of 'protected interests,' but also of the funds they need to support themselves and their families. I cannot understand how the majority can conclude that a suspension from a job without pay creates a lesser hardship than a suspension from school.

Naturally, presuspension safeguards need not be as extensive as those preceding termination. The due process clause does not mandate that the employer permit workers to retain counsel, call witnesses or confront and cross-examine their accusers prior to suspension. But employers should be required to inform employees of the charges against them and give them a chance to respond informally, either orally or in writing, to the accusations. (*Goss v. Lopez, supra*, 419 U.S. at pp. 582-583 [42 L.Ed.2d at pp. 739-740].) '"Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied.' (*Id.*, at p. 574 [42 L.Ed.2d at p. 735], quoting *Wisconsin v. Constantineau* (1971) 400 U.S. 433, 437 [27 L.Ed.2d 515, 519, 91 S.Ct. 507].)

I would grant a writ of mandate requiring the employer to afford plaintiffs an opportunity to respond to the charges against them before ordering suspensions.

Bird, C. J., and Newman, J., concurred.

On November 6, 1978, the judgment was modified to read as printed above. ***572**

Cal.
Civil Service Assn. v. City and County of San Francisco
22 Cal.3d 552, 586 P.2d 162, 150 Cal.Rptr. 129, 99 L.R.R.M. (BNA) 3284

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Supreme Court of the United States
James E. GILBERT, President, East Stroudsburg University, et al., Petitioners,
v.
Richard HOMAR.

No. 96-651.
Argued March 24, 1997.
Decided June 9, 1997.

State university employee, who had been suspended without pay following his arrest on drug-related charges, brought action against university officials alleging due process violations. The United States District Court for the Middle District of Pennsylvania, Thomas I. Vanaskie, J., entered summary judgment in favor of officials. Employee appealed. The Court of Appeals for the Third Circuit, 89 F.3d 1009,Sarokin, Circuit Judge, reversed as to issue of pre-suspension hearing, and certiorari was granted. The Supreme Court, Justice Scalia, held that employee was not entitled under due process clause to notice and hearing prior to his suspension without pay based on his arrest on drug-related charges.

Reversed and remanded.

West Headnotes

[1] Constitutional Law 92 4170

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)7 Labor, Employment, and Public Officials
92k4163 Public Employment Relationships
92k4170 k. Compensation, Pensions, and Benefits. Most Cited Cases
(Formerly 92k278.4(1))

Protections of due process clause apply to government deprivation of those perquisites of government employment in which employee has constitutionally protected property interest. U.S.C.A. Const.Amends. 5, 14.

[2] Constitutional Law 92 4171

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)7 Labor, Employment, and Public Officials
92k4163 Public Employment Relationships
92k4171 k. Termination or Discharge. Most Cited Cases
(Formerly 92k278.4(3), 92k277(2))

Public employees who can be discharged only for cause have constitutionally protected property interest in their tenure and cannot be fired without due process. U.S.C.A. Const.Amends. 5, 14.

[3] Constitutional Law 92 4172(6)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)7 Labor, Employment, and Public Officials
92k4163 Public Employment Relationships
92k4172 Notice and Hearing; Proceedings and Review
92k4172(6) k. Termination or Discharge. Most Cited Cases
(Formerly 92k278.4(5))

Public employee dismissable only for cause is entitled under due process clause to a very limited hearing prior to termination, to be followed by a more comprehensive post-termination hearing. U.S.C.A. Const.Amends. 5, 14.

[4] Constitutional Law 92 4172(6)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)7 Labor, Employment, and Public Officials
92k4163 Public Employment Relationships
92k4172 Notice and Hearing; Proceedings and Review
92k4172(6) k. Termination or Discharge. Most Cited Cases
(Formerly 92k278.4(5))

Pretermination hearing granted to tenured public employee, as required by due process clause, should be initial check against mistaken decisions, that is, it should be essentially a determination of whether there are reasonable grounds to believe that charges against employee are true and support the proposed action. U.S.C.A. Const.Amends. 5, 14.

[5] Constitutional Law 92 4172(6)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)7 Labor, Employment, and Public Officials
92k4163 Public Employment Relationships
92k4172 Notice and Hearing; Proceedings and Review
92k4172(6) k. Termination or Discharge. Most Cited Cases
(Formerly 92k278.4(5))

To comply with due process clause, pretermination process involving tenured public employee need only include oral or written notice of charges, explanation of employer's evidence, and opportunity for employee to tell his or her side of the story. U.S.C.A. Const.Amends. 5, 14.

[6] Officers and Public Employees 283 72.16(1)

283 Officers and Public Employees
283I Appointment, Qualification, and Tenure
283I(H) Proceedings for Removal, Suspension, or Other Discipline
283I(H)1 In General
283k72.16 Hearing and Determination
283k72.16(1) k. In General. Most Cited Cases

There is no absolute rule that governmental employer may not suspend employee without pay unless that suspension is preceded by some kind of pre-suspension hearing, providing employee with notice and opportunity to be heard. U.S.C.A. Const.Amends. 5, 14.

[7] Constitutional Law 92 3875

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3875 k. Factors Considered; Flexibility and Balancing. Most Cited Cases
(Formerly 92k251.1)

Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances. U.S.C.A. Const.Amends. 5, 14.

[8] Constitutional Law 92 3875

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3875 k. Factors Considered; Flexibility and Balancing. Most Cited Cases
(Formerly 92k251.5, 92k251.1)

Due process is flexible and calls for such procedural protections as the particular situation demands. U.S.C.A. Const.Amends. 5, 14.

[9] Constitutional Law 92 4172(1)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)7 Labor, Employment, and

Public Officials
92k4163 Public Employment Relationships
92k4172 Notice and Hearing; Proceedings and Review
92k4172(1) k. In General. Most Cited Cases
(Formerly 92k278.4(5))

Where state must act quickly, or where it would be impractical to provide predeprivation process to public employee dismissable only for cause, postdeprivation process satisfies requirements of due process clause. U.S.C.A. Const.Amends. 5, 14.

[10] Constitutional Law 92 3912

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3912 k. Duration and Timing of Deprivation; Pre- or Post-Deprivation Remedies. Most Cited Cases
(Formerly 92k278(1.1))

Due process does not always require state to provide hearing prior to initial deprivation of property. U.S.C.A. Const.Amends. 5, 14.

[11] Constitutional Law 92 4172(1)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)7 Labor, Employment, and Public Officials
92k4163 Public Employment Relationships
92k4172 Notice and Hearing; Proceedings and Review
92k4172(1) k. In General. Most Cited Cases
(Formerly 92k278.4(5))

An important government interest, accompanied by substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing opportunity to be heard until after the initial deprivation of public employee's property interest in employment. U.S.C.A. Const.Amends. 5, 14.

[12] Constitutional Law 92 3875

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3875 k. Factors Considered; Flexibility and Balancing. Most Cited Cases
(Formerly 92k251.5, 92k251.1)

To determine what process is constitutionally due, Supreme Court generally has balanced three distinct factors consisting of, first, private interest that will be affected by official action, second, risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards, and, third, government's interest. U.S.C.A. Const.Amends. 5, 14.

[13] Colleges and Universities 81 8.1(5)

81 Colleges and Universities
81k8 Staff and Faculty
81k8.1 Duration of Employment and Removal or Other Discipline
81k8.1(4) Proceedings
81k8.1(5) k. Statement of Reasons, Notice, Hearing, and Administrative Review. Most Cited Cases

Constitutional Law 92 4223(6)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)8 Education
92k4218 Post-Secondary Education
92k4223 Employment Relationships
92k4223(6) k. Notice and Hearing; Proceedings and Review. Most Cited Cases
(Formerly 92k278.5(4))

Police officer employed by state university was not entitled under due process clause to notice and hearing prior to his suspension without pay based on

his arrest on drug-related charges; fact that officer had been arrested and charged served to assure that suspension decision was not baseless or unwarranted, officer's lost income was relatively insubstantial, and state had significant interest in immediately suspending employee who occupied position of great public trust and who had had felony charges filed against him. U.S.C.A. Const.Amend. 14.

[14] Constitutional Law 92 3912

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3912 k. Duration and Timing of Deprivation; Pre- or Post-Deprivation Remedies. Most Cited Cases
(Formerly 92k251.5)

In determining what process is due, account must be taken of length and finality of deprivation. U.S.C.A. Const.Amends. 5, 14.

[15] Constitutional Law 92 4172(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)7 Labor, Employment, and Public Officials
92k4163 Public Employment Relationships
92k4172 Notice and Hearing; Proceedings and Review
92k4172(3) k. Discipline. Most Cited Cases
(Formerly 92k278.4(5))

Officers and Public Employees 283 72.16(1)

283 Officers and Public Employees
283I Appointment, Qualification, and Tenure
283I(H) Proceedings for Removal, Suspension, or Other Discipline
283I(H)1 In General
283k72.16 Hearing and Determination
283k72.16(1) k. In General. Most Cited Cases

Assuming that public employer had discretion not to suspend tenured public employee despite fact that employee had been arrested and charged with drug offense, existence of such discretion did not compel finding that employee was entitled under due process clause to opportunity to persuade employer of his innocence before decision to suspend him without pay was made. U.S.C.A. Const.Amends. 5, 14.

****1809** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

On August 26, 1992, while employed as a policeman at East Stroudsburg University (ESU), a Pennsylvania state institution, respondent was arrested by state police and charged with a drug felony. Petitioners, ESU officials, suspended him without pay, effective immediately, pending their own investigation. Although the criminal charges were dismissed on September 1, his suspension remained in effect. On September 18, he was provided the opportunity to tell his side of the story to ESU officials. Subsequently, he was demoted to groundskeeper. He then filed suit under 42 U.S.C. § 1983, claiming, *inter alia*, that petitioners' failure to provide him with notice and a hearing before suspending him without pay violated due process. The District Court granted petitioners summary judgment, but the Third Circuit reversed.

Held: In the circumstances here, the State did not violate due process by failing to provide notice and a hearing before suspending a tenured public employee without pay. Pp. 1811-1815.

(a) In *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494, this Court held that before being fired a public employee dismissable only for cause was entitled to a limited pretermination hearing, to be followed by a more comprehensive posttermination hearing. The Third Circuit erred in relying on dictum in *Loudermill* to conclude that a suspension without pay must also be preceded by notice and a hearing. Due process is flexible and calls for such procedural protections as the particular

situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484; *FDIC v. Mallen*, 486 U.S. 230, 240, 108 S.Ct. 1780, 1787-88, 100 L.Ed.2d 265. Pp. 1811-1812.

(b) Three factors are relevant in determining what process is constitutionally due: (1) the private interest that will be affected by the official action; (2) 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 (3) the Government's interest. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18. Respondent asserts an interest in an uninterrupted paycheck; but account must be taken of the length and finality of the temporary deprivation of his pay. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434, 102 S.Ct. 1148, 1157, 71 L.Ed.2d 265. So long as a suspended employee receives a sufficiently prompt postsuspension hearing, the lost ***925** income is relatively insubstantial, and fringe benefits such as health and life insurance are often not affected at all. On the other side of the balance, the State has a significant interest in immediately suspending employees charged with felonies who occupy positions of public trust and visibility, such as police officers. While this interest could have been accommodated by suspending respondent *with* pay, the Constitution does not require the government to give an employee charged with a felony paid leave at taxpayer expense. The remaining *Mathews* factor is the most important in this case: The purpose of a pre-suspension hearing-to assure that there are reasonable grounds to support the suspension without pay, cf. *Loudermill, supra*, at 545-546, 105 S.Ct., at 1495-has already been assured by the arrest and the filing of charges. See *FDIC, supra*. That there may have been discretion not to suspend does not mean that respondent had to be given the opportunity to ****1810** persuade officials of his innocence before the decision was made. See *id.*, at 234-235, 108 S.Ct., at 1784-1785. Pp. 1812-1814.

(c) Whether respondent received an adequately prompt *post*-suspension hearing should be considered by the Third Circuit in the first instance. Pp. 1814-1815.

89 F. 3d 1009, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court.

Gwendolyn T. Mosley, Harrisburg, PA, for petitioners.

Ann Hubbard, for U.S. as amicus curiae, by special leave of the Court.

James V. Fareri, Stroudsburg, for Respondent.

Gregory O'Duden, Washington, DC, for National Treasury Employees Union as amicus curiae, by special leave of the Court.

For U.S. Supreme Court briefs, see:1997 WL 58580 (Pet.Brief)1997 WL 101641 (Resp.Brief)

***926** Justice SCALIA delivered the opinion of the Court.

This case presents the question whether a State violates the Due Process Clause of the Fourteenth Amendment by failing to provide notice and a hearing before suspending a tenured public employee without pay.

I

Respondent Richard J. Homar was employed as a police officer at East Stroudsburg University (ESU), a branch of Pennsylvania's State System of Higher Education. On August 26, 1992, when respondent was at the home of a family friend, he was arrested by the Pennsylvania State Police in a drug raid. Later that day, the state police filed a criminal complaint charging respondent with possession of marijuana, ***927** possession with intent to deliver, and criminal conspiracy to violate the controlled substance law, which is a felony. The state police notified respondent's supervisor, University Police Chief David Marazas, of the arrest and charges. Chief Marazas in turn informed Gerald Levanowitz, ESU's Director of Human Resources, to whom ESU President James Gilbert had delegated authority to discipline ESU employees. Levanowitz suspended respondent without pay effective immediately. Respondent failed to report to work on the day of his arrest, and learned of his suspension the next day, when he called Chief Marazas to inquire whether he had been suspended. That same day, respondent received a letter from Levanowitz confirming that he had been suspended effective August 26 pending an investigation into the criminal charges filed against him. The letter explained that any action taken by ESU would not necessarily coincide with the disposition of the criminal charges.

Although the criminal charges were dismissed on September 1, respondent's suspension remained in effect while ESU continued with its own investigation. On September 18, Levanowitz and Chief Marazas met with respondent in order to give him an opportunity to tell his side of the story. Respondent was informed at the meeting that the state police had given ESU information that was "very serious in nature," Record, Doc. No. 26, p. 48, but he was not informed that that included a report of an alleged confession he had made on the day of his arrest; he was consequently unable to respond to damaging statements attributed to him in the police report.

In a letter dated September 23, Levanowitz notified respondent that he was being demoted to the position of groundskeeper effective the next day, and that he would receive backpay from the date the suspension took effect at the rate of pay of a groundskeeper. (Respondent eventually received backpay for the period of his suspension at the rate of pay of a university police officer.) The letter maintained ***928** that the demotion was being imposed "as a result of admissions made by yourself to the Pennsylvania State Police on August 26, 1992 that you maintained associations with individuals whom you knew were dealing in large quantities of marijuana and that you obtained marijuana from one of those individuals for your own ****1811** use. Your actions constitute a clear and flagrant violation of Sections 200 and 200.2 of the [ESU] Police Department Manual." App. 82a. Upon receipt of this letter, the president of respondent's union requested a meeting with President Gilbert. The requested meeting took place on September 24, at which point respondent had received and read the police report containing the alleged confession. After providing respondent with an opportunity to respond to the charges, Gilbert sustained the demotion.

Respondent filed this suit under Rev. Stat. § 1979, 42 U.S.C. § 1983, in the United States District Court for the Middle District of Pennsylvania against President Gilbert, Chief Marazas, Levanowitz, and a Vice President of ESU, Curtis English, all in both their individual and official capacities. He contended, *inter alia*, that petitioners' failure to provide him with notice and an opportunity to be heard before suspending him without pay violated due process. The District Court entered summary judgment for petitioners. A divided Court of Appeals reversed the District Court's determination that it was permissible for ESU to suspend respondent without pay without first providing a hearing. 89 F.3d 1009 (C.A.3 1996). We granted certiorari. 519 U.S. 1052, 117 S.Ct. 678, 136 L.Ed.2d 604 (1997).

II

[1][2] The protections of the Due Process Clause apply to government deprivation of those perquisites of government employment in which the employee has a constitutionally protected "property" interest. Although we have previously held that public employees who can be discharged only for cause have a constitutionally protected property interest in ***929** their tenure and cannot be fired without due process, see *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578, 92 S.Ct. 2701, 2709-2710, 33 L.Ed.2d 548 (1972); *Perry v. Sindermann*, 408 U.S. 593, 602-603, 92 S.Ct. 2694, 2700-2701, 33 L.Ed.2d 570 (1972), we have not had occasion to decide whether the protections of the Due Process Clause extend to discipline of tenured public employees short of termination. Petitioners, however, do not contest this preliminary point, and so without deciding it we will, like the District Court, "[a]ssum[e] that the suspension infringed a protected property interest," App. to Pet. for Cert. 59a, and turn at once to petitioners' contention that respondent received all the process he was due.

A

[3][4][5] In *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), we concluded that a public employee dismissable only for cause was entitled to a very limited hearing prior to his termination, to be followed by a more comprehensive post-termination hearing. Stressing that the pretermination hearing "should be an initial check against mistaken decisions-essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action," *id.*, at 545-546, 105 S.Ct., at 1495, we held that pretermination process need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story, *id.*, at 546, 105 S.Ct., at 1495. In the course of our assessment of the governmental interest in immediate termination of a tenured employee, we observed that "in those situations where the employer

perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending *with pay*." *Id.*, at 544-545, 105 S.Ct., at 1495 (emphasis added; footnote omitted).

[6] Relying on this dictum, which it read as "strongly suggest[ing] that suspension without pay must be preceded by notice and an opportunity to be heard *in all instances*," 89 F.3d, at 1015 (emphasis added), and determining on its own that ***930** such a rule would be "eminently sensible," *id.*, at 1016, the Court of Appeals adopted a categorical prohibition: "[A] governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard." *Ibid.* Respondent (as well as most of his *amici*) makes no attempt to defend this absolute****1812** rule, which spans all types of government employment and all types of unpaid suspensions. Brief for Respondent 8, 12-13. This is eminently wise, since under our precedents such an absolute rule is indefensible.

[7][8][9][10][11] It is by now well established that " 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). This Court has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause. See, *e.g.*, *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53, 114 S.Ct. 492, 500-501, 126 L.Ed.2d 490 (1993); *Zinermon v. Burch*, 494 U.S. 113, 128, 110 S.Ct. 975, 984-985, 108 L.Ed.2d 100 (1990) (collecting cases); *Barry v. Barchi*, 443 U.S. 55, 64-65, 99 S.Ct. 2642, 2649-2650, 61 L.Ed.2d 365 (1979); *Dixon v. Love*, 431 U.S. 105, 115, 97 S.Ct. 1723, 1729, 52 L.Ed.2d 172 (1977); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 314-320, 29 S.Ct. 101, 103-106, 53 L.Ed. 195 (1908). Indeed, in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), overruled in part on other grounds, *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), we specifically noted that "we have rejected the proposition that [due process] *always* requires the State to provide a hearing prior to the initial deprivation of property." 451 U.S., at 540, 101 S.Ct., at 1915. And in *FDIC v. Mallen*, 486 U.S. 230, 108 S.Ct. 1780, 100 L.Ed.2d 265 (1988), where we unanimously approved the Federal Deposit Insurance Corporation's (FDIC's) suspension, without prior hearing, of an indicted private bank employee, we said: "An important government***931** interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Id.*, at 240, 108 S.Ct., at 1787-1788. FN1

FN1. It is true, as respondent contends, that in *Mallen* we did not expressly state whether the bank president's suspension was with or without pay. But the opinion in *Mallen* recites no order from the FDIC, if it had authority to issue such an order, that the bank pay its president; only an order that the bank suspend its president's participation in the bank's affairs. Our opinion in *Mallen* certainly reflects the assumption that the suspension would be *without* pay. For example, in discussing the private interest at stake we considered "the severity of depriving someone of his or her livelihood." 486 U.S., at 243, 108 S.Ct., at 1789 (citing cases). And, Mallen argued to this Court that "denial of an income stream to underwrite these extraordinary expenses can be crucial, not only to Mallen's financial condition in general, but to his ability to pay for his criminal defense." Brief for Appellee in *FDIC v. Mallen*, O.T.1987, No. 87-82, pp. 7-8.

The dictum in *Loudermill* relied upon by the Court of Appeals is of course not inconsistent with these precedents. To say that when the government employer perceives a hazard in leaving the employee on the job it "can avoid the problem by suspending with pay" is not to say that that is the only way of avoiding the problem. Whatever implication the phrase "with pay" might have conveyed is far outweighed by the clarity of our precedents which emphasize the flexibility of due process as contrasted with the sweeping and categorical rule adopted by the

Court of Appeals.

B

[12] To determine what process is constitutionally due, we have generally balanced 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***932** safeguards; and finally, the Government's interest." *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

See also, *e.g.*, *Mallen, supra*, at 242, 108 S.Ct., at 1788-1789; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434, 102 S.Ct. 1148, 1157, 71 L.Ed.2d 265 (1982).

[13][14] ****1813** Respondent contends that he has a significant private interest in the uninterrupted receipt of his paycheck. But while our opinions have recognized the severity of depriving someone of the means of his livelihood, see, *e.g.*, *Mallen, supra*, at 243, 108 S.Ct., at 1789; *Loudermill*, 470 U.S., at 543, 105 S.Ct., at 1493-1494, they have also emphasized that in determining what process is due, account must be taken of "the *length* " and "*finality* of the deprivation," *Logan, supra*, at 434, 102 S.Ct., at 1157 (emphasis added). Unlike the employee in *Loudermill*, who faced *termination*, respondent faced only a *temporary suspension* without pay. So long as the suspended employee receives a sufficiently prompt postsuspension hearing, the lost income is relatively insubstantial (compared with termination), and fringe benefits such as health and life insurance are often not affected at all, Brief for United States as *Amicus Curiae* 18; Record, Doc. No. 19, p. 7.

On the other side of the balance, the State has a significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as police officers. Respondent contends that this interest in maintaining public confidence could have been accommodated by suspending him *with* pay until he had a hearing. We think, however, that the government does not have to give an employee charged with a felony a paid leave at taxpayer expense. If his services to the government are no longer useful once the felony charge has been filed, the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him. ESU's interest in preserving public confidence in its police force is at least as significant as the State's interest in preserving the integrity of the sport of horse racing, see *Barry v. Barchi, supra*, at 64, 99 S.Ct., at 2649, ***933** an interest we "deemed sufficiently important ... to justify a brief period of suspension prior to affording the suspended trainer a hearing," *Mallen*, 486 U.S., at 241, 108 S.Ct., at 1788.

The last factor in the *Mathews* balancing, and the factor most important to resolution of this case, is the risk of erroneous deprivation and the likely value of any additional procedures. Petitioners argue that any presuspension hearing would have been worthless because pursuant to an Executive Order of the Governor of Pennsylvania a state employee is automatically to be suspended without pay "[a]s soon as practicable after [being] formally charged with ... a felony." 4 Pa.Code § 7.173 (1997). According to petitioners, supervisors have no discretion under this rule, and the mandatory suspension without pay lasts until the criminal charges are finally resolved. See Tr. of Oral Arg. 20. If petitioners' interpretation of this order is correct, there is no need for any presuspension process since there would be nothing to consider at the hearing except the independently verifiable fact of whether an employee had indeed been formally charged with a felony. See *Codd v. Velger*, 429 U.S. 624, 627-628, 97 S.Ct. 882, 883-884, 51 L.Ed.2d 92 (1977) (*per curiam*). Cf. *Loudermill, supra*, at 543, 105 S.Ct., at 1493-1494. Respondent, however, challenges petitioners' reading of the Code, and contends that in any event an order of the Governor of Pennsylvania is a "mere directiv[e] which do[es] not confer a legally enforceable right." Brief for Respondent 20. We need not resolve this disputed issue of state law because even assuming the Code is only advisory (or has no application at all), the State had no constitutional obligation to provide respondent with a presuspension hearing. We noted in *Loudermill* that the purpose of a pre-*termination* hearing is to determine "whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." 470 U.S., at 545-546, 105 S.Ct., at 1495. By parity of reasoning, the purpose of any pre-*suspension* hearing would be to assure that there are reasonable grounds to support the suspension without pay. ***934** Cf. *Mallen*, 486 U.S., at 240, 108

S.Ct., at 1787-1788. But here that has already been assured by the arrest and the filing of charges.

In *Mallen,* we concluded that an "*ex parte* finding of probable cause" such as a grand jury indictment provides adequate assurance that the suspension is not unjustified. *Id.*, at 240-241, 108 S.Ct., at 1787-1788. ****1814** The same is true when an employee is arrested and then formally charged with a felony. First, as with an indictment, the arrest and formal charges imposed upon respondent "by an independent body demonstrat[e] that the suspension is not arbitrary." *Id.*, at 244, 108 S.Ct., at 1790. Second, like an indictment, the imposition of felony charges "itself is an objective fact that will in most cases raise serious public concern." *Id.*, at 244-245, 108 S.Ct., at 1790. It is true, as respondent argues, that there is more reason to believe an employee has committed a felony when he is indicted rather than merely arrested and formally charged; but for present purposes arrest and charge give reason enough. They serve to assure that the state employer's decision to suspend the employee is not "baseless or unwarranted," *id.*, at 240, 108 S.Ct., at 1788, in that an independent third party has determined that there is probable cause to believe the employee committed a serious crime.

[15] Respondent further contends that since (as we have agreed to assume) Levanowitz had discretion *not* to suspend despite the arrest and filing of charges, he had to be given an opportunity to persuade Levanowitz of his innocence before the decision was made. We disagree. In *Mallen,* despite the fact that the FDIC had *discretion* whether to suspend an indicted bank employee, see 64 Stat. 879, as amended, 12 U.S.C. § 1818(g)(1); *Mallen, supra,* at 234-235, and n. 5, 108 S.Ct., at 1784-1785, and n. 5 we nevertheless did not believe that a presuspension hearing was necessary to protect the private interest. Unlike in the case of a termination, where we have recognized that "the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect," *Loudermill, supra,* at 543, 105 S.Ct., at 1494, in the case of a suspension there will be ample opportunity to invoke ***935** discretion later-and a short delay actually benefits the employee by allowing state officials to obtain more accurate information about the arrest and charges. Respondent "has an interest in seeing that a decision concerning his or her continued suspension is not made with excessive haste." *Mallen,* 486 U.S., at 243, 108 S.Ct., at 1789. If the State is forced to act too quickly, the decisionmaker "may give greater weight to the public interest and leave the suspension in place." *Ibid.*

C

Much of respondent's argument is dedicated to the proposition that he had a due process right to a presuspension hearing because the suspension was open-ended and he "theoretically may not have had the opportunity to be heard for weeks, months, or even years after his initial suspension without pay." Brief for Respondent 23. But, as respondent himself asserts in his attempt to downplay the governmental interest, "[b]ecause the employee is entitled, in any event, to a prompt post-suspension opportunity to be heard, the period of the suspension should be short and the amount of pay during the suspension minimal." *Id.*, at 24-25.

Whether respondent was provided an adequately prompt *post*-suspension hearing in the present case is a separate question. Although the charges against respondent were dropped on September 1 (petitioners apparently learned of this on September 2), he did not receive any sort of hearing until September 18. Once the charges were dropped, the risk of erroneous deprivation increased substantially, and, as petitioners conceded at oral argument, there was likely value in holding a prompt hearing, Tr. of Oral Arg. 19. Cf. *Mallen, supra,* at 243, 108 S.Ct., at 1789 (holding that 90 days before the agency hears and decides the propriety of a suspension does not exceed the permissible limits where coupled with factors that minimize the risk of an erroneous deprivation). Because neither the Court of Appeals nor the District Court addressed whether, under the particular facts of this case, petitionersviolated ***936** due process by failing to provide a sufficiently prompt postsuspension hearing, we will not consider this issue in the first instance, but remand for consideration by the Court of Appeals.

* * *

****1815** The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

U.S.Pa.,1997.
Gilbert v. Homar

520 U.S. 924, 117 S.Ct. 1807, 138 L.Ed.2d 120, 118 Ed. Law Rep. 590, 12 IER Cases 1473, 97 Cal. Daily Op. Serv. 4310, 97 Daily Journal D.A.R. 7203, 97 CJ C.A.R. 854, 10 Fla. L. Weekly Fed. S 542

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139 Cal.App.3d 347, 188 Cal.Rptr. 689
(Cite as: 139 Cal.App.3d 347)

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 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, 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 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 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 adjudi-

cated 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 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**

Cal.App.2.Dist.
Hopson v. City of Los Angeles
139 Cal.App.3d 347, 188 Cal.Rptr. 689

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149 Cal.App.3d 200, 196 Cal.Rptr. 746
(Cite as: 149 Cal.App.3d 200)

C

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.)

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. 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 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 ***204**section 1328 of the Unemployment 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 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 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**

Cal.App.4.Dist.
Howell v. County of San Bernardino
149 Cal.App.3d 200, 196 Cal.Rptr. 746

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579 F.Supp. 36
(Cite as: 579 F.Supp. 36)

United States District Court,
C.D. California.

LOS ANGELES POLICE PROTECTIVE LEAGUE, a California corporation, et al., Plaintiffs,
v.
Darryl F. GATES, individually and as Chief of Police of the City of Los Angeles, et al., Defendants.

No. CV 82–3392 RG (MCx).
Jan. 17, 1984.

Police officer and others brought action against chief of police and others seeking relief under section 1983 for violations of plaintiff's civil rights during investigation. On defendant's summary judgment motion, the District Court, Gadbois, J., held that: (1) order forbidding police officer from discussing investigation did not infringe officer's right of free speech and was neither vague nor overbroad; (2) police officer was not deprived of either his Fifth or his Sixth Amendment right to counsel; (3) even assuming it was a search, black lighting of officer's hands, uniform, and wallet was reasonable, and (4) administrative order to search was not reasonable and therefore officer could not be lawfully disciplined for refusing to obey it.

Order accordingly.

West Headnotes

[1] Constitutional Law 92 1955

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(P) Public Employees and Officials
92k1955 k. Police and other public safety officials. Most Cited Cases
(Formerly 92k90.1(7.2), 92k90.1(1))

Police department order forbidding officer from discussing internal investigation with other suspects or witnesses in division until completion of investigation did not infringe officer's right of free speech, in that state had a compelling interest in protecting integrity and efficiency of its police department, order did not prevent officer from discussing case with his representative, present during all interrogations, or his attorney, order applied only until internal affairs division completed its investigation, and order did not prohibit officer from talking with other officers about matters outside the investigation.

[2] Municipal Corporations 268 180(1)

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(B) Municipal Departments and Officers Thereof
268k179 Police
268k180 In General
268k180(1) k. In general. Most Cited Cases

Police department order forbidding officer from discussing internal police investigation with other suspects or witnesses in division until completion of investigation was not unconstitutionally vague, in that officer said he understood order at the time he received it and order clearly set up the perimeters of prohibited discussion.

[3] Municipal Corporations 268 180(1)

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(B) Municipal Departments and Officers Thereof
268k179 Police
268k180 In General
268k180(1) k. In general. Most Cited Cases

Police department order forbidding officer from discussing internal police investigation with other suspects or witnesses in division until completion of investigation was not unconstitutionally overbroad, in that order terminated upon completion of investigation, order only prohibited officer from discussing

investigation with those officers involved in investigation, and officer had not shown how a narrower order could have accomplished state's compelling objective, and he had not shown how order's alleged overbreadth prejudiced him in defending charges against him.

[4] Criminal Law 110 411.31

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)12 Counsel in General
110k411.31 k. Absence or denial of counsel. Most Cited Cases
(Formerly 110k412.2(2))

Criminal Law 110 411.85

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)16 Invocation or Rights
110k411.82 Effect of Invocation
110k411.85 k. Counsel. Most Cited Cases
(Formerly 110k412.2(5))

Chief of police and other defendants did not violate police officer's right to have counsel present during Internal Affairs Division interrogation involving possible criminal activity by officer, in that the Sixth Amendment was not applicable because officer never faced a criminal prosecution or any proceeding threatening his liberty and, assuming officer had right to have counsel present during questioning, single specific instance where officer requested and was denied presence of counsel had not been demonstrated. U.S.C.A. Const.Amend. 6.

[5] Criminal Law 110 1719

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)2 Stage of Proceedings as Affecting Right
110k1719 k. Adversary or judicial proceedings. Most Cited Cases
(Formerly 110k641.3(1), 110k641.3)

Right to counsel does not arise until formal judicial criminal proceedings have begun. U.S.C.A. Const.Amend. 6.

[6] Criminal Law 110 411.31

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)12 Counsel in General
110k411.31 k. Absence or denial of counsel. Most Cited Cases
(Formerly 110k412.2(2))

Criminal Law 110 411.81

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)16 Invocation or Rights
110k411.79 Counsel
110k411.81 k. Particular cases. Most Cited Cases
(Formerly 110k412.2(5))

Chief of police and other defendants did not violate police officer's Fifth Amendment right to have counsel present during Internal Affairs Division interrogations involving possible criminal activity by officer, in that officer had not shown that he requested and was denied counsel, officer had not shown that any statement he made in absence of denied counsel was used against him in a criminal prosecution, and officer never even faced a criminal prosecution, or any proceeding which threatened his liberty. U.S.C.A. Const.Amend. 5.

[7] Civil Rights 78 1351(5)

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1351 Governmental Ordinance, Policy, Practice, or Custom

78k1351(5) k. Employment practices. Most Cited Cases
(Formerly 78k206(3), 78k13.7)

Assuming his two representations in plaintiff's memorandum and declarations that police department had no established policy, practice, or custom governing investigative searches of accused officer's patrol cars and objects therein, plaintiffs had admitted that police officer did not conduct search of patrol car and briefcase pursuant to official municipal policy or custom, and thus city could not be held liable under section 1983 for allegedly illegal search by police officers.

[8] Searches and Seizures 349 181

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k181 k. Particular concrete applications. Most Cited Cases
(Formerly 349k7(28))

Subsequent conduct of police officer under investigation by the Internal Affairs Division in limiting scope of search on January 20, 1982, and outrightly refusing to allow search on April 15, 1982 unmistakably demonstrated that Internal Affairs Division's power and authority did not coerce officer into consenting to search of his private car.

[9] Searches and Seizures 349 29

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k29 k. Containers. Most Cited Cases
(Formerly 349k7(10))

Even if police officer under investigation by the Internal Affairs Division had not consented to search of his station locker, Fourth Amendment offered him no protection because he had no reasonable expectation of privacy in locker due to operation of regulation providing that a police officer's locker may be searched in his presence, or with his consent, or where he has been notified that a search will be conducted.

[10] Searches and Seizures 349 78

349 Searches and Seizures
349I In General
349k78 k. Samples and tests; identification procedures. Most Cited Cases
(Formerly 349k7(10))

Even assuming that black lighting of police officer's hands, uniform and wallet was a search, December 7, 1981, black lighting of officer under investigation by the Internal Affairs Division was reasonable and did not violate his Fourth Amendment rights, in that only by black lighting officers who appeared at sting site could Internal Affairs Division determine which officers had been involved in criminal violation of duty.

[11] Searches and Seizures 349 181

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k181 k. Particular concrete applications. Most Cited Cases
(Formerly 349k7(28))

Consent by police officer under investigation by the Internal Affairs Division to January 20, 1982, searches of his pickup truck, police locker, home, and garage in order to clear himself of any wrongdoing was voluntarily given, in that officer's deposition testimony demonstrated that he was not coerced or intimidated by IAD investigators.

[12] Searches and Seizures 349 181

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k181 k. Particular concrete applications. Most Cited Cases
(Formerly 349k7(28))

Investigators for the Internal Affairs Division did not illegally seize power tools from truck of officer under investigation during January 20, 1982 search, in that officer voluntarily consented to search of his truck after being advised of investigator's intent to find possibly stolen tools.

[13] Searches and Seizures 349 174

349 Searches and Seizures
349V Waiver and Consent
349k173 Persons Giving Consent
349k174 k. Owners of property; hosts and guests. Most Cited Cases
(Formerly 349k7(27))

Family of police officer under investigation by the Internal Affairs Division did not suffer deprivation of Fourth Amendment rights when investigators searched officer's home and garage on January 20, 1982, in that officer consented to the search, he was the only family member home, he did not tell officers that his family would object to the search, and the officers did not search any place officer under investigation did not want them to look.

[14] Municipal Corporations 268 185(1)

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(B) Municipal Departments and Officers Thereof
268k179 Police
268k185 Suspension and Removal of Policemen
268k185(1) k. Grounds for removal or suspension. Most Cited Cases

Since police department's interest in conducting desired search on April 15 was not particularly strong, while interest of officer under investigation was great because search would have been intrusive and would not have been conducted at a time and place that were well within usual demands of a policeman's job, April 15, 1982, order to search was not reasonable and therefore officer under investigation could not lawfully be disciplined for refusing to obey it.

[15] Criminal Law 110 411.4

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)10 Warnings
110k411.4 k. Custodial interrogation in general. Most Cited Cases
(Formerly 110k412.2(3))

Chief of police and other defendants did not violate Fifth Amendment rights of police officer under investigation by the Internal Affairs Division on ground that the IAD initially interrogated officer in custody without *Miranda* warnings in what was actually a criminal investigation, in that district attorney never prosecuted officer and officer never refused to answer questions at the time. U.S.C.A. Const.Amend. 5.

[16] Civil Rights 78 1088(4)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1088 Police, Investigative, or Law Enforcement Activities
78k1088(4) k. Arrest and detention. Most Cited Cases
(Formerly 78k132.1, 78k132, 78k13.4(2))

Chief of police and other defendants did not violate Fifth Amendment rights of police officer under investigation by the Internal Affairs Division on ground that even after officer received and refused to waive his *Miranda* rights, IAD asked him questions not specifically, directly, and narrowly related to his fitness as an officer, in that officer perfectly understood his options and Internal Affairs Division followed proper procedure. U.S.C.A. Const.Amend. 5.

[17] Civil Rights 78 1088(1)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1088 Police, Investigative, or Law Enforcement Activities
78k1088(1) k. In general. Most Cited Cases
(Formerly 78k132.1, 78k132, 78k13.4(2))

Chief of police and other defendants did not violate Fifth Amendment rights of police officer under investigation by the Internal Affairs Division on ground that the IAD had no authority to grant immunity, and thus officer did not have adequate protection against self-incrimination, in that question not directly, narrowly, and specifically related to officer's

fitness was not identified, interrogations directly and narrowly related to facts surrounding those charges against officer, and officer could not complain that he was penalized for failing to answer questions not directly and narrowly concerning his fitness as an officer because he never faced criminal charges of any type and the board of rights disciplined him only for falsely answering questions which did directly and specifically concern his fitness as an officer. U.S.C.A. Const.Amend. 5.

[18] Civil Rights 78 1088(1)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1088 Police, Investigative, or Law Enforcement Activities
78k1088(1) k. In general. Most Cited Cases
(Formerly 78k132.1, 78k132, 78k13.4(2))

Officer under investigation by Internal Affairs Division and other plaintiffs could not complain that dual track investigation process resulted in prosecutorial use of evidence obtained in a compelled administrative interview, in that dual track process did not affect officer because he never faced any criminal prosecution. U.S.C.A. Const.Amend. 5.

***38** Gregory G. Petersen & Associates, Santa Ana, Cal., for plaintiffs.

Ira Reiner, City Atty., Frederick N. Merkin, Senior Asst. City Atty., Lewis N. Unger, Deputy City Atty., Los Angeles, Cal., for defendants.

OPINION

GADBOIS, District Judge.

This lawsuit arises out of a 1981–82 investigation by the Los Angeles Police Department, ("LAPD"), into widespread corruption among officers of the Hollywood Division. In late 1981, Internal Affairs Division ("IAD") investigators learned that Hollywood Division officers were committing on-duty burglaries. IAD set up a "sting" operation which resulted in the December 7, 1981 arrest of two LAPD officers—Ronald Venegas and Jack Meyers—as they left the sting site with stolen property.

Several other Hollywood Division officers, including Roger Gibson, reported to the sting site on December 7. IAD questioned and searched those officers immediately after they returned to the station in order to discover whether any of them had ***39** stolen chemically-dusted money from the burglarized store. The search produced no evidence of theft by Gibson. Nevertheless, he eventually became a suspect in IAD's investigation into widespread misconduct in the Division.

During that investigation, IAD interviewed Gibson several times. While interviewing him on January 20, 1982, IAD gave him his *Miranda* rights, and ordered him not to discuss the investigation with other suspects or witnesses in the Division until IAD had completed its investigation. After the interview, investigators searched Gibson's property for evidence of stolen tools and appliances. On April 15, investigators gave Gibson an administrative order to allow the search of his garage and private vehicles for stolen property. Gibson refused, and was charged with insubordination.

Three months after IAD finished its investigation, the Board of Rights held an administrative disciplinary hearing. The Board found Gibson guilty of thirteen charges, including insubordination and lying to investigators about on-duty drinking and sex with prostitutes. Gibson was found not guilty of committing on-duty burglaries. LAPD fired Gibson, but he was never criminally prosecuted.

On January 14, 1983, plaintiffs—Los Angeles Police Protective League ("LAPPL"), Roger Gibson, and Gibson's wife and children—filed an amended complaint seeking relief under 42 U.S.C. § 1983 for violations of plaintiffs' civil rights during the investigation. Defendants have moved for summary judgment on plaintiffs' First, Fourth, Fifth, and Sixth Amendment claims. Plaintiffs' due process and privacy claims, and their pendent state claims, will be addressed later in the litigation.

I.

FIRST AMENDMENT CHALLENGE

Plaintiffs challenge the order forbidding Gibson from discussing the investigation with other suspects or witnesses in the Hollywood Division until IAD had completed its investigation. Plaintiffs claim that the order infringed Gibson's right of free speech and was vague and overbroad.

A. *Infringement of Gibson's Free Speech*

The Supreme Court, in *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968), established the test for determining whether governmental restrictions on its employees' speech violated the First Amendment.[FN1]

> FN1. Plaintiffs challenge the order not because it prevented Gibson from commenting on the investigation (it did not); but because it prevented him from obtaining information from, or exchanging information with, other suspects or witnesses. The general principles of *Pickering* still apply to the instant case.

> The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees.
> *See also* *Fracaro v. Priddy*, 514 F.Supp. 191, 196 (M.D.N.C.1981) (applying *Pickering* test to a state's confidentiality order binding its employees).

Gibson's interest in uninhibited speech consisted of discussing the investigation with other Hollywood Division suspects and witnesses *during* the IAD's investigation, rather than *after* it. LAPD's interest in temporarily restricting Gibson's contact with other suspects and witnesses consisted of preventing suspected officers from collaborating on their stories, fabricating alibis, and disposing of stolen property.

[1] The balance in this case clearly weighs in favor of the State. The State has a compelling interest in protecting the integrity and efficiency of its police departments. *Kelley v. Johnson*, 425 U.S. 238, 247, 96 S.Ct. 1440, 1445, 47 L.Ed.2d 708 (1976); *Kannisto v. City and County of San Francisco*, 541 F.2d 841, 845 (9th Cir.1976), *cert. denied*, 430 U.S. 931, 97 S.Ct. 1552, 51 L.Ed.2d 775 (1977); ***40***Waters v. Chaffin*, 684 F.2d 833, 836 (11th Cir.1982). Especially in the face of suspected widespread corruption, the state had an overriding concern with conducting a spotless investigation and quickly restoring the public's faith in its police department.

The order did not prevent Gibson from discussing the case with his representative, present during all interrogations, or his attorney, and the order applied only until IAD completed its investigation. Moreover, the order did not prohibit Gibson from talking with other officers about matters outside the investigation. Gibson had about three months after IAD finished its investigation to discuss the case with other Hollywood Division officers, and prepare his defense.

Plaintiffs complain that two witnesses died before IAD lifted the order, so that Gibson never had the opportunity to interview them. First, even had there been no order, they might have died before Gibson had a chance to interview them. Second, on balance, the State's interest in effectively investigating police corruption outweighed the speculative chance that a witness would die during IAD's eight-month investigation. Third, plaintiffs have not shown how any testimony from the dead witnesses would have materially helped Gibson's defense.

The cases cited by plaintiffs holding that the government may not impose an obligation of secrecy on grand jury witnesses may easily be distinguished. *In Re Russo*, 53 F.R.D. 564, 569–71 (C.D.Cal.1971), determined whether the government had to provide a witness with a transcript of his grand jury testimony. The court decided the case under F.R.Crim.P. Rule 6(e), not the First Amendment; the issue of freedom of expression did not arise. Moreover, under First Amendment analysis, a grand jury witness does not stand in the same position as a government employee. *Pickering* left no doubt that the First Amendment allows significantly greater restrictions by the government on its employees' employment-related speech than on the speech of regular citizens. *Pickering v. Bd. of Education*, 391 U.S. at 568, 88 S.Ct. at 1734. *In Re Vescovo Special Grand Jury*, 473 F.Supp. 1335, 1336 (C.D.Cal.1979), may be distinguished on essentially the same grounds as *Russo*.

Beacon Journal Pub. Co. v. Unger, 532 F.Supp. 55, 59 (N.D.Ohio 1982), determined whether the state could require grand jury witnesses to swear that they would not reveal the substance of their grand jury testimony. The court specifically refrained from considering the First Amendment issue and decided the case on the state's analogue to F.R.Crim.P. Rule 6(e). Moreover, the oath there did not limit the secrecy obligation in terms of time or persons with whom the witness could speak. *Id.* at 57, 59. Finally, the court specifically recognized that the state could impose a

veil of secrecy on grand jury witnesses under proper circumstances on a case-by-case basis. *Id.* at 59.

B. *Vagueness*

[2] Plaintiffs' vagueness challenge may be disposed of summarily. First, Gibson said he understood the order at the time he received it. Declaration of Elayne Yochem, July 7, 1982, Exhibit A, pp. 37–38. Second, the order clearly set out the parameters of prohibited discussion. It did not force "men of common intelligence [to] guess at its meaning." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). It was not unconstitutionally vague.

C. *Overbreadth*

[3] Plaintiffs' overbreadth challenge is also without merit. The order terminated upon the completion of IAD's investigation. The order only prohibited Gibson from discussing the investigation with those Hollywood Division officers involved in the investigation. It did not prevent him from discussing the case with his representative or his attorney. It did not prevent him from successfully preparing a defense to the battery theft charge against him. Gibson has not shown how a narrower order could have accomplished the State's compelling***41** objective, and he has not shown how the order's alleged overbreadth prejudiced him in defending the charges against him.

Summary judgment is granted against the plaintiffs' First Amendment claims. All requests for declaratory and injunctive relief are denied. The IAD issues the type of order challenged here on a limited, case-by-case basis. See Defendants' Exh. 88, p. 6. Any challenge to future IAD orders must be analyzed under the particular circumstances found there. *See Bickel v. Burkhart*, 632 F.2d 1251, 1257 (5th Cir.1980).

II.
RIGHT TO COUNSEL

A. *Sixth Amendment*

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defence." Plaintiffs apparently claim that defendants violated Gibson's Sixth Amendment right to have counsel present during IAD interrogations involving possible criminal activity by the officer.[FN2]

FN2. Plaintiffs do not clearly explain when they think the Sixth Amendment applies during an IAD investigation. IAD's investigation of Gibson began as a dual-track criminal and administrative inquiry. As explained below, during the January 20, 1982 interview, Gibson refused to waive his *Miranda* rights, so the investigation became solely administrative. Because no criminal prosecution ever resulted from the first part of the investigation, and because the Sixth Amendment does not apply to administrative, non-criminal proceedings involving no loss of liberty, the Sixth Amendment did not apply to any phase of the IAD investigation.

[4][5] First, the Sixth Amendment does not apply because Gibson never faced a "criminal prosecution" or any proceeding threatening his liberty. *See Middendorf v. Henry*, 425 U.S. 25, 34, 96 S.Ct. 1281, 1287, 47 L.Ed.2d 556 (1976). The right to counsel does not arise until formal judicial criminal proceedings have begun, and they never did here. *See Kirby v. Illinois*, 406 U.S. 682, 688–89, 92 S.Ct. 1877, 1881–82, 32 L.Ed.2d 411 (1972); *United States v. Kenny*, 645 F.2d 1323, 1338 (9th Cir.) *cert. denied*, 452 U.S. 920, 101 S.Ct. 3059, 69 L.Ed.2d 425 (1981); *see also Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

Until the defendant has been arrested or indicted, whatever suspicions the police might have, the defendant is not an "accused," and, therefore, *Massiah* is inapplicable.

United States v. Zazzara, 626 F.2d 135, 138 (9th Cir.1980); *but cf. United States v. Gouveia*, 704 F.2d 1116 (9th Cir.) (en banc), *cert. granted*, 464 U.S. 913, 104 S.Ct. 272, 78 L.Ed.2d 254 (1983) (applying different rule to unique circumstances of prison administrative detention where detention affected subsequent criminal prosecution of detained prisoner).

Plaintiffs have presented no support for the proposition that the Sixth Amendment applies to non-criminal administrative proceedings involving no loss of liberty. In fact, the courts have held that it does not so apply. *See Haven v. United States*, 403 F.2d 384, 385 (9th Cir.1968), *cert. dismissed*, 393 U.S. 1114, 89 S.Ct. 926, 22 L.Ed.2d 120 (1969); *DeWalt v. Barger*, 490 F.Supp. 1262, 1272 (M.D.Pa.1980); *Ely v. Honaker*, 451 F.Supp. 16, 19 (W.D.Va.1977), *aff'd*,

588 F.2d 1348 (4th Cir.1978); *see also Middendorf v. Henry*, 425 U.S. at 34, 96 S.Ct. at 1287.

Second, assuming Gibson had a right to have counsel present during IAD questioning, plaintiffs have not demonstrated a single specific instance where Gibson requested and was denied presence of counsel.[FN3] In ***42** fact, uncontroverted declarations by defendants show that they never denied Gibson the right to have a lawyer present during questioning. See Defendants' Exh. 131 & 132. For at least six years, LAPD has ostensibly allowed an officer who reasonably believes he may be disciplined for misconduct to have an attorney (as well as his defense representative) present during questioning.[FN4] Defendants' Exh. 130.

FN3. Plaintiffs point to an ambiguous deposition statement by Jay Frey, Gibson's first defense representative, in support of their claim that defendants deprived Gibson of his Sixth Amendment right to counsel. Frey testified that he did not remember any time during any interview he attended that an attorney was allowed to come in. Deposition of Jay O'Reilly Frey, Aug. 2, 1983, p. 80. While his assertion must be accepted as true for purposes of this summary judgment motion, the record of the interviews Frey attended (January 20, 1982 and April 5, 1982) demonstrates unequivocally that Gibson never asked to have an attorney present, and IAD never told him he could not have one present. Declaration of Elayne Yochem, July 7, 1982, Exhs. A & B. Frey's testimony must be interpreted as merely his recollection that no attorney was present; neither he nor the plaintiffs can point to a single instance in which Gibson asked for and was denied the presence of counsel.

FN4. Because defendants have demonstrated that they never denied Gibson an opportunity to have counsel present during questioning, it is unnecessary to address the comment by Sgt. Colby, see Declaration of Elaine Yochem, July 7, 1982, Exh. C, p. 28, raising some question as to whether in fact LAPD does generally allow an interrogated officer to have both a lawyer and a defense representative during interrogation.

B. *Fifth Amendment Right to Counsel*

Miranda v. Arizona, 384 U.S. 436, 469–73, 86 S.Ct. 1602, 1625–27, 16 L.Ed.2d 694 (1966), established that the Fifth Amendment prohibits the prosecution from introducing statements made by a defendant during custodial interrogation unless officers warn defendant of his right to have counsel present during questioning.

[6] Defendants did not violate Gibson's Fifth Amendment right to counsel. First, Gibson has not shown that he requested and was denied counsel. In fact, the one time Gibson requested counsel, investigators granted his request. See Declaration of Elayne Yochem, July 7, 1982, Exh. "C", pp. 25–28. Second, Gibson has not shown that any statement he made in the absence of denied counsel was used against him in a criminal prosecution. Third, Gibson never even faced a criminal prosecution, or any proceeding which threatened his liberty.

Summary judgment is granted for the defendants on the issue of the alleged violation of plaintiffs' constitutional right to counsel.

III.
FOURTH AMENDMENT SEARCH AND SEIZURE CLAIMS

IAD officers arrested Venegas and Myers as they left a burglarized store on December 7, 1981. Several other Hollywood Division officers, including Roger Gibson, had been at the scene of the "sting" operation set up by IAD. To determine whether any of them had stolen property from the store, IAD immediately interviewed and searched those officers. Investigators searched Gibson's patrol car, private car, briefcase, and police locker, and blacklighted his hands, wallet, and uniform.

On January 20, 1982, IAD investigators once again searched Gibson's locker and private car at the station, his home, and tools and appliances at his home. [FN5]

FN5. The search on February 10, 1982, of Gibson's "Sam Browne" gun belt is no longer in issue because plaintiffs have not included this incident in their amended complaint.

On April 15, 1982, investigators returned to Gibson's house and asked to search his garage and his

family's cars. Gibson refused. IAD gave him an administrative order [FN6] to allow the search but Gibson again refused. LAPD charged Gibson with insubordination, and the Board of Rights sustained the charge.

> FN6. Since, earlier in the day Gibson had already been read, and refused to waive, his *Miranda* rights, nothing turned up at the search could have been used against him criminally.

Gibson seeks: relief declaring illegal the searches on December 7, 1981 and January 20, 1982, and the administrative order to search on April 15, 1982; general, special, and punitive damages; and injunctive relief prohibiting future illegal searches and preventing the imposition of discipline arising out of Gibson's refusal to allow the April 15 search. The Gibson family seeks general, special, and punitive damages arising out of the allegedly illegal searches. The ***43** PPL seeks declaratory and injunctive relief.

A. *December 7, 1981 Searches*

Defendants argue that none of the December 7 searches violated Gibson's rights because he either consented to the searches or had no reasonable expectation of privacy in the areas searched.

Patrol Car and Briefcase

Defendants argue that Gibson consented to the search of his patrol car and briefcase. Voluntary consent would obviate the need for a search warrant, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973), but the question of consent to the search of both the car and the briefcase remains a genuine issue of material fact, and thus not subject to summary judgment.

While Gibson has admitted twice that he consented to the patrol car search, Defendants' Exh. 86, Att. 3 and Defendants' Exh. 201, pp. 14–15, defendants have conceded that IAD officers did not even ask for his consent, Defendants' Memorandum of Points and Authorities in Support of Summary Judgment, p. 8. The two officers involved in the search split on whether Gibson actually consented. Officer Tomita testified that Gibson consented to the search. Defendants' Exh. 75, p. 7. Officer Mears testified that he did not ask for consent. Defendants' Exh. 72, p. 18.

When Officer Mears searched Gibson's patrol car he found Gibson's briefcase in the trunk. It is unclear whether Mears obtained consent for the search. Gibson admits that he gave consent, Defendants' Exh. 86, Att. 3 and Defendants' Exh. 201, p. 14, but Officer Mears testified in deposition that he did not ask for permission to search the briefcase, Defendants' Exh. 72, pp. 18, 22–23.

While the issue of consent remains disputed, Gibson's § 1983 claim relating to his patrol car and briefcase must nevertheless be dismissed. Under *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), "a municipality cannot be held liable under § 1983 on a respondeat superior theory." *Id.* at 691, 98 S.Ct. at 2036. In other words, a city cannot be held liable for its police officers' acts unless they are pursuant to "official municipal policy." *Id.*

[7] On December 29, plaintiffs stipulated to the dismissal with prejudice of Thomas Mears, the only officer who searched Gibson's patrol car and briefcase.[FN7] Moreover, plaintiffs have taken the position, supported by competent declarations, that LAPD has no established policy, practice, or custom governing investigative searches of accused officers' patrol cars and objects found therein. See Plaintiffs' Memorandum of Points and Authorities in Response to Two Questions of the Court, November 30, 1983, pp. 2–7 (and supporting declarations). Accepting as true the representations in plaintiffs' Memorandum and Declarations, plaintiffs have admitted that Officer Mears did not conduct the search pursuant to "official municipal policy or custom." [FN8] Thus, under *Monell*, the city cannot be liable, and the claim regarding the patrol car and briefcase must be dismissed.

> FN7. Plaintiffs have failed to present any evidence that any of the remaining defendants ordered Mears to search the briefcase, or the car itself. Apparently, Sergeant Small, not a defendant here, told Mears to search the car. Defendants' Exh. 204, pp. 5–7. Regardless of who told Mears to search the car, as explained below, no one told Mears what to do if he discovered an officer's personal briefcase in the trunk, so none of the individual defendants can be liable for Mears' decision to search the briefcase.

> FN8. In fact, Mears, the searching officer,

> testified that he has never been told, and does not know, of any departmental policy governing the search of an accused officer's patrol car and items found inside. Defendants' Exh. 204, p. 7.

Personal Car

Both sides agree that Gibson permitted Mears to search his private car at the Hollywood station on December 7. Defendants' Exh. 86, Att. 3; Defendants' Exh. 201, pp. 11–12, 14–15; Defendants' Exh. 72, p. 18; Defendants' Exh. 75, p. 7. Plaintiffs ***44** argue, however, that Gibson's permission did not constitute the "voluntary consent" necessary to waive his Fourth Amendment rights.

Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973), requires that a court examine all the circumstances in deciding the factual question of whether consent to a search was coerced or voluntary. Both the characteristics of the suspect and the details of the search should be examined. *Id.* at 226, 93 S.Ct. at 2047.

In *Schneckloth*, the Court listed the factors of youth, lack of education, low intelligence, lack of advice on constitutional rights, length of detention, repeated and prolonged nature of questioning, and the use of physical punishment such as deprivation of food or sleep. *Id.*

Gibson's consent to the search of his private car involves no genuine issue of material fact. Gibson had worked for LAPD for sixteen years; he apparently was educated and not of low intelligence; as a 16-year police veteran he certainly knew his constitutional rights regarding searches; he was not detained when he consented to the search; IAD did not repeatedly ask for his consent to search; obviously Gibson suffered no physical punishment; and Gibson admitted that IAD used no coercive tactics in obtaining his consent, Defendants' Exh. 201, pp. 11–12. The only real issue on consent to the search of the private car is whether IAD's mere request to search coerced Gibson's consent.

[8] Gibson has twice admitted that he consented to the December 7, 1981 searches "in order to exonerate himself." Defendants' Exh. 86, Att. 3; Defendants' Exh. 201, pp. 14–15. He cannot claim a Fourth Amendment violation after explicitly agreeing to the search in order to benefit himself. In any case, Gibson's subsequent conduct in limiting the scope of the IAD search on January 20, 1982 and outrightly refusing to allow a search on April 15, 1982 unmistakably demonstrates that IAD's power and authority did not coerce Gibson into consenting to the search of his private car. Summary judgment here is granted to defendants.

Station Locker

Gibson voluntarily consented to the search of his station locker at the same time he consented to the search of his private car. Defendants' Exh. 86, Att. 3; Defendants' Exh. 201, pp. 10–11, 14–15; Defendants' Exh. 72, p. 18; Defendants' Exh. 75, p. 7.

[9] Even if Gibson had not consented to the search, the Fourth Amendment offers him no protection because he had no reasonable expectation of privacy in the locker. *See United States v. Bunkers*, 521 F.2d 1217 (9th Cir.), *cert. denied*, 423 U.S. 989, 96 S.Ct. 400, 46 L.Ed.2d 307 (1975). Under California Government Code § 3309, a police officer's locker may be searched "in his presence, or with his consent, or ... where he has been notified that a search will be conducted." Just as in *Bunkers*, the regulation here eliminated Gibson's reasonable expectation of privacy in his locker if he observed, or was notified of, the search. *United States v. Bunkers*, 521 F.2d at 1220.[FN9] Gibson did observe, get notification of, and consent to the locker search on December 7. *United States v. Speights*, 557 F.2d 362 (3rd Cir.1977), does not apply because, unlike *Bunkers*, no regulation in *Speights* governed the use of the officer's locker. *Speights* itself explicitly distinguishes *Bunkers* as a case relying on a specific regulation and practice to find that an expectation of privacy was unreasonable.

> FN9. Plaintiffs have not challenged the constitutionality of § 3309 so they may not complain that the state regulation unlawfully deprived Gibson of his reasonable expectation of privacy.

Summary judgment here is granted to defendants.

Blacklighting

Whether Gibson voluntarily consented to the blacklighting of his hands, uniform, and wallet on December 7, 1981 remains a disputed factual issue. See Defendants' ***45** Exh. 201 at pp. 12–14. However,

no material facts regarding the blacklighting remain in controversy so the issue may be disposed of by summary judgment.

[10] Of the few courts considering the question, most have held that blacklighting does not constitute a search under the Fourth Amendment. *See Commonwealth v. DeWitt*, 226 Pa.Super. 372, 314 A.2d 27, 30–31 (1973) (limited and controlled blacklighting not a search); *United States v. Richardson*, 388 F.2d 842, 845 (6th Cir.1968) (cited with approval in *United States v. D'Amico*, 408 F.2d 331, 333 n. 1 (2nd Cir.1969)); *United States v. DeMarsh*, 360 F.Supp. 132, 137 (E.D.Wis.1973) (blacklighting of arrested suspect not a search under Fourth Amendment); *United States v. Millen*, 338 F.Supp. 747, 753 (E.D.Wis.1972) (blacklighting of person in custody not a search); *but see United States v. Kenaan*, 496 F.2d 181, 182–83 (1st Cir.1974) (blacklighting the kind of governmental intrusion into privacy regulated by Fourth Amendment). The most careful analysis of the question is provided in LaFave, *Search and Seizure*, § 2.2, pp. 264–70 (1980). This difficult conceptual question need not be resolved here because, even assuming it was a search, under all the circumstances, the December 7, 1981 blacklighting was reasonable and therefore did not violate Gibson's Fourth Amendment rights.[FN10]

> FN10. Even if blacklighting were not considered a search, investigators did conduct a search by telling Gibson to take his wallet out of his pocket in order for them to blacklight it and the money inside it. Defendants' Exh. 78, pp. 29–30. Moreover, the order to blacklight may well have constituted a seizure of the officers for the purpose of blacklighting them. In any case, as explained below, the whole blacklighting process was reasonable.

In *Biehunik v. Felicetta*, 441 F.2d 228, 230 (2nd Cir.), *cert. denied*, 403 U.S. 932, 91 S.Ct. 2256, 29 L.Ed.2d 711 (1971), the Second Circuit, facing essentially the same type of case we face here, upheld a police department's warrantless "seizure" of its officers upon less than probable cause, as reasonable, and thus non-violative of the Fourth Amendment. *See also United States v. Collins*, 349 F.2d 863, 867–68 (2nd Cir.1965), *cert. denied*, 383 U.S. 960, 86 S.Ct. 1228, 16 L.Ed.2d 303 (1966).

In *Biehunik*, the police commissioner ordered 62 officers, under threat of discharge, to appear in a lineup for possible identification by citizens claiming they had been assaulted by city patrolmen. All 62 officers had been on duty in the general area the night of the incident. The commissioner ordered the lineup, without probable cause to believe any specific officer was involved, because the department had no up-to-date photographs of the officers for the complainants to examine and positively identify. The lineup presented the risk of criminal prosecution as well as administrative sanctions.

In upholding the order, the court articulated the following test: "whether upon a balance of public and individual interests, the order ... was reasonable under the particular circumstances, even though unsupported by probable cause." [FN11] 441 F.2d at 230. In *Biehunik* "the substantial public interest in ensuring the appearance and actuality of police integrity" outweighed the infringement on the officers' personal privacy. *Id.* at 230, 231.

> FN11. While *Biehunik* involved a seizure, rather than a search, the same reasonableness test should apply in both cases to an employer's job-related intrusion into his employee's privacy. In fact, *Biehunik* relies on search, rather than seizure, caselaw to justify the application of the balancing test to its facts. Moreover, the blacklight search was basically no more intrusive than the seizure in *Biehunik*, and in both cases the procedure occurred "at a time and place that were well within the usual demands of a policeman's job." 441 F.2d at 231.

Just as in *Biehunik*, the balance here weighs in favor of the police department. On December 7, 1981, IAD needed to determine immediately whether any of the officers who appeared at the sting site along with Venegas and Myers had stolen the chemically-dusted money. Gibson admitted that he had entered the store and seen the money. Investigators here, like the investigators in *Biehunik*, knew *someone* had stolen the money, but did not know which ***46** particular officers were involved. The state, as both employer and law enforcer, had an overwhelming interest in protecting the appearance and actuality of police integrity. Only by blacklighting the uniforms, hands, and wallets of the officers who appeared at the sting site could IAD

determine which officers had been involved in a criminal violation of duty. The same practical necessity motivating the lineup in *Biehunik* justified the blacklighting here. Investigators could not have gotten a search warrant here because they had no probable cause to suspect any particular officer in the group. Moreover, investigators needed to act quickly because the guilty officers could wash their hands and destroy the evanescent evidence. In such a case a limited blacklighting search is permissible. *See* LaFave, *Search and Seizure*, § 2.2, p. 270 (1980).

Gibson's interest in not being blacklighted, while significant, simply does not reach the magnitude of the state's interest. As the court said in *Biehunik:*

> ... [P]olicemen, who voluntarily accept the unique status of watchman of the social order, may not reasonably expect the same freedom from governmental restraints which are designed to ensure his fitness for office as from similar governmental actions not so designed. The policeman's employment relationship by its nature implies that in certain aspects of his affairs, he does not have the full privacy and liberty from police officials that he would otherwise enjoy. So long as the actions of a policeman's superior remain within reasonable bounds, there can hardly be that affront to expectations of personal autonomy which marks the state's coercive power in the typical arrest case.
>
> 441 F.2d at 231.

[11] Under all the circumstances, the blacklighting was reasonable and did not violate Gibson's Fourth Amendment rights.

B. *January 20, 1982 Searches*

Gibson admits that he consented to the January 20, 1982 searches of his pick-up truck, police locker, home, and garage in order to clear himself of any wrongdoing. Defendants' Exh. 86, Att. 3; Defendants' Exh. 201, pp. 16–17; 27–28; Declaration of Elayne Yochem, July 7, 1982, Exh. A, p. 38.

Under all the circumstances, the consent was voluntarily given. See discussion of consent with respect to search of Gibson's personal car, *supra*. Gibson's deposition testimony demonstrates that he was not coerced or intimidated by IAD investigators. See Defendants' Exh. 201, pp. 27–33.

Plaintiffs also complain that investigators illegally seized power tools from Gibson's truck during the January 20, 1982 search. Investigators took the tools because they had information from Venegas and Myers that Gibson had stolen power tools during a burglary. Defendants' Exh. 112, pp. 2–3; see Defendants' Exh. 92, p. 2. Investigators examined the tools to determine whether they matched the description of the stolen tools and returned them the same day. Defendants' Exh. 93, pp. 3–4.

[12] The tool seizure did not violate the Fourth Amendment. As discussed above, Gibson voluntarily consented to the search of his truck. He did so after being advised of the investigators' intent to find possibly stolen tools. Defendants' Exh. 112, p. 3; Defendants' Exh. 93, p. 3. Investigators properly seized the tools in plain view during the course of the consent search. *United States v. Cornejo*, 598 F.2d 554, 556 (9th Cir.1979).

[13] The Gibson family suffered no deprivation of Fourth Amendment rights when investigators searched Gibson's home and garage on January 20, 1982. Roger Gibson consented to the search. He was the only family member home. He did not tell the officers that his family would object to the search, and the officers did not search any place Gibson did not want them to look. Defendants' Exh. 201, pp. 28–33. Also, it must be remembered that Gibson consented to a search for evidence of crime *by himself, not by a member of his family*. Although he may not have had actual authority to consent to the search of certain ***47** parts of his home, investigators reasonably believed that he had such authority, and therefore the search did not violate the Gibson family's Fourth Amendment rights. *United States v. Sledge*, 650 F.2d 1075, 1080–81 (9th Cir.1981); *see also United States v. Lopez-Diaz*, 630 F.2d 661, 666–67 (9th Cir.1980).

None of the January 20, 1982 [FN12] searches violated any of the plaintiffs' Fourth Amendment rights. Summary judgment is granted to the defendants with respect to those searches.

> FN12. The January 20 searches involved the only possible § 1983 claim by Gibson's family. No other alleged misbehavior by LAPD could have violated their personal rights.

C. *April 15, 1982 Administrative Order to Search*

The parties agree that the April 15 order presents no triable issues of fact, and should be decided by summary judgment. While the balancing test articulated in *Biehunik*, and applied above to the blacklighting search, still provides the method of analysis, the scale here tips in favor of Gibson.

On April 15, IAD wanted to search Gibson's garage and private vehicles to determine whether he possessed a battery he allegedly stole in an on-duty burglary on August 17, 1981. It seems highly unlikely that eight months after the burglary, Gibson, fully aware of IAD suspicion, would not have disposed of the battery. In fact, defendants concede that the great passage of time prevented them from seeking a warrant. Unlike the order in *Biehunik* and the blacklighting order in this case, the April 15 order was not a highly reliable method of determining whether a particular officer had violated departmental regulations and criminal laws. Also unlike *Biehunik*, the IAD here did not know with substantial certainty that an officer had committed a crime. See Defendants' Exh. 91, pp. 4–5. Plainly, the department's interest in conducting the desired search on April 15 was not particularly strong.

On the other hand, Gibson's interest in refusing to allow the search was much greater than the officers' interest in *Biehunik*. IAD sought to search his garage and his private cars at home. That search would have been much more intrusive than the seizure in *Biehunik* or the blacklight search on December 7, 1981. Moreover, the search definitely would not have been "conducted at a time and place that were well within the usual demands of a policeman's job." 441 F.2d at 231.

[14] Under all the circumstances, the April 15, 1982 order to search was not reasonable and therefore Gibson could not lawfully be disciplined for refusing to obey it. Appropriate relief will be determined later. LAPPL's request for relief is denied. Each case must be determined by balancing the particular factors present. Under appropriate circumstances, a warrantless search of an officer's private property may be reasonable.

IV.

FIFTH AMENDMENT CLAIMS

Before giving Gibson his *Miranda* warnings, defendants interviewed him on December 7, 28, and 30, 1981. IAD read Gibson his *Miranda* rights during an interview on January 20, 1982, and then interviewed him again on April 5, April 15, and May 19, 1982.

Plaintiffs apparently argue that defendants violated Gibson's Fifth Amendment rights because (1) IAD initially interrogated him in custody without *Miranda* warnings in what was actually a criminal investigation; (2) even after Gibson received and refused to waive his *Miranda* rights, IAD asked him questions not specifically, directly, and narrowly related to his fitness as an officer; (3) IAD had no authority to grant immunity, and thus Gibson did not have adequate protection against self-incrimination; (4) IAD's dual-track investigatory system is unconstitutional because statements and fruits from the ostensibly "administrative" part of the investigation are presented to the district attorney for prosecutorial***48** purposes; and (5) defendants did not properly advise Gibson of his options as required by *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967).

[15] Plaintiffs' arguments are meritless. With respect to the interviews before Gibson received *Miranda* warnings on January 2, 1982, the Fifth Amendment never came into play. The district attorney never prosecuted Gibson and Gibson never refused to answer questions before January 20, 1982. Moreover, none of the administrative charges brought against him related to the interviews before January 20, 1982. See Defendants' Amended Exhibit 83, Att. 13.

[16] With respect to the interviews occurring on and after January 20, 1982, defendants did not violate Gibson's Fifth Amendment rights. On January 20, 1982 IAD gave Gibson *Miranda* warnings. Investigators made clear that nothing Gibson said could be used in any criminal investigation or prosecution of him, but that if he insisted on remaining silent he could be fired. Declaration of Elayne Yochem, July 7, 1982, Exh. A, p. 4. Gibson perfectly understood his options under *Garrity*. IAD followed the procedure explicitly approved in *Gardner v. Broderick*, 392 U.S. 273, 278, 88 S.Ct. 1913, 1916, 20 L.Ed.2d 1082 (1968) (dictum); *Lefkowitz v. Turley*, 414 U.S. 70, 84, 94 S.Ct. 316, 325, 38 L.Ed.2d 274 (1973); and *Uniformed S.M. Ass'n Inc. v. Commissioner of S. of N.Y.*, 426 F.2d 619,

626 (2nd Cir.1970), *cert. denied*, 406 U.S. 961, 92 S.Ct. 2055, 32 L.Ed.2d 349 (1972). See Declaration of Elayne Yochem, July 7, 1982, Exh. A, p. 4. Even had IAD not followed the correct procedure, Gibson would have no complaint under *Garrity* because the Board of Rights disciplined him only for giving false answers, not for refusing to answer at all.

Plaintiff misses the mark by complaining that IAD had no statutory authority to grant immunity. As the court said in *Confederation of Police v. Conlisk*, 489 F.2d 891, 895 n. 4 (7th Cir.1973), *cert. denied, sub nom. Rochford v. Confederation of Police*, 416 U.S. 956, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974):

> In *Garrity*, the Supreme Court indicated that the Fifth Amendment *itself* prohibited the use of statements or their fruits where the statements had been made under the threat of dismissal from public office. Therefore, by advising the officers that their statements, when given under threat of discharge, cannot be used against them in subsequent criminal proceedings, the IAD is not "granting" immunity from prosecution; it is merely advising the officers of the constitutional limitations on any criminal prosecution should they answer. *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation*, 426 F.2d 619, 627 (2nd Cir.1970), *cert. denied*, 406 U.S. 961 [92 S.Ct. 2055, 32 L.Ed.2d 349] (1972).

[17] Plaintiffs fail to identify a single question not directly, narrowly, and specifically related to Gibson's fitness as a police officer. A review of the Board of Rights Rationale on Findings & Penalty, Defendants' Amended Exh. 83, Att. 13, demonstrates the wide scope of the job-related administrative charges against him. IAD's interrogations directly and narrowly related to the facts surrounding those charges. In any case, Gibson cannot complain that he was penalized for failing to answer questions not directly and narrowly concerning his fitness as an officer. He never faced criminal charges of any type and the Board of Rights disciplined him only for falsely answering questions which did directly and specifically concern his fitness as an officer.

[18] Plaintiffs also cannot complain that the dual-track investigation process results in the prosecutorial use of evidence obtained in a compelled administrative interview. Gibson never faced any criminal prosecution. The dual-track process did not affect him.

Defendants did not violate plaintiffs' Fifth Amendment rights. Summary judgment on this issue is granted to defendants.

***49** CONCLUSION

Summary judgment is granted to defendants on plaintiffs' First, Fifth, and Sixth Amendment claims. Summary judgment is also granted to defendants on all Fourth Amendment claims except the April 15, 1982 administrative order to search. That order was unreasonable and summary judgment on that issue is granted to plaintiffs.

D.C.Cal.,1984.
Los Angeles Police Protective League v. Gates
579 F.Supp. 36

END OF DOCUMENT

160 Cal.App.3d 302, 206 Cal.Rptr. 699
(Cite as: 160 Cal.App.3d 302)

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 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 cannot be obtained at a postdeprivation hearing. With respect

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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.

(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 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. Lieu-

tenant 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 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 peti-

tion.

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 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.)

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 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 ex-

plain 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. County of Sacramento
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68 Cal.App.3d 600, 137 Cal.Rptr. 387
(Cite as: 68 Cal.App.3d 600)

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 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.

(3) Civil Service § 12--Discharge, Demotion, 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 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 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 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 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.
Ng v. State Personnel Bd.
68 Cal.App.3d 600, 137 Cal.Rptr. 387

END OF DOCUMENT

Supreme Court of the United States
Dennis M. O'CONNOR, et al., Petitioners
v.
Magno J. ORTEGA.

No. 85-530.
Argued Oct. 15, 1986.
Decided March 31, 1987.

Former chief of professional education at state hospital brought action against various state hospital officials, alleging claims under § 1983 and state law. On cross motions for summary judgment, the United States District Court for the Northern District of California, John P. Vucasin, Jr., J., granted summary judgment against plaintiff, and he appealed. The Court of Appeals, 764 F.2d 703, affirmed in part and reversed and remanded with instructions in part, and officials petitioned for certiorari. The Supreme Court, Justice O'Connor, held that: (1) public employers' intrusions on constitutionally protected privacy interest of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by standard of reasonableness under all the circumstances, and (2) whether public employer's search of hospital supervisor's office was reasonable, both in its inception and in its scope, presented factual question precluding summary judgment.

Reversed and remanded.

Justice Scalia, concurred in judgment and filed opinion.

Justice Blackmun, dissented and filed opinion in which Justices Brennan, Marshall, and Stevens, joined.

West Headnotes

[1] Searches and Seizures 349 31.1

349 Searches and Seizures
349I In General
349k31 Persons Subject to Limitations; Governmental Involvement
349k31.1 k. In General. Most Cited Cases
(Formerly 349k31)

Searches and seizures by government employers or supervisors of private property of their employees are subject to restraints of Fourth Amendment. U.S.C.A. Const.Amend. 4.

[2] Searches and Seizures 349 26

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k26 k. Expectation of Privacy. Most Cited Cases

Physician and psychiatrist, as state employee responsible for training physicians in hospital's psychiatric residency program, had reasonable expectation of privacy in his desk and file cabinets located in his office, for purpose of Fourth Amendment protection, where physician did not share desk or file cabinets with any other employees, and desk and file cabinet contained only personal items. U.S.C.A. Const.Amend. 4.

[3] Searches and Seizures 349 23

349 Searches and Seizures
349I In General
349k23 k. Fourth Amendment and Reasonableness in General. Most Cited Cases

Searches and Seizures 349 36.1

349 Searches and Seizures
349I In General
349k36 Circumstances Affecting Validity of Warrantless Search, in General
349k36.1 k. In General. Most Cited Cases
(Formerly 349k36)

Public employers' intrusions on constitutionally

protected privacy interest of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by standard of reasonableness under all the circumstances; under this standard, both inception and scope of intrusion must be reasonable. (Per Justice O'Connor, with the Chief Justice and two Justices concurring and one Justice concurring in judgment.) U.S.C.A. Const.Amend. 4.

[4] Federal Civil Procedure 170A 2491.5

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2491.5 k. Civil Rights Cases in General. Most Cited Cases

Whether public employer's search of hospital supervisor's office was reasonable, both in its inception and in its scope, presented factual question precluding summary judgment in supervisor's civil rights action, where employer characterized search as motivated by need to secure state property, but supervisor contended that search was investigatory search whose purpose was simply to discover evidence that would be of use in administrative proceedings. (Per Justice O'Connor, with the Chief Justice and two Justices concurring and one Justice concurring in judgment.) U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

****1493 *709** *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Respondent, a physician and psychiatrist, was an employee of a state hospital and had primary responsibility for training physicians in the psychiatric residency program. Hospital officials became concerned about possible improprieties in his management of the program, particularly with respect to his acquisition of a computer and charges against him concerning sexual harassment of female hospital employees and inappropriate disciplinary action against a resident. While he was on administrative leave pending investigation of the charges, hospital officials, allegedly in order to inventory and secure state property, searched his office and seized personal items from his desk and file cabinets that were used in administrative proceedings resulting in his discharge. No formal inventory of the property in the office was ever made, and all the other papers in the office were merely placed in boxes for storage. Respondent filed an action against petitioner hospital officials in Federal District Court under 42 U.S.C. § 1983, alleging that the search of his office violated the Fourth Amendment. On cross-motions for summary judgment, the District Court granted judgment for petitioners, concluding that the search was proper because there was a need to secure state property in the office. Affirming in part, reversing in part, and remanding the case, the Court of Appeals concluded that respondent had a reasonable expectation of privacy in his office, and that the search violated the Fourth Amendment. The court held that the record justified a grant of partial summary judgment for respondent on the issue of liability for the search, and it remanded the case to the District Court for a determination of damages.

Held: The judgment is reversed, and the case is remanded.

764 F.2d 703 (CA9 1985), reversed and remanded.

Justice O'CONNOR, joined by THE CHIEF JUSTICE, Justice WHITE, and Justice POWELL, concluded that:

1. Searches and seizures by government employers or supervisors of the private property of their employees are subject to Fourth Amendment restraints. An expectation of privacy in one's place of work is based upon societal expectations that have deep roots in the history of the Amendment. However, the operational realities of the workplace may make *some* public employees' expectations of privacy unreasonable ***710** when an intrusion is by a supervisor rather than a law enforcement official. Some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable. Given the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis. Because the record does not reveal the extent to which hospital officials may have

had work-related reasons to enter respondent's office, the Court of Appeals should have remanded the matter to the District Court for its further determination. However, a majority of this Court agrees with the determination of the ****1494** Court of Appeals that respondent had a reasonable expectation of privacy in his office. Regardless of any expectation of privacy in the office itself, the undisputed evidence supports the conclusion that respondent had a reasonable expectation of privacy at least in his desk and file cabinets. Pp. 1497-1499.

2. In determining the appropriate standard for a search conducted by a public employer in areas in which an employee has a reasonable expectation of privacy, what is a reasonable search depends on the context within which the search takes place, and requires balancing the employee's legitimate expectation of privacy against the government's need for supervision, control, and the efficient operation of the workplace. Requiring an employer to obtain a warrant whenever the employer wishes to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unreasonable. Moreover, requiring a probable cause standard for searches of the type at issue here would impose intolerable burdens on public employers. Their intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. Under this standard, both the inception and the scope of the intrusion must be reasonable. Pp. 1499-1503.

3. In the procedural posture of this case, it cannot be determined whether the search of respondent's office, and the seizure of his personal belongings, satisfied the standard of reasonableness. Both courts below were in error because summary judgment was inappropriate. The parties were in dispute about the actual justification for the search, and the record was inadequate for a determination of the reasonableness of the search and seizure. On remand, the District Court must determine these matters. Pp. 1503-1504.

Justice SCALIA concluded that the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by Fourth Amendment protections as a general matter, and no special circumstanceswere ***711** present here that would call for an exception to the ordinary rule. However, government searches to retrieve work-related materials or to investigate violations of workplace rules-searches of the sort that are regarded as reasonable and normal in the private-employer context-do not violate the Fourth Amendment. Because the conflicting and incomplete evidence in the present case could not conceivably support summary judgment that the search did not have such a validating purpose, the decision must be reversed and remanded. Pp. 1505-1506.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion in which REHNQUIST, C.J., and WHITE and POWELL, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post,* p. ----. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post,* p. ----.
Jeffrey T. Miller argued the cause for petitioners. With him on the briefs were *John K. Van de Kamp,* Attorney General of California, *Marvin Goldsmith,* Assistant Attorney General, and *Jeffrey T. Miller* and *Teresa Tan,* Deputy Attorneys General.

Joel I. Klein, by invitation of the Court, 475 U.S. 1006, argued the cause and filed a brief as *amicus curiae* in support of the judgment below. *Magno J. Ortega, pro se,* filed a brief as respondent.*

* *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Geller, Alan I. Horowitz, Barbara L. Herwig,* and *John P. Schnitker* filed a brief for the United States as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Peter W. Morgan, Jack Novik, Burt Neuborne,* and *Michael Simpson;* and for the American Federation of State, County, and Municipal Employees, AFL-CIO, by *Richard Kirschner.*

Justice O'CONNOR announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, Justice WHITE, and Justice POWELL join.

This suit under 42 U.S.C. § 1983 presents two issues concerning the Fourth Amendment rights of public employees. First, we must determine whether the respondent, a public ***712** employee, had a rea-

sonable expectation of privacy in his office, desk, and file cabinets at his place of work. Second, we must address the appropriate Fourth Amendment standard for a search conducted by a public employer in areas in which a ****1495** public employee is found to have a reasonable expectation of privacy.

I

Dr. Magno Ortega, a physician and psychiatrist, held the position of Chief of Professional Education at Napa State Hospital (Hospital) for 17 years, until his dismissal from that position in 1981. As Chief of Professional Education, Dr. Ortega had primary responsibility for training young physicians in psychiatric residency programs.

In July 1981, Hospital officials, including Dr. Dennis O'Connor, the Executive Director of the Hospital, became concerned about possible improprieties in Dr. Ortega's management of the residency program. In particular, the Hospital officials were concerned with Dr. Ortega's acquisition of an Apple II computer for use in the residency program. The officials thought that Dr. Ortega may have misled Dr. O'Connor into believing that the computer had been donated, when in fact the computer had been financed by the possibly coerced contributions of residents. Additionally, the Hospital officials were concerned with charges that Dr. Ortega had sexually harassed two female Hospital employees, and had taken inappropriate disciplinary action against a resident.

On July 30, 1981, Dr. O'Connor requested that Dr. Ortega take paid administrative leave during an investigation of these charges. At Dr. Ortega's request, Dr. O'Connor agreed to allow Dr. Ortega to take two weeks' vacation instead of administrative leave. Dr. Ortega, however, was requested to stay off Hospital grounds for the duration of the investigation. On August 14, 1981, Dr. O'Connor informed Dr. Ortega that the investigation had not yet been completed, and that he was being placed on paid administrative leave. Dr. Ortega remained on administrative leave until ***713** the Hospital terminated his employment on September 22, 1981.

Dr. O'Connor selected several Hospital personnel to conduct the investigation, including an accountant, a physician, and a Hospital security officer. Richard Friday, the Hospital Administrator, led this "investigative team." At some point during the investigation, Mr. Friday made the decision to enter Dr. Ortega's office. The specific reason for the entry into Dr. Ortega's office is unclear from the record. The petitioners claim that the search was conducted to secure state property. Initially, petitioners contended that such a search was pursuant to a Hospital policy of conducting a routine inventory of state property in the office of a terminated employee. At the time of the search, however, the Hospital had not yet terminated Dr. Ortega's employment; Dr. Ortega was still on administrative leave. Apparently, there was no policy of inventorying the offices of those on administrative leave. Before the search had been initiated, however, petitioners had become aware that Dr. Ortega had taken the computer to his home. Dr. Ortega contends that the purpose of the search was to secure evidence for use against him in administrative disciplinary proceedings.

The resulting search of Dr. Ortega's office was quite thorough. The investigators entered the office a number of times and seized several items from Dr. Ortega's desk and file cabinets, including a Valentine's Day card, a photograph, and a book of poetry all sent to Dr. Ortega by a former resident physician. These items were later used in a proceeding before a hearing officer of the California State Personnel Board to impeach the credibility of the former resident, who testified on Dr. Ortega's behalf. The investigators also seized billing documentation of one of Dr. Ortega's private patients under the California Medicaid program. The investigators did not otherwise separate Dr. Ortega's property from state property because, as one investigator testified, "[t]rying to sort State from non-State, it was too much to do, so I gave it ***714** up and boxed it up." App. 62. Thus, no formal inventory of the property in the office was ever made. Instead, all the papers in Dr. Ortega's office were merely placed in boxes, and put in storage for Dr. Ortega to retrieve.

****1496** Dr. Ortega commenced this action against petitioners in Federal District Court under 42 U.S.C. § 1983, alleging that the search of his office violated the Fourth Amendment. On cross-motions for summary judgment, the District Court granted petitioners' motion for summary judgment. The District Court, relying on *Chenkin v. Bellevue Hospital Center, New York City Health & Hospitals Corp.*, 479 F.Supp. 207 (SDNY 1979), concluded that the search was proper because there was a need to secure state property in

the office. The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part, 764 F.2d 703 (1985), concluding that Dr. Ortega had a reasonable expectation of privacy in his office. While the Hospital had a procedure for office inventories, these inventories were reserved for employees who were departing or were terminated. The Court of Appeals also concluded-albeit without explanation-that the search violated the Fourth Amendment. The Court of Appeals held that the record justified a grant of partial summary judgment for Dr. Ortega on the issue of liability for an unlawful search, and it remanded the case to the District Court for a determination of damages.

We granted certiorari, 474 U.S. 1018, 106 S.Ct. 565, 88 L.Ed.2d 551 (1985), and now reverse and remand.

II

[1] The strictures of the Fourth Amendment, applied to the States through the Fourteenth Amendment, have been applied to the conduct of governmental officials in various civil activities. *New Jersey v. T.L.O.*, 469 U.S. 325, 334-335, 105 S.Ct. 733, 738-739, 83 L.Ed.2d 720 (1985). Thus, we have held in the past that the Fourth Amendment governs the conduct of school officials, see *ibid.*, building inspectors, see *Camara v. Municipal Court*, 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930 (1967), and Occupational Safety and Health ***715** Act inspectors, see *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-313, 98 S.Ct. 1816, 1820-1821, 56 L.Ed.2d 305 (1978). As we observed in *T.L.O.*, "[b]ecause the individual's interest in privacy and personal security 'suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards,' ... it would be 'anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.' " 469 U.S., at 335, 105 S.Ct., at 739 (quoting *Marshall v. Barlow's, Inc., supra*, 436 U.S., at 312-313, 98 S.Ct., at 1820 and *Camara v. Municipal Court, supra*, 387 U.S., at 530, 87 S.Ct., at 1731). Searches and seizures by government employers or supervisors of the private property of their employees, therefore, are subject to the restraints of the Fourth Amendment.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." Our cases establish that Dr. Ortega's Fourth Amendment rights are implicated only if the conduct of the Hospital officials at issue in this case infringed "an expectation of privacy that society is prepared to consider reasonable." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable. Instead, "the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." *Oliver v. United States*, 466 U.S. 170, 178, 104 S.Ct. 1735, 1741, 80 L.Ed.2d 214 (1984) (citations omitted).

Because the reasonableness of an expectation of privacy, as well as the appropriate standard for a search, is understood to differ according to context, it is essential first to delineate the boundaries of the workplace context. The workplace includes****1497** those areas and items that are related to work and are generally within the employer's control. At a hospital, for ***716** example, the hallways, cafeteria, offices, desks, and file cabinets, among other areas, are all part of the workplace. These areas remain part of the workplace context even if the employee has placed personal items in them, such as a photograph placed in a desk or a letter posted on an employee bulletin board.

Not everything that passes through the confines of the business address can be considered part of the workplace context, however. An employee may bring closed luggage to the office prior to leaving on a trip, or a handbag or briefcase each workday. While whatever expectation of privacy the employee has in the existence and the outward appearance of the luggage is affected by its presence in the workplace, the employee's expectation of privacy in the *contents* of the luggage is not affected in the same way. The appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage, a handbag or a briefcase that happens to be within the employer's business address.

Within the workplace context, this Court has

recognized that employees may have a reasonable expectation of privacy against intrusions by police. See *Mancusi v. DeForte*, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968). As with the expectation of privacy in one's home, such an expectation in one's place of work is "based upon societal expectations that have deep roots in the history of the Amendment." *Oliver v. United States*, *supra*, 466 U.S., at 178, n. 8, 104 S.Ct., at 1741, n. 8. Thus, in *Mancusi v. DeForte*, *supra*, the Court held that a union employee who shared an office with other union employees had a privacy interest in the office sufficient to challenge successfully the warrantless search of that office:

"It has long been settled that one has standing to object to a search of his office, as well as of his home.... [I]t seems clear that if DeForte had occupied a 'private' office in the union headquarters, and union records had been seized from a desk or a filing cabinet in that office, he would have had standing.... In such a 'private' office,***717** DeForte would have been entitled to expect that he would not be disturbed except by personal or business invitees, and that records would not be taken except with his permission or that of his union superiors." 392 U.S., at 369, 88 S.Ct., at 2124.

Given the societal expectations of privacy in one's place of work expressed in both *Oliver* and *Mancusi*, we reject the contention made by the Solicitor General and petitioners that public employees can never have a reasonable expectation of privacy in their place of work. Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer. The operational realities of the workplace, however, may make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official. Public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation. Indeed, in *Mancusi* itself, the Court suggested that the union employee did not have a reasonable expectation of privacy against his union supervisors. 392 U.S., at 369, 88 S.Ct., at 2124. The employee's expectation of privacy must be assessed in the context of the employment relation. An office is seldom a private enclave free from entry by supervisors, other employees, and business and personal invitees. Instead, in many cases offices are continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits. Simply put, it is the nature of government offices that others-such as fellow employees, supervisors, consensual visitors, and the general public-may have frequent access to an individual's office. We agree with Justice ****1498** SCALIA that "[c]onstitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer,"***718** *post*, at 1505, but some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable. Cf. *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"). Given the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.

[2] The Court of Appeals concluded that Dr. Ortega had a reasonable expectation of privacy in his office, and five Members of this Court agree with that determination. See *post*, at 1504 (SCALIA, J., concurring in judgment); *post*, at 1506 (BLACKMUN, J., joined by BRENNAN, MARSHALL, and STEVENS, JJ., dissenting). Because the record does not reveal the extent to which Hospital officials may have had work-related reasons to enter Dr. Ortega's office, we think the Court of Appeals should have remanded the matter to the District Court for its further determination. But regardless of any legitimate right of access the Hospital staff may have had to the office as such, we recognize that the undisputed evidence suggests that Dr. Ortega had a reasonable expectation of privacy in his desk and file cabinets. The undisputed evidence discloses that Dr. Ortega did not share his desk or file cabinets with any other employees. Dr. Ortega had occupied the office for 17 years and he kept materials in his office, which included personal correspondence, medical files, correspondence from private patients unconnected to the Hospital, personal financial records, teaching aids and notes, and personal gifts and mementos. App. 14. The files on physicians in residency training were kept outside Dr. Ortega's office. *Id.*, at 21. Indeed, the only items found by the investigators were apparently personal items because, with the exception of the items seized for use

in the administrative hearings, all the papers and effects found in the office were simply placed in boxes and made available to Dr. Ortega. ***719** *Id.*, at 58, 62. Finally, we note that there was no evidence that the Hospital had established any reasonable regulation or policy discouraging employees such as Dr. Ortega from storing personal papers and effects in their desks or file cabinets, *id.*, at 44, although the absence of such a policy does not create an expectation of privacy where it would not otherwise exist.

On the basis of this undisputed evidence, we accept the conclusion of the Court of Appeals that Dr. Ortega had a reasonable expectation of privacy at least in his desk and file cabinets. See *Gillard v. Schmidt*, 579 F.2d 825, 829 (CA3 1978); *United States v. Speights*, 557 F.2d 362 (CA3 1977); *United States v. Blok*, 88 U.S.App.D.C. 326, 188 F.2d 1019 (1951).

III

Having determined that Dr. Ortega had a reasonable expectation of privacy in his office, the Court of Appeals simply concluded without discussion that the "search ... was not a reasonable search under the fourth amendment." 764 F.2d, at 707. But as we have stated in *T.L.O.*, "[t]o hold that the Fourth Amendment applies to searches conducted by [public employers] is only to begin the inquiry into the standards governing such searches.... [W]hat is reasonable depends on the context within which a search takes place." *New Jersey v. T.L.O.*, 469 U.S., at 337, 105 S.Ct., at 740. Thus, we must determine the appropriate standard of reasonableness applicable to the search. A determination of the standard of reasonableness applicable to a particular class of searches requires "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify****1499** the intrusion." *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983); *Camara v. Municipal Court*, 387 U.S., at 536-537, 87 S.Ct., at 1734-1735. In the case of searches conducted by a public employer, we must balance the invasion of the employees' legitimate expectations of privacyagainst ***720** the government's need for supervision, control, and the efficient operation of the workplace.

"[I]t is settled ... that 'except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.' " *Mancusi v. DeForte*, 392 U.S., at 370, 88 S.Ct., at 2125 (quoting *Camara v. Municipal Court, supra*, 387 U.S., at 528-529, 87 S.Ct., at 1731). There are some circumstances, however, in which we have recognized that a warrant requirement is unsuitable. In particular, a warrant requirement is not appropriate when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara v. Municipal Court, supra*, at 533, 87 S.Ct., at 1733. Or, as Justice BLACKMUN stated in *T.L.O.*, "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." 469 U.S., at 351, 105 S.Ct., at 749 (concurring in judgment). In *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), for example, the Court explored the burdens a warrant requirement would impose on the Occupational Safety and Health Act regulatory scheme, and held that the warrant requirement was appropriate only after concluding that warrants would not "impose serious burdens on the inspection system or the courts, [would not] prevent inspections necessary to enforce the statute, or [would not] make them less effective." 436 U.S., at 316, 98 S.Ct., at 1822. In *New Jersey v. T.L.O., supra,* we concluded that the warrant requirement was not suitable to the school environment, because such a requirement would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.

There is surprisingly little case law on the appropriate Fourth Amendment standard of reasonableness for a public employer's work-related search of its employee's offices, desks, or file cabinets. Generally, however, the lower courts have held that any "work-related" search by an employersatisfies ***721** the Fourth Amendment reasonableness requirement. See *United States v. Nasser*, 476 F.2d 1111, 1123 (CA7 1973) ("work-related" searches and seizures are reasonable under the Fourth Amendment); *United States v. Collins*, 349 F.2d 863, 868 (CA2 1965) (upholding search and seizure because conducted pursuant to "the power of the Government as defendant's employer, to supervise and investigate the performance of his duties as a Customs employee"). Others have suggested the use of a standard other than probable cause. See *United States v. Bunkers*, 521 F.2d 1217 (CA9 1975) (work-related search of a locker tested under "reasonable cause" standard); *United States v. Blok, supra*, at 328, 188 F.2d, at 1021 ("No doubt a search of [a desk] without her consent

would have been reasonable if made by some people in some circumstances. Her official superiors might reasonably have searched the desk for official property needed for official use"). The only cases to imply that a warrant should be required involve searches that are not work related, see *Gillard v. Schmidt, supra,* at 829, n. 1, or searches for evidence of criminal misconduct, see *United States v. Kahan*, 350 F.Supp. 784 (SDNY 1972).

The legitimate privacy interests of public employees in the private objects they bring to the workplace may be substantial. Against these privacy interests, however, must be balanced the realities of the workplace, which strongly suggest that a warrant requirement would be unworkable. While police, and even administrative enforcement personnel, conduct searches for the primary purpose of obtaining evidence ****1500** for use in criminal or other enforcement proceedings, employers most frequently need to enter the offices and desks of their employees for legitimate work-related reasons wholly unrelated to illegal conduct. Employers and supervisors are focused primarily on the need to complete the government agency's work in a prompt and efficient manner. An employer may have need for correspondence, or a file or report available only in an employee's office while the employee is ***722** away from the office. Or, as is alleged to have been the case here, employers may need to safeguard or identify state property or records in an office in connection with a pending investigation into suspected employee misfeasance.

In our view, requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome. Imposing unwieldy warrant procedures in such cases upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable. In contrast to other circumstances in which we have required warrants, supervisors in offices such as at the Hospital are hardly in the business of investigating the violation of criminal laws. Rather, work-related searches are merely incident to the primary business of the agency. Under these circumstances, the imposition of a warrant requirement would conflict with "the common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick v. Myers*, 461 U.S. 138, 143, 103 S.Ct. 1684, 1688, 75 L.Ed.2d 708 (1983).

Whether probable cause is an inappropriate standard for public employer searches of their employees' offices presents a more difficult issue. For the most part, we have required that a search be based upon probable cause, but as we noted in *New Jersey v. T.L.O.*, "[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, ... in certain limited circumstances neither is required.' " 469 U.S., at 340, 105 S.Ct., at 742 (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 277, 93 S.Ct. 2535, 2541, 37 L.Ed.2d 596 (1973) (POWELL, J., concurring)). Thus, "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to ***723** adopt such a standard." 469 U.S., at 341, 105 S.Ct., at 742. We have concluded, for example, that the appropriate standard for administrative searches is not probable cause in its traditional meaning. Instead, an administrative warrant can be obtained if there is a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied. See *Marshall v. Barlow's, Inc.*, 436 U.S., at 320, 98 S.Ct., at 1824; *Camara v. Municipal Court*, 387 U.S., at 538, 87 S.Ct., at 1735.

As an initial matter, it is important to recognize the plethora of contexts in which employers will have an occasion to intrude to some extent on an employee's expectation of privacy. Because the parties in this case have alleged that the search was either a noninvestigatory work-related intrusion or an investigatory search for evidence of suspected work-related employee misfeasance, we undertake to determine the appropriate Fourth Amendment standard of reasonableness *only* for these two types of employer intrusions and leave for another day inquiry into other circumstances.

The governmental interest justifying work-related intrusions by public employers is the efficient and proper operation of the workplace. Government agencies provide myriad services to the public, and the work of these agencies would suffer if employers were required to have probable cause before they entered an

employee's desk for the purpose of finding a file or ****1501** piece of office correspondence. Indeed, it is difficult to give the concept of probable cause, rooted as it is in the criminal investigatory context, much meaning when the purpose of a search is to retrieve a file for work-related reasons. Similarly, the concept of probable cause has little meaning for a routine inventory conducted by public employers for the purpose of securing state property. See *Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987); *Illinois v. Lafayette*, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983). To ensure the efficient and proper operation of the agency, therefore, public employers must be given wide latitude to enter employee offices for work-related, noninvestigatory reasons.

***724** We come to a similar conclusion for searches conducted pursuant to an investigation of work-related employee misconduct. Even when employers conduct an investigation, they have an interest substantially different from "the normal need for law enforcement." *New Jersey v. T.L.O., supra*, 469 U.S., at 351, 105 S.Ct., at 748 (BLACKMUN, J., concurring in judgment). Public employers have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies inevitably suffers from the inefficiency, incompetence, mismanagement, or other work-related misfeasance of its employees. Indeed, in many cases, public employees are entrusted with tremendous responsibility, and the consequences of their misconduct or incompetence to both the agency and the public interest can be severe. In contrast to law enforcement officials, therefore, public employers are not enforcers of the criminal law; instead, public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner. In our view, therefore, a probable cause requirement for searches of the type at issue here would impose intolerable burdens on public employers. The delay in correcting the employee misconduct caused by the need for probable cause rather than reasonable suspicion will be translated into tangible and often irreparable damage to the agency's work, and ultimately to the public interest. See 469 U.S., at 353, 105 S.Ct., at 749. ("The time required for a teacher to ask the questions or make the observations that are necessary to turn reasonable grounds into probable cause is time during which the teacher, and other students, are diverted from the essential task of education.") Additionally, while law enforcement officials are expected to "schoo[l] themselves in the niceties of probable cause," *id.*, at 343, 105 S.Ct., at 743, no such expectation is generally applicable to public employers, at least when the search is not used to gather evidence of a criminal offense. It is simply unrealistic to expect supervisors in most government agencies to learn the subtleties of ***725** the probable cause standard. As Justice BLACKMUN observed in *T.L.O.*, "[a] teacher has neither the training nor the day-to-day experience in the complexities of probable cause that a law enforcement officer possesses, and is ill-equipped to make a quick judgment about the existence of probable cause." *Id.*, at 353, 105 S.Ct., at 749. We believe that this observation is an equally apt description of the public employer and supervisors at the Hospital, and we conclude that a reasonableness standard will permit regulation of the employer's conduct "according to the dictates of reason and common sense." *Id.*, at 343, 105 S.Ct., at 743.

Balanced against the substantial government interests in the efficient and proper operation of the workplace are the privacy interests of government employees in their place of work which, while not insubstantial, are far less than those found at home or in some other contexts. As with the building inspections in *Camara*, the employer intrusions at issue here "involve a relatively limited invasion" of employee privacy. 387 U.S., at 537, 87 S.Ct., at 1735. Government offices are provided to employees for the sole purpose of facilitating the work of an agency. The employee may ****1502** avoid exposing personal belongings at work by simply leaving them at home.

[3] In sum, we conclude that the "special needs, beyond the normal need for law enforcement make the ... probable-cause requirement impracticable," 469 U.S., at 351, 105 S.Ct., at 748 (BLACKMUN, J., concurring in judgment), for legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct. A standard of reasonableness will neither unduly burden the efforts of government employers to ensure the efficient and proper operation of the workplace, nor authorize arbitrary intrusions upon the privacy of public employees. We hold, therefore, that public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness ***726** under all the cir-

cumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable:

"Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the ... action was justified at its inception,' *Terry v. Ohio*, 392 U.S. [1], at 20 [88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968)]]; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place,' *ibid.*" *New Jersey v. T.L.O., supra*, at 341, 105 S.Ct., at 742-743.

Ordinarily, a search of an employee's office by a supervisor will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file. Because petitioners had an "individualized suspicion" of misconduct by Dr. Ortega, we need not decide whether individualized suspicion is an essential element of the standard of reasonableness that we adopt today. See *New Jersey v. T.L.O., supra*, at 342, n. 8, 105 S.Ct., at 743, n. 8. The search will be permissible in its scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of ... the nature of the [misconduct]." 469 U.S., at 342, 105 S.Ct., at 743.

IV

[4] In the procedural posture of this case, we do not attempt to determine whether the search of Dr. Ortega's office and the seizure of his personal belongings satisfy the standard of reasonableness we have articulated in this case. No evidentiary hearing was held in this case because the District Court acted on cross-motions for summary judgment, and granted petitioners summary judgment. The Court of Appeals, on the other hand, concluded that the record in this case justified***727** granting partial summary judgment on liability to Dr. Ortega.

We believe that both the District Court and the Court of Appeals were in error because summary judgment was inappropriate. The parties were in dispute about the actual justification for the search, and the record was inadequate for a determination on motion for summary judgment of the reasonableness of the search and seizure. Petitioners have consistently attempted to justify the search and seizure as required to secure the state property in Dr. Ortega's office. Mr. Friday testified in a deposition that he had ordered members of the investigative team to "check Dr. Ortega's office out in order to separate the business files from any personal files in order to ascertain what was in his office." App. 50. He further testified that the search was initiated because he "wanted to make sure that we had our state property identified, and in order to provide Dr. Ortega with his property and get what we had out of there, in order to make sure our ****1503** resident's files were protected, and that sort of stuff." *Id.*, at 51.

In their motion for summary judgment in the District Court, petitioners alleged that this search to secure property was reasonable as "part of the established hospital policy to inventory property within offices of departing, terminated or separated employees." Record Doc. No. 24, p. 9. The District Court apparently accepted this characterization of the search because it applied *Chenkin v. Bellevue Hospital Center, New York City Health & Hospitals Corp.*, 479 F.Supp. 207 (SDNY 1979), a case involving a Fourth Amendment challenge to an inspection *policy.* At the time of the search, however, Dr. Ortega had not been terminated, but rather was still on administrative leave, and the record does not reflect whether the Hospital had a policy of inventorying the property of investigated employees. Respondent, moreover, has consistently rejected petitioners' characterization of the search as motivated by a need to secure state property. ***728** Instead, Dr. Ortega has contended that the intrusion was an investigatory search whose purpose was simply to discover evidence that would be of use in administrative proceedings. He has pointed to the fact that no inventory was ever taken of the property in the office, and that seized evidence was eventually used in the administrative proceedings. Additionally, Dr. O'Connor stated in a deposition that one purpose of the search was "to look for contractural [*sic*] and other kinds of documents that might have been related to the issues" involved in the investigation. App. 38.

Under these circumstances, the District Court was in error in granting petitioners summary judgment. There was a dispute of fact about the character of the search, and the District Court acted under the erro-

neous assumption that the search was conducted pursuant to a Hospital policy. Moreover, no findings were made as to the scope of the search that was undertaken.

The Court of Appeals concluded that Dr. Ortega was entitled to partial summary judgment on liability. It noted that the Hospital had no policy of inventorying the property of employees on administrative leave, but it did not consider whether the search was otherwise reasonable. Under the standard of reasonableness articulated in this case, however, the absence of a Hospital policy did not necessarily make the search unlawful. A search to secure state property is valid as long as petitioners had a reasonable belief that there was government property in Dr. Ortega's office which needed to be secured, and the scope of the intrusion was itself reasonable in light of this justification. Indeed, petitioners have put forward evidence that they had such a reasonable belief; at the time of the search, petitioners knew that Dr. Ortega had removed the computer from the Hospital. The removal of the computer-together with the allegations of mismanagement of the residency program and sexual harassment-may have made the search reasonable at its inception under the standard we have put forth in this case. As with the ***729** District Court order, therefore, the Court of Appeals conclusion that summary judgment was appropriate cannot stand.

On remand, therefore, the District Court must determine the justification for the search and seizure, and evaluate the reasonableness of both the inception of the search and its scope.[FN*]

> FN* We have no occasion in this case to reach the issue of the appropriate standard for the evaluation of the Fourth Amendment reasonableness of the seizure of Dr. Ortega's personal items. Neither the District Court nor the Court of Appeals addressed this issue, and the *amicus curiae* brief filed on behalf of respondent did not discuss the legality of the seizure separate from that of the search. We also have no occasion in this case to address whether qualified immunity should protect petitioners from damages liability under § 1983. See *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The qualified immunity issue was not raised below and was not addressed by either the District Court or the Court of Appeals. Nor do we address the proper Fourth Amendment analysis for drug and alcohol testing of employees. Finally, we do not address the appropriate standard when an employee is being investigated for criminal misconduct or breaches of other nonwork-related statutory or regulatory standards.

****1504** Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, concurring in the judgment.

Although I share the judgment that this case must be reversed and remanded, I disagree with the reason for the reversal given by the plurality opinion, and with the standard it prescribes for the Fourth Amendment inquiry.

To address the latter point first: The plurality opinion instructs the lower courts that existence of Fourth Amendment protection for a public employee's business office is to be assessed "on a case-by-case basis," in light of whether the office is "so open to fellow employees or the public that no expectation of privacy is reasonable." *Ante*, at 1498. No clue is provided as to how open "so open" must be; much less ***730** is it suggested how police officers are to gather the facts necessary for this refined inquiry. As we observed in *Oliver v. United States*, 466 U.S. 170, 181, 104 S.Ct. 1735, 1743, 80 L.Ed.2d 214 (1984), "[t]his Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances." Even if I did not disagree with the plurality as to what result the proper legal standard should produce in the case before us, I would object to the formulation of a standard so devoid of content that it produces rather than eliminates uncertainty in this field.

Whatever the plurality's standard means, however, it must be wrong if it leads to the conclusion on the present facts that if Hospital officials had extensive "work-related reasons to enter Dr. Ortega's office" no

Fourth Amendment protection existed. *Ante,* at 1498. It is privacy that is protected by the Fourth Amendment, not solitude. A man enjoys Fourth Amendment protection in his home, for example, even though his wife and children have the run of the place-and indeed, even though his landlord has the right to conduct unannounced inspections at any time. Similarly, in my view, one's personal office is constitutionally protected against warrantless intrusions by the police, even though employer and co-workers are not excluded. I think we decided as much many years ago. In *Mancusi v. DeForte,* 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968), we held that a union employee had Fourth Amendment rights with regard to an office at union headquarters that he shared with two other employees, even though we acknowledged that those other employees, their personal or business guests, and (implicitly) "union higher-ups" could enter the office. *Id.,* at 369, 88 S.Ct. at 2124. Just as the secretary working for a corporation in an office frequently entered by the corporation's other employees is protected against unreasonable searches of that office by the government, so also is the government secretary working in an office frequently entered by other government employees. There is no reason why this ***731** determination that a legitimate expectation of privacy exists should be affected by the fact that the government, rather than a private entity, is the employer. Constitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer.

I cannot agree, moreover, with the plurality's view that the reasonableness of the expectation of privacy (and thus the existence of Fourth Amendment protection) changes "when an intrusion is by a supervisor rather than a law enforcement official." *Ante,* at 1498. The identity of the searcher (police v. employer) is relevant not to whether Fourth Amendment protections ****1505** apply, but only to whether the search of a protected area is reasonable. Pursuant to traditional analysis the former question must be answered on a more "global" basis. Where, for example, a fireman enters a private dwelling in response to an alarm, we do not ask whether the occupant has a reasonable expectation of privacy (and hence Fourth Amendment protection) vis-à-vis firemen, but rather whether-given the fact that the Fourth Amendment covers private dwellings-intrusion for the purpose of extinguishing a fire is reasonable. Cf. *Michigan v. Tyler,* 436 U.S. 499, 509, 98 S.Ct. 1942, 1949, 56 L.Ed.2d 486 (1978). A similar analysis is appropriate here.

I would hold, therefore, that the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by Fourth Amendment protections as a general matter. (The qualifier is necessary to cover such unusual situations as that in which the office is subject to unrestricted public access, so that it is "expose[d] to the public" and therefore "not a subject of Fourth Amendment protection." *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967).) Since it is unquestioned that the office here was assigned to Dr. Ortega, and since no special circumstances are suggested that would call for an exception to the ordinary rule, I would ***732** agree with the District Court and the Court of Appeals that Fourth Amendment protections applied.

The case turns, therefore, on whether the Fourth Amendment was violated-*i.e.,* whether the governmental intrusion was reasonable. It is here that the government's status as employer, and the employment-related character of the search, become relevant. While as a general rule warrantless searches are *per se* unreasonable, we have recognized exceptions when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable...." *New Jersey v. T.L.O.,* 469 U.S. 325, 351, 105 S.Ct. 733, 749, 83 L.Ed.2d 720 (BLACKMUN, J., concurring in judgment). Such "special needs" are present in the context of government employment. The government, like any other employer, needs frequent and convenient access to its desks, offices, and file cabinets for work-related purposes. I would hold that government searches to retrieve work-related materials or to investigate violations of workplace rules-searches of the sort that are regarded as reasonable and normal in the private-employer context-do not violate the Fourth Amendment. Because the conflicting and incomplete evidence in the present case could not conceivably support summary judgment that the search did not have such a validating purpose, I agree with the plurality that the decision must be reversed and remanded.

Justice BLACKMUN, with whom Justice BRENNAN, Justice MARSHALL, and Justice STEVENS join, dissenting.

The facts of this case are simple and straightfor-

ward. Dr. Ortega had an expectation of privacy in his office, desk, and file cabinets, which were the target of a search by petitioners that can be characterized only as investigatory in nature. Because there was no "special need," see *New Jersey v. T.L.O.*, 469 U.S. 325, 351, 105 S.Ct. 733, 748, 83 L.Ed.2d 720 (1985) (opinion concurring in judgment), to dispense with the warrant and probable-cause requirements of the Fourth Amendment, I would evaluate the search by applying this traditional standard. Under that ***733** standard, this search clearly violated Dr. Ortega's Fourth Amendment rights.

The problems in the plurality's opinion all arise from its failure or unwillingness to realize that the facts here are clear. The plurality, however, discovers what it feels is a factual dispute: the plurality is not certain whether the search was routine or investigatory. Accordingly, it concludes that a remand is the appropriate course of action. Despite the remand, the plurality assumes it must announce a standard concerning the reasonableness of a public employer's search of the workplace. Because the plurality treats the facts as in dispute, ****1506** it formulates this standard at a distance from the situation presented by this case.

This does not seem to me to be the way to undertake Fourth Amendment analysis, especially in an area with which the Court is relatively unfamiliar.[FN1] Because this analysis, when conducted properly, is always fact specific to an extent, it is inappropriate that the plurality's formulation of a standard does not arise from a sustained consideration of a particular factual situation. [FN2] Moreover, given that *any* standard ***734** ultimately rests on judgments about factual situations, it is apparent that the plurality has assumed the existence of hypothetical facts from which its standard follows. These "assumed" facts are weighted in favor of the public employer,[FN3] and, as a result, the standard that emerges makes reasonable almost any workplace search by a public employer.

FN1. Although there has been some development on these issues in federal courts, see *ante*, at 1500, this Court has not yet squarely faced them.

FN2. It is true that this Court has expressed concern about the workability of " 'an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances.' " *Ante*, at 1505 (SCALIA, J., concurring in judgment), quoting *Oliver v. United States*, 466 U.S. 170, 181, 104 S.Ct. 1735, 1743, 80 L.Ed.2d 214 (1984). Given, however, the number and types of workplace searches by public employers that can be imagined-ranging all the way from the employer's routine entry for retrieval of a file to a planned investigatory search into an employee's suspected criminal misdeeds-development of a jurisprudence in this area might well require a case-by-case approach. See *California v. Carney*, 471 U.S. 386, 400, 105 S.Ct. 2066, 2074, 85 L.Ed.2d 406 (1985) (STEVENS, J., dissenting) ("The only true rules governing search and seizure have been formulated and refined in the painstaking scrutiny of case-by-case adjudication"); *New Jersey v. T.L.O.*, 469 U.S. 325, 366-367, 105 S.Ct. 733, 755-756, 83 L.Ed.2d 720 (1985) (BRENNAN, J., concurring in part and dissenting in part) ("I would not think it necessary to develop a single standard to govern all school searches, any more than traditional Fourth Amendment law applies even the probable-cause standard to *all* searches and seizures" (emphasis in original)). Under a case-by-case approach, a rule governing a particular type of workplace search, unlike the standard of the plurality here, should emerge from a concrete set of facts and possess the precision that only the exploration of "every aspect of a multifaced situation embracing conflicting and demanding interests" can produce. See *United States v. Fruehauf*, 365 U.S. 146, 157, 81 S.Ct. 547, 554, 5 L.Ed.2d 476 (1961). The manner in which the plurality arrives at its standard, it seems to me, thus not only harms Dr. Ortega and other public employees, but also does a disservice to Fourth Amendment analysis.

FN3. It could be argued that the plurality removes its analysis from the facts of this case in order to arrive at a result unfavorable to public employees, whose position members of the plurality do not look upon with much sympathy. As Justice Cardozo long ago explained, judges are never free from the feelings of the times or those emerging from

their own personal lives:

> "I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge." B. Cardozo, The Nature of the Judicial Process 167 (1921).
>
> It seems to me that whenever, as here, courts fail to concentrate on the facts of a case, these predilections inevitably surface, no longer held in check by the "discipline" of the facts, and shape, more than they ever should and even to an extent unknown to the judges themselves, any legal standard that is then articulated. This, I believe, is the central problem of the opinion of the plurality and, indeed, of the concurrence.

I

It is necessary to review briefly the factual record in this case because of the plurality's assertion, *ante,* at 1504, that ***735** "[t]here was a dispute of fact about the character of the search." The plurality considers it to be either an inventory search to secure government property or an investigative search to gather evidence concerning Dr. Ortega's alleged misdeeds. *Ante,* at 1503-1504. It is difficult to comprehend how, on the facts of this case, the search in any way could be seen as one for inventory purposes. As the plurality concedes, the search could not have been made pursuant to the Hospital's policy of routinely****1507** inventorying state property in an office of a terminated employee, because at the time of the search Dr. Ortega was on administrative leave and had not been terminated. *Ante,* at 1496, 1504).[FN4] Napa had no policy of inventorying the office of an employee placed on administrative leave. *Ante,* at 1504.

FN4. The plurality is correct in pointing out that the District Court erred in its conclusion that there was a Hospital policy that would have justified this search. *Ante,* at 1504. This was not the only error on the District Court's part. That court also concluded that Dr. Ortega was notified of the search and could have participated in it, see App. 23, a conclusion at odds with the record, see *id.,* at 24, 40.

The plurality, however, observes that the absence of the policy does not dispositively eliminate inventorying or securing state property as a possible purpose for conducting the search. *Ante,* at 1504. As evidence suggesting such a purpose, the plurality points to petitioners' concern that Dr. Ortega may have removed from the Hospital's grounds a computer owned by the Hospital and to their desire to secure such items as files located in Dr. Ortega's office. See *ante,* at 1503-1504.

The record evidence demonstrates, however, that ensuring that the computer had not been removed from the Hospital was not a reason for the search. Mr. Friday, the leader of the "investigative team," stated that the alleged removal of the computer had nothing to do with the decision to enter Dr. Ortega's office. App. 59. Dr. O'Connor himself admitted that there was little connection between the entry and an attempt***736** by petitioners to ascertain the location of the computer. *Id.,* at 39. The search had the computer as its focus only insofar as the team was investigating practices dealing with its acquisition. *Id.,* at 32.

In deposition testimony, petitioners did suggest that the search was inventory in character insofar as they aimed to separate Dr. Ortega's personal property from Hospital property in the office. *Id.,* at 38, 40, 50. Such a suggestion, however, is overwhelmingly contradicted by other remarks of petitioners and particularly by the character of the search itself. Dr. O'Connor spoke of the individuals involved in the search as "investigators," see *id.,* at 37, and, even where he described the search as inventory in nature, he observed that it was aimed primarily at furthering investigative purposes. See, *e.g., id.,* at 40 ("Basically what we were trying to do is to remove what was obviously State records or records that had to do with his program, his department, any of the materials that would be involved in running the residency program,

around contracts, around the computer, around the areas that we were interested in investigating"). Moreover, as the plurality itself recognizes, *ante,* at 1496, the "investigators" never made a formal inventory of what they found in Dr. Ortega's office. Rather, they rummaged through his belongings and seized highly personal items later used at a termination proceeding to impeach a witness favorable to him. *Ibid.* Furthermore, the search was conducted in the evening, App. 53, and it was undertaken only after the investigators had received legal advice, *id.,* at 51.

The search in question stemmed neither from a Hospital policy nor from a practice of routine entrances into Dr. Ortega's office. It was plainly exceptional and investigatory in nature. Accordingly, there is no significant factual dispute in this case.

II

Before examining the plurality's standard of reasonableness for workplace searches, I should like to state both my ***737** agreement and disagreement with the plurality's discussion of a public employee's expectation of privacy. What is most important, of course, is that in this case the plurality acknowledges that Dr. Ortega had an expectation of privacy in his desk and file cabinets, *ante,* at 1499, and that, as the plurality concedes, *ante,* at 1498, the majority of this Court holds that he had a similar expectation in his office. With respect to the plurality's general comments, I ****1508** am in complete agreement with its observation that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." *Ante,* at 1498. Moreover, I would go along with the plurality's observation that, in certain situations, the "operational realities" of the workplace may remove some expectation of privacy on the part of the employee. *Ibid.* However, I am disturbed by the plurality's suggestion, see *ante,* at 1498, that routine entries by visitors might completely remove this expectation.

First, this suggestion is contrary to the traditional protection that this Court has recognized the Fourth Amendment accords to offices. See *Oliver v. United States,* 466 U.S. 170, 178, n. 8, 104 S.Ct. 1735, 1741, n. 8, 80 L.Ed.2d 214 (1984) ("The Fourth Amendment's protection of offices and commercial buildings, in which there may be legitimate expectations of privacy, is also based upon societal expectations that have deep roots in the history of the Amendment"); *Hoffa v. United States,* 385 U.S. 293, 301, 87 S.Ct. 408, 413, 17 L.Ed.2d 374 (1966) ("What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile"). The common understanding of an office is that it is a place where a worker receives an occasional business-related visitor. Thus, when the office has received traditional Fourth Amendment protection in our cases, it has been with the understanding that such routine visits occur there.

***738** Moreover, as the plurality appears to recognize, see *ante,* at 1504, the precise extent of an employee's expectation of privacy often turns on the nature of the search. This observation is in accordance with the principle that the Fourth Amendment may protect an individual's expectation of privacy in one context, even though this expectation may be unreasonable in another. See *New Jersey v. T.L.O.,* 469 U.S., at 339, 105 S.Ct., at 742. See also *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319, 329, 99 S.Ct. 2319, 2326, 60 L.Ed.2d 920 (1979) (the opening of a retail store to the public does not mean that "it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees"). As Justice SCALIA observes, "[c]onstitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer." *Ante,* at 1505. Thus, although an employee might well have no reasonable expectation of privacy with respect to an occasional visit by a fellow employee, he would have such an expectation as to an afterhours search of his locked office by an investigative team seeking materials to be used against him at a termination proceeding.[FN5]

FN5. This common-sense notion that public employees have some expectation of privacy in the workplace, particularly with respect to private documents or papers kept there, was exemplified by recent remarks of the Attorney General. In responding to questions concerning the possibility of a search and seizure of papers and offices of Government employees in connection with an investigation into allegedly illegal diversion of funds to Central American recipients, he is reported to have stated: "I'm not sure we would have any opportunity or any legal right to get into

those personal papers.... There was certainly no evidence of any criminality that would have supported a search warrant at that time.... I don't think public employees' private documents belong to the Government." N.Y.Times, Dec. 3, 1986, p. A11, col. 3.

Moreover, courts have recognized that a public employee has a legitimate expectation of privacy as to an employer's search and seizure at the workplace. See, *e.g.*, *Gillard v. Schmidt*, 579 F.2d 825, 829 (CA3 1978) (search of desk); *United States v. McIntyre*, 582 F.2d 1221, 1224 (CA9 1978) (monitoring conversations at office desk). But see *Williams v. Collins*, 728 F.2d 721, 728 (CA5 1984) (search of desk). In some cases, courts have decided that an employee had no such expectation with respect to a workplace search because an established regulation permitted the search. See *United States v. Speights*, 557 F.2d 362, 364-365 (CA3 1977) (describing cases); *United States v. Donato*, 269 F.Supp. 921 (ED Pa.), aff'd, 379 F.2d 288 (CA3 1967) (Government regulation notified employees that lockers in the United States Mint were not to be viewed by employees as private lockers). The question of such a search pursuant to regulations is not now before this Court.

739 **1509** Finally and most importantly, the reality of work in modern time, whether done by public or private employees, reveals why a public employee's expectation of privacy in the workplace should be carefully safeguarded and not lightly set aside. It is, unfortunately, all too true that the workplace has become another home for most working Americans. Many employees spend the better part of their days and much of their evenings at work. See R. Kanter, Work and Family in the United States: A Critical Review and Agenda for Research and Policy 31-32 (1977); see also R. Bellah, R. Madsen, W. Sullivan, A. Swidler, & S. Tipton, Habits of the Heart: Individualism and Commitment in American Life 288-289 (1985) (a "less frantic concern for advancement and a reduction of working hours" would make it easier for both men and women to participate fully in working and family life). Consequently, an employee's private life must intersect with the workplace, for example, when the employee takes advantage of work or lunch breaks to make personal telephone calls, to attend to personal business, or to receive personal visitors in the office. As a result, the tidy distinctions (to which the plurality alludes, see *ante*, at 1497) between the workplace and professional affairs, on the one hand, and personal possessions and private activities, on the other, do not exist in reality.[FN6] Not all of an employee's private740** possessions will stay in his or her briefcase or handbag. Thus, the plurality's remark that the "employee may avoid exposing personal belongings at work by simply leaving them at home," *ante*, at 1502, reveals on the part of the Members of the plurality a certain insensitivity to the "operational realities of the workplace," *ante*, at 1498, they so value. [FN7]

FN6. Perhaps the greatest sign of the disappearance of the distinction between work and private life is the fact that women-the traditional representatives of the private sphere and family life-have entered the work force in increasing numbers. See BNA Special Report, Work & Family: A Changing Dynamic, 1, 3, 13-15 (1986). It is therein noted:

"The myth of 'separate worlds'-one of work and the other of family life-long harbored by employers, unions, and even workers themselves has been effectively laid to rest. Their inseparability is undeniable, particularly as two-earner families have become the norm where they once were the exception and as a distressing number of single parents are required to raise children on their own. The import of work-family conflicts-for the family, for the workplace, and, indeed, for the whole of society-will grow as these demographic and social transformations in the roles of men and women come to be more fully clarified and appreciated." *Id.*, at 217 (remarks of Professor Phyllis Moen).

As a result of this disappearance, moreover, the employee must attempt to maintain the difficult balance between work and personal life. *Id.*, at 227 (remarks of Barney Olmsted and Suzanne Smith).

FN7. I am also troubled by the plurality's

implication that a public employee is entitled to a lesser degree of privacy in the workplace because the public agency, not the employee, *owns* much of what constitutes the workplace. This implication emerges in the distinction the plurality draws between the workplace "context," which includes "the hallways, cafeteria, offices, desks, and file cabinets," and an employee's "closed personal luggage, a handbag, or a briefcase." *Ante*, at 1497. This Court, however, has made it clear that privacy interests protected by the Fourth Amendment do not turn on ownership of particular premises. See, *e.g.*, *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978) ("[T]he protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place"); *Katz v. United States*, 389 U.S. 347, 353, 88 S.Ct. 507, 512, 19 L.Ed.2d 576 (1967) (Fourth Amendment protects people and not simply "areas"). To be sure, the public employer's ownership of the premises is relevant in determining an employee's expectation of privacy, for often it is the main reason for the routine visits into an employee's office. The employee is assigned an office for work purposes; it is expected that the employee will receive work-related visitors and that the employer will maintain the office. This fact of ownership, however, like the routine visits, does not abrogate the employee's expectation of privacy.

***741** Dr. Ortega clearly had an expectation of privacy in his office, desk, and file cabinets, particularly with respect to the type of investigatory search involved here. In ****1510** my view, when examining the facts of other cases involving searches of the workplace, courts should be careful to determine this expectation also in relation to the search in question.

III

A

At the outset of its analysis, the plurality observes that an appropriate standard of reasonableness to be applied to a public employer's search of the employee's workplace is arrived at from "balancing" the privacy interests of the employee against the public employer's interests justifying the intrusion. *Ante*, at 1499. Under traditional Fourth Amendment jurisprudence, however, courts abandon the warrant and probable-cause requirements, which constitute the standard of reasonableness for a government search that the Framers established, "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable...." *New Jersey v. T.L.O.*, 469 U.S., at 351, 105 S.Ct., at 748 (opinion concurring in the judgment); see *United States v. Place*, 462 U.S. 696, 721-722, and n. 1, 103 S.Ct. 2637, 2652-2653, and n. 1, 77 L.Ed.2d 110 (1983) (opinion concurring in judgment). In sum, only when the practical realities of a particular situation suggest that a government official cannot obtain a warrant based upon probable cause without sacrificing the ultimate goals to which a search would contribute, does the Court turn to a "balancing" test to formulate a standard of reasonableness for this context.

In *New Jersey v. T.L.O.*, *supra*, I faulted the Court for neglecting this "crucial step" in Fourth Amendment analysis. See 469 U.S., at 351, 105 S.Ct., at 747. I agreed, however, with the *T.L.O.* Court's standard because of my conclusion that this step, had ***742** it been taken, would have revealed that the case presented a situation of "special need." *Id.*, at 353, 105 S.Ct., at 749. I recognized that discipline in this country's secondary schools was essential for the promotion of the overall goal of education, and that a teacher could not maintain this discipline if, every time a search was called for, the teacher would have to procure a warrant based on probable cause. *Id.*, at 352-353, 105 S.Ct., at 748-749. Accordingly, I observed: "The special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirements, and in applying a standard determined by balancing the relevant interests." *Id.*, at 353, 105 S.Ct., at 749.

The plurality repeats here the *T.L.O.* Court's error in analysis. Although the plurality mentions the "special need" step, *ante*, at 1499-1500, it turns immediately to a balancing test to formulate its standard of reasonableness. This error is significant because, given the facts of this case, no "special need" exists here to justify dispensing with the warrant and prob-

able-cause requirements. As observed above, the facts suggest that this was an investigatory search undertaken to obtain evidence of charges of mismanagement at a time when Dr. Ortega was on administrative leave and not permitted to enter the Hospital's grounds. There was no special practical need that might have justified dispensing with the warrant and probable-cause requirements. Without sacrificing their ultimate goal of maintaining an effective institution devoted to training and healing, to which the disciplining of Hospital employees contributed, petitioners could have taken any evidence of Dr. Ortega's alleged improprieties to a magistrate in order to obtain a warrant.

Furthermore, this seems to be exactly the kind of situation where a neutral magistrate's involvement would have been helpful in curtailing the infringement upon Dr. Ortega's privacy. See ***743***United States v. United States District Court*, 407 U.S. 297, 317, 92 S.Ct. 2125, 2136, 32 L.Ed.2d 752 (1972) ("The historical judgment, which ****1511** the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech"). Petitioners would have been forced to articulate their exact reasons for the search and to specify the items in Dr. Ortega's office they sought, which would have prevented the general rummaging through the doctor's office, desk, and file cabinets. Thus, because no "special need" in this case demanded that the traditional warrant and probable-cause requirements be dispensed with, petitioners' failure to conduct the search in accordance with the traditional standard of reasonableness should end the analysis, and the judgment of the Court of Appeals should be affirmed.

B

Even were I to accept the proposition that this case presents a situation of "special need" calling for an exception to the warrant and probable-cause standard, I believe that the plurality's balancing of the public employer's and the employee's respective interests to arrive at a different standard is seriously flawed. Once again, the plurality fails to focus on the facts. Instead, it arrives at its conclusion on the basis of "assumed" facts. First, sweeping with a broad brush, the plurality announces a rule that dispenses with the warrant requirement in every public employer's search of an employee's office, desk, or file cabinets because it "would seriously disrupt the routine conduct of business and would be unduly burdensome." *Ante*, at 1500. The plurality reasons that a government agency could not conduct its work in an efficient manner if an employer needed a warrant for every routine entry into an employee's office in search of a file or correspondence, or for every investigation of suspected employee misconduct. In addition, it argues that the warrant requirement, if imposed on an employer who would be unfamiliar with this procedure, would prove "unwieldy." *Ibid.*

***744** The danger in formulating a standard on the basis of "assumed" facts becomes very clear at this stage of the plurality's opinion. Whenever the Court has arrived at a standard of reasonableness other than the warrant and probable-cause requirements, it has first found, through analysis of a factual situation, that there is a nexus between this other standard, the employee's privacy interests, and the government purposes to be served by the search. Put another way, the Court adopts a new standard only when it is satisfied that there is no alternative in the particular circumstances.[FN8] In *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968), the Court concluded that, as a practical matter, brief, on-the-spot stops of individuals by police officers need not be subject to a warrant. Still concerned, however, with the import of the warrant requirement, which provides the "neutral scrutiny of a judge," *id.*, at 21, 88 S.Ct., at 1880, the Court weighed in detail the law enforcement and the suspect's interests in the circumstances of the protective search. The resulting standard constituted the equivalent of the warrant: judging the officer's behavior from a reasonable or objective standard, *id.*, at 21, 27, 88 S.Ct., at 1879, 1883. In *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), on the other hand, the Court declined to abandon the warrant as a standard in the case of a municipal health inspection in light of the interests of the ****1512** target of the health investigation and those of the government in enforcing health standards. *Id.*, at 532-533, 87 S.Ct., at 1732-1733.

FN8. This part of the analysis is related to the "special need" step. Courts turn to the balancing test only when they conclude that the traditional warrant and probable-cause requirements are not a practical alternative. Through the balancing test, they then try to identify a standard of reasonableness, other

than the traditional one, suitable for the circumstances. The warrant and probable-cause requirements, however, continue to serve as a model in the formulation of the new standard. It is conceivable, moreover, that a court, having initially decided that it is faced with a situation of "special need" that calls for balancing, may conclude after application of the balancing test that the traditional standard is a suitable one for the context after all.

***745** A careful balancing with respect to the warrant requirement is absent from the plurality's opinion, an absence that is inevitable in light of the gulf between the plurality's analysis and any concrete factual setting. It is certainly correct that a public employer cannot be expected to obtain a warrant for every routine entry into an employee's workplace.[FN9] This situation, however, should not justify dispensing with a warrant in *all* searches by the employer. The warrant requirement is perfectly suited for many work-related searches, including the instant one.[FN10] Moreover, although the plurality abandons the warrant requirement, it does not explain what it will substitute or how the standard it adopts retains anything of the normal "neutral scrutiny of the judge." [FN11] In sum, the plurality's general result is preordained because, cut off from a particular factual setting, it cannot make the necessary distinctions among types of searches, or formulate an alternative to the warrant requirement that derives from a precise weighing of competing interests.

FN9. In some workplace investigations, the particular goals of the government agency coupled with a need for special employee discipline may justify dispensing with the warrant requirement. See, *e.g.*, *Security and Law Enforcement Employees Dist. Council 82, American Federation of State, County and Municipal Employees, AFL-CIO v. Carey*, 737 F.2d 187, 203-204 (CA2 1984) (government interest in maintaining security of a correctional facility justifies strip searches of correctional officers, in certain circumstances, in absence of a warrant).

FN10. While the warrant requirement might be "unwieldy" for public employers if it was required for every workplace search, the plurality has failed to explain why, on the facts of this case, obtaining a warrant would have been burdensome for petitioners, even if one assumes that they were unfamiliar with this requirement. In fact, the opposite seems true. Moreover, contrary to the plurality's suggestion, see *ante*, at 1500, the warrant requirement is not limited to the criminal context. See *Camara v. Municipal Court*, 387 U.S. 523, 530-531, 87 S.Ct. 1727, 1731-1732, 18 L.Ed.2d 930 (1967).

FN11. The plurality adopts a "standard of reasonableness under all the circumstances." *Ante*, at 1502. It fails completely to suggest how this standard captures any of the protection of the traditional warrant requirement; indeed, the standard appears to be simply an alternative to probable cause.

***746** When the plurality turns to the balancing that will produce an alternative to probable cause, it states that it is limiting its analysis to the two situations arguably presented by the facts of this case-the "noninvestigatory work-related intrusion" (*i.e.*, inventory search) and the "investigatory search for evidence of suspected work-related employee misfeasance" (*i.e.*, investigatory search). *Ante*, at 1501. This limitation, however, is illusory. The plurality describes these searches in such a broad fashion that it is difficult to imagine a search that would *not* fit into one or the other of the categories. Moreover, it proposes the *same* standard, one taken from *New Jersey v. T.L.O.*, for both inventory and investigatory searches. See *ante*, at 1502. Therefore, in the context of remanding a case because the facts are unclear, the plurality is announcing a standard to apply to *all* public employer searches.

Moreover, the plurality also abandons any effort at careful balancing in arriving at its substitute for probable cause. Just as the elimination of the warrant requirement requires some nexus between its absence, the employee's privacy interests, and the government interests to be served by the search, so also does the formulation of a standard less than probable cause for a particular search demand a similar connection between these factors. See, *e.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 881, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607 (1975). The plurality's discussion of investigatory searches reveals no attempt to set forth the appropriate nexus.[FN12] It is certainly true, as the

plurality observes, that a ****1513** public employer has an interest in eliminating incompetence and work-related misconduct in order to enable the government agency to accomplish its tasks in an efficient manner. It is also conceivable that a public employee's privacy interests are somewhat limited in the workplace, although, as noted above, not to the extent suggested by the plurality. The plurality, however, fails to ***747** explain why the balancing of these interests *necessarily* leads to the standard borrowed from *New Jersey v. T.L.O.*, as opposed to other imaginable standards. Indeed, because the balancing is simply asserted rather than explicated, [FN13] the plurality never really justifies why probable cause, characterized by this Court as a "practical, nontechnical conception," *Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949), would not protect adequately the public employer's interests in the situation presented by this case. See *New Jersey v. T.L.O.*, 469 U.S., at 363-364, 105 S.Ct., at 754-755 (BRENNAN, J., concurring in part and dissenting in part).[FN14]

FN12. The same holds true for the plurality's discussion of inventory searches.

FN13. The plurality's attempt at explication consists of little more than a series of assertions: that the probable-cause requirement "would impose intolerable burdens on public employers"; that the delay caused by such a requirement would result in "tangible and often irreparable damage" to a government agency; and that public employers cannot be expected "to learn the subtleties of the probable cause standard." See *ante*, at 1501-1502. Such assertions cannot pass for careful balancing on the facts of this case, given that the search was conducted during Dr. Ortega's administrative leave from the Hospital, with the advice of counsel, and by an investigating party that included a security officer. My observation that a particular Fourth Amendment standard of reasonableness should be developed from a specific context bears repeating here.

FN14. Even if I believed that this case were an appropriate vehicle for development of a standard on public-employer searches, I would fault the plurality for its failure to give much substance to the standard it has borrowed almost verbatim from *New Jersey v. T.L.O.* See *ante*, at 1502-1503. The *T.L.O.* Court described in some detail the substance of its test, which was tailored to the circumstances of the case before it and thus is not directly transferable from the halls of a high school to the offices of government. In any event, were I to apply the rather stark standard of reasonableness announced by the plurality, I would conclude that petitioners here did not satisfy it. Assuming, without deciding, that petitioners had an individualized suspicion that Dr. Ortega was mismanaging the psychiatric residency program, I believe the scope of the search was not reasonably related to this concern. If petitioners were truly in search of evidence of respondent's mismanagement, it is difficult to understand why they looked through the personal belongings of Dr. Ortega, a search that resulted in the seizure of a Valentine's Day card, a photograph, and a book of poetry, which could have no conceivable relation to the claimed purpose of the search. Although, in the plurality's view, the seizure of these items is not an issue in this case, see *ante*, at 1504, n., I would think that this seizure is relevant to determining the reasonableness of the scope of the search. Accordingly, under the plurality's own standard, this search was unreasonable.

***748** IV

I have reviewed at too great length the plurality's opinion because the question of public employers' searches of their employees' workplaces, like any relatively unexplored area of Fourth Amendment law, demands careful analysis. These searches appear in various factual settings, some of which courts are only now beginning to face, and present different problems.[FN15] Accordingly, I believe that the Court should examine closely the practical realities of a particular situation and the interests implicated there before replacing the traditional warrant and probable-cause requirements with some other standard of reasonableness derived from a balancing test. The ****1514** Fourth Amendment demands no less. By ignoring the specific facts of this case, and by announcing in the abstract a standard as to the reasonableness of an employer's workplace searches, the plurality undermines not only the Fourth Amendment rights of public em-

ployees but also any further analysis of the constitutionality of public employer searches.

> FN15. One example is the Fourth Amendment problem associated with drug and alcohol testing of employees. See, *e.g.*, *Shoemaker v. Handel*, 795 F.2d 1136, 1141-1143 (CA3) (administrative-search exception extended to warrantless breath and urine testing of jockeys, given the heavily regulated nature of the horse-racing industry), cert. denied, 479 U.S. 986, 107 S.Ct. 577, 93 L.Ed.2d 580 (1986); *National Treasury Employees Union v. Von Raab*, 649 F.Supp. 380 (ED La.1986) (wide-scale urinalysis of United States Customs Service employees without probable cause or reasonable suspicion struck down as violative of the Fourth Amendment).

I respectfully dissent.

U.S.Cal.,1987.
O'Connor v. Ortega
480 U.S. 709, 107 S.Ct. 1492, 42 Empl. Prac. Dec. P 36,891, 94 L.Ed.2d 714, 55 USLW 4405, 1 IER Cases 1617

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PASADENA POLICE OFFICERS ASSOCIATION et al., Plaintiffs and Respondents,
v.
CITY OF PASADENA et al., Defendants and Appellants

No. S007915.

Supreme Court of California
Oct 11, 1990.

SUMMARY

The trial court issued a preliminary injunction enjoining a city from ordering a police officer, the president of the city's police officers' association, to participate in an internal affairs investigation unless the city provided nonconfidential notes made by investigators, prior to any interrogation of the officer. Previously, the association had decided to send letters discussing a negotiating impasse between the city and the association to the block captains of a neighborhood watch program. Although an officer was warned that the list of block captains was intended solely for the purposes of crime prevention, the association nonetheless obtained the list and contacted them. After that officer was interrogated in an internal affairs investigation, an investigator denied the request of the association's president for a copy of the notes from that officer's interview, prior to the president's interrogation. Thereafter, the association filed a complaint seeking an injunction. (Superior Court of Los Angeles County, No. C603533, Jack M. Newman, Judge.) The Court of Appeal, Second Dist., Div. One, No. B024968, affirmed.

The Supreme Court reversed the judgment of the Court of Appeal with directions to vacate the order of the superior court granting the preliminary injunction and to remand the case to the superior court. It held that the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), which balances peace officers' basic procedural rights with the need for prompt, thorough, and fair internal investigations to maintain public confidence in law enforcement agencies, does not compel preinterrogation discovery. (Opinion by Kennard, J., with Lucas, C. J., Mosk, Broussard, Eagleson and Arabian, JJ., concurring. Separate concurring and dissenting opinion by Panelli, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Law Enforcement Officers § 3--Police--High Standard of Personal Conduct.

While the off-duty conduct of employees is generally of no legal consequence to their employers, the public expects peace officers to be above suspicion of violation of the very laws they are sworn to enforce. Historically, peace officers have been held to a higher standard than other public employees, in part because they alone are the guardians of peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them. To maintain the public's confidence in its police force, a law enforcement agency must promptly, thoroughly, and fairly investigate allegations of police officer misconduct; if warranted, it must institute disciplinary proceedings.

(2) Law Enforcement Officers § 11--Police--Disciplinary Proceedings-- Purpose of Public Safety Officers Procedural Bill of Rights Act.

The purpose of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) is to maintain stable employer-employee relations and thereby assure effective law enforcement. The act requires the law enforcement agencies throughout the state afford minimal procedural rights to their peace officer employees. Thus, the act secures for peace officers-when off duty and not in uniform-certain specified rights. Although notions of fundamental fairness for police officers underlie the act, a number of its provisions also reflect the Legislature's recognition of the necessity for internal affairs investigations to maintain the efficiency and integrity of the police force serving the community.
[See **Cal.Jur.3d,** Law Enforcement Officers, § 22 et seq.]

(3) Law Enforcement Officers § 11--Police--Disciplinary Proceedings-- Advisement of Rights to Remain Silent.

If criminal charges are contemplated against a

police officer who is undergoing an internal investigation, Gov. Code, § 3303, subd. (h), requires advisement of the officer's right to remain silent. The officer must be told that, although he has a right to remain silent and not incriminate himself, his silence could be deemed insubordination, leading to administrative discipline, and any statement made under the compulsion of the threat of such discipline could not be used against him in any subsequent criminal proceeding.

(4a, 4b, 4c, 4d, 4e) Law Enforcement Officers § 11--Police-- Disciplinary Proceedings--Investigation--Officer's Right to Nonconfidential Notes Before Interrogation.

The Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) does not compel preinterrogation discovery of notes relating to an internal affairs investigation to an officer who is the subject of an investigation regarding his conduct. Although Gov. Code, § 3303, subd. (f), entitles an officer to reports, notes, and reports incident to an investigation, it does not address an officer's entitlement to discovery in the event he or she is administratively charged with misconduct, nor does it address when the entitlement arises. Under established rules of statutory construction, the correct interpretation is that the officer's entitlement arises after any interrogation. Also, preinterrogation discovery is not essential to the fundamental fairness of the investigation, and such discovery could frustrate the effectiveness of the investigation, thus jeopardizing public confidence in the integrity of the police force. Thus, in a proceeding by a police officers' association against a city, as to an investigation by the city after the association had obtained an unauthorized police department list of block captains of a neighborhood watch program, the trial court erred in granting a preliminary injunction enjoining the city from proceeding with the interrogation of a police officer, who was the association's president, in an internal affairs investigation unless the city provided him, prior to any interrogation, the nonconfidential notes made by investigators of a previous interview of another officer.

(5) Statutes § 31--Construction--Language--Words and Phrases--Common Interpretation.

When a statute does not define some of its terms, the court generally looks to the common knowledge and understanding of members of the particular vocation or profession to which the statute applies, for the meaning of those terms.
[See 7 **Witkin,** Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 92 et seq.]

(6) Statutes § 29--Construction--Language--Legislative Intent.

To discern legislative intent, the court looks first to the words of the statute and its provisions, reading them as a whole, keeping in mind the statutory purpose and harmonizing statutes or statutory sections relating to the same subject, both internally and with each other, to the extent possible.

(7) Statutes § 48--Construction--Reference to Other Laws--Exclusion of Specific Words Employed Elsewhere.

When the Legislature has employed a term or phrase in one place in a statute and excluded it in another, it should not be implied where excluded.

(8) Law Enforcement Officers § 11--Police--Disciplinary Proceedings-- Balancing Officers' Rights With Protection of Integrity of Law Enforcement Agency.

Protection of police officers from abusive or arbitrary treatment in their employment is the essence of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). To accomplish this, the Legislature set out certain rights and procedures relating to investigation of officers. Some of the rights that the act affords peace officers resemble those available in a criminal investigation. However, to accommodate the administrative setting, the act also allows investigative procedures that might not meet constitutional standards for criminal investigations. This accommodation suggests a recognition by the Legislature that a law enforcement agency should retain greater latitude when it investigates suspected officer misconduct than would be constitutionally permissible in a criminal investigation. Limitations on the rights of those employed in law enforcement are a necessary adjunct to the employing department's substantial interest in maintaining discipline, morale, and uniformity. That interest is increased when preservation of public confidence in the trustworthiness and integrity of its police force is at stake.

(9) Law Enforcement Officers § 11--Police--Disciplinary Proceedings-- Officer's Right to Remain Silent.

An officer under administrative investigation does not have the right to remain silent free of all

sanctions. A peace officer has no absolute right under the Constitution to refuse to answer potentially incriminating questions asked by his or her employer; instead, the officer employee's right against self-incrimination is deemed adequately protected by precluding any use of his or her statements at a subsequent criminal trial should such charges be filed.

(10) Law Enforcement Officers § 11--Police--Disciplinary Proceedings-- Officer's Right to Discovery.

Although the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) does not compel preinterrogation discovery of internal affairs investigation documents, the act does not preclude a law enforcement agency from providing such discovery.

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KENNARD, J.

To keep the peace and enforce the law, a police department needs the confidence and cooperation of the community it serves. Even if not criminal in nature, acts of a police officer that tend to impair the public's trust in its police department can be harmful to the department's efficiency and morale. Thus, when allegations of officer misconduct are raised, it is essential that the department conduct a prompt, thorough, and fair investigation. Nothing can more swiftly destroy the community's confidence in its police force than its perception that concerns raised about an officer's honesty or integrity will go unheeded or will lead only to a superficial investigation.

This case concerns one important aspect of the procedures governing internal police department investigations into suspected officer misconduct. The narrow issue before us is whether subdivision (f) of ***569**Government Code section 3303 [FN1] manifests a legislative intent to grant preinterrogation discovery rights to a peace officer who is the subject of an internal affairs investigation. After careful consideration of the language and the purpose of the statute, we conclude it does not.

FN1 Unless otherwise indicated, all further statutory references are to the Government Code.

The provision in question appears in the Public Safety Officers Procedural Bill of Rights Act(§ 3300 et seq.; hereafter the Act), which sets forth the basic rights that law enforcement agencies must provide to their peace officer employees. By devoting a substantial portion of the Act to internal affairs investigations, the Legislature has implicitly recognized the importance of such investigations.

The law enforcement agency conducting the investigation into alleged misconduct by an officer employee represents the public interest in maintaining the efficiency and integrity of its police force, which, in enforcing the law, is entrusted with the protection of the community it serves. The officer under investigation, on the other hand, has a personal interest in receiving fair treatment. The procedural protections that the Act affords in this regard reflect the Legislature's balancing of these competing interests. These considerations and our analysis of the statute's language and purpose lead us to conclude that, in allowing an officer under administrative investigation access to reports and complaints, the Legislature intended the right to such access to arise after, rather than before, the officer's interrogation.

Background

This lawsuit arises from a labor dispute between the police department for the City of Pasadena (the

Department) and the Pasadena Police Officers Association (PPOA), which is the recognized bargaining agent for the Department's nonsupervisory sworn police personnel. In early 1986, the Department and PPOA were engaged in negotiations intended to produce a memorandum of understanding. Negotiations broke down, and an impasse was declared when the parties could not agree on a wage package.

Shortly thereafter, Officer Robert Ford, PPOA's vice-president, asked Commander Richard Emerson, a divisional supervisor for the Department, for a computer printout of the names and addresses of individuals designated as block captains in the Pasadena Neighborhood Watch program. [FN2] Ford wanted the list for PPOA so it could send letters to the block captains to solicit their support for the wage package favored by the officers. Because ***570** the Department used the list solely to administer the Neighborhood Watch program, Emerson considered it confidential, and therefore denied Ford's request.

FN2 Neighborhood Watch is a program that enlists citizens to assist local police agencies with crime prevention and detection.

In May 1986, apparently as the result of information from Officer Ford,the Department learned that Officer Dennis Diaz, PPOA's president, had obtained an "unauthorized" copy of the list. Diaz assertedly used the list to distribute a letter from PPOA to block captains of Neighborhood Watch soliciting their support for PPOA's proposed resolution of the wage dispute.

On May 26, 1986, the Department began an internal affairs investigation into the circumstances surrounding PPOA's use of the list to determine whether there was sufficient cause to charge Officer Diaz with insubordination. In the course of that investigation, Lieutenant Donnie Burwell interviewed Officer Ford. Burwell then notified Diaz to appear on June 5, 1986, for an administrative interrogation. Because Diaz was under investigation and the interrogation might lead to punitive action, Burwell complied with the Act by advising Diaz of the general nature of the investigation. (§ 3303, subd. (c).)

Officer Diaz appeared as scheduled, with counsel.Before Diaz would respond to questioning, however, he demanded to see the notes that Lieutenant Burwell had taken during his interview of Officer Ford. Relying on section 3303, subdivision (f), which allows officers who are subject to interrogation to have access to "reports or complaints made by investigators or other persons," Diaz maintained he did not have to submit to an administrative interrogation until the Department had given him access to its notes of the Ford interview. Based on his understanding of the requirements of subdivision (f) and the Department's policy, Burwell refused to turn over the notes.

Thereafter, Officer Diaz and PPOA filed this lawsuit to enjoin the Department from proceeding with the interrogation of Diaz until it had disclosed to him the notes of the Ford interview. In their complaint, they alleged these grounds for relief: (1) subdivision (f) of section 3303 requires disclosure of reports and complaints to an officer under investigation *before* interrogation; (2) although it had been the Department's practice to provide investigative reports and witness statements to officers before interrogation, it unilaterally changed that practice in this case, thus violating its obligation to "meet and confer in good faith" on a term or condition of employment (§ 3505); and (3) the Department's investigation into the purported misuse of the Neighborhood Watch mailing list constituted statutorily prohibited ***571** interference with, or intimidation of, a public employee engaged in protected labor activity (§§ 3502, 3506).

In opposing the request for an injunction, the Department argued that subdivision (f) of section 3303 required only *postinterrogation* disclosure of reports and complaints.In the alternative, the Department maintained that its notes of the Ford interview were confidential and therefore exempt from disclosure under subdivision (f). The Department also submitted declarations disputing the allegation that it had established a practice of disclosing investigative materials *before* interrogation.

The superior court interpreted subdivision (f) of section 3303 as requiring preinterrogation disclosure of reports and complaints, and issued a preliminary injunction prohibiting the Department from proceeding with the interrogation of Officer Diaz until it had provided him with its notes of the Ford interview. [FN3] (§ 3309.5, subd. (c).) The Department appealed.

FN3 In its statement of decision, the superior court acknowledged that the facts pertaining

to past practice were in dispute. Thus it did not decide whether the Department had breached its obligation to meet and confer. And because the Department and PPOA had reached agreement on a "successor" memorandum of understanding before the hearing on the preliminary injunction, the superior court did not address whether the Department had interfered with or intimidated a public employee engaged in protected labor activity, considering that issue to be moot.

The Court of Appeal affirmed the trial court's order granting the preliminary injunction. It interpreted subdivision (f) of section 3303 as entitling "a public safety officer who is the subject of an internal affairs investigation ... to copies of nonconfidential reports or complaints ... prior to being interrogated." It rejected the Department's claim that the notes of the Ford interview were confidential, but it did not define the appropriate standard for determining confidentiality.

Discussion

A. *Legislative Intent to Provide for Postinterrogation Disclosure of Reports and Complaints*

(1) Courts have long recognized that, while the off-duty conduct of employees is generally of no legal consequence to their employers, the public expects peace officers to be "above suspicion of violation of the very laws [they are] sworn ... to enforce." (*McCain* v. *Sheridan* (1958) 160 Cal.App.2d 174, 177 [324 P.2d 923]; see also *Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 770, fn. 13 [221 Cal.Rptr. 779, 710 P.2d 845]; ***572***Cleu* v. *Board of Police Commissioners* (1906) 3 Cal.App. 174, 176 [84 P. 672].) Historically, peace officers have been held to a higher standard than other public employees, in part because they alone are the "guardians of peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them." (*Christal* v. *Police Commission* (1939) 33 Cal.App.2d 564, 567 [92 P.2d 416].) To maintain the public's confidence in its police force, a law enforcement agency must promptly, thoroughly, and fairly investigate allegations of officer misconduct; if warranted, it must institute disciplinary proceedings.

(2) The purpose of the Act is "to maintain stable employer-employee relations and thereby assure effective law enforcement." (*Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 826 [221 Cal.Rptr. 529, 710 P.2d 329]; § 3301.) The Act requires that law enforcement agencies throughout the state afford minimum procedural rights to their peace officer [FN4] employees. (§ 3300 et seq.; *Baggett v. Gates* (1982) 32 Cal.3d 128, 135 [185 Cal.Rptr. 232, 649 P.2d 874]; *White v. County of Sacramento* (1982) 31 Cal.3d 676, 679 [183 Cal.Rptr. 520, 646 P.2d 191].) Thus the Act secures for peace officers - when off duty and not in uniform - the right to engage, or to refrain from engaging, in political activity (§ 3302); it protects against punitive action or denial of promotion for the exercise of procedural rights granted under its own terms or under an existing grievance procedure (§3304, subd. (a)); it provides that no adverse comment be entered in an officer's personnel file until after the officer has been given an opportunity to read and sign the comment (§ 3305); it mandates that when an adverse comment is entered in a personnel file, the officer shall have 30 days to file a written response to be attached to the adverse comment in the file (§ 3306); and it protects against compelled disclosure, except in limited circumstances, of an officer's financial status (§ 3308).

FN4 The Act, by its terms, applies only to "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." (§ 3301.)

Although notions of fundamental fairness for police officers underlie the Act, a number of its provisions also reflect the Legislature's recognition of the necessity for internal affairs investigations to maintain the efficiency and integrity of the police force serving the community. For instance, while the Act allows administrative searches of an officer's workplace locker or storage space only under certain conditions (§ 3309), the authorization of administrative searches in itself manifests an acknowledgment by the Legislature that such searches are integral to law enforcement employment. This ***573** balancing of two competing interests is also present in section 3303, [FN5] the statute at issue here. ***574**

FN5 That section provides: "When any pub-

lic 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 be subject to any punitive action for re-

> fusing to disclose, any information received from the officer under investigation for non-criminal 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.

Section 3303 prescribes protections that apply when a peace officer is interrogated in the course of an administrative investigation that might subject the officer to punitive action, such as "dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment." (*Ibid.*) Inherent in this protective scheme is a recognition that such investigations are a necessary component of employment in law enforcement. Indeed, the Act requires officers to comply with administrative interrogations: under section 3303, subdivision (e), refusal to answer questions is a ground for punitive action.

To ensure fair treatment of an officer during an internal affairs interrogation, section 3303 requires that the employing agency notify the officer to be interrogated of the identity of the interrogating officers (§ 3303, subd. (b)), and of "the nature of the investigation prior to any interrogation" (§ 3303, subd. (c)). It also prohibits abusive interrogation techniques. (§ 3303, subds. (a) [interrogation to be conducted at a reasonable hour], (b) [no more than two interrogators], (d) [length of the interrogation session not to be unreasonable; subject must be allowed to attend to physical necessities], and (e) [no abusive language, promises or threats].) If the interrogation focuses on matters likely to result in punitive action against the peace officer, section 3303 allows the officer to designate a representative to be present at the interrogation, provided that the representative is not someone subject to the same investigation. (§ 3303, subd. (h).) (3) If criminal charges are contemplated, section 3303 requires immediate advisement of the so-called *Miranda* rights. [FN6] (§ 3303, subd. (g); *Lybarger v. City of Los Angeles, supra*, 40 Cal.3d 822, 829.) In other words, the officer must be told that although he has a right to remain silent and not incriminate himself, "(1) his silence could be deemed insubordination, leading to administrative discipline, and (2) any statement made under the compulsion of the threat of such discipline could not be used against him in any subsequent criminal proceeding." (*Lybarger v. City of Los Angeles, supra*, at p. 829.)

> FN6 *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974].

(4a) In this case, the relevant provision of section 3303 is subdivision (f), which entitles an officer to tape recordings, transcribed notes, and to ***575** reports and complaints made by the investigators or other persons. Subdivision (f) defines only disclosure requirements incident to an *investigation*; it does not address an officer's entitlement to discovery in the event he or she is administratively *charged* with misconduct.

Subdivision (f) of section 3303 provides: "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 maybe 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." (Italics added.) The statutory language requiring interpretation is the italicized sentence.

Preliminarily, we note that the Act nowhere defines "reports" or "complaints, " as used in subdivision (f) of section 3303. (5) When a statute does not

define some of its terms, we generally look to "the common knowledge and understanding of members of the particular vocation or profession to which the statute applies" for the meaning of those terms. (*Cranston v. City of Richmond, supra*, 40 Cal.3d 755, 765.) (4b) Here, however, we need not engage in that task because the Department does not dispute that its notes of the Ford interview are the type of documents subject to disclosure under this provision.

Because subdivision (f) of section 3303 does not specify when an officer's entitlement to the reports and complaints arises, we must determine whether the Legislature intended such disclosure to occur before or after interrogation. (6) To discern legislative intent, we look first to the words of the statute and its provisions, reading them as a whole, keeping in mind the statutory purpose and harmonizing "statutes or statutory sections relating to the same subject ... both internally and with each other, to the extent possible. " (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387 [241 Cal.Rptr. 67, 743 P.2d 1323].)

(4c) Subdivision (f) of section 3303 generally provides for *recording* the interrogation of an officer who is under administrative investigation. Although it grants the officer access to tape recordings or transcribed notes of the interrogation "if any further proceedings are contemplated or prior to ***576** any further interrogation at a subsequent time," it does not specify when that access must be given. The recordings and notes memorialize the interrogation. It follows, therefore, that access to them would be after the interrogation. Thus, with respect to *recordings and notes*, subdivision (f) must be read to provide for their production after an interrogation. If we are to harmonize subdivision (f) as a whole, as we must, then the provision should also be interpreted as requiring that, as is the case with recordings and notes, *reports and complaints* be produced after interrogation.

We also note that the Legislature placed the provision regarding disclosure of reports and complaints and the provision specifying entitlement to transcribed notes *in the same sentence* in subdivision (f). That sentence states that the 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." (§ 3303, subd. (f), italics added.) This placement is an additional indication that the Legislature must have intended the discovery rights in each instance to be coextensive, entitling the officer to copies of reports and complaints and transcribed stenographer's notes after the interrogation.

Moreover, in other parts of section 3303 where the Legislature has required that certain acts be performed before interrogation, it manifested that intent by including the words "prior to" in the provision. (§ 3303, subds. (b) ["The public safety officer ... shall be informed *prior to* such interrogation of the rank, name and command of the officer in charge ..., the interrogating officers, and all other persons to be present during the interrogation"], (c) ["The public safety officer ... shall be informed of the nature of the investigation *prior to* any interrogation"] and (g) ["If *prior to* or during the interrogation ... it is deemed that he may be charged with a criminal offense, he shall be immediately informed of his constitutional rights"], italics added.) But the words "prior to" do not appear in that part of subdivision (f) requiring disclosure of reports and complaints. (7) When the Legislature " has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded." (*Phillips v. San Luis Obispo County Dept. etc.Regulation* (1986) 183 Cal.App.3d 372, 379 [228 Cal.Rptr. 101]; see also *People* v. *Drake* (1977) 19 Cal.3d 749, 755 [139 Cal.Rptr. 720, 566 P.2d 622].) (4d) Therefore, in this instance, the omission of the words " prior to" is another indicator of legislative intent to provide for production of reports and complaints after interrogation.

As our review of the statutory language has shown, there is nothing in the statute that can be interpreted as indicative of the Legislature's intent to ***577** grant an officer under administrative investigation the right to discovery of reports and complaints before the officer's interrogation. Consideration of the competing interests underlying the Act lends further support for this conclusion, as we shall explain.

(8) Protection of peace officers from abusive or arbitrary treatment in their employment is the essence of the Act.To accomplish this, the Legislature set out certain rights and procedures. Some of the rights that the Act affords peace officers resemble those available in a criminal investigation. [FN7] For example, section 3309 to some extent echoes the Fourth Amendment's

prohibition against unreasonable searches and seizures in that it permits searches of an officer's workplace locker or storage space only if conducted under a warrant (see, e.g., U.S. Const., 4th Amend.; Pen. Code, § 1524, subd. (a); *Illinois v. Gates* (1983) 462 U.S. 213, 238-239 [76 L.Ed.2d 527, 548-549, 103 S.Ct. 2317]; *United States* v. *Ventresca* (1965) 380 U.S. 102 [13 L.Ed.2d 684, 85 S.Ct. 741]) or with the officer's consent (see, e.g., *United States* v. *Mendenhall* (1980) 446 U.S. 544, 557-558 [64 L.Ed.2d 497, 511-512, 100 S.Ct. 1870]; *United States* v. *Watson* (1976) 423 U.S. 411, 424-425 [46 L.Ed.2d 598, 609-610, 96 S.Ct. 820]). To accommodate the administrative setting, however, the Act also provides that, if the officer is present during a search performed without a warrant or consent, the search is permissible, even though it would not meet Fourth Amendment standards. (§ 3309.) This accommodation suggests a recognition by the Legislature that a law enforcement agency should retain greater latitude when it investigates suspected officer misconduct than would be constitutionally permissible in a criminal investigation. Limitations on the rights of those employed in law enforcement have long been considered "a necessary adjunct to the[employing] department's substantial interest in maintaining discipline, morale and uniformity." (*Kannisto v. City and County of San Francisco* (9th Cir. 1976) 541 F.2d 841, 843.) That interest is increased when preservation of public confidence in the trustworthiness and integrity of its police force is at stake.

> FN7 In a letter urging passage of the Act, the Los Angeles Police Protective League, which in this case has filed an amicus curiae brief on behalf of PPOA, explained: "Under [the proposed Act] a policeman will no longer find himself in the contradictory situation of having to enforce the law and protect the rights of others, and yet be denied the same fundamental rights by his own department."

The presence of subdivision(g) in section 3303 is another indicator that the Legislature looked to criminal procedure as a model for the Act but then provided somewhat reduced protections. For example, similar to the Fifth Amendment's protection against self-incrimination, subdivision (g) requires that if the officer is deemed a criminal suspect, *Miranda* warnings ***578** must precede the interrogation even in a noncustodial, administrative setting. (§ 3303, subd. (g); *Lybarger v. City of Los Angeles, supra*, 40 Cal.3d 822, 828.) But if no criminal charges are contemplated, a peace officer under administrative interrogation must respond to questioning. (§ 3303, subd. (e); see *Lefkowitz* v. *Turley* (1973) 414 U.S. 70, 84 [38 L.Ed.2d 274, 285, 94 S.Ct. 316].) (9) Thus, an officer under administrative investigation does not have "the right to remain silent free of all sanctions. " (*Williams v. City of Los Angeles* (1988) 47 Cal.3d 195, 200, fn. 3 [252 Cal.Rptr. 817, 763 P.2d 480].) As we observed in *Lybarger, supra*, at page 827, a peace officer has no absolute right under the Constitution to refuse to answer potentially incriminating questions asked by his or her employer; instead, the officer employee's right against self-incrimination is deemed adequately protected by precluding any use of his or her statements at a subsequent criminal proceeding should such charges be filed.

(4e) PPOA maintains that subdivision (f) of section 3303 entitles peace officers under administrative investigation to discover reports and complaints in their employer's possession before submitting to interrogation. We disagree. Unlike other protections set forth in the Act, a right to preinterrogation discovery is not essential to the fundamental fairness of an internal affairs investigation. Indeed, the right to discovery *before interrogation and before charges have been filed*, as PPOA seeks here, is without precedent.

For instance, during a criminal investigation a suspect has no right to discovery. In a criminal case, the right to discovery does not arise until charges have been filed and the suspect becomes an accused. (Pen. Code, § 859; *Weatherford v. Bursey* (1977) 429 U.S. 545, 559 [51 L.Ed.2d 30, 42, 97 S.Ct. 837] ["no general constitutional right to discovery in a criminal case "]; *Brady v. Maryland* (1963) 373 U.S. 83, 87 [10 L.Ed.2d 215, 218, 83 S.Ct. 1194]; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531,535-536 [113 Cal.Rptr. 897, 522 P.2d 305]; see generally, 2 LaFave & Israel, Criminal Procedure (1984) Defense Pretrial Discovery, § 19.3, pp. 481-482; 2 Witkin, Cal. Evidence (3d ed. 1986) Discovery and Production of Evidence, § 1637 et seq., pp. 1578-1607.)

Moreover, granting discovery before interrogation could frustrate the effectiveness of any investigation, whether criminal or administrative. Underlying every administrative inquiry into suspected officer misconduct is the obligation of the law enforcement

agency to assure public confidence in the integrity of its officers. The purpose of the inquiry is to determine whether there is any truth to the allegations of misconduct made against an officer and, if so, whether to commence disciplinary proceedings. PPOA's ***579** interpretation of subdivision (f) of section 3303 would impair the reliability of such a determination and the effectiveness of the agency's efforts to police itself.

Disclosure before interrogation might color the recollection of the person to be questioned or lead that person to conform his or her version of an event to that given by witnesses already questioned. Presumably, a related concern led the Legislature to limit an officer's choice of a representative during interrogation to someone who is not a subject of the same investigation. (§ 3303, subd. (h).) That limitation seeks to ensure that participants in the same incident are not privy to evidence provided by other witnesses. Because in this case both Officer Ford and Officer Diaz were involved in the same investigation, under subdivision (h) neither could have designated the other as his representative. Furnishing Officer Diaz *before* his interrogation with the notes of the Ford interview would require the Department to disclose the same type of information that subdivision (h) seeks to shield from exposure.

Furthermore, to require disclosure of crucial information about an ongoing investigation to its subject before interrogation would be contrary to sound investigative practices. During an interrogation, investigators might want to use some of the information they have amassed to aid in eliciting truthful statements from the person they are questioning. Mandatory preinterrogation discovery would deprive investigators of this potentially effective tool and impair the reliability of the investigation. This is true in any interrogation, whether its purpose is to ferret out criminal culpability or, as in this case, to determine if a peace officer used a mailing list in contravention of a direct order by his superiors.

In interpreting subdivision (f) of section 3303, our role is limited to ascertaining legislative intent. Based on our review of the statutory language and the purpose underlying the Act, we conclude that the Legislature intended subdivision (f) to require law enforcement agencies to disclose reports and complaints to an officer under an internal affairs investigation only *after* the officer's interrogation. Because entitlement to *preinterrogation* discovery is neither apparent from the language of subdivision (f) nor fundamental to the fairness of an internal affairs investigation, and because such mandatory discovery might jeopardize public confidence in the efficiency and integrity of its police force, we decline to engraft such a right onto the Act. (10) Although the statute does not compel preinterrogation discovery, it does not preclude a law enforcement agency from providing such discovery. ***580**

B. *Confidentiality*

As an additional ground for its refusal to provide Officer Diaz before his interrogation with its notes of the Ford interview, the Department claimed that the notes were confidential. Subdivision (f) of section 3033 does exempt from disclosure any reports and complaints "deemed by the investigating agency to be confidential." The Department, however, did not assert a statutory basis for confidentiality (e.g., Evid. Code, § 1040; Pen. Code, § 832.7, subd. (a)). Rather, it argued that the notes were "confidential" because their disclosure to Diaz before his interrogation would impair the investigator's ability to evaluate the credibility of Diaz. In view of our conclusion that subdivision (f) does not require disclosure of reports and complaints until after interrogation, we need not address the Department's claim of confidentiality.

C. *Department's Past Practice*

In the trial court, PPOA alleged that the Department had a practice of preinterrogation disclosure, an allegation the Department denies. Other than noting that the relevant facts were in dispute, the superior court did not address this issue; instead, it relied solely on subdivision (f) of section 3033 as its basis for issuing the injunction against the Department. At oral argument before this court, the Department acknowledged that the issue of its past practice remains to be decided in this case.

We need not determine whether the Department did have such a practice and, if so, whether that practice would entitle Officer Diaz to have access to the notes of the Ford interview before the Department's interrogation of him. But because the issue has not yet been resolved in the superior court, the matter is remanded to allow that court to decide whether PPOA is entitled to injunctive relief on that ground.

Disposition

The judgment of the Court of Appeal is reversed with directions to vacate the order of the superior court granting a preliminary injunction and to remand the case to that court for proceedings consistent with this opinion.

Lucas, C. J., Mosk, J., Broussard, J., Eagleson, J., and Arabian, J., concurred. ***581**

PANELLI, J.,
Concurring and Dissenting.

I concur with that portion of the majority opinion that concludes that the matter must be remanded to allow the trial court to decide whether the Pasadena Police Officers Association (PPOA) is entitled to injunctive relief on the ground that the City of Pasadena (City) had a practice of preinterrogation disclosure of reports and complaints. However, I am not in accord with the remainder of the majority's opinion and, accordingly, I respectfully dissent.

In my view, fairness and Government Code section 3303, subdivision (f) (hereafter section 3303(f)) [FN1] entitle an accused officer to preinterrogation disclosure of nonconfidential reports and complaints made by investigators or other persons. Accordingly, I would affirm the judgment of the Court of Appeal.

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

Section 3303(f) provides that: "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."

My analysis starts from the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007 [239 Cal.Rptr. 656, 741 P.2d 154]; *People* v. *Overstreet* (1986) 42 Cal.3d 891, 895 [231 Cal.Rptr. 213, 726 P.2d 1288]; *People* ex rel. *Younger v. Superior Court* (1976) 16 Cal.3d 30, 40 [127 Cal.Rptr. 122, 544 P.2d 1322].) In determining intent, we look first to the language of the statute.(*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 218-219 [188 Cal.Rptr. 115, 655 P.2d 317].) When the statutory language is clear and unambiguous, there is no need for statutory construction and the courts should not indulge in it. (*Woodhead, supra*, 43 Cal.3d at pp. 1007-1008; *Overstreet, supra*, 42 Cal.3d at p. 1008.)

Section 3303 sets forth a detailed exposition of the manner and method by which investigations and interrogations are to be conducted. ***582**Section 3303(f) is primarily concerned with an officer's right to have a record of his or her interrogation and access to nonconfidential documents. The section clearly provides that if a tape recording is made of the proceedings, the officer "shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time." (*Ibid.*) The statute, however, does not specify the timing of the required disclosure of investigatory notes, reports, statements and complaints in the same language as the provision regarding tape recordings. in my view, the words themselves, therefore, provide no determinative answer as to when these materials are to become available to an officer.

It is a well-recognized principle of statutory construction that every 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].) Moreover, "[i]nterpretive 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].)

As the City points out, there are three contexts in section 3303, apart from section 3303(f), in which the timing of certain conduct and behavior of law enforcement agencies is explicitly set forth. [FN2] The City argues that had the Legislature intended to entitle a

police officer to investigatory materials before the initial interrogation of the officer, it would have expressed that intention in terms as clear and unmistakable as it did in section 3303, subdivisions (b), (c), and (g). This position is accepted by the majority in its opinion.

> FN2 Section 3303, subdivision (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, ... " Section 3303, subdivision (c): "The public safety officer under investigation shall be informed of the nature of the investigation *prior* to any interrogation ...." Section 3303, subdivision (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." (Italics added.)

The City's argument is not without logic, but, as the Court of Appeal noted, a closer examination of section 3303 reveals it is fallacious. For example, section 3303, subdivision (e), provides, inter alia, 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." Although there is no explicit requirement that this admonition be given before interrogation, no reasonable person would argue that because of the omission of the words "prior to the termination of the interrogation" the Legislature intended ***583** such an admonition to be given only after the interrogation has concluded, a time when it would be of no benefit to a suspected officer. Similarly, the Legislature's silence regarding the timing of the disclosure at issue in the instant case does not convincingly indicate a legislative intent to have the disclosure follow the interrogation. On the contrary, it would be most reasonable to assume the legislative silence was attributable to the Legislature's belief that the timing of the disclosure, being a condition to interrogation, was self-evident.

The majority advances its interpretation of section 3303(f) as an attempt to "harmonize" the statutory treatment of "reports and complaints" with that of "recordings and notes." (Maj. opn., *ante*, at pp. 575-576.) The majority relies, however, on the flawed premise that because such recordings and notes memorialize the interrogation, "[i]t follows, therefore, that access to them would be after the interrogation." (Maj. opn., *ante*, at p. 576.) Contrary to the majority's reasoning, it is possible to grant access to recordings and notes as soon as they are made, which certainly might be well before the investigation has concluded. A "harmonious" interpretation that recognizes this fact would require disclosure of reports and complaints at the same time, i.e., at the time they come into the physical possession of the investigators, whether that is before, during or after the investigation has formally concluded.

In sum, I would find that the City has not demonstrated that its reading is the only reasonable interpretation of the statutory language. To discern and effectuate the Legislature's intent we therefore must look to extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. (*People v. Woodhead, supra*, 43 Cal.3d at p. 1008; *People v. Shirokow* (1980) 26 Cal.3d 301, 306-307 [162 Cal.Rptr. 30, 605 P.2d 859]; *Morse v. Municipal Court* (1974) 13 Cal.3d 149 [118 Cal.Rptr. 14, 529 P.2d 46].)

The purpose of the Public Safety Officers Procedural Bill of Rights Act was articulated by the Legislature in section 3301, which provides: "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."

This court has determined that the general purpose of the act was "to secure basic rights and protections to a segment of public employees who ***584** were thought unable to secure them for themselves." (*Baggett v. Gates* (1982) 32 Cal.3d 128, 140 [185 Cal.Rptr. 232, 649 P.2d 874].) Specifically, there "can be no doubt that the act is concerned primarily with affording individual police officers certain procedural rights during the course of proceedings which might lead to the imposition of penalties against them, ..." (*White v. City of Sacramento* (1982) 31 Cal.3d 676, 681 [183 Cal.Rptr. 520, 646 P.2d 191].) These pro-

cedural protections, which encompass the initial interrogation as well as all subsequent disciplinary proceedings, serve the legislative goal of stable employer-employee relations, for "[e]rroneous 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." (*White v. City of Sacramento, supra*, 31 Cal.3d at p. 683.)

The majority argues that preinterrogation disclosure of an investigator's notes would compromise the truth-finding process by impairing the reliability of the investigation. I am not persuaded.

While there is no guaranty that an officer under investigation will not attempt to prevaricate, the investigating agency is vested with an array of tools to ferret out the truth. The investigating agency controls the resources to be expended on the investigation, the range of charges to be considered, the timing of various phases (including interrogations), and has the power to order the accused officer to answer questions under the threat of discipline. Section 3303, subdivision (e) provides that an officer who refuses to respond to questions or submit to interrogations is subject to punitive action by his employer. (See *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 827 [221 Cal.Rptr. 529, 710 P.2d 329].)

I believe that preinterrogation disclosure may in fact further the truth-finding purpose of the investigation. Interrogations may take place weeks or months after the alleged misconduct. It is not difficult to envision an officer having trouble remembering the events surrounding the conduct in question. As the Court of Appeal properly noted: "Access to this information may properly refresh an officer's recollection regardless of whether the information is favorable to his position. Rather than impeding the defendant's search for truth, informing a suspected officer of the information provided by others will permit him to meet the charges head on."

The majority argues that only by reading section 3303(f) as entitling an officer to an investigator's notes *after* the interrogation will the proper balance be struck between the interest in reliable investigations and the interest in fairness to officers under investigation. As the legislative history ***585** demonstrates, however, the Legislature itself sought to, and did, strike the balance between the public's interest and the police officer's individual rights by providing police agencies the right to withhold confidential reports and complaints while at the same time giving police officers access to a wide range of nonconfidential documentary evidence.

The first version of Assembly Bill No. 301, 1975-1976 Regular Session, which resulted in the enactment of the Public Safety Officers Procedural Bill of Rights Act, was introduced on December 19, 1974. It did not provide the employing agency with any protection for confidential documents, stating only that: "The public safety officer shall be entitled to a transcribed copy of any notes by a stenographer or to any reports made by investigators." On August 25, 1975, proposed section 3303(f) was amended to provide: "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 into the officer's personnel file*." (Sen. Amend. to Assem. Bill No. 301 (1975-1976 Reg. Sess.) Aug. 25, 1975, italics added.)

The final amendment to proposed section 3303(f) was made in conference in August of 1976.It maintained the basic structure of the section but expanded the material to which the public safety officer was entitled. Thus the final amendment provided: "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." (Conference Amend. to Assem. Bill No. 301 (1975-1976 Reg. Sess.)Aug. 12, 1976.)

The amendments during the legislative process reflect the Legislature's express concern with balancing the competing interests implicated by the statute. The public's interest in a well-disciplined police force is protected by allowing a police agency to withhold matter it deems confidential. On the other hand, such matter may not be entered into the officer's personnel file and the officer's procedural rights are protected by entitling him or her to discover a wide range of documentary evidence. I therefore cannot agree with the City's contention that the timing of disclosure is critical to a proper balancing of the competing interests.

Nor do I agree that preinterrogation disclosure of an investigator's documents will unduly hamper or burden employing police agencies.

The legislative purpose of the act, which is remedial, and prior case law call for a liberal construction of the rights guaranteed by section 3303(f). ***586** (See *Baggett* v. *Gates*, *supra*, 32 Cal.3d 128; *Lybarger v. City of Los Angeles*, *supra*, 40 Cal.3d 822; *White v. City of Sacramento*, *supra*, 31 Cal.3d 676.) A statute must be construed "in the context of the entire statutory system of which it is a part, in order to achieve harmony among the parts" (*People v. Shirokow*, *supra*, 26 Cal.3d 301, 307; see also *Moyer* v. *Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224]), and any doubt that the Legislature intended a more restrictive reading of section 3303(f) is dispelled by reference to the act as a whole.

The introductory paragraph to section 3303 provides: "When any public safety officer is under investigation and subjected to interrogation ... which could lead to punitive action, *such interrogation shall be conducted under the following conditions* ...." (Italics added.) Following this introductory paragraph, there are nine subparagraphs articulating in considerable detail the conditions under which a public safety officer may be interrogated. Review of the nine subdivisions together with the introductory paragraph reveals that the language specifies what is to occur *before or during* the interrogation of the police officer. One of these, section 3303(f), sets forth that the officer " shall be entitled to" any nonconfidential reports or complaints made by investigators. The interpretation suggested by the City, that a public safety officer is entitled to such reports and complaints only after the interrogation, when it would be of little use to him or her, would make little sense and would be contrary to the structure and the purpose of the section and the act as a whole. Such an incongruous interpretation should be avoided. (*Nunn* v. *State* (1984) 35 Cal.3d 616, 624-625 [200 Cal.Rptr. 440, 677 P.2d 846].)

For the foregoing reasons, I conclude that a police officer is entitled under section 3303(f) to preinterrogation disclosure of nonconfidential reports or complaints made by investigators or other persons.

Accordingly, I would affirm the judgment of the Court of Appeal. ***587**

Cal.
Pasadena Police officers Assn. v. City of Pasadena
51 Cal.3d 564, 797 P.2d 608, 273 Cal.Rptr. 584

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THE PEOPLE, Plaintiff and Respondent,
v.
DWIGHT WILBUR BRADLEY, Defendant and Appellant.

Crim. No. 12806.

Supreme Court of California
Oct. 31, 1969.

SUMMARY

The trial court sitting without a jury, found defendant guilty of possession of marijuana and possession of marijuana for sale. Evidence admitted against defendant included marijuana plants found in a yard adjacent to his residence and marijuana and narcotics paraphernalia found inside his house. It appeared that the arresting officers went to defendant's residence at night, left an officer in charge of the plants in the yard, and, without demanding admittance or explaining their purpose, entered the residence through an open door while defendant apparently was asleep. As the officers entered defendant raised up and the officers told him he was under arrest, and asked him if he minded if the house was searched. Defendant told the officers to go ahead, and the contraband was found in the ensuing search. (Superior Court of San Diego County, William A. Glen, Judge.)

The Supreme Court reversed the judgment of the trial court, holding that while the marijuana plants found outside the house were admissible, it was prejudicial error to receive the evidence found in the house. The basis for the holding was that Pen. Code, § 844, requiring peace officers to demand admittance and explain their purpose before breaking open a door or window to make an arrest, was applicable under the circumstances even though the door to the house was open, and, further, that it was clear that admission of evidence found in the house contributed to the judgment.

A separate concurring and dissenting opinion agreed that the evidence found in the house was inadmissible but would also have held that compliance with Pen. Code, § 844, was required in connection with any entry of a house for the purpose of making an arrest, and, further, that the marijuana plants found outside the house should also have been excluded. (Opinion by Burke, J., with Traynor, C. J., and McComb and Mosk, JJ., concurring. Separate concurring and dissenting opinion by Tobriner, J., with Peters and Sullivan, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Poisons § 14(3)--Prosecutions--Evidence--Admissibility--Product of Search and Seizure.

In a narcotics prosecution, the trial court properly admitted marijuana plants in evidence, where the plants were found growing in a keg under a fig tree in a yard adjacent to defendant's residence, where it could be inferred from the evidence that the plants were partially but not totally covered by the foliage of the tree, and that at least parts of the plants were in plain sight of anyone within a foot of the tree, where, although the plants were in a rear yard fenced to an undisclosed extent, they were located a scant 20 feet from defendant's door to which presumably deliverymen and others came, and where another house apparently had access to the same yard; under such circumstances it did not appear that defendant exhibited a subjective expectation of privacy as to the plants, and any such expectation would have been unreasonable.

(2) Searches and Seizures § 6--Investigations Falling Short of Search.

In cases involving a claim of an illegal search and seizure in open fields or grounds around a house, an appropriate test is whether a reasonable expectation of privacy has been exhibited, and, if so, whether that expectation has been violated by unreasonable governmental intrusion.

(3) Courts § 106--Decisions as Precedents--Relationship of Courts.

The California Supreme Court is bound by decisions of the United States Supreme Court interpreting the federal Constitution, but it is not bound by decisions of the lower federal courts even on federal questions, although such decisions are persuasive and entitled to great weight.

[Duty of state courts to follow decisions of federal courts, other than the Supreme Court, on federal questions, note, 147 **A.L.R.** 857. See also **Cal.Jur.2d,** Courts, § 149; **Am.Jur.2d,** Courts, §§ 226, 230.]

(4a, 4b) Criminal Law § 1382(28)--Appeal--Reversible Error--Evidence Obtained After illegal Arrest.

In a narcotics prosecution, it was prejudicial error to admit in evidence marijuana and narcotics paraphernalia found inside defendant's house, where peace officers entered the house through an open door at night without a warrant, told defendant, who had appeared to be asleep when the officers entered, that he was under arrest, and then made the search of the house which produced the contraband, where it did not appear that the officers complied with Pen. Code, § 844, by demanding admittance and explaining the purpose for which admittance was desired before their entry, or that such noncompliance was excused, and where it was clear that admission of the evidence found in the house contributed to the judgment of conviction.

[See **Cal.Jur.2d, Rev.,** Arrest, § 49; **Am.Jur.2d,** Arrest, § 93.]

(5) Arrest § 13.5--Making Arrest--Validity of Entry.

The requirements of Pen. Code, § 844, that a peace officer demand admittance and explain his purpose before breaking into a house to make an arrest, are a codification of the common law.

(6) Arrest § 13.5--Making Arrest--Validity of Entry.

Pen. Code, § 844, requiring peace officers to demand admittance and explain their purpose before they break open a door or window to make an arrest, also applies where officers walk into a dwelling through an open door at nighttime when the occupant apparently is asleep. (Disapproving *People v. Hamilton*, 257 Cal.App.2d 296 [64 Cal.Rptr. 578], to the extent it is inconsistent herewith.)

(7) Arrest § 13.5--Making Arrest--Validity of Entry.

Noncompliance with Pen. Code, § 844, requiring peace officers to demand admittance and explain their purpose before they break open a door or window to make an arrest, may be excused when an officer acts on a reasonable and good faith belief that compliance would increase his peril, frustrate an arrest, or permit the destruction of evidence; such belief, however, must be based on the facts of the particular case, and it cannot be justified by a general assumption that certain classes of persons subject to arrest are more likely than others to resist arrest, attempt to escape, or destroy evidence.

COUNSEL

Peter Clarke, under appointment by the Supreme Court, for Defendant and Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and Mark L. Christiansen, Deputy Attorney General, for Plaintiff and Respondent. ***83**

BURKE, J.

A court, sitting without a jury, found defendant guilty of possession of marijuana (Health & Saf. Code, § 11530) and possession of marijuana for sale (Health & Saf. Code, § 11530.5). He admitted prior felony convictions for possession of narcotics (Health & Saf. Code, § 11500) and possession of marijuana (Health & Saf. Code § 11530).

Defendant appeals from the judgment, contending that the court erred in admitting, over objection, evidence of marijuana plants found in the yard adjacent to his residence and marijuana and narcotics paraphernalia found inside his house. (1a)We have concluded that the evidence of the marijuana plants was properly admitted but that the evidence found inside his house should have been excluded because the officers' entry into the house was unlawful and that the error in admitting this evidence was prejudicial.

On July 28, 1967, Deputy Sheriff Narron, an experienced narcotics officer, was told by an informer of unknown reliability that defendant had marijuana in his house, was engaged in selling it, and was on parole for its possession. The informer also gave information concerning defendant's car. The next evening the same informer told Narron that defendant was growing marijuana by a fig tree at the rear of his residence.

After receiving this second report, Narron went to defendant's address about 9 p.m. on July 29, 1967. The premises included a house that faced the street; a driveway that ran along the east of the house and terminated in a garage at the rear and east of the house; defendant's residence which was attached to the rear of the garage; and a large “fenced in yard” to the west of defendant's residence. The extent and the manner of

the fencing are not disclosed by the record.

Narron, noticing that defendant's car was gone, believed he was away and went into the "rear yard area" to investigate. There he saw a marijuana plant in a keg two or three feet from the base of a fig tree that was about 20 feet from defendant's door. The officer did not know if the tree was in the backyard of the owner (who presumably lived in the front house) or of defendant. It was necessary for the officer to be within almost a foot of the tree to distinguish the marijuana plant. According to the officer, the keg was "partially covered by the leaves and the limbs of the fig tree." When later asked if the "marijuana plant was hidden under the fig tree," the officer replied, "I don't believe you could say exactly hidden, however, it was covered by foliage." He did not have a search warrant.

After leaving defendant's premises Narron went to the sheriff's office where he obtained a photograph of defendant and from a record check ascertained he had been, but was no longer, on parole for "narcotics." Narron ***84** tried to obtain a search warrant but was unsuccessful due to the unavailability of a judge.

Narron, accompanied by four other officers, then returned to defendant's residence about 3:15 a.m. on July 30, 1967. At this time Narron ascertained that there were three marijuana plants in the keg. The largest one was about two and a half feet tall; the others about a foot and a half tall. One of the officers stayed to guard the plants.

Narron and the other officers approached defendant's residence. The door was fully open. From the outside Narron, with the aid of a flashlight, saw a man who appeared to be asleep on a bed. Without asking permission or speaking to defendant, the officers entered. Narron testified that "as I went into the living room area, the defendant ... raised on his side as I was approximately half way across the room." Narron showed his "I.D.," illuminated by a flashlight, and identified himself. Another officer in uniform was by him. The officers told defendant he was under arrest for possession of marijuana and informed him of his "constitutional rights." When asked whether he minded if a search was made of the house, defendant replied, "No, go ahead." An ensuing search disclosed marijuana and specified narcotics paraphernalia.

Defendant contends that Officer Narron's discovery and seizure of the marijuana plants in the yard violated the Fourth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment (*Mapp v. Ohio*, 367 U.S. 643, 655-657 [6 L.Ed.2d 1081, 1089-1091, 81 S.Ct. 1684, 84 A.L.R.2d 933].) The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...." An essentially identical guarantee of personal privacy is contained in article I, section 19, of the California Constitution.

(2)A number of cases in upholding searches in open fields or grounds around a house have stated their conclusions in terms of whether the place was a "constitutionally protected area," (See, e.g., cases cited in *People v. Edwards*, 71 Cal.2d 1096 [80 Cal. Rptr. 633, 458 P.2d 7131]). That phrase, however, does not afford a solution to every case involving a claim of an illegal search and seizure (see *Katz v. United States*, 389 U.S. 347, 350-352 [19 L.Ed.2d 576, 581-582, 88 S.Ct. 507]), and we believe that an appropriate test is whether the person has exhibited a reasonable expectation of privacy, and, if so, whether that expectation has been violated by unreasonable governmental intrusion (*People v. Edwards*, 71 Cal.2d 1096 [80 Cal.Rptr. 633, 458 P.2d 7131], and cases cited therein). ***85**

(1b)Measured by that test we are satisfied that the officer's discovery and seizure of the marijuana plants in the yard adjacent to defendant's residence did not violate the constitutional prohibitions against unreasonable searches and seizures. From the recited evidence it may be inferred that the marijuana plants were partially but not totally covered by foliage. It does not appear that the plants were covered by nontransparent material, and it may be inferred that at least part of the plants were in plain sight of anyone within a foot of the tree. Although they were in a rear yard that was fenced to an undisclosed extent, they were located a scant 20 feet from defendant's door to which presumably delivery men and others came, and the front house, as well as defendant's house, apparently had access to the yard. Under the circumstances it does not appear that defendant exhibited a subjective expectation of privacy as to the plants. Furthermore, any such expectation would have been unreasonable. (Cf. e.g., *Hester v. United States*, 265 U.S. 57 [68 L.Ed. 898, 44 S.Ct. 445]; *People v. Terry*, 70 Cal.2d 410, 427-428 [

77 Cal.Rptr. 460, 454 P.2d 36]; *People v. Alexander*, 253 Cal.App.2d 691, 700 [61 Cal.Rptr. 814]; see *Katz v. United States, supra.*, 389 U.S. 347, 361 [19 L.Ed 576, 587, 88 S.Ct. 507] [concurring opinion by Harlan, J., containing statements to the effect that there is no reasonable expectation of privacy in an open field or with respect to "conversations in the open"].)

Bielicki v. Superior Court, 57 Cal.2d 602 [21 Cal.Rptr 552, 371 P.2d 288], and *Britt v. Superior Court*, 58 Cal.2d 469 [24 Cal.Rptr. 849, 374 P.2d 817], cited by defendant, differ from the instant cases. In the cited cases unlawful conduct of the petitioners in public toilets, which were enclosed by three walls and a door, was observed by officers through a pipe installed through the roof in one case and through vents in the other, and this court condemned the officers' conduct as constituting exploratory searches. There the officers' surveillance, because of the character of the place to which it was directed, violated the petitioners' right of privacy. The character of the place here in question (i.e. the yard near the defendant's door) manifestly is totally dissimilar to an enclosed toilet stall.

Defendant's reliance on *Wattenburg v. United States*, 388 F.2d 853, 857, is misplaced. He points to the statement in *Wattenburg* that "it seems to us a more appropriate test [than one based on curtilage] in determining if a search and seizure adjacent to a house is constitutionally forbidden is whether it constitutes an intrusion upon what the resident seeks to preserve as private even in an area which, although adjacent to his home, is accessible to the public." The court applied this test and concluded that Wattenburg, in placing a stockpile of Christmas trees in the backyard of the motel where he resided, not more than 35 feet therefrom, sought to protect it from the search and that the search and the seizure of trees from the stockpile were ***86** therefore illegal as to him. In *Wattenburg*, unlike the instant case, the recited facts do not show that any part of the objects seized was visible to a person nearby on the premises. Rather it appears that the objects (i.e. trees) "were seized from the stockpile" during a search which lasted over six hours. The seized trees thus apparently were covered by other trees, evidence that Wattenburg exhibited a subjective expectation of privacy. (3)Furthermore, although we are bound by decisions of the United States Supreme Court interpreting the federal Constitution (*Moon v. Martin*, 185 Cal. 361, 366 [197 P. 771]; *Mackenzie v. Hare*, 165 Cal. 776, 779 [134 P. 713, Ann. Cas. 1915B 261, L.R.A. 1916D 127] [affd. 239 U.S. 299 [60 L.Ed. 297, 36 S.Ct. 106]], we are not bound by the decisions of the lower federal courts even on federal questions. However, they are persuasive and entitled to great weight. (*Rohr Aircraft Corp. v. County of San Diego*, 51 Cal.2d 759, 764-765 [336 P.2d 521] [revd., without comment on this point, 362 U.S. 628 [4 L.Ed.2d 1002, 80 S.Ct. 1050]]; *Stock v. Plunkett*, 81 Cal. 193, 194-195 [183 P. 657]; *People v. Willard*, 238 Cal.App.2d 292, 305 [47 Cal. Rptr. 734]; *People v. Estrada*, 234 Cal.App.2d 136, 145 [44 Cal.Rptr. 165, 11 A.L.R.3d 1307].)

(4a)Defendant next contends that the officers' unannounced intrusion into his home at night was in violation of Penal Code section 844 and that therefore the arrest and subsequent search and seizure were illegal. Section 844 provides: "To make an arrest, ... a peace-officer, may *break open* the door or window of the house in which the person to be arrested is, or in which [the officer has] reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired." (Italics added.)

Here it does not appear that the officers demanded admittance and explained the purpose for which admittance was desired before their entry, but the Attorney General argues that section 844 is inapplicable because, he asserts, the entry through the open door was not a "breaking" within the meaning of this section.

The rule of announcement was early set forth in *Semayne's Case* (1603) 77 Eng. Rep. 194, which states, "... In all cases when the King ... is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors...." (See generally, Blakey, *The Rule of Announcement and Unlawful Entry*, 112 U.Pa. L.Rev. 499, 500 et seq; Wilgus, *Arrest Without a Warrant*, 22 Mich. L.Rev. 798, 800-807.)

(5)The demand and explanation requirements of section 844 are a codification of the common law. (*People v. Rosales*, 68 Cal.2d 299, 303 [66 Cal.Rptr. 1, 437 P.2d 489]; *People v. Maddox*, 46 Cal.2d 301, 306

***87** [294 P.2d 6].) *Rosales*, in rejecting a claim that opening an unlocked screen door and walking in was not a breaking within the meaning of section 844, stated that at the very least the section covers unannounced entries that would be considered breaking as that term is used in defining common law burglary and that as so defined no more is needed "than the opening of a door or window, even if not locked, or not even latched. Pulling open a screen door held closed only by a spring is sufficient." We further stated in *Rosales* (at p. 304) that "Section 844 is designed to protect fundamental rights. •Decisions in both the federal and state courts have recognized, as did the English courts, that the requirement is of the essence of the substantive protections which safeguard individual liberty.' (*Ker v. California* (1962) 374 U.S. 23, 49 ... Brennan, J. dissenting.) The statute reflects more than concern for the rights of those accused of crime. It serves to preclude violent resistance to unexplained entries and to protect the security of innocent persons who may also be present on premises where an arrest is made."

In *Sabbath v. United States*, 391 U.S. 585 [20 L.Ed.2d 828, 88 S.Ct. 1755], a federal statute substantially identical to Penal Code section 844 was interpreted in accord with *People v. Rosales, supra.*, 68 Cal.2d 299, to apply to opening a closed but unlocked door. The court stated in part (at p. 589 [20 L.Ed.2d at p. 833]), "... the statute uses the phrase •break open' and that connotes some use of force. But linguistic analysis seldom is adequate when a statute is designed to incorporate fundamental values and the on-going development of the common law."

The Legislature in codifying common law rules does not necessarily freeze the law to the rules existing at common law. (See e.g. *People v. Spriggs*, 60 Cal.2d 868, 871 [36 Cal.Rptr. 841, 389 P.2d 377].) Questions arise on which the Legislature has been silent or inexplicit, and the courts must answer these questions in the light of common law principles and the basic objectives of the legislation (see *People v. Spriggs, supra.*, at p. 872; Stone, *The Common Law in the United States*, 50 Harv. L.Rev. 4; Pound, *Common Law and Legislation*, 21 Harv. L.Rev. 383, 388.)

(6)Although section 844 codified the common law rule requiring peace officers to demand admittance and explain their purpose before they break open a door or window, the section is silent or inexplicit as to whether the officers must make such a demand and explanation before they enter a house through an open door. Even if at common law an unannounced intrusion through an open door was lawful, we are satisfied in view of the purposes of section 844, as stated in *People v. Rosales, supra.*, 68 Cal.2d 299, 304, that the demand and explanation requirements of that section also apply where, as here, officers walk into a dwelling through an open door at nighttime when the occupant apparently is asleep. [FN1] Under the circumstances ***88** here appearing there was a breaking within the meaning of the section. The consequences of such an unannounced intrusion could be resistance to the intruders and violent death or injury to them or others including innocent third parties. The burden of complying with the demand and explanation requirements of section 844 is slight, and in view of the special circumstances under which noncompliance with section 844 is excused, insistence upon compliance in the absence of those circumstances in a case like the instant one should not result in any undue impairment of lawful police action.

FN1 *People v. Beamon*, 268 Cal.App.2d 61, 64 [73 Cal.Rptr. 604], broadly states that an officer may not enter through an open door without first complying with the demand and explanation requirements of section 844 unless compliance is excused under one of the established exceptions to the section, and *Beamon* concluded that under the circumstances there appearing compliance was excused. We need not decide here whether the broad statement in *Beamon* is correct. We hold merely that under the circumstances of the instant case compliance with the demand and explanation requirements of section 844 was necessary. We intimate no view whether in the absence of an excuse for compliance under the exceptions to section 844 the demand and explanation requirements of that section apply to all entries through an open door (including e.g. entrance through an open door by a uniformed officer during the day where immediately after crossing the threshold he announces himself and his purpose). In order to avoid any possible illegality, however, it would be advisable for officers before entering a house through an open door to make an arrest to always demand admittance and explain the purpose for which they desire admittance unless the case comes within an established exception to section

844.

People v. Hamilton, 257 Cal.App.2d 296, 300-302 [64 Cal.Rptr. 58], which contains dictum that section 844 "leaves the law of arrests where the common law left it" and that an officer may enter an open door without warning, is disapproved insofar as it is inconsistent with the views expressed herein. [FN2]

FN2 In support of the dictum that an officer may enter an open door without warning *Hamilton* cited *United States v. Williams* (6th Cir. 1965) 351 F.2d 475. *Williams* stated that a state statute similar to section 844 was not of assistance on the question whether a search following an unannounced entrance by officers through an open door was lawful and that the Fourth Amendment was not violated by a search following such an entrance under the circumstances there appearing. (See also *Hopper v. United States* (9th Cir. 1959) 267 F.2d 904, 908.) However, other federal courts in interpreting a federal statute similar to section 844 have stated that any entry without permission is a breaking. (See, e.g. *Keiningham v. United States* (D. C. Cir. 1960) 287 F.2d 126, 130 [109 App. D. C. 272].)

(7)"Noncompliance with section 844 may ... be excused when the officer acts on a reasonable and good faith belief that compliance would increase his peril, frustrate an arrest, or permit the destruction of evidence. Such a belief, however, must be based on the facts of the particular case. It cannot be justified by a general assumption that certain classes of persons subject to arrest are more likely than others to resist arrest, attempt to escape, or destroy evidence. [Citation.]" (*People v. Rosales, supra.*, 68 Cal.2d 299, 305.) (4b)Here the Attorney General does not claim, nor does it appear, that noncompliance with section 844 was excused. ***89**

Since the entry was unlawful, it vitiated the lawfulness of the arrest and subsequent search and required exclusion of the evidence obtained in that search. (*People v. Kanos*, 70 Cal.2d 381, 384 [74 Cal.Rptr. 902, 450 P.2d 278]; *People v. Rosales, supra.*, 68 Cal.2d 299, 302.) [FN3]

FN3 No claim is, or properly could be, made that the search was lawful because it was pursuant to defendant's consent. "A search and seizure made pursuant to consent secured immediately following an illegal arrest or entry ... are inextricably bound up with the illegal conduct and cannot be segregated therefrom." (*People v. Haven*, 59 Cal.2d 713, 719 [31 Cal.Rptr. 47, 381 P.2d 927]; *People v. Henry*, 65 Cal.2d 842, 846 [56 Cal.Rptr. 485, 423 P.2d 557].)

The admission of that evidence requires reversal of the judgment on both counts. The marijuana and narcotics paraphernalia found in the search of the house manifestly were highly prejudicial, and, although as we have seen the marijuana plants in the yard were not obtained by an illegal search, the properly admitted evidence that defendant had possession of those plants was not overwhelming. From the recited evidence it appears that the officer did not know whether the plants were in the yard of defendant or the owner. Under the circumstances it is clear that the error in admitting the evidence found in the house contributed to the judgment. (*Chapman v. California*, 386 U.S. 18, 21-24 [17 L.Ed.2d 705, 708-710, 78 S.Ct. 824, 24 A.L.R.3d 1065]; *People v. Watson*, 46 Cal.2d 818, 835-837 [299 P.2d 243]; *People v. Marshall*, 69 Cal.2d 51, 62 [69 Cal.Rptr. 585, 442 P.2d 665].)

The judgment is reversed.

Traynor, C. J., McComb, J., and Mosk, J., concurred.

TOBRINER, J.,
Concurring and Dissenting.

I concur in the opinion of the majority that the marijuana and narcotics equipment found in Bradley's house were seized in violation of Penal Code section 844, and must be excluded from evidence. The majority reach this conclusion in the following language: "Although section 844 codified the common law rule requiring peace officers to demand admittance and explain their purpose before they break open a door or window, the section is silent or inexplicit as to whether the officers must make such a demand and explanation before they enter a house through an open door. Even if at common law an unannounced intrusion through an open door was lawful, we are satisfied in view of the purposes of section 844, as stated in *People v. Rosales* ... 68 Cal.2d 299, 304, that the de-

mand and explanation requirements of that section also apply where, as here, officers walk into a dwelling through an open door at nighttime when the occupant apparently is asleep." (*Ante*, p. 87 [81 Cal.Rptr. 457, 460 P.2d. 129].) This language is unduly restrictive, and ***90** invites unnecessary litigation of cases involving daytime entries, and entries upon awakened or apparently awakened occupants.

Section 844 serves to protect the privacy (A occupants (see *Miller v. United States* (1958) 357 U.S. 301, 313-314 [2 L.Ed.2d 1332, 1340-1341, 78 S.Ct. 1190]) and the safety of occupants, policemen, and bystanders (see *People v. Rosales* (1968) 68 Cal.2d 299, 304 [66 Cal.Rptr. 1, 437 P.2d 489].) I cannot accept the limiting language of the majority opinion in the light of these objectives: the intrusion upon privacy does not depend upon the time of day; an awake occupant is perhaps more likely to offer violent resistance than a sleeping one. In *People v. Beamon* (1968) 268 Cal.App. 2d 61, 64-65 [73 Cal.Rptr. 604], the Court of Appeal stated: "In our opinion an open door does not excuse noncompliance with section 844 unless noncompliance is otherwise excused under the rules declared in *Rosales*. Accordingly, a police officer may not enter through an open door of a house without first demanding admittance and explaining the purpose for which admittance is desired unless he reasonably and in good faith believes that such compliance would increase his peril, frustrate an arrest, or permit the destruction of evidence. We are persuaded to this conclusion by the purpose of section 844 as declared in *Rosales* and by the clear language of the section which does not restrict the required announcement to any particular type of entry by the police officers .... Moreover, if analogy to the law of burglary is required, we note that in California no breaking or forceable entry is required in proof of the commission of a burglary ... and, accordingly, that a burglary can be committed by entering through an open door or window."

I believe that the Court of Appeal in *Beamon* correctly interpreted our decision in *Rosales*. I would therefore hold that the officers' entry in the instant case violated section 844 not because they entered upon a sleeping occupant at night, but simply because there was neither substantial compliance with section 844 nor excuse for noncompliance.

I concur also in the majority's reasoning that the protection of the Fourth Amendment is not limited to buildings, nor delimitated by common law definitions of the curtilage, but extends "wherever an individual may harbor a reasonable 'expectation of privacy.'" [FN1] (*Terry v. Ohio* (1968) 392 U.S. 1, 9 [20 L.Ed.2d 889, 898, 88 S.Ct. 1868]); see ***91***Katz v. United States* (1967) 389 U.S. 347, 361 [19 L.Ed.2d 576, 587, 88 S.Ct. 507] (concurring opinion of Harlan, J.), and p. 351 [19 L.Ed.2d at p. 581]; *Britt v. Superior Court* (1962) 58 Cal.2d 469 [24 Cal.Rptr. 849, 374 P.2d 817]; *Bielicki v. Superior Court* (1962) 57 Cal.2d 602 [21 Cal.Rptr. 552, 371 P.2d 288]; *People v. Willard* (1965) 238 Cal.App.2d 292 [47 Cal.Rptr. 734]. I disagree, however, in the application of this reasoning to the marijuana plants offered in evidence.

FN1 The majority opinion in this case, and that in *People v. Edwards*, proposes the test: "whether the person has *exhibited* a reasonable expectation of privacy." (*Ante*, p. 84 [81 Cal.Rptr. 457, 460 P.2d 129]; *People v. Edwards* (1969) 71 Cal.2d 1096, 1104 [80 Cal.Rptr. 633, 458 P.2d 713].) (Italics added.) Although there may be no significant difference between this language and "may harbor a reasonable expectation of privacy," I prefer the latter language, because I wish to avoid any suggestion that the expectation of privacy must be demonstrated by an overt act of defendant, or that evidence that a defendant did or did not deliberately try to hide the item should be decisive.

The marijuana plants were located in a keg under a fig tree in a back yard which was entirely or partially fenced. They were not on a portion of the property open to the general public, nor to implied invitees such as mailmen, milkmen, trash collectors (compare *People v. Edwards, supra.*, 71 Cal.2d 1096) and the like. They were implanted about 20 feet from defendant's door and apparently could not be seen-or at least not seen clearly enough to be identified as marijuana-until the searcher approached to within a foot of the plants. The defendant could reasonably expect that members of the public calling at his residence would stay in the approximate vicinity of the door and pathway, would see only what can be seen from that viewpoint, and that the balance of the yard was private. [FN2]

FN2 An area not open to the public generally

> may be open to such a large number of persons that no one of them could reasonably expect privacy. Examples are the common hallways of apartments, or the apartment garage in *People v. Terry* (1969) 70 Cal.2d 410, 427 [77 Cal.Rptr. 460, 454 P.2d 36], which held 5 to 105 cars. An area open only to occupants of two adjoining residences, however, is still an area which may lend itself to a sense of privacy.

The recent decision of the Ninth Circuit in *Wattenburg v. United States* (9th Cir. 1968) 388 F.2d 853, offers strong support for this position. In that case the defendant stole about 1,000 red fir trees from federal land and piled them about 35 feet behind his motel. Federal investigators cut cross-sections from nine stumps on the land, and without a valid warrant searched through the pile of trees to find the nine trees which matched the stumps. The court held the search unlawful, since it constituted "an intrusion upon what the resident seeks to preserve as private even in an area which, although adjacent to his home, is accessible to the public." (P. 857.)

The grounds advanced in the majority opinion to distinguish this case appear insufficient. Although the 1,000 fir trees must have been highly conspicuous from the motel 35 feet away, no evidence in the instant case indicates whether the marijuana plants were visible from Bradley's doorway. Despite the implication of the majority opinion, there is no evidence in *Wattenburg* that the nine trees were covered by other trees, or deliberately hidden by the defendant; one would assume they were not deliberately concealed, ***92** since Wattenburg had no knowledge of which stumps the investigators would cross-section. The instant case is a stronger case for exclusion than *Wattenburg*: a motel is a more public place than a private walk, and in *Wattenburg* stolen property was visible from the place open to the public.

People v. Edwards, supra., 71 Cal.2d 1096, also supports defendant's right to exclude the evidence. In that case we held a search of a trash can 2-3 feet from Edwards's back door unlawful. Edwards's trash can was covered, but such coverage was essential to insure its privacy since it was located where various members of the public would pass by, including, of course, the trash collector. Bradley's plants were not covered, but such coverage was not essential to insure their privacy since the plants could not be recognized from any area open to the public. The key similarity is that in both cases evidence in the back yard of a residence was not visible from the doorstep, walkway, or other place where visitors might be. It was, in short, located in a place where it was relatively safe from public intrusion, or so the occupant could reasonably believe. The trash can cannot logically be distinguished from the marijuana plants.

This case does not deal with "open fields," but with the yard adjacent to a private residence. (Compare *Hester v. United States* (1924) 265 U.S. 57 [68 L.Ed. 898, 44 S.Ct. 445].) The resident cannot reasonably expect privacy in those portions of the yard open to the public, or if not to the public, at least to a substantial number of people. (Compare *People v. Terry, supra.*, 70 Cal.2d 410, permitting a search in the common garage of a large apartment building.) Nor can he expect privacy for things in plain sight from such public areas. (*People v. Terry, supra.*, 70 Cal.2d 410; *People v. Willard, supra.*, 238 Cal.App.2d 292.) But he can reasonably, and probably does, expect privacy for the remainder of the property. No evidence in this case shows that the marijuana plants could be seen until the officer left the area open to the public and approached to a point approximately one foot from the plants. Consequently, the evidence must be excluded.

Peters, J., and Sullivan, J., concurred. ***93**

Cal.
People v. Bradley
1 Cal.3d 80, 460 P.2d 129, 81 Cal.Rptr. 457

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Supreme Court of the United States
Merle R. SCHNECKLOTH, Superintendent, California Conservation Center, Petitioner,
v.
Robert Clyde BUSTAMONTE.

No. 71—732.
Argued Oct. 10, 1972.
Decided May 29, 1973.

State prisoner brought petition for habeas corpus. The United States District Court for the Northern District of California denied the petition, and the prisoner appealed. The United States Court of Appeals for the Ninth Circuit, 448 F.2d 699, vacated the order of the District Court, and remanded, and certiorari was granted. The Supreme Court, Mr. Justice Stewart, held that when the subject of a search is not in custody and the state attempts to justify a search on basis of his consent, state must demonstrate that the consent was in fact voluntarily given; that voluntariness is a question of fact to be determined from all the circumstances; and that, while the subject's knowledge of his right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

Judgment of the Court of Appeals reversed.

Mr. Justice Blackmun filed a concurring opinion.

Mr. Justice Powell filed a concurring opinion in which Mr. Chief Justice Burger and Mr. Justice Rehnquist joined.

Mr. Justice Douglas, Mr. Justice Brennan and Mr. Justice Marshall filed separate dissenting opinions.

West Headnotes

[1] Searches and Seizures 349 24

349 Searches and Seizures
349I In General
349k24 k. Necessity of and preference for warrant, and exceptions in general. Most Cited Cases
(Formerly 349k7(1))

Search conducted without a warrant issued upon probable cause is per se unreasonable, subject only to a few specifically established and well-delineated exceptions. U.S.C.A.Const. Amends. 4, 14.

[2] Searches and Seizures 349 171

349 Searches and Seizures
349V Waiver and Consent
349k171 k. In general. Most Cited Cases
(Formerly 349k7(27))

One exception to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. U.S.C.A.Const. Amends. 4, 14.

[3] Criminal Law 110 410.77

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)9 Voluntariness in General
110k410.77 k. What constitutes voluntary statement, admission, or confession. Most Cited Cases
(Formerly 110k519(1))

Searches and Seizures 349 180

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k180 k. Voluntary nature in general. Most Cited Cases
(Formerly 349k7(28))

"Voluntariness," as applied to a confession or a consent to search, cannot be taken to mean simply a "knowing" choice in the sense of a choice made by a

person with a capacity for conscious choice, nor, on the other hand, can it be limited to a choice made in the absence of official action of any kind. U.S.C.A.Const. Amends. 4, 14.

[4] Criminal Law 110 410.77

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)9 Voluntariness in General
110k410.77 k. What constitutes voluntary statement, admission, or confession. Most Cited Cases
(Formerly 110k519(1))

Neither linguistics nor epistemology provides a ready definition of the meaning of "voluntariness" as applied to a confession; rather, such term reflects an accommodation of the complex of values implicated in police questioning a suspect. U.S.C.A.Const. Amend. 14.

[5] Constitutional Law 92 4664(1)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)5 Evidence and Witnesses
92k4661 Statements, Confessions, and Admissions
92k4664 Circumstances Under Which Made; Interrogation
92k4664(1) k. In general. Most Cited Cases
(Formerly 92k266.1(1))

The due process clause does not mandate that the police forgo all questioning, or that they be given carte blanche to extract what they can from a suspect; the ultimate test is of voluntariness. U.S.C.A.Const. Amend. 14.

[6] Searches and Seizures 349 180

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k180 k. Voluntary nature in general. Most Cited Cases
(Formerly 349k7(28))

Question of whether a consent to a search was "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. U.S.C.A.Const. Amends. 4, 14.

[7] Searches and Seizures 349 183

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k183 k. Knowledge of rights; warnings and advice. Most Cited Cases
(Formerly 349k7(28))

Knowledge of the right to refuse consent to search is one factor to be taken into account, but the government need not establish such knowledge as the sine qua non of an effective, voluntary consent. U.S.C.A.Const. Amends. 4, 14.

[8] Searches and Seizures 349 180

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k180 k. Voluntary nature in general. Most Cited Cases
(Formerly 349k7(28))

Two competing concerns must be accommodated in determining the meaning of a "voluntary" consent to search: the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.

[9] Searches and Seizures 349 62

349 Searches and Seizures
349I In General
349k60 Motor Vehicles
349k62 k. Probable or reasonable cause. Most Cited Cases
(Formerly 349k3.3(7))

If there had been probable cause for search of automobile which was stopped by the police on street,

a search warrant would not have been necessary. U.S.C.A.Const. Amends. 4, 14.

[10] Constitutional Law 92 4460

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)23 Search, Seizure, and Confiscation
92k4460 k. In general. Most Cited Cases
(Formerly 92k319.5(1), 92k319)

Searches and Seizures 349 180

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k180 k. Voluntary nature in general. Most Cited Cases
(Formerly 349k7(28))

The Fourth and Fourteenth Amendments require that a consent to a search not be coerced, by explicit or implicit means, by implied threat or covert force. U.S.C.A.Const. Amends. 4, 14.

[11] Searches and Seizures 349 180

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k180 k. Voluntary nature in general. Most Cited Cases
(Formerly 349k7(28))

In examining all the surrounding circumstances to determine if in fact consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. U.S.C.A.Const. Amends. 4, 14.

[12] Searches and Seizures 349 183

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k183 k. Knowledge of rights; warnings and advice. Most Cited Cases
(Formerly 349k7(28))

It is not necessary to a voluntary consent to a search that the police, before eliciting consent, advise the subject of the search of his right to refuse consent. U.S.C.A.Const. Amends. 4, 14.

[13] Searches and Seizures 349 183

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k183 k. Knowledge of rights; warnings and advice. Most Cited Cases
(Formerly 349k7(28))

Knowledge of a right to refuse to consent to a search is not a prerequisite of a "voluntary" consent. U.S.C.A.Const. Amends. 4, 14.

[14] Constitutional Law 92 947

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(B) Estoppel, Waiver, or Forfeiture
92k947 k. Waiver in general. Most Cited Cases
(Formerly 92k43(1))

Knowing and intelligent waiver is not demanded in every situation where a person has failed to invoke a constitutional protection.

[15] Constitutional Law 92 947

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(B) Estoppel, Waiver, or Forfeiture
92k947 k. Waiver in general. Most Cited Cases
(Formerly 92k43(1))

Generally, requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial.

[16] Searches and Seizures 349 180

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k180 k. Voluntary nature in general. Most Cited Cases
(Formerly 349k7(28))

Question of whether a person has acted "voluntarily" is distinct from question of whether there has been "waiver" of a trial right; the former question can be answered only by examining the relevant circumstances to determine if he has been coerced, while the latter turns on extent of his knowledge.

[17] Criminal Law 110 633.10

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.10 k. Requisites of fair trial. Most Cited Cases
(Formerly 110k633(1))

Estoppel 156 52.10(2)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52.10 Waiver Distinguished
156k52.10(2) k. Nature and elements of waiver. Most Cited Cases
(Formerly 110k633(1))

Searches and Seizures 349 171

349 Searches and Seizures
349V Waiver and Consent
349k171 k. In general. Most Cited Cases
(Formerly 349k7(27))

Any alleged waiver of the guarantees afforded criminal defendant at trial must meet the strict standard of an intentional relinquishment of a "known" right, and "trial" guarantees that have been applied to the "pre-trial" stage of the criminal process are similarly designed to protect the fairness of the trial itself.

[18] Searches and Seizures 349 194

349 Searches and Seizures
349VI Judicial Review or Determination
349k192 Presumptions and Burden of Proof
349k194 k. Consent, and validity thereof. Most Cited Cases
(Formerly 349k7(29))

It cannot be said that every reasonable presumption ought to be indulged against voluntary relinquishment of right not to be subject to search without a warrant. U.S.C.A.Const. Amends. 4, 14.

[19] Searches and Seizures 349 180

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k180 k. Voluntary nature in general. Most Cited Cases
(Formerly 349k7(28))

Standard of intentional relinquishment or abandonment of a known right or privilege does not apply in determining the "voluntariness" of a consent search. U.S.C.A.Const. Amends. 4, 14.

[20] Constitutional Law 92 4460

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)23 Search, Seizure, and Confiscation
92k4460 k. In general. Most Cited Cases
(Formerly 92k319.5(1), 92k319)

Searches and Seizures 349 180

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k180 k. Voluntary nature in general. Most Cited Cases
(Formerly 349k7(28))

When the subject of a search is not in custody and the state attempts to justify search on the basis of his consent, the Fourth and Fourteenth Amendments

require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. U.S.C.A.Const. Amends. 4, 14.

****2043 *218** Syllabus[FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

During the course of a consent search of a car that had been stopped by officers for traffic violations, evidence was discovered that was used to convict respondent of unlawfully possessing a check. In a habeas corpus proceeding, the Court of Appeals, reversing the District Court, held that the prosecution had failed to prove that consent to the search had been made with the understanding that it could freely be withheld. Held: When the subject of a search is not in custody and the State would justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntary; voluntariness is to be determined from the totality of the surrounding circumstances. While knowledge of a right to refuse consent is a factor to be taken into account, the State need not prove that the one giving permission to search knew that he had a right to withhold his consent. Pp. 2045—2059.

448 F.2d 699, reversed.

Robert R. Granucci, San Francisco, Cal., for petitioner.

Stuart P. Tobisman, Los Angeles, Cal., for the respondent, pro hac vice, by special leave of Court.

***219** Mr. Justice STEWART delivered the opinion of the Court.

[1][2] It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.' Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576; Coolidge v. New Hampshire, 403 U.S. 443, 454—455, 91 S.Ct. 2022, 2031—2032, 29 L.Ed.2d 564; Chambers v. Maroney, 399 U.S. 42, 51, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419. It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is ****2044** conducted pursuant to consent. Davis v. United States, 328 U.S. 582, 593—594, 66 S.Ct. 1256, 1261—1262, 90 L.Ed. 1453; Zap v. United States, 328 U.S. 624, 630, 66 S.Ct. 1277, 1280, 90 L.Ed. 1477. The constitutional question in the present case concerns the definition of 'consent' in this Fourth and Fourteenth Amendment context.

I

The respondent was brought to trial in a California court upon a charge of possessing a check with intent to defraud.[FN1] He moved to suppress the introduction of certain material as evidence against him on the ground that the material had been acquired through an unconstitutional search and seizure. In response to the motion, the trial judge conducted an evidentiary hearing ***220** where it was established that the material in question had been acquired by the State under the following circumstances:

FN1. Cal.Penal Code s 475a.

While on routine patrol in Sunnyvale, California, at approximately 2:40 in the morning, Police Officer James Rand stopped an automobile when he observed that one headlight and its license plate light were burned out. Six men were in the vehicle. Joe Alcala and the respondent, Robert Bustamonte, were in the front seat with Joe Gonzales, the driver. Three older men were seated in the rear. When, in response to the policeman's question, Gonzales could not produce a driver's license, Officer Rand asked if any of the other five had any evidence of identification. Only Alcala produced a license, and he explained that the car was his brother's. After the six occupants had stepped out of the car at the officer's request and after two additional policemen had arrived, Officer Rand asked Alcala if he could search the car. Alcala replied, 'Sure, go ahead.' Prior to the search no one was threatened with arrest and, according to Officer Rand's uncontradicted testimony, it 'was all very congenial at this time.' Gonzales testified that Alcala actually helped in the search of the car, by opening the trunk and glove compartment. In Gonzales' words: '(T)he police officer asked Joe (Alcala), he goes, 'Does the trunk open?' And Joe said, 'Yes.' He went to the car and got

the keys and opened up the trunk.' Wadded up under the left rear seat, the police officers found three checks that had previously been stolen from a car wash.

The trial judge denied the motion to suppress, and the checks in question were admitted in evidence at Bustamonte's trial. On the basis of this and other evidence he was convicted, and the California Court of Appeal for the First Appellate District affirmed the conviction.***221** 270 Cal.App.2d 648, 76 Cal.Rptr. 17. In agreeing that the search and seizure were constitutionally valid, the appellate court applied the standard earlier formulated by the Supreme Court of California in an opinion by then Justice Traynor: 'Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances.' People v. Michael, 45 Cal.2d 751, 753, 290 P.2d 852, 854. The appellate court found that '(i)n the instant case the prosecution met the necessary burden of showing consent . . . since there were clearly circumstances from which the trial court could ascertain that consent had been freely given without coercion or submission to authority. Not only officer Rand, but Gonzales, the driver of the automobile, testified that Alcala's assent to the search of his brother's automobile was freely, even casually given. At the time of the request to search the automobile the atmosphere, according to Rand, was 'congenital' and there has been no discussion of any crime. As noted, Gonzales said Alcala even attempted to aid in the search.' ****2045**270 Cal.App.2d, at 652, 76 Cal.Rptr., at 20. The California Supreme Court denied review.[FN2]

FN2. The order of the California Supreme Court is unreported.

Thereafter, the respondent sought a writ of habeas corpus in a federal district court. It was denied.[FN3] On appeal, the Court of Appeals for the Ninth Circuit, relying on its prior decisions in Cipres v. United States, 343 F.2d 95, and Schoepflin v. United States, 391 F.2d 390, set aside the District Court's order. 448 F.2d 699. The appellate court reasoned that a consent was a waiver of a person's Fourth and Fourteenth Amendment rights, and that the State was under an obligation to demonstrate,***222** not only that the consent had been uncoerced, but that it had been given with an understanding that it could be freely and effectively withhold. Consent could not be found, the court held, solely from the absence of coercion and a verbal expression of assent. Since the District Court had not determined that Alcala had known that his consent could have been withheld and that he could have refused to have his vehicle searched, the Court of Appeals vacated the order denying the writ and remanded the case for further proceedings. We granted certiorari to determine whether the Fourth and Fourteenth Amendments require the showing thought necessary by the Court of Appeals. 405 U.S. 953, 92 S.Ct. 1168, 31 L.Ed.2d 230.

FN3. The decision of the District Court is unreported.

II

It is important to make it clear at the outset what is not involved in this case. The respondent concedes that a search conducted pursuant to a valid consent is constitutionally permissible. In Katz v. United States, 389 U.S., at 358, 88 S.Ct., at 515, and more recently in Vale v. Louisiana, 399 U.S. 30, 35, 90 S.Ct. 1969, 1972, 26 L.Ed.2d 409, we recognized that a search authorized by consent is wholly valid. See also Davis v. United States, 328 U.S., at 593—594, 66 S.Ct., at 1261—1262; Zap v. United States, 328 U.S., at 630, 66 S.Ct., at 1280.[FN4] And similarly the State concedes that '(w)hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.' Bumper v. North Carolina, 391 U.S. 543, 548, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797. See also Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436; Amos v. United States, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654.

FN4. 'One would expect a hard-headed system like the common law to recognize exceptions even to the most comprehensive principle for safeguarding liberty. This is true of the prohibition of all searches and seizures as unreasonable unless authorized by a judicial warrant appropriately supported.' Davis v. United States, 328 U.S. 582, 609, 66 S.Ct. 1256, 1269, 90 L.Ed. 1453 (Frankfurter, J., dissenting).

***223** The precise question in this case, then, is what must the prosecution prove to demonstrate that a consent was 'voluntarily' given. And upon that ques-

tion there is a square conflict of views between the state and federal courts that have reviewed the search involved in the case before us. The Court of Appeals for the Ninth Circuit concluded that it is an essential part of the State's initial burden to prove that a person knows he has a right to refuse consent. The California courts have followed the rule that voluntariness is a question of fact to be determined from the totality of all the circumstances, and that the state of a defendant's knowledge is only one factor to be taken into account in assessing the voluntariness of a consent. See, e.g., People v. Tremayne, 20 Cal.App.3d 1006, 98 Cal.Rptr. 193; People v. Roberts, 246 Cal.App.2d 715, 55 Cal.Rptr. 62.

A

The most extensive judicial exposition of the meaning of 'voluntariness' has been developed in those cases in which ****2046** the Court has had to determine the 'voluntariness' of a defendant's confession for purposes of the Fourteenth Amendment. Almost 40 years ago, in Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682, the Court held that a criminal conviction based upon a confession obtained by brutality and violence was constitutionally invalid under the Due Process Clause of the Fourteenth Amendment. In some 30 different cases decided during the era that intervened between Brown and Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, the Court was faced with the necessity of determining whether in fact the confessions in issue had been 'voluntarily' given.[FN5] It is to that body ***224** of case law to which we turn for initial guidance on the meaning of 'voluntariness' in the present context.[FN6]

FN5. See Miranda v. Arizona, 384 U.S. 436, 507, and n. 3, 86 S.Ct. 1602, 1645, 16 L.Ed.2d 694 (Harlan, J., dissenting); Spano v. New York, 360 U.S. 315, 321 n. 2, 79 S.Ct. 1202, 1206, 3 L.Ed.2d 1265 (citing 28 cases).

FN6. Similarly, when we recently considered the meaning of a 'voluntary' guilty plea, we returned to the standards of 'voluntariness' developed in the coerced—confession cases. See Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747. See also n. 25, infra.

[3][4] Those cases yield no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen. 'The notion of 'voluntariness,' Mr. Justice Frankfurter once wrote, 'is itself an amphibian.' Culombe v. Connecticut, 367 U.S. 568, 604—605, 81 S.Ct. 1860, 1880—1881, 6 L.Ed.2d 1037. It cannot be taken literally to mean a 'knowing' choice. 'Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are 'voluntary' in the sense of representing a choice of alternatives. On the other hand, if 'voluntariness' incorporates notions of 'butfor' cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind.'[FN7] It is thus evident that neither linguistics nor epistemology will provide a ready definition of the meaning of 'voluntariness.'

FN7. Bator & Vorenberg, Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions, 66 Col.L.Rev. 62, 72—73. See also 3 J. Wigmore, Evidence s 826 (J. Chadbourn rev. 1970): 'When, for example, threats are used, the situation is one of choice between alternatives, either one disagreeable, to be sure, but still subject to a choice. As between the rack and a confession, the latter would usually be considered the less disagreeable; but it is nonetheless a voluntary choice.'

Rather, 'voluntariness' has reflected an accommodation of the complex of values implicated in police questioning***225** of a suspect. At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws. See Culombe v. Connecticut, supra, at 578—580, 81 S.Ct., at 1865—1866. Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. Haynes v. Washington, 373 U.S. 503, 515, 83 S.Ct. 1336, 1344, 10 L.Ed.2d 513. At the other end of the spectrum is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility

of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice. '(I)n cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction,****2047** wrings a confession out of an accused against his will.' Blackburn v. Alabama, 361 U.S. 199, 206—207, 80 S.Ct. 274, 280, 4 L.Ed.2d 242. See also Culombe v. Connecticut, supra, 367 U.S., at 581—584, 81 S.Ct., at 1867—1869; Chambers v. Florida, 309 U.S. 227, 235—238, 60 S.Ct. 472, 476—478, 84 L.Ed. 716.

[5] This Court's decisions reflect a frank recognition that the Constitution requires the sacrifice of neither security nor liberty. The Due Process Clause does not mandate that the police forgo all questioning, or that they be given carte blanche to extract what they can from a suspect. 'The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his ***226** confession offends due process.' Culombe v. Connecticut, supra, 367 U.S., at 602, 81 S.Ct., at 1879.

In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, e.g., Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224; his lack of education, e.g., Payne v. Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975; or his low intelligence, e.g., Fikes v. Alabama, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246; the lack of any advice to the accused of his constitutional rights, e.g., Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895; the length of detention, e.g., Chambers v. Florida, supra; the repeated and prolonged nature of the questioning, e.g., Ashcraft v. Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192; and the use of physical punishment such as the deprivation of food or sleep, e.g., Reck v. Pate, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948.[FN8] In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted. Culombe v. Connecticut, supra, 367 U.S., at 603, 81 S.Ct., at 1879.

FN8. See generally Miranda v. Arizona, 384 U.S., at 508, 86 S.Ct., at 1645 (Harlan, J., dissenting); 3 J. Wigmore, Evidence s 826 (J. Chadbourn rev. 1970); Note, Developments in the Law: Confessions, 79 Harv.L.Rev. 938, 954—984.

The significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances. See Miranda v. Arizona, 384 U.S. 436, 508, 86 S.Ct. 1602, 1645, 16 L.Ed.2d 694 (Harlan, J., dissenting); id., at 534—535, 86 S.Ct., at 1659—1660 (White, J., dissenting). In none of them did the Court rule that the Due Process Clause required the prosecution to prove as part of its ***227** initial burden that the defendant knew he had a right to refuse to answer the questions that were put. While the state of the accused's mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated in assessing the 'voluntariness' of an accused's responses, they were not in and of themselves determinative. See, e.g., Davis v. North Carolina, supra; Haynes v. Washington, supra, 373 U.S., at 510—511, 83 S.Ct., at 1341—1342; Culombe v. Connecticut, supra, 367 U.S., at 610, 81 S.Ct., at 1883; Turner v. Pennsylvania, 338 U.S. 62, 64, 69 S.Ct. 1352, 93 L.Ed. 1810.

B

[6][7][8] Similar considerations lead us to agree with the courts of California that the question whether a consent to a ****2048** search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent. As with police questioning, two competing concerns must be accommodated in determining the meaning of a 'voluntary' consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.

[9] In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. [FN9] In the present case for example, while the police had reason to stop the car for traffic violations, the State does not contend that there was probable cause to search the vehicle or that the search was incident to a valid arrest ***228** of any of the occupants.[FN10] Yet, the search yielded tangible evidence that served as a basis for a prosecution, and provided some assurance that others, wholly innocent of the crime, were not mistakenly brought to trial. And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity.

FN9. See Note, Consent Searches; A Reappraisal After Miranda v. Arizona, 67 Col.L.Rev. 130, 130—131.

FN10. If there had been probable cause for the search of the automobile, a search warrant would not have been necessary in this case. See Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879; Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543.

[10] But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. In the words of the classic admonition in Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746:

'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close ***229** and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'

[11] The problem of reconciling the recognized legitimacy of consent searches with the requirement that they be free from any aspect of official coercion cannot be resolved by any infallible touchstone. To approve such searches without the most careful scrutiny would sanction the possibility of official coercion; to place artificial restrictions upon such searches would jeopardize their basic validity. Just as was true with confessions, the requirement of a 'voluntary' consent reflects a fair accommodation****2049** of the constitutional requirements involved. In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. Those searches that are the product of police coercion can thus be filtered out without undermining the continuing validity of consent searches. In sum, there is no reason for us to depart in the area of consent searches, from the traditional definition of 'voluntariness.'

The approach of the Court of Appeals for the Ninth Circuit finds no support in any of our decisions that have attempted to define the meaning of 'voluntariness.' Its ruling, that the State must affirmatively prove that the subject of the search knew that he had a right to refuse consent, would, in practice, create serious doubt whether consent searches could continue to be conducted. There might be rare cases where it could be proved from the record that a person in fact affirmatively knew of his ***230** right to refuse—such as a case where he announced to the police that if he didn't sign the consent form, 'you (police) are going to get a search warrant;'[FN11] or a case where by prior experience and training a person had clearly and convincingly demonstrated such knowledge.[FN12] But more commonly where there was no evidence of any

coercion, explicit or implicit, the prosecution would nevertheless be unable to demonstrate that the subject of the search in fact had known of his right to refuse consent.

FN11. United States v. Curiale, 414 F.2d 744, 747 (2 Cir.).

FN12. Cf. Rosenthall v. Henderson, 389 F.2d 514, 516 (6 Cir.).

The very object of the inquiry—the nature of a person's subjective understanding—underlines the difficulty of the prosecution's burden under the rule applied by the Court of Appeals in this case. Any defendant who was the subject of a search authorized solely by his consent could effectively frustrate the introduction into evidence of the fruits of that search by simply failing to testify that he in fact knew he could refuse to consent. And the near impossibility of meeting this prosecutorial burden suggests why this Court has never accepted any such litmus-paper test of voluntariness. It is instructive to recall the fears of then Justice Traynor of the California Supreme Court:

'(I)t is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. Such inquiries, although courteously made and not accompanied with any assertion of a right to enter or search or secure answers, would permit the criminal to defeat his prosecution by voluntarily revealing all of the evidence against him and then contending that he acted only in response to an implied assertion of ***231** unlawful authority.' People v. Michael, 45 Cal.2d, at 754, 290 P.2d, at 854.

[12] One alternative that would go far toward proving that the subject of a search did know he had a right to refuse consent would be to advise him of that right before eliciting his consent. That, however, is a suggestion that has been almost universally repudiated by both federal[FN13] and state courts, [FN14] and, ****2050** we think, rightly so. For it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning. Consent searches are part of the standard investigatory techniques of law enforcement ***232** agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning. The police may seek to investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a crime. These situations are a far cry from the structured atmosphere of a trial where, assisted by counsel if he chooses, a defendant is informed of his trial rights. Cf. Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274. And, while surely a closer question, these situations are still immeasurably, far removed from 'custodial interrogation' where, in Miranda v. Arizona, supra, we found that the Constitution required certain now familiar warnings as a prerequisite to police interrogation. Indeed, in language applicable to the typical consent search, we refused to extend the need for warnings:

FN13. See, e.g., Gorman v. United States, 380 F.2d 158, 164 (CA1); United States ex rel. Code v. Mancusi, 429 F.2d 61, 66 (CA2); United States ex rel. Harris v. Hendricks, 423 F.2d 1096, 1101 (CA3); United States v. Vickers, 387 F.2d 703, 707 (CA4); United States v. Goosbey, 419 F.2d 818 (CA6); United States v. Noa, 443 F.2d 144, 147 (CA9); Leeper v. United States, 446 F.2d 281, 284 (CA10). But see, United States v. Nikrasch, 367 F.2d 740, 744 (CA7); United States v. Moderacki, 280 F.Supp. 633 (D.Del); United States v. Blalock, 255 F.Supp. 268 (ED Pa.). While there is dictum in Nikrasch to the effect that warnings are necessary for an effective Fourth Amendment consent, the Court of Appeals for the Seventh Circuit subsequently recanted that position and termed it 'of dubious propriety.' Byrd v. Lane, 398 F.2d 750, 755. The Court of Appeals limited Nikrasch to its facts—a case where a suspect arrested on a disorderly conduct charge and incarcerated for eight hours 'consented' from his jail cell to a search of his car.

FN14. See, e.g., People v. Roberts, 246 Cal.App.2d 715, 55 Cal.Rptr. 62; People v. Dahlke, 257 Cal.App.2d 82, 64 Cal.Rptr. 599; State v. Custer, 251 So.2d 287 (Fla.App.); State v. Oldham, 92 Idaho 124, 438 P.2d 275; State v. McCarty, 199 Kan. 116, 427 P.2d 616, vacated in part on other

grounds, 392 U.S. 308, 88 S.Ct. 2065, 20 L.Ed.2d 1115; Hohnke v. Commonwealth, 451 S.W.2d 162 (Ky.); State v. Andrus, 250 La. 765, 199 So.2d 867; Morgan v. State, 2 Md.App. 440, 234 A.2d 762; State v. Witherspoon, 460 S.W.2d 281 (Mo.); State v. Forney, 181 Neb. 757, 150 N.W.2d 915; State v. Douglas, 260 Or. 60, 488 P.2d 1366.

'Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.' 384 U.S., at 477—478, 86 S.Ct., at 1629—1630.

Consequently, we cannot accept the position of the Court of Appeals in this case that proof of knowledge of the right to refuse consent is a necessary prerequisite ***233** to demonstrating a 'voluntary' consent. Rather it is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced. It is this careful sifting of the unique facts and circumstances of each case that is evidenced in our prior decisions involving consent searches.

For example in Davis v. United States, 328 U.S. 582, 66 S.Ct. 1256, 90 L.Ed. 1453, federal agents enforcing wartime gasoline-rationing regulations, arrested a filling station operator and asked to see his rationing coupons. He eventually unlocked a room where the agents discovered the coupons that formed the basis for his conviction. The District Court found that the petitioner had consented to the search—that although he had at first refused to turn the coupons over, he had soon been persuaded to do so and that force or threat of force had not been employed to persuade****2051** him. Concluding that it could not be said that this finding was erroneous, this Court, in an opinion by Mr. Justice Douglas that looked to all the circumstances surrounding the consent, affirmed the judgment of conviction: 'The public character of the property, the fact that the demand was made during business hours at the place of business where the coupons were required to be kept, the existence of the right to inspect, the nature of the request, the fact that the initial refusal to turn the coupons over was soon followed by acquiescence in the demand—these circumstances all support the conclusion of the District Court.' Id., 328 U.S., at 593—594, 66 S.Ct., at 1261—1262, 90 L.Ed. 1453. See also Zap v. United States, 328 U.S. 624, 66 S.Ct. 1277, 90 L.Ed. 1477.

Conversely, if under all the circumstances it has appeared that the consent was not given voluntarily—that it was coerced by threats or force, or granted only in submission to a claim of lawful authority—then we have found the consent invalid and the search unreasonable. See, e.g., Bumper v. North Carolina, 391 U.S., at 548—549, 88 S.Ct., at 1791—1792; Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436; ***234**Amos v. United States, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654. In Bumper, a 66-year-old Negro widow, who lived in a house located in a rural area at the end of an isolated mile-long dirt road, allowed four white law enforcement officials to search her home after they asserted they had a warrant to search the house. We held the alleged consent to be invalid, noting that '(w)hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.' 391 U.S., at 550, 88 S.Ct., at 1792.

[13] Implicit in all of these cases is the recognition that knowledge of a right to refuse is not a prerequisite of a voluntary consent. If the prosecution were required to demonstrate such knowledge, Davis and Zap could not have found consent without evidence of that knowledge. And similarly if the failure to prove such knowledge were sufficient to show an ineffective consent, the Amos, Johnson, and Bumper opinions would surely have focused upon the subjective mental state of the person who consented. Yet they did not.

In short, neither this Court's prior cases, nor the traditional definition of 'voluntariness' requires proof of knowledge of a right to refuse as the sine qua non of an effective consent to a search.[FN15]

FN15. This view is bolstered by Coolidge v.

New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564. There the Court determined that a suspect's wife was not operating as an agent of the State when she handed over her husband's guns and clothing to the police. We found nothing constitutionally suspect in the subjective forces that impelled the spouse to cooperate with the police. 'Among these are the simple but often powerful convention of openness and honesty, the fear that secretive behavior will intensify suspicion, and uncertainty as to what course is most likely to be helpful to the absent spouse.' Id., at 488, 91 S.Ct., at 2049.

'The test . . . is whether Mrs. Coolidge, in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state when she produced her husband's belongings.' Id., at 487, 91 S.Ct., at 2049.

Just as it was necessary in Coolidge to analyze the totality of the surrounding circumstances to assess the validity of Mrs. Coolidge's offer of evidence, it is equally necessary to assess all the circumstances surrounding a search where consent is obtained in response to an initial police question.

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It is said, however, that a 'consent' is a 'waiver' of a person's rights under the Fourth and Fourteenth Amendments. The argument is that by allowing the police to conduct a search, a person 'waives' whatever right he had to prevent the police from searching. It is argued that under the doctrine of ****2052**Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, to establish such a 'waiver' the State must demonstrate 'an intentional relinquishment or abandonment of a known right or privilege.'

[14] But these standards were enunciated in Johnson in the context of the safeguards of a fair criminal trial. Our cases do not reflect an uncritical demand for a knowing and intelligent waiver in every situation where a person has failed to invoke a constitutional protection. As Mr. Justice Black once observed for the Court: "Waiver' is a vague term used for a great variety of purposes, good and bad, in the law.' Green v. United States, 355 U.S. 184, 191, 78 S.Ct. 221, 226, 2 L.Ed.2d 199. With respect to procedural due process, for example, the Court has acknowledged that waiver is possible, while explicitly leaving open the question whether a 'knowing and intelligent' waiver need be shown.[FN16] See ***236**D. H. Overmyer Co., Inc. v. Frick Co., 405 U.S. 174, 185—186, 92 S.Ct. 775, 782, 31 L.Ed.2d 124; Fuentes v. Shevin, 407 U.S. 67, 94—96, 92 S.Ct. 1983, 2001—2002, 32 L.Ed.2d 556. [FN17]

FN16. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, itself relied on three civil cases, but none of those cases established the proposition that a waiver, to be effective, must be knowing and intelligent. Hodges v. Easton, 106 U.S. 408, 1 S.Ct. 307, 27 L.Ed. 169, which concerned the waiver of a civil jury trial by the submission of a special verdict to the jury, indicates only that 'every reasonable presumption should be indulged against . . . waiver.' Id., at 412, 1 S.Ct., at 311. Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 57 S.Ct. 809, 81 L.Ed. 1177, is to the same effect. Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093, which involved the possible waiver of procedural due process rights, stands only for the proposition that: 'We do not presume acquiescence in the loss of fundamental rights.' Id., at 307, 57 S.Ct., at 731.

FN17. Cf. Parden v. Terminal R. Co., 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (operation of common carrier railroad found to be waiver of State's sovereign immunity despite objection that there was no 'waiver' under Johnson); National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (valid waiver of procedural due process found over objection of no compliance with Johnson). See also Employees of Dept. of Public Health and Welfare, Missouri v. Department of Public Health and Welfare, Missouri, 411 U.S. 279, 296, 93 S.Ct. 1614, 1623, 36 L.Ed.2d 251 (Marshall, J., concurring in result).

The requirement of a 'knowing' and 'intelligent' waiver was articulated in a case involving the validity of a defendant's decision to forego a right constitu-

tionally guaranteed to protect a fair trial and the reliability of the truth-determining process. Johnson v. Zerbst, supra, dealt with the denial of counsel in a federal criminal trial. There the Court held that under the Sixth Amendment a criminal defendant is entitled to the assistance of counsel, and that if he lacks sufficient funds to retain counsel, it is the Government's obligation to furnish him with a lawyer. As Mr. Justice Black wrote for the Court: 'The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer—to the untrained layman may appear intricate, complex and mysterious.' 304 U.S., at 462—463, 58 S.Ct., at 1022 (footnote omitted). To preserve the fairness of the trial process the Court established an appropriately heavy burden on the Government before waiver could be found—'an intentional***237** relinquishment or abandonment of a known right or privilege.' Id., at 464, 58 S.Ct., at 1023.

[15][16] Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in ****2053** order to preserve a fair trial. [FN18] Hence, and hardly surprisingly in view of the facts of Johnson itself, the standard of a knowing and intelligent waiver has most often been applied to test the validity of a waiver of counsel, either at trial,[FN19] or upon a guilty plea.[FN20] And the Court has also applied the Johnson criteria to assess the effectiveness of a waiver of other trial rights such as the right to confrontation,[FN21] to a jury trial,[FN22] and to a speedy trial,[FN23] and the right to be free from ***238** twice being placed in jeopardy.[FN24] Guilty pleas have been carefully scrutinized to determine whether the accused knew and understood all the rights to which he would be entitled at trial, and that he had intentionally chosen to forgo them. [FN25] And the Court has evaluated the knowing and intelligent nature of the waiver of trial rights in trial-type situations, such as the waiver of the privilege against compulsory self-incrimination before an administrative agency [FN26] or a congressional committee,[FN27] or the waiver of counsel in a juvenile proceeding.[FN28]

FN18. One apparent exception was Marchetti v. United States, 390 U.S. 39, 51—52, 88 S.Ct. 697, 704, 705, 19 L.Ed.2d 889, where we found no meaningful waiver of the privilege against compulsory self-incrimination when a gambler was forced to pay a wagering tax. We reasoned that there could be no choice when the gambler was faced with the alternative of giving up gambling or providing incriminatory information. Analytically, therefore, although the Court cited Johnson, Marchetti turned on the lack of a 'voluntary' waiver rather than the lack of any 'knowing' and 'intelligent' waiver.

FN19. See, e.g., Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268; Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70; cf. Chessman v. Teets, 354 U.S. 156, 77 S.Ct. 1127, 1 L.Ed.2d 1253 (no waiver of counsel shown at settlement of state court record).

FN20. See, e.g., Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309; Uveges v. Pennsylvania, 335 U.S. 437, 69 S.Ct. 184, 93 L.Ed. 127; Moore v. Michigan, 355 U.S. 155, 78 S.Ct. 191, 2 L.Ed.2d 167; Boyd v. Dutton, 405 U.S. 1, 92 S.Ct. 759, 30 L.Ed.2d 755.

FN21. See, e.g., Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314; Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255.

FN22. See, e.g., Adams v. United States ex rel. McCann, supra.

FN23. See, e.g., Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101.

FN24. See, e.g., Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199.

FN25. See, e.g., McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418;

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274.

Our cases concerning the validity of guilty pleas underscore the fact that the question whether a person has acted 'voluntarily' is quite distinct from the question whether he has 'waived' a trial right. The former question, as we made clear in Brady v. United States, 397 U.S., at 749, 90 S.Ct., at 1469, can be answered only by examining all the relevant circumstances to determine if he has been coerced. The latter question turns on the extent of his knowledge. We drew the same distinction in McMann v. Richardson, 397 U.S. 759, 766, 90 S.Ct. 1441, 1446, 25 L.Ed.2d 763:

'A conviction after a plea of guilty normally rests on the defendant's own admission in open court that he committed the acts with which he is charged. . . . That admission may not be compelled, and since the plea is also a waiver of trial—and unless the applicable law otherwise provides, a waiver of the right to contest the admissibility of any evidence the State might have offered against the defendant—it must be an intelligent act 'done with sufficient awareness of the relevant circumstances and likely consequences.'' (Footnote omitted.)

FN26. See, e.g., Smith v. United States, 337 U.S. 137, 69 S.Ct. 1000, 93 L.Ed. 1264.

FN27. See, e.g., Emspak v. United States, 349 U.S. 190, 75 S.Ct. 687, 99 L.Ed. 997.

FN28. See In re Gault, 387 U.S. 1, 42, 87 S.Ct. 1428, 1451, 18 L.Ed.2d 527.

****2054** [17] The guarantees afforded a criminal defendant at trial also protect him at certain stages before the actual trial, and any alleged waiver must meet the strict standard of an intentional relinquishment of a 'known' right. But the 'trial' guarantees that have been applied to the 'pretrial'***239** stage of the criminal process are similarly designed to protect the fairness of the trial itself.

Hence, in United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149, and Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178, the Court held 'that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth (and Fourteenth) Amendment right to counsel . . ..' Id., at 272, 87 S.Ct., at 1956. Accordingly, the Court indicated that the standard of a knowing and intelligent waiver must be applied to test the waiver of counsel at such a lineup. See United States v. Wade, supra, 388 U.S., at 237, 87 S.Ct., at 1937. The Court stressed the necessary interrelationship between the presence of counsel at a post-indictment lineup before trial and the protection of the trial process itself:

'Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless the subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923. And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the ***240** witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness—'that's the man.'' Id., at 235—236, 87 S.Ct., at 1936—1937.

And in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, the Court found that custodial interrogation by the police was inherently coercive, and consequently held that detailed warnings were required to protect the privilege against compulsory self-incrimination. The Court made it clear that the basis for decision was the need to protect the fairness of the trial itself:

'That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the fact-finding processes in court. The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process. Without the protections flowing from adequate warnings and the rights of counsel, 'all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.'' Id., at 466, 86 S.Ct., at 1623.

The standards of Johnson were, therefore, found to be a necessary prerequisite to a finding of a valid waiver. See 384 U.S., at 475—479, 86 S.Ct., at 1628—1631. ****2055** Cf. Escobedo v. Illinois, 378 U.S., at 490 n. 14, 84 S.Ct., at 1765. [FN29]

> FN29. As we have already noted, supra, at 2050, Miranda itself involved interrogation of a suspect detained in custody and did not concern the investigatory procedures of the police in general on-the-scene questioning. 384 U.S., at 477, 86 S.Ct., at 1629.
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> By the same token, the present case does not require a determination of the proper standard to be applied in assessing the validity of a search authorized solely by an alleged consent that is obtained from a person after he has been placed in custody. We do note, however, that other courts have been particularly sensitive to the heightened possibilities for coercion when the 'consent' to a search was given by a person in custody. See, e.g., Judd v. United States, 89 U.S.App.D.C. 64, 66, 190 F.2d 649, 651; Channel v. United States, 285 F.2d 217 (9 Cir.); Villano v. United States, 310 F.2d 680, 684 (10 Cir.); United States v. Marrese, 336 F.2d 501 (3 Cir.).

***241** There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.

A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial. Any trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided. A prime example is the right to counsel. For without that right, a wholly innocent accused faces the real and substantial danger that simply because of his lack of legal expertise he may be convicted. As Mr. Justice Harlan once wrote: 'The sound reason why (the right to counsel) is so freely extended for a criminal trial is the severe injustice risked by confronting an untrained defendant with a range of technical points of law, evidence, and tactics familiar to the prosecutor but not to ***242** himself.' Miranda v. Arizona, supra, 384 U.S., at 514, 86 S.Ct., at 1649 (dissenting opinion). The Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial.[FN30]

> FN30. '(In) the uniformly structured situation of the defendant whose case is formally called for plea or trial, where, with everything to be gained by the presence of counsel and no interest deserving consideration to be lost, an inflexible rule serves well.' Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif.L.Rev. 929, 950.

The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial. Rather, as Mr. Justice Frankfurter's opinion for the Court put it in Wolf v. Colorado, 338 U.S. 25, 27, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782, the Fourth Amendment protects the 'security of one's privacy against arbitrary intrusion by the police . . ..' In declining to apply the exclusionary rule of Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, to

convictions that had become final before rendition of that decision, the Court emphasized that 'there is no likelihood of unreliability or coercion present in a search-and-seizure case,' Linkletter v. Walker, 381 U.S. 618, 638, 85 S.Ct. 1731, 1742, 14 L.Ed.2d 601. In Linkletter, the Court indicated that those cases that had been given retroactive effect went to 'the fairness of the trial—the very integrity of the fact-finding process. Here . . . the fairness of the trial is not under attack.' Id., at 639, 85 S.Ct., at 1743. The Fourth Amendment 'is not an adjunct to the ascertainment of truth.' The guarantees of the ****2056** Fourth Amendment stand 'as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone. To recognize this is no more than to accord those values undiluted respect.' Tehan v. United States ex rel. Shott, 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453.

[18] Nor can it even be said that a search, as opposed to an eventual trial, is somehow 'unfair' if a person consents to a search. While the Fourth and Fourteenth ***243** Amendments limit the circumstances under which the police can conduct a search, there is nothing constitutionally suspect in a person's voluntarily allowing a search. The actual conduct of the search may be precisely the same as if the police had obtained a warrant. And, unlike those constitutional guarantees that protect a defendant at trial, it cannot be said every reasonable presumption ought to be indulged against voluntary relinquishment. We have only recently stated: '(I)t is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals.' Coolidge v. New Hampshire, 403 U.S., at 488, 91 S.Ct., at 2049. Rather, the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense.

[19] Those cases that have dealt with the application of the Johnson v. Zerbst rule make clear that it would be next to impossible to apply to a consent search the standard of 'an intentional relinquishment or abandonment of a known right or privilege.'[FN31] To be true to Johnson ***244** and its progeny, there must be examination into the knowing and understanding nature of the waiver, an examination that was designed for a trial judge in the structured atmosphere of a courtroom. As the Court expressed it in Johnson:

> FN31. While we have occasionally referred to a consent search as a 'waiver,' we have never used that term to mean 'an intentional relinquishment or abandonment of a known right or privilege.' Hence, for example, in Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436, this Court found the consent to be ineffective: 'Entry to defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right.' Id., 333 U.S., at 13, 68 S.Ct., at 368, 92 L.Ed. 436. While the Court spoke in terms of 'waiver' it arrived at the conclusion that there had been no 'waiver' from an analysis of the totality of the objective circumstances—not from the absence of any express indication of Johnson's knowledge of a right to refuse or the lack of explicit warnings. See also Amos v. United States, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654.

'The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.' 304 U.S., at 465, 58 S.Ct., at 1023, 82 L.Ed. 1461.[FN32]

> FN32. The Court was even more explicit in Von Moltke v. Gillies, 332 U.S., at 723—724, 68 S.Ct., at 323:
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> 'To discharge this duty (of assuring the intelligent nature of the waiver) properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case be-

> fore him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.'

****2057 *245** It would be unrealistic to expect that in the informal, unstructured context of a consent search, a policeman, upon pain of tainting the evidence obtained, could make the detailed type of examination demanded by Johnson. And, if for this reason a diluted form of 'waiver' were found acceptable, that would itself be ample recognition of the fact that there is no universal standard that must be applied in every situation where a person foregoes a constitutional right. [FN33]

> FN33. It seems clear that even a limited view of the demands of 'an intentional relinquishment or abandonment of a known right or privilege' standard would inevitably lead to a requirement of detailed warnings before any consent search—a requirement all but universally rejected to date. See nn. 13 and 14, supra. As the Court stated in Miranda with respect to the privilege against compulsory self-incrimination: '(W)e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact.' Miranda v. Arizona, 384 U.S., at 468—469, 86 S.Ct., at 1625 (footnote omitted). See United States v. Moderacki, 280 F.Supp. 633 (D.Del.); United States v. Blalock, 255 F.Supp. 268 (E.D.Pa.).

Similarly, a 'waiver' approach to consent searches would be thoroughly inconsistent with our decisions that have approved 'third party consents.' In Coolidge v. New Hampshire, 403 U.S., at 487—490, 91 S.Ct., at 2048—2050, where a wife surrendered to the police guns and clothing belonging to her husband, we found nothing constitutionally impermissible in the admission of that evidence at trial since the wife had not been coerced. Frazier v. Cupp, 394 U.S. 731, 740, 89 S.Ct. 1420, 1425, 22 L.Ed.2d 684, held that evidence seized from the defendant's duffel bag in a search authorized by his cousin's consent was admissible at trial. We found that the defendant had assumed the risk that his cousin, with whom he shared the bag, would allow the police to search it. See also Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668. And ***246** in Hill v. California, 401 U.S. 797, 802—805, 91 S.Ct. 1106, 1110—1111, 28 L.Ed.2d 484, we held that the police had validly seized evidence from the petitioner's apartment incident to the arrest of a third party, since the police had probable cause to arrest the petitioner and reasonably, though mistakenly, believed the man they had arrested was he. Yet it is inconceivable that the Constitution could countenance the waiver of a defendant's right to counsel by a third party, or that a waiver could be found because a trial judge reasonably, though mistakenly, believed a defendant had waived his right to plead not guilty.[FN34]

> FN34. Our decision today is, of course, concerned with what constitutes a valid consent, not who can consent. But, the constitutional validity of third-party consents demonstrates the fundamentally different nature of a consent search from the waiver of a trial right.

In short, there is nothing in the purposes or application of the waiver requirements of Johnson v. Zerbst that justifies, much less compels, the easy equation of a knowing waiver with a consent search. To make such an equation is to generalize from the broad rhetoric of some of our decisions, and to ignore the substance of the differing constitutional guarantees. We decline to follow what one judicial scholar has termed 'the domino method of constitutional****2058** adjudication . . . wherein every explanatory statement

in a previous opinion is made the basis for extension to a wholly different situation.'[FN35]

FN35. Friendly, supra, n. 30, at 950.

D

Much of what has already been said disposes of the argument that the Court's decision in the Miranda case requires the conclusion that knowledge of a right to refuse is an indispensable element of a valid consent. The considerations that informed the Court's holding in Miranda are simply inapplicable in the present case. ***247** In Miranda the Court found that the techniques of police questioning and the nature of custodial surroundings produce an inherently coercive situation. The Court concluded that '(u)nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.' 384 U.S., at 458, 86 S.Ct., at 1619. And at another point the Court noted that 'without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.' Id., at 467, 86 S.Ct., at 1624.

In this case, there is no evidence of any inherently coercive tactics—either from the nature of the police questioning or the environment in which it took place. Indeed, since consent searches will normally occur on a person's own familiar territory, the specter of incommunicado police interrogation in some remote station house is simply inapposite.[FN36] There is no reason to believe, under circumstances such as are present here, that the response to a policeman's question is presumptively coerced; and there is, therefore, no reason to reject the traditional test for determining the voluntariness of a person's response. Miranda, of course, did not reach investigative questioning of a person not in custody, which is most directly analogous to the situation of a consent search, and it assuredly did not indicate that such questioning ought to be deemed inherently coercive. See supra, at 2050.

FN36. As noted above, supra, n. 29, the present case does not require a determination of what effect custodial conditions might have on a search authorized solely by an alleged consent.

It is also argued that the failure to require the Government to establish knowledge as a prerequisite to a valid ***248** consent, will relegate the Fourth Amendment to the special province of 'the sophisticated, v. knowledgeable and the privileged.' We cannot agree. The traditional definition of voluntariness we accept today has always taken into account evidence of minimal schooling, low intelligence, and the lack of any effective warnings to a person of his rights; and the voluntariness of any statement taken under those conditions has been carefully scrutinized to determine whether it was in fact voluntarily given.[FN37]

FN37. See, e.g., Clewis v. Texas, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423; Culombe v. Connecticut, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037; Reck v. Pate, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948; Payne v. Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975; Fikes v. Alabama, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246; Harris v. South Carolina, 338 U.S. 68, 69 S.Ct. 1354, 93 L.Ed. 1815; Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224.

Mr. Justice White once answered a similar argument:

'The Court may be concerned with a narrower matter: the unknowing defendant who responds to police questioning because he mistakenly believes that he must and that his admissions will not be used against him. . . . The failure to inform an accused that he need not answer and that his answers may be used against him is very relevant indeed to whether the disclosures are compelled. Cases in this Court, to say the least, have never placed a premium on ignorance of constitutional rights. If an accused is told he must answer and does not know better, it would be very doubtful that the resulting admissions could be used against him. When the accused has not been informed of his rights at all the Court characteristically and properly looks very closely at the surrounding circumstances.' Escobedo v. Illinois, 378 U.S. 478, 499, 84 S.Ct. 1758, 1769, 12 L.Ed.2d 977 (White, J., dissenting).

****2059** E

[20] Our decision today is a narrow one. We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact ***249** to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.[FN38] Because the California court followed these principles in affirming the respondent's conviction, and because the Court of Appeals for the Ninth Circuit in remanding for an evidentiary hearing required more, its judgment must be reversed.

FN38. The State also urges us to hold that a violation of the exclusionary rule may not be raised by a state or federal prisoner in a collateral attack on his conviction, and thus asks us to overturn our contrary holdings in Kaufman v. United States, 394 U.S. 217, 89 S.Ct. 1068, 22 L.Ed.2d 227; Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306; Harris v. Nelson, 394 U.S. 286, 89 S.Ct. 1082, 22 L.Ed.2d 281; and Mancusi v. DeForte, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154. Since we have found no valid Fourth and Fourteenth Amendment claim in this case, we do not consider that question.

It is so ordered.

Judgment of Court of Appeals reversed.

Mr. Justice BLACKMUN, concurring.

I join the Court's opinion and its judgment.

At the time Kaufman v. United States, 394 U.S. 217, 89 S.Ct. 1068, 22 L.Ed.2d 227 (1969), was decided, I, as a member of the Court of Appeals (but not of its panel) whose order was there reversed, found myself in agreement with the views expressed by Mr. Justice Harlan, writing for himself and my Brother Stewart in dissent. Id., at 242, 89 S.Ct., at 1082. My attitude has not changed in the four years that have passed since Kaufman was decided.

Although I agree with nearly all that Mr. Justice POWELL has to say in his detailed and persuasive concurring opinion, post, p. 2059, I refrain from joining it at this time because, as Mr. Justice STEWART'S opinion reveals, it is not necessary to reconsider Kaufman in order to decide the present case.

***250** Mr. Justice POWELL, with whom THE CHIEF JUSTICE and Mr. Justice REHNQUIST join, concurring.

While I join the opinion of the Court, it does not address what seems to me the overriding issue briefed and argued in this case: the extent to which federal habeas corpus should be available to a state prisoner seeking to exclude evidence from an allegedly unlawful search and seizure. I would hold that federal collateral review of a state prisoner's Fourth Amendment claims—claims which rarely bear on innocence—should be confined solely to the question of whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in state courts. In view of the importance of this issue to our system of criminal justice, I think it appropriate to express my views.

I

Although petitions for federal habeas corpus assert a wide variety of constitutional questions, we are concerned in this case only with a Fourth Amendment claim that an unlawful search occurred ****2060** and that the state court erred in failing to exclude the evidence obtained therefrom. A divided court in Kaufman v. United States, 394 U.S. 217, 89 S.Ct. 1068, 22 L.Ed.2d 227 (1969), held that collateral review of search-and-seizure claims was appropriate on motions filed by federal prisoners under 28 U.S.C. s 2255. Until Kaufman, a substantial majority of the federal courts of appeals had considered that claims of unlawful search and seizure "are not proper matters to be presented by a motion to vacate sentence under s 2255 . . .." Id., at 220, 89 S.Ct., at 1070. The rationale of this view was fairly summarized by the Court:

'The denial of Fourth Amendment protection against unreasonable searches and seizures, the Government's***251** argument runs, is of a different nature from denials of other constitutional rights which we have held subject to collateral attack by federal prisoners. For unlike a claim of denial of effective counsel or of violation of the privilege against self-incrimination, as examples, a claim of illegal

search and seizure does not impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable; rather, the exclusion of illegally seized evidence is simply a prophylatic device intended generally to deter Fourth Amendment violations by law enforcement officers.' Id., at 224, 89 S.Ct., at 1073.

In rejecting this rationale, the Court noted that under prior decisions 'the federal habeas remedy extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial.' FN1 and concluded that there was no basis for restricting 'access by federal prisoners with illegal search-and-seizure claims to federal collateral remedies, while placing no similar restriction on access by state prisoners.' Id., at 225—226, 89 S.Ct., at 1073—1074. In short, on petition for habeas corpus or collateral review filed in a federal district court, whether by state prisoners under 28 U.S.C. s 2254 or federal prisoners under s 2255, the present rule is that Fourth Amendment claims may be asserted and the exclusionary rule must be applied in precisely the same manner as on direct review. Neither the history or purpose of habeas corpus, the desired prophylactic utility of the exclusionary rule as applied to Fourth Amendment claims, nor any sound reason relevant to the administration of criminal justice in our federal system justifies such a power.

> FN1. Cases cited as examples included Mancusi v. DeForte, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968); Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968); Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967).

***252** II

The federal review involved in this Fourth Amendment case goes well beyond the traditional purpose of the writ of habeas corpus. Much of the present perception of habeas corpus stems from a revisionist view of the historic function that writ was meant to perform. The critical historical argument has focused on the nature of the writ at the time of its incorporation in our Constitution and at the time of the Habeas Corpus Act of 1867, the direct ancestor of contemporary habeas corpus statutes.FN2 ****2061** In Fay v. Noia, 372 U.S. 391, 426, 83 S.Ct. 822, 842, 9 L.Ed.2d 837 (1963), the Court interpreted the writ's historic position as follows:

> FN2. The Act of Feb. 5, 1867, c. 28, s 1, 14 Stat. 385, provided that
>
> 'the several courts of the United States . . . within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . ..'
>
> Federal habeas review for those in state custody is now authorized by 28 U.S.C. s 2254(a):
>
> 'The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.'

'At the time the provilege of the writ was written into the Federal Constitution it was settled that the writ lay to test any restraint contrary to fundamental law, which in England stemmed ultimately from Magna Charta but in this country was embodied in the written Constitution. Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum. Obedient to this purpose, we have consistently held that federal court ***253** jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings.'

If this were a correct interpretation of the relevant history, the present wide scope accorded the writ would have arguable support, despite the impressive reasons to the contrary. But recent scholarship has cast grave doubt on Fay's version of the writ's historic function.

It has been established that both the Framers of

the Constitution and the authors of the 1867 Act expected that the scope of habeas corpus would be determined with reference to the writ's historic, common-law development. [FN3] Mr. Chief Justice Marshall early referred to the common-law conception of the writ in determining its constitutional and statutory scope, Ex parte Bollman, 4 Cranch 75, 93—94, 2 L.Ed. 554 (1807); Ex parte Watkins, 3 Pet. 193, 201—202, 7 L.Ed. 650 (1830), and Professor Oaks has noted that 'when the 1867 Congress provided that persons restrained of their liberty in violation of the Constitution could obtain a writ of habeas corpus from a federal court, it undoubtedly intended—except to the extent the legislation provided otherwise—to incorporate the common-law uses and functions of this remedy.'[FN4]

FN3. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv.L.Rev. 441, 466 (1963); Habeas Corpus, Oaks, Legal History in the High Court—64 Mich.L.Rev. 451, 451—456 (1966).

FN4. Oaks, supra, n. 3, at 452.

It thus becomes important to understand exactly what was the common-law scope of the writ both when embraced by our Constitution and incorporated into the Habeas Corpus Act of 1867. Two respected scholars have recently explored precisely these questions.[FN5] Their efforts ***254** have been both meticulous and revealing. Their conclusions differ significantly from those of the Court in Fay v. Noia, that habeas corpus traditionally has been available 'to remedy any kind of governmental restraint contrary to fundamental law.' 372 U.S., at 405, 83 S.Ct., at 831.

FN5. Professor Paul M. Bator of Harvard Law School and Professor Dallin H. Oaks formerly of the University of Chicago School of Law. Citations to the relevant articles are in n. 3, supra.

The considerable evidence marshaled by these scholars need not be restated here. Professor Oaks makes a convincing case that under the common law of habeas corpus at the time of the adoption of the Constitution, 'once a person had been convicted by a superior court or general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court.'[FN6] Certainly that was what Mr. Chief Justice Marshall understood when he stated:

FN6. Oaks, supra, n. 3, at 468.

'This writ (habeas corpus) is, as has been said, in the nature of a writ of error which brings up the body of ****2062** the prisoner with the cause of commitment. The court can undoubtedly inquire into the sufficiency of that cause; but if it be the judgment of a court of competent jurisdiction, especially a judgment withdrawn by law from the revision of this court, is not that judgment in itself sufficient cause? Can the court, upon this writ, look beyond the judgment, and re-examine the charges on which it was rendered. A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inequiry concerning the fact, by deciding it.' Ex parte Watkins, 3 Pet., at 202—203.

***255** The respect shown under common law for the finality of the judgment of a committing court at the time of the Constitution and in the early 19th century did not, of course, explicitly contemplate the operation of habeas corpus in the context of federal-state relations. Federal habeas review for state prisoners was not available until passage of the Habeas Corpus Act of 1867. Yet there is no evidence that Congress intended that Act to jettison the respect theretofore shown by a reviewing court for prior judgments by a court of proper jurisdiction. The Act 'received only the most perfunctory attention and consideration in the Congress; indeed, there were complaints that its effects could not be understood at all.'[FN7] In fact, as Professor Bator notes, it would require overwhelming evidence, which simply is not present, to conclude that the 1867 Congress intended 'to tear habeas corpus entirely out of the context of its historical meaning and scope and convert it into an ordinary writ of error with respect to all federal questions in all criminal cases.' [FN8] Rather, the House Judiciary Committee when it reviewed the Act in 1884 understood that it was not 'contemplated by its framers or . . . properly . . . construed to authorize the overthrow of the final judgments of the State courts of

general jurisdiction, by the inferior Federal judges. . . .'[FN9]

FN7. Bator, supra, n. 3, at 475—476.

FN8. Id., at 475.

FN9. H.R.Rep.No.730, 48th Cong., 1st Sess., 5 (1884), quoted in Bator, supra, n. 3, at 477.

Much, of course, has transpired since that first Habeas Corpus Act. See Fay v. Noia, 372 U.S., at 449—463, 83 S.Ct., at 854—862 (Harlan, J., dissenting). The scope of federal habeas corpus for state prisoners has evolved from a quite limited inquiry into whether the committing state court had jurisdiction, Andrews v. Swartz, 156 U.S. 272, 15 S.Ct. 389, 39 L.Ed. 422 (1895); In re ***256** Moran, 203 U.S. 96, 27 S.Ct. 25, 51 L.Ed. 105 (1906), to whether the applicant had been given an adequate opportunity in state court to raise his constitutional claims, Frank v. Mangum, 237 U.S. 307, 35 S.Ct. 582, 59 L.Ed. 969 (1915); and finally to actual redetermination in federal court of state court rulings on a wide variety of constitutional contentions, Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953). No one would now suggest that this Court be imprisoned by every particular of habeas corpus as it existed in the late 18th and 19th centuries. But recognition of that reality does not liberate us from all historical restraint. The historical evidence demonstrates that the purposes of the writ, at the time of the adoption of the Constitution, were tempered by a due regard for the finality of the judgment of the committing court. This regard was maintained substantially intact when Congress, in the Habeas Corpus Act of 1867, first extended federal habeas review to the delicate interrelations of our dual court systems.

III

Recent decisions, however, have tended to depreciate the importance of the ****2063** finality of prior judgments in criminal cases. Kaufman, 394 U.S., at 228, 89 S.Ct., at 1075, 22 L.Ed.2d 227; Sanders v. United States, 373 U.S. 1, 8, 83 S.Ct. 1068, 1073, 10 L.Ed.2d 148 (1963); Fay, supra, 372 U.S., at 424, 83 S.Ct., at 841. This trend may be a justifiable evolution of the use of habeas corpus where the one in state custody raises a constitutional claim bearing on his innocence. But the justification for disregarding the historic scope and function of the writ is measurably less apparent in the typical Fourth Amendment claim asserted on collateral attack. In this latter case, a convicted defendant is most often asking society to redetermine a matter with no bearing at all on the basic justice of his incarceration.

Habeas corpus indeed should provide the added assurance for a free society that no innocent man suffers an unconstitutional loss of liberty. The Court in Fay described ***257** habeas corpus as a remedy for 'whatever society deems to be intolerable restraints,' and recognized that those to whom the writ should be granted 'are persons whom society has grievously wronged and for whom belated liberation is little enough compensation.' Id., at 401—402, 441, 83 S.Ct., at 829, 850. The Court there acknowledged that the central reason for the writ lay in remedying injustice to the individual. Recent commentators have recognized the same core concept, one noting that 'where personal liberty is involved, a democratic society . . . insists that it is less important to reach an unshakable decision than to do justice (emphasis added),'[FN10] and another extolling the use of the writ in Leyra v. Denno, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948 (1954), with the assertion that '(b)ut for federal habeas corpus, these two men would have gone to their deaths for crimes of which they were found not guilty.'[FN11]

FN10. Pollak, Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ, 66 Yale L.J. 50, 65 (1956).

FN11. Reitz, Federal Habeas Corpus: Post-conviction Remedy for State Prisoners, 108 U.Pa.L.Rev. 461, 497 (1960).

I am aware that history reveals no exact tie of the writ of habeas corpus to a constitutional claim relating to innocence or guilt. Traditionally, the writ was unavailable even for many constitutional pleas grounded on a claimant's innocence, while many contemporary proponents of expanded employment of the writ would permit its issuance for one whose deserved confinement was never in doubt. We are now faced, however, with the task of accommodating the historic respect for the finality of the judgment of a committing court with recent Court expansions of the role of the writ. This accommodation can best be achieved, with due regard to all of the values implicated, by

recourse to the central reason for habeas corpus: the affording of means, ***258** through an extraordinary writ, of redressing an unjust incarceration.

Federal habeas review of search and seizure claims is rarely relevant to this reason. Prisoners raising Fourth Amendment claims collaterally usually are quite justly detained. The evidence obtained from searches and seizures is often 'the clearest proof of guilt' with a very high content of reliability. [FN12] Rarely is there any contention that the search rendered the evidence unreliable or that its means cast doubt upon the prisoner's guilt.The words of Mr. Justice Black drive home the point:

> FN12. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi.L.Rev. 142, 160 (1970).

'A claim of illegal search and seizure under the Fourth Amendment is crucially different from many other constitutional rights; ordinarily the evidence seized can in no way have been rendered untrustworthy by the means ****2064** of its seizure and indeed often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty.' Kaufman v. United States, 394 U.S., at 237, 89 S.Ct., at 1079 (1969) (dissenting opinion).

Habeas corpus review of search and seizure claims thus brings a deficiency of our system of criminal justice into sharp focus: a convicted defendant asserting no constitutional claim bearing on innocence and relying solely on an alleged unlawful search, is now entitled to federal habeas review of state conviction and the likelihood of release if the reviewing court concludes that the search was unlawful. That federal courts would actually redetermine constitutional claims bearing no relation to the prisoner's innocence with the possibility of releasing him from custody if the search is held unlawful not only defeats our societal interest in a rational legal system but serves no compensating ends of personal justice.

***259** IV

This unprecedented extension of habeas corpus far beyond its historic bounds and in disregard of the writ's central purpose is an anomaly in our system sought to be justified only by extrinsic reasons which will be addressed in Part V of this opinion. But first let us look at the costs of this anomaly—costs in terms of serious intrusions on other societal values. It is these other values that have been subordinated—not to further justice on behalf of arguably innocent persons but all too often to serve mechanistic rules quite unrelated to justice in a particular case. Nor are these neglected values unimportant to justice in the broadest sense or to our system of Government. They include (i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded.

When raised on federal habeas, a claim generally has been considered by two or more tiers of state courts. It is the solemn duty of these courts, no less than federal ones, to safeguard personal liberties and consider federal claims in accord with federal law. The task which federal courts are asked to perform on habeas is thus most often one that has or should have been done before. The presumption that 'if a job can be well done once, it sould not be done twice' is sound and one calculated to utilize best 'the intellectual, moral, and political resources involved in the legal system.'[FN13]

> FN13. Bator, supra, n. 3, at 451.
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> The conventional justifications for extending federal habeas corpus to afford collateral review of state court judgments were summarized in Kaufman v. United States, 394 U.S. 217, 225—226, 89 S.Ct. 1068, 1073—1074, 22 L.Ed.2d 227, as follows:
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> '(T)he necessity that federal courts have the 'last say' with respect to questions of federal law, the inadequacy of state procedures to raise and preserve federal claims, the concern that state judges may be unsympathetic to federally created rights, the institutional constraints on the exercise of this Court's certiorari jurisdiction to review state convictions . . ..' Each of these justifications has merit in certain situations, although the asserted inadequacy of state procedures and unsympathetic attitude of state judges are far less realistic grounds of concern than in years past. The issue, fundamentally, is one of perspective and a rational balancing. The

> appropriateness of federal collateral review is evident in many instances. But is hardly follows that, in order to promote the ends of individual justice which are the foremost concerns of the writ, it is necessary to extend the scope of habeas review indiscriminately. This is especially true with respect to federal review of Fourth Amendment claims with the consequent denigration of other important societal values and interests.

260** Those resources are limited but demand on them constantly increases. There is an insistent call on federal courts both in civil actions, many novel ****2065** and complex, which affect intimately the lives of great numbers of people and in original criminal trials and appeals which deserve our most careful attention. [FN14] To the extent the federal courts are required to re-examine claims on collateral261** attack,[FN15] they deprive primary litigants of their prompt availability and mature reflection. After all, the resources of our system are finite: their overextension jeopardizes the care and quality essential to fair adjudication.

> FN14. Briefly, civil filings in United States district courts increased from 58,293 in 1961 to 96,173 in 1972. Total appeals commenced in the United States courts of appeals advanced from 4,204 in 1961 to 14,535 in 1972. Petitions for federal habeas corpus filed by state prisoners jumped from 1,020 in 1961 to 7,949 in 1972. Though habeas petitions filed by state prisoners did decline from 9,063 in 1970 to 7,949 in 1972, the overall increase from 1,000 at the start of the last decade is formidable. Furthermore, civil rights prisoner petitions under 42 U.S.C. s 1983 increased from 1,072 to 3,348 in the past five years. Some of these challenged the fact and duration of confinement and sought release from prison and must now be brought as actions for habeas corpus, Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). See 1972 Annual Report of the Director of the Administrative Office of the United States Courts, II—5, II—22, II—28—32.
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> FN15. Mr. Chief Justice Burger has illustrated the absurd extent to which relitigation is sometimes allowed:
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> > 'In some of these multiple trial and appeal cases (on collateral attack) the accused continued his warfare with society for eight, nine, ten years and more. In one case . . . more than fifty appellate judges reviewed the case on appeals.' Address before the Association of the Bar of the City of New York, N.Y.L.J., Feb. 19, 1970, p. 1.
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> The English courts, 'long admired for (their) fair treatment of accused persons,' have never so extended habeas corpus. Friendly, supra, n. 12, at 145.

The present scope of federal habeas corpus also have worked to defeat the interest of society in a rational point of termination for criminal litigation. Professor Amsterdam has identified some of the finality interests at stake in collateral proceedings:

'They involve (a) duplication of judicial effort; (b) delay in setting the criminal proceeding at rest; (c) inconvenience and possibly danger in transporting a prisoner to the sentencing court for hearing; (d) postponed litigation of fact, hence litigation which will often be less reliable in reproducing the facts (i) respecting the postconviction claim itself, and (ii) respecting the issue of a guilt if the collateral attack succeeds in a form which allows retrial. . . .'

He concluded that:

'(I)n combination, these finality considerations amount to a more or less persuasive argument against the cognizability of any particular collateral ***262** claim, the strength of the argument depending upon the nature of the claim, the manner of its treatment (if any) in the conviction proceedings, and the circumstances under which collateral litigation must be had.'[FN16]

> FN16. Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U.Pa.L.Rev. 378, 383—384 (1964). The article addresses the problem of collateral relief for federal prisoners, but its rationable applies forcefully to federal habeas for state prisoners as well.

No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen.[FN17]

FN17. Mr. Justice Harlan put it very well:

'Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.' Sanders v. United States, 373 U.S. 1, 24—25, 83 S.Ct. 1068, 1082, 10 L.Ed.2d 148 (1963) (dissenting opinion).

****2066** Nowhere should the merit of this view be more self-evident than in collateral attack on an allegedly unlawful search and seizure, where the petitioner often asks society to redetermine a claim with no relationship at all to the justness of his confinement. Professor Amsterdam has noted that 'for reasons which are common to all search and seizure claims,' he 'would hold even a slight finality interest sufficient to deny the collateral remedy.' [FN18] But, in fact, a strong finality interest militates against allowing***263** collateral review of search-and-seizure claims. Apart from the duplication of resources inherent in most habeas corpus proceedings, the validity of a search-and-seizure claim frequently hinges on a complex matrix of events which may be difficult indeed for the habeas court to disinter especially where, as often happens, the trial occurred years before the collateral attack and the state record is thinly sketched.[FN19]

FN18. Supra, n. 16, at 388.

FN19. The latter occurs for various reasons, namely, failure of the accused to raise the claim at trial, a determination by the state courts that the claim did not merit a hearing, or a recent decision of this Court extending rights of the accused (although, on Fourth Amendment claims, such decisions have seldom been applied retroactively, see, e.g., Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, constitutional dimensions going to the

Finally, the present scope of habeas corpus tends to undermine the values inherent in our federal system of government. To the extent that every state criminal judgment is to be subject indefinitely to broad and repetitive federal oversight, we render the actions of state courts a serious disrespect in derogation of the constitutional balance between the two systems.[FN20] The present expansive scope of federal habeas review has prompted no small friction between state and federal judiciaries. Justice Paul C. Reardon of the Massachusetts Supreme ***264** Judicial Court and then President of the National Center for State Courts, in identifying problems between the two systems, noted bluntly that '(t)he first, without question, is the effect of Federal habeas corpus proceedings on State ****2067** courts.' He spoke of the 'humiliation of review from the full bench of the highest State appellate court to a single United States District Court judge.' Such broad federal habeas powers encourage in his view the 'growing denigration of the State courts and their functions in the public mind.'[FN21] In so speaking Justice Reardon echoed the words of Professor Bator:

FN20. The dispersion of power between State and Federal Governments is constitutionally premised, as Mr. Justice Harlan observed:

'(I)t would surely be shallow not to recognize that the structure of our political system accounts no less for the free society we have. Indeed, it was upon the structure of government that the founders primarily focused in writing the Constitution. Out of bitter experience they were suspicious of every form of all-powerful central authority and they sought to assure that such a government would never exist in this country by structuring the federal establishment so as to diffuse power between the executive, legislative, and judicial branches. The diffusion of power between federal and state authority serves the same ends and takes on added significance as the size of the federal bu-

reaucracy contines to grow.' Thoughts at a Dedication: Keeping the Judicial Function in Balance, 49 A.B.A.J. 943, 943—944 (1963).

The Justice recognized that problems of habeas corpus jurisdiction were 'of constitutional dimensiong going to the heart of the division of judicial powers in a federal system.' Fay v. Noia, 372 U.S. 391, 464, 83 S.Ct. 822, 862, 9 L.Ed.2d 837 (1963) (dissenting opinion). Nor have such perceptions ever been the product of but a single Justice. As the Court noted in a historic decision on the conflicting realms of state and federal judicial power:

'(T)he constitution of the United States . . . recognizes and preserves the autonomy and independence of the states—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence.' Erie R. Co. v. Tompkins, 304 U.S. 64, 78—79, 58 S.Ct. 817, 822—823, 82 L.Ed. 1188 (1938), quoting Mr. Justice Field in Baltimore & O.R. Co. v. Baugh, 149 U.S. 368, 401, 13 S.Ct. 914, 927, 37 L.Ed. 772 (1893).

FN21. Address at the annual dinner of the Section of Judicial Administration, American Bar Association, San Francisco, California, Aug. 14, 1972, pp. 5, 9, and 10.

'I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate***265** acceptance of the notion that all the shots will always be called by someone else.'[FN22]

FN22. Bator, supra, n. 3, at 451.

In my view, this Court has few more pressing responsibilities than to restore the mutual respect and the balanced sharing of responsibility between the state and federal courts which our tradition and the Constitution itself so wisely contemplate. This can be accomplished without retreat from our inherited insistence that the writ of habeas corpus retain its full vitality as a means of redressing injustice.

This case involves only a relatively narrow aspect of the appropriate reach of habeas corpus. The specific issue before us, and the only one that need be decided at this time, is the extent to which a state prisoner may obtain federal habeas corpus review of a Fourth Amendment claim. Whatever may be formulated as a more comprehensive answer to the important broader issues (whether by clarifying legislation or in subsequent decisions), Mr. Justice Black has suggested what seems to me to be the appropriate threshold requirement in a case of this kind:

'I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt.' Kaufman v. United States, 394 U.S., at 242, 89 S.Ct., at 1082 (dissenting opinion).

In a perceptive analysis, Judge Henry J. Friendly expressed a similar view. He would draw the line against habeas corpus review in the absence of a 'colorable claim of innocence':

'(W)ith a few important exceptions, convictions should be subject to collateral attack only when ***266** the prisoner supplements his constitutional plea with a colorable claim of innocence.'[FN23]

FN23. Friendly, supra, n. 12, at 142. Judge Friendly's thesis, as he develops it, would encompass collateral attack broadly both within the federal system and with respect to federal habeas for state prisoners. Subject to the exceptions carefully delineated in his article, Judge Friendly would apply the criterion of a 'colorable showing of innocence' to any collateral attack of a conviction, including claims under the Fifth and Sixth as well as the Fourth Amendments. Id., at 151—157. In this case we need not consider anything other than the Fourth Amendment claims.

Where there is no constitutional claim bearing on innocence, the inquiry of the federal court on habeas review of a state prisoner's Fourth Amendment claim

should be confined solely to the question whether the defendant was provided a fair opportunity in the state courts to raise and have adjudicated the Fourth Amendment claim. Limiting the scope of habeas review in this manner would reduce the role of the federal courts in determining the merits of constitutional claims with no relation to a petitioner's innocence and contribute to the restoration of recently neglected values to their proper place in our criminal justice system.

V

The importance of the values referred to above is not questioned. What, then, is the reason which has prompted this ****2068** Court in recent decisions to extend habeas corpus to Fourth Amendment claims largely in disregard of its history as well as these values? In addressing Mr. Justice Black's dissenting view that constitutional claims raised collaterally should be relevant to the petitioner's innocence, the majority in Kaufman noted:

'It (Mr. Justice Black's view) brings into question the propriety of the exclusionary rule itself. The application of that rule is not made to turn on the ***267** existence of a possibility of innocence; rather, exclusion of illegally obtained evidence is deemed necessary to protect the right of all citizens, not merely the citizen on trial, to be secure against unreasonable searches and seizures.' 394 U.S., at 229, 89 S.Ct., at 1075. (Emphasis added.)

The exclusionary rule has occasioned much criticism, largely on grounds that its application permits guilty defendants to go free and law-breaking officers to go unpunished.[FN24] The oft-asserted reason for the rule is to deter illegal searches and seizures by the police, Elkins v. United States, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960); Mapp v. Ohio, 367 U.S. 643, 656, 81 S.Ct. 1684, 1692, 6 L.Ed.2d 1081 (1961); Linkletter v. Walker, 381 U.S. 618, 636, 85 S.Ct. 1731, 1741, 14 L.Ed.2d 601 (1965); Terry v. Ohio, 392 U.S. 1, 29, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889 (1968).[FN25] ***268** The efficacy of this deterrent function, however, has been brought into serious question by recent empirical research. Whatever the rule's merits on an initial trial and appeal[FN26]—a question not in issue here—the case for ***269** collateral ****2069** application of the rule is an anemic one. On collateral attack, the exclusionary rule retains its major liabilities while the asserted benefit of the rule dissolves. For whatever deterrent function the rule may serve when applied on trial and appeal becomes greatly attenuated when, months or years afterward, the claim surfaces for collateral review. The impermissible conduct has long since occurred, and the belated wrist slap of state police by federal courts harms no one but society on whom the convicted criminal is newly released. [FN27]

FN24. See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 411, 91 S.Ct. 1999, 2012, 29 L.Ed.2d 619 (Burger, C.J., dissenting); Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J.Crim.L.C. & P.S. 255, 256 (1961); see also J. Wilson, Varieties of Police Behavior (1968); 8 Wigmore, Evidence s 2184, pp. 51—52 (J. McNaughton ed. 1961), and H. Friendly, Benchmarks 260—261 (1967), suggesting that even at trial the exclusionary rule should be limited to exclusion of 'the fruit of activity intentionally or flagrantly illegal.' But see Kamisar, Public Safety v. Individual Liberties: Some 'Facts' and 'Theories,' 53 J.Crim.L.C. & P.S. 171, 188—190 (1962), and Kamisar, On the Tactics of Police-Prosecution Oriented Critics of the Courts, 49 Cornell L.Q. 436 (1964).

FN25. These expressions antedated the only scholarly empirical research, Mr. Justice Stewart having noted in Elkins v. United States, 364 U.S. 206, 218, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 669 (1960), that '(e)mpirical statistics are not available' as to the efficacy of the rule—a situation which continued until Professor Oaks' study. Indeed, in referring to the basis for the exclusionary rule, Professor Oaks noted that it has been supported, not by facts, but by 'recourse to polemic, rhetoric, and intuition.' Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665, 755 (1970). See also Burger, Who Will Watch the Watchman?, 14 Am.U.L.Rev. 1 (1964).

I mention the controversy over the exclusionary rule—not to suggest here its total abandonment (certainly not in the absence of some other deterrent to deviant police con-

duct) but rather to emphasize its precarious and undemonstrated basis, especially when applied to a Fourth Amendment claim on federal habeas review of a state court decision.

FN26. The most searching empirical study of the efficacy of the exclusionary rule was made by Professor Oaks, who concluded that '(a)s a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure.' Supra, n. 25, at 755. Professor Oaks, though recognizing that conclusive data may not yet be available, summarized the results of his study as follows:

'There is no reason to expect the rule to have any direct effect on the overwhelming majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement activity that is aimed at prosecution. What is known about the deterrent effect of sanctions suggests that the exclusionary rule operates under conditions that are extremely unfavorable for deterring the police. The harshest criticism of the rule is that it is ineffective. It is the sole means of enforcing the essential guarantees of freedom from unreasonable arrests and searches and seizures by law enforcement officers, and it is a failure in that vital task.

'The use of the exclusionary rule imposes excessive costs on the criminal justice system. It provides no recompense for the innocent and it frees the guilty. It creates the occasion and incentive for large scale lying by law enforcement officers. It diverts the focus of the criminal prosecution from the guilt or innocence of the defendant to a trial of the police. Only a system with limitless patience with irrationality could tolerate the fact that where there has been one wrong, the defendant's, he will be punished, but where there have been two wrongs, the defendant's and the officer's, both will go free. This would not be an excessive cost for an effective remedy against police misconduct, but it is a prohibitive price to pay for an illusory one.' Id., 755.

Despite a conviction that the exclusionary rule is a 'failure,' Professor Oaks would not abolish it altogether until there is something to take its place. He recommends 'an effective tort remedy against the offending officer or his employer.' He notes that such a 'tort remedy would give courts an occasion to rule on the content of constitutional rights (the Canadian example shows how), and it would provide the real consequence needed to give credibility to the guarantee.' Id., at 756—757.

FN27. 'As the exclusionary rule is applied time after time, it seems that its deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that point its continued application is a public nuisance.' Amsterdam, supra, n. 16, at 389.

Searches and seizures are an opaque area of the law: flagrant Fourth Amendment abuses will rarely escape detection but there is a vast twilight zone with respect to which one Justice has stated that our own 'decisions . . . are hardly notable for their predictability,'[FN28] and another had observed that this Court was "bifurcating elements too infinitesimal to be split." [FN29] Serious Fourth Amendment infractions can be dealt with by state judges or by this Court on direct review. But the nonfrivolous Fourth Amendment claims that survive for collateral attack are most likely to be in this grey, twilight area, where the law is difficult for courts to apply, let alone for the policeman on the beat to understand. This is ***270** precisely the type of case where the deterrent function of the exclusionary rule is least efficacious, and where there is the least justification for freeing a duly convicted defendant.[FN30]

FN28. Ker v. California, 374 U.S. 23, 45, 83 S.Ct. 1623, 1646, 10 L.Ed.2d 726 (1963) (Harlan, J., concurring in result).

FN29. Coolidge v. New Hampshire, 403 U.S. 443, 493, 91 S.Ct. 2022, 2051, 29 L.Ed.2d 564 (1971) (opinion of Burger, C.J.). The Chief Justice was quoting Mr. Justice Stone of the Minnesota Supreme Court.

FN30. Friendly, supra, n. 12, at 162—163.

Our decisions have not encouraged the thought that what may be an appropriate constitutional policy in one context automatically becomes such for all times and all seasons. In Linkletter v. Walker, 381 U.S., at 629, 85 S.Ct., at 1738, the Court recognized the compelling practical considerations against retroactive application of the exclusionary rule. Rather than viewing the rule as having eternal constitutional verity, the Court decided to

'weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective****2070** operation will further or retard its operation. We believe that this approach is particularly correct with reference to the Fourth Amendment's prohibitions as to unreasonable searches and seizures.' Id., at 629, 85 S.Ct., at 1738.

Such a pragmatic approach compelled the Court to conclude that the rule's deterrent function would not be advanced by its retrospective application:

'The misconduct of the police prior to Mapp has already occurred and will not be corrected by releasing the prisoners involved. . . . Finally, the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.' Id., at 637, 85 S.Ct., at 1742.

See also Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969).

The same practical, particularized analysis of the exclusionary rule's necessity also was evident in Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954), when the Court permitted***271** the Government to utilize unlawfully seized evidence to impeach the credibility of a defendant who had first testified broadly in his own defense. The Court held, in effect, that the policies protected by the exclusionary rule were outweighed in this case by the need to prevent perjury and assure the integrity of proceedings at trial. The Court concluded that to apply the exclusionary rule in such circumstances 'would be a perversion of the Fourth Amendment.' Id., at 65, 74 S.Ct., at 356. The judgment in Walder revealed most pointedly that the policies behind the exclusionary rule are neither absolute nor all-encompassing, but rather must be weighed and balanced against a competing and more compelling policy, namely the need for effective determination of truth at trial.

In sum: the case for the exclusionary rule varies with the setting in which it is imposed. It makes little sense to extend the Mapp exclusionary rule to a federal habeas proceeding where its asserted deterrent effect must be least efficacious, and its obvious harmful consequences persist in full force.

VI

The final inquiry is whether the above position conforms to 28 U.S.C. s 2254(a) which provides:

'The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.'

The trend in recent years has witnessed a proliferation of constitutional rights, 'a vast expansion of the claims of error in criminal cases for which a resourceful defense lawyer can find a constitutional basis.'[FN31] Federal habeas***272** jurisdiction has been extended far beyond anyone's expectation or intendment when the concept of 'custody in violation of the Constitution,' now in s 2254(a), first appeared in federal law over a century ago. [FN32]

FN31. Friendly, supra, n. 12, at 156.

FN32. See Part II, supra.

Mr. Justice Black was clearly correct in noting that 'not every conviction based in part on a denial of a constitutional right is subject to attack by habeas corpus or s 2255 proceedings after a conviction has become final.' Kaufman, 394 U.S., at 232, 89 S.Ct., at 1077, 22 L.Ed.2d 227 (dissenting opinion). No evidence exists that Congress intended every allegation of a constitutional violation to afford an appropriate basis for collateral review: indeed, the latest revisions of the Federal Habeas Corpus statute in 1966 [FN33] and the enactment of ****2071** s 2254(a) came at the time a majority of the courts of appeals held that

claims of unlawful search and seizure "are not proper matters to be presented by a motion to vacate sentence under s 2255 but can only be properly presented by appeal from the conviction." Id., at 220, 89 S.Ct., at 1070, quoting Warren v. United States, 311 F.2d 673, 675 (CA8 1963). [FN34] Though the precise discussion in Kaufman concerned the claims of federal prisoners under s 2255, the then-existing principle of a distinction between review of search-and-seizure claims in direct and collateral proceedings clearly existed.

FN33. The 1966 revision of the Federal Habeas Corpus statute enacted, among other things, the present 28 U.S.C. s 2254(a), (d), (e), and (f).

FN34. See Kaufman, supra, 394 U.S., at 220—221, nn. 3 and 4, 89 S.Ct., at 1070—1071, for a listing of the respective positions of the courts of appeals.

There is no indication that Congress intended to wipe out this distinction. Indeed, the broad purpose of the 1966 amendments pointed in the opposite direction. The report of the Senate Judiciary Committee notes that:

'Although only a small number of these (habeas) applications have been found meritorious, the applications***273** in their totality have imposed a heavy burden on the Federal courts. . . . The bill seeks to alleviate the unnecessary burden by introducing a greater degree of finality of judgments in habeas corpus proceedings.' S.Rep.No. 1797, 89th Cong., 2d Sess., 2 (1966) U.S. Code Cong. & Admin. News 1966, p. 3664.[FN35]

FN35. The letter from Circuit Judge Orie L. Phillips, Chairman of the Committee on Habeas Corpus of the Judicial Conference of the United States, which sponsored the 1966 legislation, to the Chairman of the Senate Subcommittee on Improvements in Judicial Machinery also strongly emphasized the necessity of expediting 'the determination in Federal courts of nonmeritorious and repetitious applications for the writ by State court prisoners.' S.Rep.No.1797, 89th Cong., 2d Sess., 5 (1966); U.S.Code Cong. & Admin.News 1966, p. 3667.

The House Report states similarly that:

'While in only a small number of these applications have the petitioners been successful, they nevertheless have not only imposed an unnecessary burden on the work of the Federal courts but have also greatly interfered with the procedures and processes of the State courts by delaying, in many cases, the proper enforcement of their judgments.' H.R.Rep.No. 1892, 89th Cong., 2d Sess., 5 (1966).

This most recent congressional expression on the scope of federal habeas corpus reflected the sentiment, shared alike by judges and legislators, that the writ has overrun its historical banks to inundate the dockets of federal courts and denigrate the role of state courts. Though Congress did not address the precise question at hand, nothing in s 2254(a), the state of the law at the time of its adoption, or the historical uses of the language 'custody in violation of the Constitution' from which s 2254(a) is derived,[FN36] compels a holding that rulings of state courts on claims of unlawful search and ***274** seizure must be reviewed and redetermined in collateral proceedings.

FN36. See Part II, supra.

VII

Perhaps no single development of the criminal law has had consequences so profound as the escalating use, over the past two decades, of federal habeas corpus to reopen and readjudicate state criminal judgments. I have commented in Part IV above on the far-reaching consequences: the burden on the system, [FN37] in terms of demands on the courts, prosecutors, defense attorneys, ****2072** and other personnel and facilities; the absence of efficiency and finality in the criminal process, frustrating both the deterrent function of the law and the effectiveness of rehabilitation; the undue subordination of state courts, with the resulting exacerbation of state-federal relations; and the subtle erosion of the doctrine of federalism itself. Perhaps the single most disquieting consequence of open-ended habeas review is reflected in the prescience of Mr. Justice Jackson's warning that '(i)t must prejudice the occasional meritorious application to be buried in a flood of worthless ones.' [FN38]

FN37. Mr. Justice Jackson, concurring in the result 20 years ago in Brown v. Allen, 344 U.S. 443, 532, 73 S.Ct. 397, 423, 97 L.Ed.

469 (1953), lamented the 'floods of stale, frivolous and repetitious petitions (for federal habeas corpus by state prisoners which) inundate the docket of the lower courts and swell our own.' Id., at 536, 73 S.Ct., at 425. The inundation which concerned Mr. Justice Jackson consisted of 541 such petitions. In 1971, the latest year for which figures are available, state prisoners alone filed 7,949 petitions for habeas in federal district courts, over 14 times the number filed when Mr. Justice Jackson voiced his misgivings.

FN38. Brown v. Allen, supra, at 537, 73 S.Ct., at 425.

If these consequences flowed from the safeguarding of constitutional claims of innocence they should, of course, be accepted as a tolerable price to pay for cherished standards of justice at the same time that efforts are pursued to find more rational procedures. Yet, as illustrated by the case before us today, the question on habeas corpus is ***275** too rerely whether the prisoner was innocent of the crime for which he was convicted[FN39] and too frequently whether some evidence of undoubted probative value has been admitted in violation of an exclusionary rule ritualistically applied without due regard to whether it has the slightest likelihood of achieving its avowed prophylactic purpose.

FN39. Commenting on this distortion of our criminal justice system, Justice Walter Schaefer of the Illinois Supreme Court has said:

'What bothers me is that almost never do we have a genuine issue of guilt or innocence today. The system has so changed that what we are doing in the courtroom is trying the conduct of the police and that of the prosecutor all along the line.' Address before Center for the Study of Democratic Institutions, June 1968, cited by Friendly, supra, n. 12, at 145 n. 12.

It is this paradox of a system, which so often seems to subordinate substance to form, that increasingly provokes criticism and lack of confidence. Indeed, it is difficult to explain why a system of criminal justice deserves respect which allows repetitive reviews of convictions long since held to have been final at the end of the normal process of trial and appeal where the basis for re-examination is not even that the convicted defendant was innocent. There has been a halo about the 'Great Writ' that no one would wish to dim. Yet one must wonder whether the stretching of its use far beyond any justifiable purpose will not in the end weaken rather than strengthen the writ's vitality.

Mr. Justice DOUGLAS, dissenting.

I agree with the Court of Appeals that 'verbal assent' to a search is not enough, that the fact that consent was given to the search does not imply that the suspect knew that the alternative of a refusal existed. 448 F.2d 699, 700. As that court stated:

'(U)nder many circumstances a reasonable person might read an officer's 'May I' as the courteous expression***276** of a demand backed by force of law.' Id., at 701.

A considerable constitutional guarantee rides on this narrow issue. At the time of the search there was no probable cause to believe that the car contained contraband or other unlawful articles. The car was stopped only because a headlight and the license plate light were burned out. The car belonged to Alcala's brother, from whom it was borrowed, and Alcala had a driver's license. Traffic citations were appropriately issued. The car was searched, the present record showing that Alcala consented. But whether Alcala knew he had the right to refuse, we do not know. All the Court of Appeals did was to remand the ****2073** case to the District Court for a finding—and if necessary, a hearing on that issue.

I would let the case go forward on that basis. The long, time-consuming contest in this Court might well wash out. At least we could be assured that, if it came back, we would not be rendering an advisory opinion. Had I voted to grant this petition, I would suggest we dismiss it as improvidently granted. But, being in the minority, I am bound by the Rule of Four.

Mr. Justice BRENNAN, dissenting.

The Fourth Amendment specifically guarantees '(t)he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures . . ..' We have consistently held that governmental searches conducted pursuant to a validly obtained warrant or reasonably incident to a valid arrest do not violate this guarantee. Here, how-

ever, as the Court itself recognizes, no search warrant was obtained and the State does not even suggest 'that there was probable cause to search the vehicle or that the search was incident to a valid arrest of any of the occupants.' Ante, ***277** at 2048. As a result, the search of the vehicle can be justified solely on the ground that the owner's brother gave his consent—that is, that he waived his Fourth Amendment right 'to be secure' against an otherwise 'unreasonable' search. The Court holds today that an individual can effectively waive this right even though he is totally ignorant of the fact that, in the absence of his consent, such invasions of his privacy would be constitutionally prohibited. It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence. In my view, the Court's conclusion is supported neither by 'linguistics,' nor by 'epistemology,' nor, indeed, by 'common sense.' I respectfully dissent.

Mr. Justice MARSHALL, dissenting.

Several years ago, Mr. Justice Stewart reminded us that '(t)he Constitution guarantees . . . a society of free choice. Such a society presupposes the capacity of its members to choose.' Ginsberg v. New York, 390 U.S. 629, 649, 88 S.Ct. 1274, 1285, 20 L.Ed.2d 195 (1968) (concurring in result). I would have thought that the capacity to choose necessarily depends upon knowledge that there is a choice to be made. But today the Court reaches the curious result that one can choose to relinquish a constitutional right—the right to be free of unreasonable searches—without knowing that he has the alternative of refusing to accede to a police request to search.[FN1] I cannot agree, and therefore dissent.

FN1. The Court holds that Alcala's consent to search was shown, in the state court proceedings, to be constitutionally valid as a relinquishment of his Fourth Amendment rights. In those proceedings, no evidence was adduced as to Alcala's knowledge of his right to refuse assent. The Court of Appeals for the Ninth Circuit, whose judgment is today reversed, would have required petitioner to produce such evidence. As discussed infra, p. 2078, the Court of Appeals did not hold that the police must inform a subject of investigation of his right to refuse assent as an essential predicate to their effort to secure consent to search.

***278** I

I believe that the Court misstates the true issue in this case. That issue is not, as the Court suggests whether the police overbore Alcala's will in eliciting his consent, but rather, whether a simple statement of assent to search, without more,[FN2] should be sufficient to permit the police to search and thus act as a relinquishment****2074** of Alcala's constitutional right to exclude the police.[FN3] This Court has always scrutinized with great care claims that a person has forgone the opportunity to assert constitutional rights. See, e.g., Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); D. H. Overmyer Co., Inc. v. Frick Co., 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972); Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962). I see no reason to give the claim that a person consented to a search any less rigorous scrutiny. Every case in this Court involving this kind of search has heretofore spoken ***279** of consent as a waiver.[FN4] See, e.g., Amos v. United States, 255 U.S. 313, 317, 41 S.Ct. 266, 267, 65 L.Ed. 654 (1921); Zap v. United States, 328 U.S. 624, 628, 66 S.Ct. 1277, 1279, 90 L.Ed. 1477 (1946); Johnson v. United States, 333 U.S. 10, 13, 68 S.Ct. 367, 368, 92 L.Ed. 436 (1948).[FN5] Perhaps one skilled in linguistics***280** or opistemology can disregard those comments, but I find them hard to ignore.

FN2. The Court concedes that the police lacked probable cause to search. Ante, at 2047—2048. At the time the search was conducted, there were three police vehicles near the car. 270 Cal.App.2d 648, 651, 76 Cal.Rptr. 17, 19 (1969). Perhaps the police in fact had some reason, not disclosed in this record, to believe that a search would turn up incriminating evidence. But it is also possible that the late hour and the number of men in Alcala's car suggested to the first officer on the scene that it would be prudent to wait until other officers had arrived before investigating any further.

FN3. Because Bustamonte was charged with possessing stolen checks found in the search at which he was present, he has standing to object to the search even though he claims no possessory or proprietary interest in the car. Jones v. United States, 362 U.S. 257, 80

S.Ct. 725, 4 L.Ed.2d 697 (1960). Cf. People v. Ibarra, 60 Cal.2d 460, 34 Cal.Rptr. 863, 386 P.2d 487 (1963); People v. Perez, 62 Cal.2d 769, 44 Cal.Rptr. 326, 401 P.2d 934 (1965).

FN4. The Court reads Davis v. United States, 328 U.S. 582, 66 S.Ct. 1256, 90 L.Ed. 1453 (1946), as upholding a search like the one in this case on the basis of consent. But it was central to the reasoning of the Court in that case that the items seized were the property of the Government temporarily in Davis' custody. See id., at 587—593, 66 S.Ct., at 1258—1261. The agents of the Government were thus simply demanding that property to which they had a lawful claim be returned to them. Because of this, the Court held that 'permissible limits of persuasion are not so narrow as where private papers are sought.' Id., at 593, 66 S.Ct., at 1261. The opinion of the Court therefore explicitly disclaimed stating a general rule for ordinary searches for evidence. That the distinction, for purposes of Fourth Amendment analysis, between mere evidence and contraband or instrumentalities has now been abolished, Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967), is no reason to disregard the fact that when Davis was decided, that distinction played an important role in shaping analysis.

In Zap v. United States, 328 U.S. 624, 628, 66 S.Ct. 1277, 1279, 90 L.Ed. 1477 (1946), the Court held that 'when petitioner, in order to obtain the government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts.' (Emphasis added.) Because Zap had signed a contract specifically providing that his records would be open at all time to the Government, he had indeed waived his right to keep those records private. Cf. United States v. Biswell, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972).

FN5. Aside from Zap and Davis, supra, n. 4, I have found no cases decided by this Court explicitly upholding a search based on the consent of the defendant. It is hardly surprising, them, that '(t)he approach of the Court of Appeals for the Ninth Circuit finds no support in any of our decisions,' ante, at 2049. But in nearly every case discussing the problem at length, the Court referred to consent as a waiver. And it mischaracterizes those cases to describe them as analyzing the totality of the circumstances, ante, at 2056 n. 31. See infra, at 2076—2077.

To begin, it is important to understand that the opinion of the Court is misleading in its treatment of the issue here in three ways. First, it derives its criterion for determining when a verbal statement of assent to search operates as a relinquishment of a person's right to preclude entry from a justification of consent searches that is inconsistent with our treatment in earlier cases of exceptions to the requirements of the ****2075** Fourth Amendment, and that is not responsive to the unique nature of the consent-search exception. Second, it applies a standard of voluntariness that was developed in a very different context, where the standard was based on policies different from those involved in this case. Third, it mischaracterizes our prior cases involving consent searches.

A

The Court assumes that the issue in this case is: what are the standards by which courts are to determine that consent is voluntarily given? It then imports into the law of search and seizure standards developed to decide entirely different questions about coerced confessions.[FN6]

FN6. That this application of the 'domino' method of adjudication is misguided is shown, I believe, by the fact that the phrase 'voluntary consent' seems redundant in a way that the phrase 'voluntary confession' does not.

The Fifth Amendment, in terms, provides that no person 'shall be compelled in any criminal case to be a witness against himself.' Nor is the interest protected by the Due Process Clause of the Fourteenth Amendment any different. The inquiry in a case where a confession is challenged as having been elicited in an unconstitutional manner is, therefore, whether the

behavior ***281** of the police amounted to compulsion of the defendant.[FN7] Because of the nature of the right to be free of compulsion, it would be pointless to ask whether a defendant knew of it before he made a statement; no sane person would knowingly relinquish a right to be free of compulsion. Thus, the questions of compulsion and of violation of the right itself are inextricably intertwined. The cases involving coerced confessions, therefore, pass over the question of knowledge of that right as irrelevant, and turn directly to the question of compulsion.

FN7. The Court used the terms 'voluntary' or 'involuntary' in such cases as shorthand labels for an assessment of the police behavior in light of the particular characteristics of the individual defendant because behavior that might not be coercive of some individuals might nonetheless compel others to give incriminating statements. See, e.g., Haley v. Ohio, 332 U.S. 596, 599, 68 S.Ct. 302, 303, 92 L.Ed. 224 (1948); Stein v. New York, 346 U.S. 156, 185, 73 S.Ct. 1077, 1093, 97 L.Ed. 1522 (1953); Fikes v. Alabama, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957).

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), confirms this analysis. There the Court held that certain warnings must be given to suspects prior to their interrogation so that the inherently coercive nature of in-custody questioning would be diminished by the suspect's knowledge that he could remain silent. But, although those warnings, of course, convey information about various rights of the accused, the information is intended only to protect the suspect against acceding to the other coercive aspects of police interrogation. While we would not ordinarily think that a suspect could waive his right to be free of coercion, for example, we do permit suspects to waive the rights they are informed of by police warnings, on the belief that such information in itself sufficiently decreases the chance that a statement would be elicited by compulsion. Id., at 475—476, 86 S.Ct., at 1628—1629. Thus, nothing the defendant did in the cases involving coerced confessions was taken to operate as a relinquishment of his rights; certainly the fact that the defendant made ***282** a statement was never taken to be a relinquishment of the right to be free of coercion.[FN8]

FN8. I, of course, agree with the Court's analysis to the extent that it treats a verbal expression of assent as no true consent when it is elicited through compulsion. Ante, at 2048. Since, in my view, it is just as unconstitutional to search after coercing consent as it is to search after uninformed consent, I agree with the rationale of Amos v. United States, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654 (1921), Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948), and Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). That an alternative rationale might have been used in those cases seems to me irrelevant.

****2076** B

In contrast, this case deals not with 'coercion,' but with 'consent,' a subtly different concept to which different standards have been applied in the past. Freedom from coercion is a substantive right, guaranteed by the Fifth and Fourteenth Amendments. Consent, however, is a mechanism by which substantive requirements, otherwise applicable, are avoided. In the context of the Fourth Amendment, the relevant substantive requirements are that searches be conducted only after evidence justifying them has been submitted to an impartial magistrate for a determination of probable cause. There are, of course, exceptions to these requirements based on a variety of exigent circumstances that make it impractical to invalidate a search simply because the police failed to get a warrant.[FN9] But none of the exceptions ***283** relating to the overriding needs of law enforcement are applicable when a search is justified solely by consent. On the contrary, the needs of law enforcement are significantly more attenuated, for probable cause to search may be lacking but a search permitted if the subject's consent has been obtained. Thus, consent searches are permitted, not because such an exception to the requirements of probable cause and warrant is essential to proper law enforcement, but because we permit our citizens to choose whether or not they wish to exercise their constitutional rights. Our prior decisions simply do not support the view that a meaningful choice has been made solely because no coercion was brought to bear on the subject.

FN9. See, e.g., Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969);

> Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967).
>
> In Chimel, we explained that searches incident to arrest were justified by the need to protect officers from attacks by the persons they have arrested, and by the need to assure that easily destructible evidence in the reach of the suspect will not be destroyed. 395 U.S., at 762—763, 89 S.Ct., at 2039—2040. And in Coolidge, we said that searches of automobiles on the highway are justified because an alerted criminal might easily drive the evidence away while a warrant was sought. 403 U.S., at 459—462, 91 S.Ct., at 2034—2036. In neither situation is police convenience alone a sufficient reason for establishing an exception to the warrant requirement. Yet the Court today seems to say that convenience alone justifies consent searches.

For example, in Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968), four law enforcement officers went to the home of Bumper's grandmother. They announced that they had a search warrant, and she permitted them to enter. Subsequently, the prosecutor chose not to rely on the warrant, but attempted to justify the search by the woman's consent. We held that consent could not be established 'by showing no more than acquiescence to a claim of lawful authority,' id., at 548—549, 88 S.Ct., at 1792. We did not there inquire into all the circumstances, but focused on a single fact, the claim of authority, even though the grandmother testified that no threats were made. Id., at 547 n. 8, 88 S.Ct., at 1791. It may be that, on the facts of that case, her consent was under all the circumstances involuntary, but it is plain that we did not apply the test adopted by the Court today. And, whatever the posture of the case when it reached this Court, it could ***284** not be said that the police in Bumper acted in a threatening or coercive manner, for they did have the warrant they said they had; the decision not to rely on it was made long after the search, when the case came into court.[FN10]

> FN10. The Court's interpretation of Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948), a similar case, is baffling. The Court in Johnson did not in fact analyze the totality of the circumstances, as the Court now argues, ante, at 2056 n. 31; the single fact that the police claimed authority to search when in truth they lacked such authority conclusively established that no valid consent had been given.

****2077** That case makes it clear that police officers may not courteously order the subject of a search simply to stand aside while the officers carry out a search they have settled on. Yet there would be no coercion or brutality in giving that order. No interests that the Court today recognizes would be damaged in such a search. Thus, all the police must do is conduct what will inevitably be a charade of asking for consent. If they display any firmness at all, a verbal expression of assent will undoubtedly be forthcoming. I cannot believe that the protections of the Constitution mean so little.

II

My approach to the case is straight-forward and, to me, obviously required by the notion of consent as a relinquishment of Fourth Amendment rights. I am at a loss to understand why consent 'cannot be taken literally to mean a 'knowing' choice.' Ante, at 2046. In fact, I have difficulty in comprehending how a decision made without knowledge of available alternatives can be treated as a choice at all.

If consent to search means that a person has chosen to forgo his right to exclude the police from the place they seek to search, it follows that his consent cannot ***285** be considered a meaningful choice unless he knew that he could in fact exclude the police. The Court appears, however, to reject even the modest proposition that, if the subject of a search convinces the trier of fact that he did not know of his right to refuse assent to a police request for permission to search, the search must be held unconstitutional. For it says only that 'knowledge of the right to refuse consent is one factor to be taken into account.' Ante, at 2048. I find this incomprehensible. I can think of no other situation in which we would say that a person agreed to some course of action if he convinced us that he did not know that there was some other course he might have pursued. I would therefore hold, at a minimum, that the prosecution may not rely on a purported consent to search if the subject of the search did not know that he could refuse to give consent.

That, I think, is the import of Bumper v. North Carolina, supra. Where the police claim authority to search yet in fact lack such authority, the subject does not know that he may permissibly refuse them entry, and it is this lack of knowledge that invalidates the consent.

If one accepts this view, the question then is a simple one: must the Government show that the subject knew of his rights, or must the subject show that he lacked such knowledge?

I think that any fair allocation of the burden would require that it be placed on the prosecution. On this question, the Court indulges in what might be called the 'straw man' method of adjudication. The Court responds to this suggestion by overinflating the burden. And, when it is suggested that the prosecution's burden of proof could be easily satisfied if the police informed the subject of his rights, the Court responds by refusing to require the police to make a 'detailed' inquiry. Ante, at 2057. If the Court candidly faced the real ***286** question of allocating the burden of proof, neither of these maneuvers would be available to it.

If the burden is placed on the defendant, all the subject can do is to testify that he did not know of his rights. And I doubt that many trial judges will find for the defendant simply on the basis of that testimony. Precisely because the evidence is very hard to come by, courts have traditionally been reluctant to require****2078** a party to prove negatives such as the lack of knowledge. See, e.g., 9 J. Wigmore, Evidence 274 (3d ed. 1940); F. James, Civil Procedure s 7.8 (1965); E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 75—76 (1956).

In contrast, there are several ways by which the subject's knowledge of his rights may be shown. The subject may affirmatively demonstrate such knowledge by his responses at the time the search took place, as in United States v. Curiale, 414 F.2d 744 (CA2 1969). Where, as in this case, the person giving consent is someone other than the defendant, the prosecution may require him to testify under oath. Denials of knowledge may be disproved by establishing that the subject had, in the recent past, demonstrated his knowledge of his rights, for example, by refusing entry when it was requested by the police. The prior experience or training of the subject might in some cases support an inference that he knew of his right to exclude the police.

The burden on the prosecutor would disappear, of course, if the police, at the time they requested consent to search, also told the subject that he had a right to refuse consent and that his decision to refuse would be respected. The Court's assertions to the contrary notwithstanding, there is nothing impractical about this method of satisfying the prosecution's burden of proof. [FN11] ***287** It must be emphasized that the decision about informing the subject of his rights would lie with the officers seeking consent. If they believed that providing such information would impede their investigation, they might simply ask for consent, taking the risk that at some later date the prosecutor would be unable to prove that the subject knew of his rights or that some other basis for the search existed.

> FN11. The proposition rejected in the cases cited by the Court in nn. 13 and 14, was that, as in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), a statement to the subject of his rights must be given as an indispensable prerequisite to a request for consent to search. This case does not require us to address that proposition, for all that is involved here is the contention that the prosecution could satisfy the burden of establishing the knowledge of the right to refuse consent by showing that the police advised the subject of a search, that is sought to be justified by consent, of that right.

The Court contends that if an officer paused to inform the subject of his rights, the informality of the exchange would be destroyed. I doubt that a simple statement by an officer of an individual's right to refuse consent would do much to alter the informality of the exchange, except to alert the subject to a fact that he surely is entitled to know. It is not without significance that for many years the agents of the Federal Bureau of Investigation have routinely informed subjects of their right to refuse consent, when they request consent to search. Note, Consent Searches: A Reappraisal After Miranda v. Arizona, 67 Col.L.Rev. 130, 143 n. 75 (1967) (citing letter from J. Edgar Hoover). The reported cases in which the police have informed subjects of their right to refuse consent show, also, that the information can be given without disrupting the casual flow of events. See, e.g., United

States v. Miller, 395 F.2d 116 (CA7 1968). What evidence there is, then, rather strongly suggests that nothing disastrous would happen if the police, before requesting consent, informed the subject that he had ***288** a right to refuse consent and that his refusal would be respected.[FN12]

FN12. The Court's suggestion that it would be 'unrealistic' to require the officers to make 'the detailed type of examination' involved when a court considers whether a defendant has waived a trial right, ante, at 2057, deserves little comment. The question before us relates to the inquiry to be made in court when the prosecution seeks to establish that consent was given. I therefore do not address the Court's strained argument that one may waive constitutional rights without making a knowing and intentional choice so long as the rights do not relate to the fairness of a criminal trial. I would suggest, however, that that argument is fundamentally inconsistent with the law of unconstitutional conditions. See, e.g., Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). The discussion of United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), ante, at 2054, also seems inconsistent with the opinion of Mr. Justice Stewart in Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). In any event, I do not understand how one can relinquish a right without knowing of its existence, and that is the only issue in this case.

****2079** I must conclude with some reluctance that when the Court speaks of practicality, what it really is talking of is the continued ability of the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights. Of course it would be 'practical' for the police to ignore the commands of the Fourth Amendment, if by practicality we mean that more criminals will be apprehended, even though the constitutional rights of innocent people also go by the board. But such a practical advantage is achieved only at the cost of permitting the police to disregard the limitations that the Constitution places on their behavior, a cost that a constitutional democracy cannot long absorb.

I find nothing in the opinion of the Court to dispel my belief that, in such a case, as the Court of Appeals for ***289** the Ninth Circuit said, '(u)nder many circumstances a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by force of law.' 448 F.2d, at 701. Most cases, in my view, are akin to Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968): consent is ordinarily given as acquiescence in an implicit claim of authority to search. Permitting searches in such circumstances, without any assurance at all that the subject of the search knew that, by his consent, he was relinquishing his constitutional rights, is something that I cannot believe is sanctioned by the Constitution.

III

The proper resolution of this case turns, I believe, on a realistic assessment of the nature of the interchange between citizens and the police, and of the practical import of allocating the burden of proof in one way rather than another. The Court seeks to escape such assessments by escalating its rhetoric to unwarranted heights, but no matter how forceful the adjectives the Court uses, it cannot avoid being judged by how well its image of these interchanges accords with reality. Although the Court says without real elaboration that it 'cannot agree,' ante, at 2058, the holding today confines the protection of the Fourth Amendment against searches conducted without probable cause to the sophisticated, the knowledgeable, and, I might add, the few.[FN13] In the final analysis, the Court now sanctions a game of blindman's buff, in which the police always have the upper hand, for the sake of nothing more than the convenience of ***290** the police. But the guarantees of the Fourth Amendment were never intended to shrink before such an ephemeral and changeable interest. The Framers of the Fourth Amendment struck the balance against this sort of convenience and in favor of certain basic civil rights. It is not for this Court to restrike that balance because of its own views of the ****2080** needs of law enforcement officers. I fear that that is the effect of the Court's decision today.

> FN13. The Court's half-hearted defense, that lack of knowledge is to be 'taken into account,' rings rather hollow, in light of the apparent import of the opinion that even a subject who proves his lack of knowledge may nonetheless have consented 'voluntarily,' under the Court's peculiar definition of voluntariness.

It is regrettable that the obsession with validating searches like that conducted in this case, so evident in the Court's hyperbole, has obscured the Court's vision of how the Fourth Amendment was designed to govern the relationship between police and citizen in our society. I believe that experience and careful reflection show how narrow and inaccurate that vision is, and I respectfully dissent.

U.S.Cal. 1973.
Schneckloth v. Bustamonte
412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854

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JOHN F. SKELLY, Plaintiff and Appellant,
v.
STATE PERSONNEL BOARD et al., Defendants and Respondents

S.F. No. 23241.

Supreme Court of California
September 16, 1975.

SUMMARY

After receiving a written notice from the State Department of Health Care Services terminating his employment on the grounds of intemperance, inexcusable absences and other failures, a physician with the status of a permanent civil service employee was accorded a hearing before a representative of the State Personnel Board which adopted the representative's recommendation and dismissed the physician from employment. The trial court denied the physician's application for a writ of mandate to compel the board to set aside the dismissal. (Superior Court of Sacramento County, No. 232477, Lloyd Allan Phillips, Jr., Judge.)

The Supreme Court reversed and remanded for further proceedings. Preliminarily, it was noted that the state statutory scheme regulating civil service employment confers on a permanent civil service employee a property interest in continuation of his employment and that this interest is protected by due process. Concluding, from the record, that the basis of the dismissal had been the physician's conduct in extending his alloted lunch time by five to fifteen minutes and in twice leaving his office for several hours without permission, the court held that the dismissal constituted an abuse of discretion in view of the record's failure to show that these deviations adversely affected public service. Further, it was held that provisions of the Civil Service Act (Gov. Code, § 18500 et seq.), including, in particular, Gov. Code, § 19574, relating to punitive action against a permanent employee, violate federal and state constitutional due process provisions. Thus, the dismissal had been improper as excessive punishment, and as having been effectuated under procedures which denied the physician due process. (In Bank. Opinion by Sullivan, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Civil Service § 7--Discharge, Demotion, Suspension, and Dismissal-- Permanent Employee Status as Protected by Due Process.

The California statutory scheme regulating civil service employment confers on an individual who achieves the status of "permanent employee" a property interest in the continuation of his employment which is protected by due process.

(2) Constitutional Law § 102--Due Process--Right to Governmental Benefit as Protected by Due Process.

A person's legally enforcible right to receive a government benefit in the event that certain facts exist constitutes a property interest protected by due process.

(3) Civil Service § 7--Discharge, Demotion, Suspension, and Dismissal--Due Process.

Due process does not require the state to provide a permanent civil service employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action, but does require, as minimum preremoval safeguards, a notice of the proposed action, the reasons therefor, a copy of the charges and materials on which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.

(4) Civil Service § 7--Discharge, Demotion, Suspension, and Dismissal-- Statutes--Constitutionality.

Provisions of the State Civil Service Act (Gov. Code, § 18500 et seq.), including, in particular, Gov. Code, § 19574, concerning the taking of punitive action against a permanent civil service employee, violate the due process clauses of U.S. Const. 5th and 14th Amends. and of Cal. Const., art. I, §§ 7, 15.

(5) Administrative Law § 114--Judicial Review--Limited Nature--Review of State Personnel Board's Findings.

Inasmuch as the State Personnel Board is a statewide agency deriving its adjudicating powers

from the state Constitution, the board's factual determinations are not subject to re-examination in a trial de novo, but are to be upheld by a reviewing court if supported by substantial evidence.
[See **Cal.Jur.3d,** Administrative Law, § 287; **Am.Jur.2d,** Administrative Law, § 659.]
(6) Civil Service § 11--Discharge, Demotion, Suspension, and Dismissal-- Judicial Review--Sufficiency of Evidence.

The State Personnel Board's findings that certain of a permanent civil service employee's absences on certain working days were due to his drinking of intoxicating liquors, rather than due to illness, were sustained by testimony of two apparently credible witnesses that they had seen him at a bar drinking on those days, and by his own testimony that at lunch on one of those days, he had consumed two martinis despite his assertions of illness.

(7) Public Officers and Employees § 27--Duration and Termination of Tenure--Administrative Body's Discretion.

Although an administrative body has broad discretion as to imposition of discipline it must exercise legal discretion which, in the circumstances, is judicial discretion. And in determining whether such discretion has been abused in the context of public employee discipline, the overriding consideration is the extent to which his conduct resulted in, or if repeated is likely to result in, harm to the public service. Other relevant factors include the circumstances surrounding the misconduct and the likelihood of recurrence.

(8) Civil Service § 11--Discharge, Demotion, Suspension, and Dismissal-- Judicial Review--Abuse of Discretion.

In dismissing a physician with the status of a permanent civil service employee on the basis of his extension of his alloted lunch time by five to fifteen minutes, and in twice leaving his office for several hours without permission, the State Personnel Board abused its discretion, where the record failed to show that such deviations adversely affected the public service, but did disclose that he more than made up the lost time by working during nonworking periods, and that he was informative, cooperative, helpful, extremely thorough, and productive.

COUNSEL

Loren E. McMaster and Allen R. Link for Plaintiff and Appellant.

Evelle J. Younger, Attorney General, and Joel S. Primes, Deputy Attorney General, for Defendant and Respondent. ***197**

SULLIVAN, J.

Plaintiff John F. Skelly, M.D. (hereafter petitioner) appeals from a judgment denying his petition for writ of mandate to compel defendants State Personnel Board (Board) and its members to set aside his allegedly wrongful dismissal from employment by the State Department of Health Care Services (Department). [FN1] In challenging his removal, petitioner asserts, among other things, that California's statutory scheme regulating the taking of punitive action against permanent civil service employees violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 15, of the California Constitution.

FN1 Petitioner also named as defendants the Department and its director.

In July 1972 petitioner was employed by the Department as a medical consultant. [FN2] He held that position for about seven years and was a permanent civil service employee of the state. (See Gov. Code, § 18528.) [FN3] About that time the Department, through its personnel officer Wade Williams, gave petitioner written notice that he was terminated from his position as medical consultant, effective 5 p.m., July 11, 1972. The notice specified three causes for the dismissal: (1) Intemperance, (2) inexcusable absence without leave, and (3) other failure of good behavior during duty hours which caused discredit to the Department. [FN4] It further described petitioner's alleged acts and omissions which formed the basis of these charges, and notified him that to secure a hearing in the matter, he would be required to file a written answer with the Board within 20 days, and that in the event of his failure to do so, the punitive action ***198** would be final. On July 12, 1972, petitioner filed an answer, and on September 15, 1972, a hearing was held before an authorized representative of the 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 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 and the California Consti-

tution. 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 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 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 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 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 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 ***210***Mitchell v. W. T. Grant Co., supra*, 416 U.S. 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 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 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 sub-

stantial. [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].)

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 *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 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 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.
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226 Cal.App.3d 1438, 277 Cal.Rptr. 478
(Cite as: 226 Cal.App.3d 1438)

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†] with Marler, Acting P. J., and Scotland, J., concurring.)

FN† 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).
[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. 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 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-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.
Stanton v. City of West Sacramento
226 Cal.App.3d 1438, 277 Cal.Rptr. 478

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521 F.2d 1217
(Cite as: 521 F.2d 1217)

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, Plaintiff/Appellee,
v.
Jennieve Rose BUNKERS, Defendant/Appellant.

No. 74-2944.
Aug. 5, 1975.

Postal employee was convicted in the United States District Court for the Eastern District of California, Philip C. Wilkins, J., of theft of United States mailing matters, and she appealed. The Court of Appeals, East, Senior District Judge, held that where postal inspectors observed employee improperly take postal package from her work area to locker room and within one minute return without package, warrantless search of government owned locker which was furnished employee as incident of her employment and which was subject to search by postal inspectors and supervisors was not unreasonable.

Affirmed.

West Headnotes

[1] Criminal Law 110 392.15(8)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k392.1 Wrongfully Obtained Evidence
110k392.15 Search or Seizure Without Warrant in General
110k392.15(4) Particular Places or Things Searched or Seized Without Warrant
110k392.15(8) k. Place of business or other premises. Most Cited Cases
(Formerly 110k394.4(3))

Postal Service 306 47

306 Postal Service
306III Offenses Against Postal Laws
306k47 k. Searches, seizures, and opening letters or packages. Most Cited Cases
(Formerly 349k7(10))

Where postal inspectors observed postal employee improperly take postal package from her work area to locker room and within one minute return without package, warrantless search of government owned locker which was furnished employee as incident of her employment and for her convenience and which was subject to search by postal inspectors and supervisors and the subsequent seizure of stolen postal packages from locker at time of employee's arrest were not unreasonable; rendering postal packages admissible in prosecution of postal employee for theft of mailing matters. 18 U.S.C.A. § 1709; U.S.C.A.Const. Amend. 4.

[2] Searches and Seizures 349 185

349 Searches and Seizures
349V Waiver and Consent
349k185 k. Implied consent; airport, boarding, or entry searches. Most Cited Cases
(Formerly 349k7(27))

Postal employee's voluntary entrance into postal service employment and her acceptance and use of government owned locker which was furnished her as incident of her employment for her convenience and which was subject to search by supervisors and postal inspectors and her labor union's agreement to allow search of locker upon reasonable suspicion of criminal activity amounted to effective relinquishment of employee's Fourth Amendment immunity in her work-connected use of locker. U.S.C.A.Const. Amend. 4.

***1218** Gary E. McCurdy (argued), Sacramento, Cal., for defendant-appellant.

Donald Heller, Asst. U. S. Atty. (argued), Sacramento, Cal., for plaintiff-appellee.

OPINION

Before CHAMBERS and CHOY, Circuit Judges, and

521 F.2d 1217
(Cite as: 521 F.2d 1217)

EAST,[FN*] Senior District Judge.

FN* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

EAST, Senior District Judge:

THE APPEAL

The defendant-appellant Jennieve Rose Bunkers (hereinafter Bunkers) appeals from a judgment of her conviction and sentence for a postal employee's theft of United States mailing matters in violation of 18 U.S.C. s 1709.

There is presented a single issue on appeal: Did the District Court err in denying Bunkers' motion for the suppression as evidence of the fruits of the crime searched for and seized from her locker at the post office and her following made incriminating statement?

We conclude that the District Court did not so err and affirm.

THE FACTS

During the pertinent times subsequent to on or about January 1, 1974, Bunkers was a postal employee at the Colonial Post Office in Sacramento, California. Experienced postal inspectors were cognizant of a recurring disappearance of C.O.D. parcels at the post office and charted the time of C.O.D. package losses for a correlation thereof to the work schedules of the several employees at the post office. Through such charting, the inspectors determined that Bunkers' work schedule coincided or correlated with the dates and times of the C.O.D. package losses. The postal inspectors, based upon that information, suspected Bunkers and made the investigatory decision to conduct from the secreted observation galleries an undetected surveillance of Bunkers during her working hours. The postal inspectors saw her take a parcel from her assigned work area to the women's locker room and within one minute return from the locker room without the parcel.

***1219** Thereupon the postal inspectors requested the post office manager to request the office's female supervisor to search the locker and she observed several post office packages therein. During the day, the locker was searched for a second time by the manager of the post office who also observed the postal packages and for a third time by the manager and one of the postal inspectors following Bunkers' leaving for the night. At this last search, two locks were placed on the locker door and the manager and the postal inspector each retained the key to one lock. The following morning Bunkers was met by the postal inspectors and the locker was opened in her presence. Nine items of postal matter so found were seized from the locker. Bunkers subsequently signed the incriminating statement.

The locker in question was government property within the post office building and was furnished Bunkers as an incident of her employment " . . . to be used for (her) convenience and . . . subject to search by supervisors and postal inspectors." Part 643 of the Postal Manual.

The regulatory leave for governmental search of the employees' lockers is emphasized by the alleviation or protection from indiscriminate governmental searches by Article 37, Section 5, of the Union Agreement with the postal service carriers which provides that:

"Except in matters where there is reasonable cause to suspect criminal activity, a steward or an employee shall be given the opportunity to be present in any inspection of employees' lockers." (Italics supplied.)

Bunkers had been supplied with a copy of this agreement at the commencement of her employment and the evidence is undisputed on these two factors:

(a) Bunkers had no authority or permission to take parcels or packages out of her work area of the post office, and no postal employee was permitted or held authority to take mailing matter entrusted to him to the locker areas; and

(b) Bunkers was fully advised of the regulatory term and conditions of her use of the locker and the government's continuing leave to search it.

BUNKERS' CONTENTION

Bunkers contends that the search of her locker without a search warrant violated her Fourth Amendment immunities. We disagree and conclude the contention to be untenable.

521 F.2d 1217
(Cite as: 521 F.2d 1217)

DISCUSSION

The Supreme Court's decision in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), makes it clear that the claim of:

"(T)he protection of the (Fourth) Amendment (against unreasonable searches and seizures) depends not upon a property right in the invaded (locker) but upon whether the (locker) was (an area) in which there was a reasonable expectation of freedom from governmental intrusion. See 389 U.S., at 352, 88 S.Ct., at 511. The crucial issue, therefore, is whether, in light of all the circumstances, (Bunkers' locker) was such a place." Mancusi v. DeForte, 392 U.S. 364, 368, 88 S.Ct. 2120, 2124, 20 L.Ed.2d 1154 (1968).

United States v. Hitchcock, 467 F.2d 1107, 1108 (9th Cir. 1972), defines the Mancusi statement of "a reasonable expectation of freedom from governmental intrusion" thus:

"The protection of the Fourth Amendment no longer depends upon 'constitutionally protected' places. Instead, we must consider 'first that a person have exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as " reasonable." ' "

The public interest in the protection of the safety of the mail and the need for the prevention and discovery of theft and desecration of the mails are of great governmental postal service urgency. ***1220** On the other side, Bunkers' private interest in the locker is at most a very restricted and regulated employment related use thereof.

The active role and mission of the postal authorities in protecting the security and safety of the mails from theft and desecration and the detection of postal crimes is famous, if not notorious, through the open public news media exploitation thereof. The postal inspectors' regular use of hidden-from-view catwalks and galleries in postal service buildings for the unobserved surveillance of postal employees at work is of common knowledge. In short, and we paraphrase Hitchcock at 1108, in postal service buildings official surveillance has traditionally been the order of the day.

Manifestly Bunkers "exhibited an actual (subjective) expectation of privacy" by placing the C.O.D. parcels in the locker. However, we are satisfied that it would be incredulous for any postal employee to hold a reasonable expectation of privacy from the here involved postal inspectors' search of his work connected locker for the fruits of suspected criminal activity. We decline to believe that society is prepared to recognize Bunkers' use of the government supplied employment connected locker to hold in privacy the C.O.D. parcels as "reasonable." [FN1]

FN1. We are dealing here only with the seizure of the fruits of a postal crime connected with Bunkers' performance of her employment at the post office. We express no view or opinion upon the reasonableness of a search of a postal employee's employment connected locker for the fruits of a crime not work connected.

[1] Bunkers obliquely contends that the postal inspectors' observation of her with-parcel-entry-to and quick-without-parcel-exit-from the locker room area was sufficient to raise probable belief and cause to seek the issuance of a search warrant, without which the search of her locker was unreasonable. We disagree. The inspectors held the continuing regulatory leave and unrestricted right to inspect and search the locker at any time "where there is reasonable cause to suspect criminal activity." The observation of the work-area-to-locker-room-with package-trip of Bunkers at the very least gave the experienced postal inspectors a well-founded suspicion that criminal activity was afoot. Each of the three searches pursuant to that reasonably grounded suspicion of criminal activity was lawful and armed the inspectors with ample probable cause to arrest Bunkers for the commission of a crime in their presence. The securing of the situation by the two locks on the locker was a freezing of the status quo of the locker and its contents after Bunkers had left for the evening and until her lawful arrest on the following morning. The seizure of the stolen postal parcels from the locker in the presence of Bunkers was a lawful incident of her arrest.

Accordingly the warrantless search for and the ultimate seizure of the postal packages from Bunkers' locker was not unreasonable and unlawful. United States v. Donato, 269 F.Supp. 921 at 923-24 (E.D.Pa.), Aff'd, 379 F.2d 288 (3d Cir. 1967).[FN2]

Bunkers' reliance upon the rationale of United States v. Blok, 88 U.S.App.D.C. 326, 188 F.2d 1019 (1951), is misplaced. The existence of Part 643 of the Postal Manual distinguishes this case from Blok. See Donato at 924 n. 4.

> FN2. Donato is pre-Katz ; nevertheless the force of its rationale of regulatory leave on the part of postal authorities to search the mint employee's work connected locker is not restricted nor eroded by the reasonable expectancy of privacy test under Katz. In fact, we believe the thrust of the Donato rationale to be enhanced by Katz. See United States v. Magana, 512 F.2d 1169 (9th Cir. 1975), for a lack of reasonable expectancy of privacy in a residential driveway.
>
> The government relies on the work related element of the crime rationale of United States v. Collins, 349 F.2d 863 (2d Cir. 1965), Cert. denied, 383 U.S. 960, 86 S.Ct. 1228, 16 L.Ed.2d 303 (1966). Collins is also pre-Katz. We believe the search of the closed locker area involved in this case is distinguishable from the open space area involved in Collins.

***1221** [2] Furthermore, we believe that Bunkers' voluntary entrance into postal service employment and her acceptance and use of the locker subject to the regulatory leave of inspection and search and the labor union's contractual rights of search upon reasonable suspicion of criminal activity amount to an effective relinquishment of Bunkers' Fourth Amendment immunity in her work connected use of the locker. See Knopf, Inc. v. Colby, 509 F.2d 1362 at 1370 (4th Cir.), Review denied, —- U.S. —-, 95 S.Ct. 1999, 44 L.Ed.2d 482 (1975), for an effective relinquishment of First Amendment rights in work connected information.

The judgment of conviction and sentence is affirmed.

Affirmed.

C.A.Cal. 1975.
U.S. v. Bunkers
521 F.2d 1217

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557 F.2d 362
(Cite as: 557 F.2d 362)

United States Court of Appeals,
Third Circuit.
UNITED STATES of America, Appellee,
v.
Ronald Miller SPEIGHTS, Appellant.

No. 76-2000.
Submitted under Third Circuit Rule 12(6) May 6, 1977.
Decided June 7, 1977.

Defendant, a police officer, was convicted before the United States District Court for the District of New Jersey, Frederick B. Lacey, J., 413 F.Supp. 1221, of knowingly possessing an unregistered sawed-off shotgun, and he appealed. The Court of Appeals, Joseph S. Lord, III, District Judge, held that defendant's subjective expectation of privacy in his locker was reasonable and thus constitutionally justifiable, compelling suppression of the shotgun found therein.

Reversed and remanded for new trial.

West Headnotes

Criminal Law 110 392.15(8)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k392.1 Wrongfully Obtained Evidence
110k392.15 Search or Seizure Without Warrant in General
110k392.15(4) Particular Places or Things Searched or Seized Without Warrant
110k392.15(8) k. Place of business or other premises. Most Cited Cases
(Formerly 110k394.4(3))

Searches and Seizures 349 26

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k26 k. Expectation of privacy. Most Cited Cases
(Formerly 349k7(10))

Police officer's subjective expectation of privacy in locker assigned to him at police headquarters was reasonable and thus constitutionally justifiable, even though the lockers were owned by police department, were made available primarily for storage of police equipment, and could, absent an added personal lock, be opened with a master key, where use of private locks on a number of the lockers had, in effect, been tacitly approved by the department, where the lockers were frequently used for storage of personal items, and where there was no regulation or notice that the lockers might be searched and where no practice of unconsented locker searches without a warrant had been proven; accordingly, the unregistered sawed-off shotgun found in a warrantless search of the officer's locker was inadmissible evidence. 26 U.S.C.A. (I.R.C.1954) §§ 5861(d), 5871; U.S.C.A.Const. Amend. 4.

***362** Robert W. Gluck, Weiner & Sussan, East Brunswick, N. J., for appellant.

John J. Barry, Asst. U. S. Atty., Jonathan L. Goldstein, U. S. Atty., Newark, N. J., for appellee.

Submitted under Third Circuit Rule 12(6) May 6, 1977

Before SEITZ, Chief Judge, ROSENN, Circuit Judge and LORD, District Judge. [FN*]

FN* Joseph S. Lord, III, Chief Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT
JOSEPH S. LORD, III, District Judge.

Appellant, Ronald Miller Speights, was convicted by a jury of knowingly possessing an unregistered sawed-off shotgun in violation of 26 U.S.C. ss 5861(d) and 5871. On appeal, Speights alleges that the district court erred in denying his motion to suppress the

sawed-off shotgun which had been seized after a search of his locker at police headquarters in New Brunswick, New Jersey. We reverse.

At the time of his arrest, Speights was a police officer for five or six years. In the course of an investigation into a breaking and entering ring, the Middlesex County (New Jersey) Prosecutor received corroborated information that Speights had a sawed-off shotgun in his police locker. The Prosecutor went to the New Brunswick Police Chief with the information. At the Prosecutor's request, the Police Chief consented to having a sergeant in the Service Department open eight lockers, including Speights'.

Speights' locker was secured by both a police-issued lock and a personal lock. The sergeant opened the issued lock with a master key and he sawed off the personal lock ***363** with bolt cutters. Of the 113 police lockers, forty or fifty percent were secured by personal locks. In fact, seven of the eight lockers opened by the sergeant had personal locks which had to be sawed off. The eleven most recently purchased police lockers did not have issued locks and could only be secured with personal locks.

There was no regulation concerning the use of private locks on the lockers. No officer had been given permission to put a personal lock on the locker, nor had any officer been told that such locks were impermissible or been required to provide the department with a duplicate key (or combination). A master key to the issued locks was available to those police officers who might have misplaced their key and this was common knowledge. In fact, Speights admitted he was aware of the existence of the master key.

There was no regulation as to what officers might keep in their lockers. The lockers were often utilized for safekeeping personal belongings as well as police equipment. No officer was ever forbidden from keeping personal items in the locker.

The government admits that appellant felt the contents of his locker were personal and private. There was no regulation or notice to the ranks that the lockers might be searched. However, on one occasion three years earlier, a search was conducted of an officer's locker who another officer had claimed was in possession of the latter's weapon. In addition, in the past twelve years there were three or four routine inspections of the lockers to check on cleanliness.

Speights' locker was opened without a search warrant. The government concedes that the circumstances of the search do not fall within one of the well-defined warrant exceptions. Instead, the government challenges the applicability of the fourth amendment. Speights may claim the protection of the fourth amendment only if the area searched was one in which he held a reasonable expectation of freedom from governmental intrusion. United States v. White, 401 U.S. 745, 751-52, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971); Mancusi v. DeForte, 392 U.S. 364, 368, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968); Katz v. United States, 389 U.S. 347, 351, 353, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Speights concededly had a subjective expectation of privacy in the locker assigned to him at police headquarters, but the issue is whether that expectation was reasonable and thus constitutionally justifiable. See United States v. Kahan, 350 F.Supp. 784 (S.D.N.Y.1972), modified on other grounds, 479 F.2d 290 (2d Cir. 1973), rev'd., 415 U.S. 239, 94 S.Ct. 1179, 39 L.Ed.2d 297 (1974).

Appellant was permitted to keep personal belongings in his locker. There was no regulation or notice that the lockers might be searched. Moreover, when appellant placed a personal lock on his locker, he took affirmative action to secure his privacy. The police department acquiesced in appellant's attempt to secure his privacy by permitting the use of personal locks and by not requiring that duplicate keys or combinations be made available to the department. These facts more than furnish a prima facie showing of a reasonable expectation of privacy. The trial court gave insufficient weight to these factors and placed too much reliance on factors which we conclude do not negate a reasonable expectation of privacy.

The trial court stated:

"That the failure of the department to prohibit the use of personal locks may have indicated acquiescence in the attempt by the men to secure the privacy of their lockers is only one factor to be considered in this inquiry. This court places equal weight on the fact that the lockers are owned by the department; that they were made available primarily for the storage of police equipment; that a master key was available to superior officers; and that the men, including Speights, knew that most of the lockers could be opened through the

use of the master key. Furthermore, I do not lose sight of the fact that these lockers were in a police headquarters. The station house is a place where firearms and ammunition***364** may be kept, and contraband secured after it has been confiscated by policemen in the proper performance of their duties. Accordingly, conditions exist that make the necessity of a search far more likely than would be the case in a private dwelling, or even some other place of employment. See Shaffer v. Field, 339 F.Supp. 997, 1003 (C.D.Cal.1972), aff'd, 484 F.2d 1196 (9th Cir. 1973)." 413 F.Supp. 1221, 1223-24.

The district court's assertion that the conditions in a station house make the necessity of a search far more likely is not supported by any evidence. There was no testimony that confiscated evidence was kept in these lockers. In addition, the reality that there had never been a search for confiscated contraband or the like belies any inference that a search for such items was likely to be necessary.

The fact that the police officers, including Speights, knew that most of the lockers could be opened with a master key does not make an expectation of privacy unreasonable. The master key was loaned to officers who had misplaced their key and there is no evidence that the key was used for any other purpose. But in any event, appellant also had a private lock on his locker which had, in effect, been tacitly approved by the department. Therefore the master key had little bearing on the reasonableness of Speights' expectation of privacy.

While the lockers were primarily used for the storage of police equipment, they were also frequently used for the storage of personal items. There was no evidence that the storage of police equipment in the locker made it more likely that the department would have to open the locker. In fact, the lockers had never been opened for this purpose. And since the department permitted the storing of personal items in the locker, the primary usage does not negate the reasonableness of an expectation of privacy.

The district court recognized that the police department's property interest in the lockers does not determine the applicability of the fourth amendment. 413 F.Supp. at 1224. See, e.g., Katz v. United States, supra, 389 U.S. at 353, 88 S.Ct. 507, 19 L.Ed.2d 576. The court considered the fact that appellant did not own the locker as bearing on the reasonableness of appellant's belief that his permission would be obtained before a search of the locker was undertaken. However, we have found that appellant made a prima facie showing of a reasonable expectation of privacy. Only if the police department had a practice of opening lockers with private locks without the consent of the user would appellant's privacy expectation be unreasonable.

The evidence alluded to one search for a weapon three years earlier and three or four routine inspections for cleanliness which occurred in the past twelve years. As to the weapon search, the record does not reveal whether the locker was opened with a master key, whether the officer had a private lock, whether the officer had consented to the search or whether a warrant had been issued. As to the locker inspections, the record does not reveal whether the lockers were opened with a master key, whether any notice was provided to the officers or whether there had been any such inspections in appellant's five or six years on the force. In short, there is insufficient evidence to conclude that the police department practice negated Speights' otherwise reasonable expectation of privacy.

The few analogous reported cases support our view that the evidence in this case is insufficient to find that there is no constitutionally justifiable expectation of privacy. In each of the cases, the government-employer took actions which were entirely inconsistent with a reasonable expectation of privacy. In United States v. Donato, D.C., 269 F.Supp. 921, aff'd, 379 F.2d 288 (3d Cir. 1967), the warrantless search of a United States Mint employee's locker was upheld where there was a government regulation providing that Mint lockers were not to be considered private lockers; all employee lockers were subject to inspection and were regularly inspected by Mint security guards for sanitation purposes; and Mint security guards had a master key which opened all the employee lockers. Id. at 923.

***365** Similarly, in Shaffer v. Field, 339 F.Supp. 997 (C.D.Cal.1972), aff'd, 484 F.2d 1196 (9th Cir. 1973), the warrantless search of a deputy sheriff's locker was upheld where the locks given the deputies had both keys and combinations but the commander kept a master key and the combination to all locks; the lockers and locks could be changed at will; and on at least three occasions in the past, deputies' lockers had

been searched by commanders without the deputies' permission. Id. at 1003.

In United States v. Bunkers, 521 F.2d 1217 (9th Cir.), cert. denied, 423 U.S. 989, 96 S.Ct. 400, 46 L.Ed.2d 307 (1975), the warrantless search for stolen C.O.D. parcels of a postal employee's locker was upheld because of a regulation allowing for such searches where there is reasonable cause to suspect criminal activity; and because the defendant had been fully advised of the regulation, conditions placed upon her use of the locker and the government's right to search it. Id. at 1219-20.

Donato, Shaffer and Bunkers all relied on specific regulations and practices in finding that an expectation of privacy was not reasonable. In this case, there is no regulation and no police practice has been shown which would alert an officer to expect unconsented locker searches. Appellant met his burden of showing a constitutionally justified expectation of privacy in his locker and the government failed to rebut appellant's evidence. Therefore, the district court erred in not granting appellant's motion to suppress the sawed-off shotgun.

The judgment of the district court will be reversed and the case remanded for a new trial.

C.A.N.J. 1977.
U.S. v. Speights
557 F.2d 362

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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

RECONSIDERATION OF PRIOR STATEMENT OF DECISION ON:

Government Code Sections 3300 through 3310

As Added and Amended by Statutes 1976, Chapter 465;Statutes 1978, Chapters 775, 1173, 1174, and 1178; Statutes1979, Chapter 405; Statutes 1980, Chapter 1367; Statutes 1982, Chapter 994; Statutes 1983, Chapter 964; Statutes 1989, Chapter 1165; and Statutes 1990, Chapter 675 (CSM 4499)

Directed by Government Code Section 3313, Statutes 2005, chapter 72, section 6 (Assem. Bill (AB) No. 138), Effective July 19, 2005.

Case No.: 05-RL-4499-01

Peace Officer Procedural Bill of Rights

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7

(Adopted on April 26, 2006)

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

Paula Higashi
PAULA HIGASHI, Executive Director

May 1, 2006
Date

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

RECONSIDERATION OF PRIOR STATEMENT OF DECISION ON: Government Code Sections 3300 through 3310 As Added and Amended by Statutes 1976, Chapter 465;Statutes 1978, Chapters 775, 1173, 1174, and 1178; Statutes1979, Chapter 405; Statutes 1980, Chapter 1367; Statutes 1982, Chapter 994; Statutes 1983, Chapter 964; Statutes 1989, Chapter 1165; and Statutes 1990, Chapter 675 (CSM 4499) Directed by Government Code Section 3313, Statutes 2005, chapter 72, section 6 (Assem. Bill (AB) No. 138), Effective July 19, 2005.	**Case No.: 05-RL-4499-01** ***Peace Officer Procedural Bill of Rights*** STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (Adopted on April 26, 2006)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on April 26, 2006. Pam Stone, Dee Contreras, and Ed Takach appeared for the City of Sacramento. Lt. Dave McGill appeared for the Los Angeles Police Department. Susan Geanacou appeared for the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 5 to 1.

Summary of Findings

Statutes 2005, chapter 72, section 6 (AB 138) added section 3313 to the Government Code to direct the Commission to "review" the Statement of Decision, adopted in 1999, on the *Peace Officer Procedural Bill of Rights* test claim (commonly abbreviated as "POBOR") to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859 and other applicable court decisions.

In 1999, the Commission approved the test claim and adopted the original Statement of Decision. The Commission found that certain procedural requirements under POBOR were rights already provided to public employees under the due process clause of the

United States and California Constitutions. Thus, the Commission denied the procedural requirements of POBOR that were already required by law on the ground that they did not impose a new program or higher level of service, or impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c). Government Code section 17556, subdivision (c), generally provides that the Commission shall not find costs mandated by the state for test claim statutes that implement a federal law, unless the test claim statute mandates costs that exceed the federal mandate. The Commission approved the activities required by POBOR that exceeded the requirements of existing state and federal law.

On July 27, 2000, the Commission adopted parameters and guidelines that authorized reimbursement, beginning July 1, 1994, to counties, cities, a city and county, school districts, and special districts that employ peace officers for the ongoing activities summarized below:

- Developing or updating policies and procedures.
- Training for human resources, law enforcement, and legal counsel.
- Updating the status of cases.
- Providing the opportunity for an administrative appeal for permanent, at-will, and probationary employees that were subject to certain disciplinary actions that were not covered by the due process clause of state and federal law.
- When a peace officer is under investigation, or becomes a witness to an incident under investigation, and is subjected to an interrogation by the employer that could lead to certain disciplinary actions, the following costs and activities are eligible for reimbursement: compensation to the peace officer for interrogations occurring during off-duty time; providing prior notice to the peace officer regarding the nature of the interrogation and identification of investigating officers; tape recording the interrogation; providing the peace officer employee with access to the tape prior to any further interrogation at a subsequent time or if any further specified proceedings are contemplated; and producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of complaints of reports or complaints made by investigators.
- Performing certain activities, specified by the type of local agency or school district, upon the receipt of an adverse comment against a peace officer employee.

On review of this claim pursuant to Government Code section 3313, the Commission finds that the *San Diego Unified School Dist.* case supports the Commission's 1999 Statement of Decision, which found that the POBOR legislation constitutes a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for counties, cities, school districts, and special districts identified in Government Code section 3301 that employ peace officers.

The Commission further finds that the *San Diego Unified School Dist.* case supports the Commission's 1999 Statement of Decision that the test claim legislation constitutes a partial reimbursable state-mandated program within the meaning of article XIII B,

section 6 of the California Constitution and Government Code section 17514 for all activities previously approved by the Commission except the following:

- The activity of providing the opportunity for an administrative appeal to probationary and at-will peace officers (except when the chief of police is removed) pursuant to Government Code section 3304 is no longer a reimbursable state-mandated activity because the Legislature amended Government Code section 3304 in 1998. The amendment limited the right to an administrative appeal to only those peace officers "who successfully completed the probationary period that may be required" by the employing agency and to situations where the chief of police is removed. (Stats. 1998, ch. 786, § 1.)
- The activities of obtaining the signature of the peace officer on the adverse comment or noting the officer's refusal to sign the adverse comment, pursuant to Government Code sections 3305 and 3306, when the adverse comment results in a punitive action protected by the due process clause[1] does not constitute a new program or higher level of service and does not impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c).

BACKGROUND

Statutes 2005, chapter 72, section 6 (AB 138) added section 3313 to the Government Code to direct the Commission to "review" the Statement of Decision, adopted in 1999, on the *Peace Officer Procedural Bill of Rights* test claim. Government Code section 3313 states the following:

> In the 2005-06 fiscal year, the Commission on State Mandates shall review its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim and make any modifications necessary to this decision to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal.4th 859 and other applicable court decisions. If the Commission on State Mandates revises its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim, the revised decision shall apply to local government Peace Office Procedural Bill of Rights activities occurring after the date the revised decision is adopted.

Commission's Decision on *Peace Officer Procedural Bill of Rights* (CSM 4499)

The Legislature enacted the Peace Officers Procedural Bill of Rights Act (commonly abbreviated as "POBOR"), by adding Government Code sections 3300 through 3310, in 1976. POBOR provides a series of rights and procedural safeguards to peace officers employed by local agencies and school districts that are subject to investigation or

[1] Due process attaches when a permanent employee is dismissed, demoted, suspended, receives a reduction in salary, or receives a written reprimand. Due process also attaches when the charges supporting a dismissal of a probationary or at-will employee constitute moral turpitude that harms the employee's reputation and ability to find future employment and, thus, a name-clearing hearing is required.

discipline. Generally, POBOR prescribes certain protections that must be afforded officers during interrogations that could lead to punitive action against them; gives officers the right to review and respond in writing to adverse comments entered in their personnel files; and gives officers the right to an administrative appeal when any punitive action is taken against them, or they are denied promotion on grounds other than merit.[2]

Legislative intent for POBOR 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.

POBOR 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.[3]

In 1995, the City of Sacramento filed a test claim alleging that POBOR, as it existed from 1976 until 1990, constituted a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.[4] In 1999, the Commission approved the test claim and adopted a Statement of Decision.[5] The Commission found that certain procedural requirements under POBOR were rights already provided to public employees under the due process clause of the United States and California Constitutions. Thus, the Commission denied the procedural requirements of POBOR that were already required by law on the ground that they did not impose a new program or

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[2] See California Supreme Court's summary of the legislation in *Baggett v. Gates* (1982) 32 Cal.3d 128, 135.

[3] 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."

[4] The POBOR Act has been subsequently amended by the Legislature. (See Stats. 1994, ch. 1259; Stats. 1997, ch. 148; Stats. 1998, ch. 263; Stats. 1998, ch. 786; Stats. 1999, ch. 338; Stats. 2000, ch. 209; Stats. 2002, ch. 1156; Stats. 2003, ch. 876; Stats. 2004, ch. 405; and Stats. 2005, ch. 22.) These subsequent amendments are outside the scope of the Commission's decision in POBOR (CSM 4499), and therefore are *not* analyzed to determine whether they impose reimbursable state-mandated activities within the meaning of article XIII B, section 6.

[5] Administrative Record, page 859.

higher level of service, or impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c). Government Code section 17556, subdivision (c), generally provides that the Commission shall not find costs mandated by the state for test claim statutes that implement a federal law, unless the test claim statute mandates costs that exceed the federal mandate. The Commission approved the activities required by POBOR that exceeded the requirements of existing state and federal law.

On July 27, 2000, the Commission adopted parameters and guidelines that authorized reimbursement, beginning July 1, 1994, to counties, cities, a city and county, school districts, and special districts that employ peace officers for the ongoing activities summarized below:

- Developing or updating policies and procedures.
- Training for human resources, law enforcement, and legal counsel.
- Updating the status of cases.
- Providing the opportunity for an administrative appeal for permanent, at-will, and probationary employees that were subject to certain disciplinary actions that were not covered by the due process clause of state and federal law.
- When a peace officer is under investigation, or becomes a witness to an incident under investigation, and is subjected to an interrogation by the employer that could lead to certain disciplinary actions, the following costs and activities are eligible for reimbursement: compensation to the peace officer for interrogations occurring during off-duty time; providing prior notice to the peace officer regarding the nature of the interrogation and identification of investigating officers; tape recording the interrogation; providing the peace officer employee with access to the tape prior to any further interrogation at a subsequent time or if any further specified proceedings are contemplated; and producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of complaints of reports or complaints made by investigators.
- Performing certain activities, specified by the type of local agency or school district, upon the receipt of an adverse comment against a peace officer employee.[6]

On March 29, 2001, the Commission adopted a statewide cost estimate covering fiscal years 1994-1995 through 2001-2002 in the amount of $152,506,000.[7]

Audit by the Bureau of State Audits

The Legislative Analyst's Office (LAO), in its Analysis of the 2002-2003 Budget Bill, reviewed a sample of POBOR reimbursement claims and found that the annual state costs associated with the program was likely to be two to three times higher than the amount projected in the statewide cost estimate and significantly higher than what the Legislature initially expected. LAO projected costs in the range of $50 to $75 million annually.

[6] Administrative Record, page 1273.

[7] Administrative Record, page 1309.

LAO also found a wide variation in the costs claimed by local governments. Thus, LAO recommended that the Legislature refer the POBOR program to the Joint Legislative Audit Committee for review, possible state audit, and possible revisions to the parameters and guidelines.

In March 2003, the Joint Legislative Audit Committee authorized the Bureau of State Audits to conduct an audit of the process used by the Commission to develop statewide cost estimates and to establish parameters and guidelines for the claims related to POBOR.

On October 15, 2003, the Bureau of State Audits issued its audit report, finding that reimbursement claims were significantly higher than anticipated and that some agencies claimed reimbursement for questionable activities.[8] While the Bureau of State Audits recommended the Commission make changes to the overall mandates process, it did not recommend the Commission make any changes to the parameters and guidelines for the POBOR program. The Commission implemented all of the Bureau's recommendations.

On July 19, 2005, the Legislature enacted Government Code section 3313 (Stats. 2005, ch. 72, § 6 (AB 138)) and directed the Commission to "review" the Statement of Decision in POBOR.

Comments Filed Before the Issuance of the Draft Staff Analysis by the City and County of Los Angeles

On October 19, 2005, Commission staff requested comments from interested parties, affected state agencies, and interested persons on the Legislature's directive to "review" the POBOR program. Comments were received from the City of Los Angeles and the County of Los Angeles. The City and County both contend that the Commission properly found that POBOR constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. The County further argues that, under the California Supreme Court decision in *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859, reimbursement must be expanded to include all activities required under the test claim statutes including those procedures required by the federal due process clause. The County of Los Angeles also proposes that the Commission adopt a reasonable reimbursement methodology in the parameters and guidelines to reimburse these claims.

Comments Filed on the Draft Staff Analysis

On February 24, 2006, Commission staff issued the draft staff analysis and requested comments on the draft. The Commission received responses from the following parties:

City of Sacramento

The City of Sacramento argues the following:

- Prior law does not require due process protections for employees receiving short-term suspensions, reclassifications, or reprimands. Therefore, the administrative appeal required by the test claim legislation constitutes a new program or higher

[8] Administrative Record, page 1407 et seq.

level of service when an officer receives a short-term suspension, reclassification, or reprimand.

- Not every termination of a police chief warrants a liberty interest hearing required under prior law. The decision of the Commission should distinguish between those situations where there is a valid right to a liberty interest hearing under principles of due process, from the remaining situations where a police chief is terminated.
- The decision of the Commission should reflect "the onerous requirements imposed when interrogations are handled under POBOR."
- All activities required when an officer receives an adverse comment are reimbursable.

County of Alameda

The County of Alameda states that interrogation of a sworn officer under POBOR is difficult and requires preparation. The County alleges that ten hours of investigation must be conducted before an interview that might take thirty minutes.

County of Los Angeles

The County of Los Angeles contends that investigation is a reimbursable state-mandated activity. The County also argues that, pursuant to the *San Diego Unified School Dist.* case, all due process activities are reimbursable.

County of Orange

The County of Orange believes the staff analysis "does not fully comprehend or account for the [investigation] requirements of interrogation governed by Government Code section 3303." The County contends that the requirements of law enforcement agencies to investigate complaints have correspondingly increased under POBOR. When a complaint is received, the County argues that "every department is called upon to conduct very detailed investigations when allegations of serious misconduct occur. These investigations can vary in scope and depth from abuses of authority, the use of deadly force, excessive force where injuries may be significant, serious property damage, and criminal behavior." The County also contends that the investigation involves the subject officer and other officer witnesses.

Department of Finance

The Department of Finance contends that the *San Diego Unified School Dist.* case does not support the finding that the test claim legislation constitutes a reimbursable state-mandated program for school districts. Finance acknowledges the language in *San Diego Unified School Dist.* declining to extend the *City of Merced* decision to preclude reimbursement whenever any entity makes a discretionary decision that triggers mandated costs. Finance argues, however, that the Supreme Court's findings are not applicable to school districts since there is no requirement in law for school districts to form a police department. Finance states the following:

> . . . there is no requirement in law for these districts to form a police department and safe schools can be maintained without the need to hire

police officers as is evidenced by the many school districts that do not have police departments. The fact that the Legislature has declared it necessary for POBOR to apply to all public safety officers is not the same as requiring their hiring in the first place. School districts could, indeed, control or even avoid the extra cost of the POBOR legislation by not forming a police department at all, which is materially different from fire protection services that must be provided by fire protection districts. POBOR activities that might be claimed by school districts are, instead, analogous to non-reimbursable activities in the *Department of Finance v. Commission on State Mandates [Kern High School Dist.]* case that flowed from an underlying exercise of discretion and those in past Commission decisions that denied reimbursement to school districts for other peace officer activities.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[9] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[10] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[11] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[12] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[13]

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[9] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "(a) 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 that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[10] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

[11] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[12] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[13] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[14] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[15] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[16]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[17]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[18] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[19]

I. Commission Jurisdiction and Period of Reimbursement for Decision on Reconsideration

It is a well-settled issue of law that administrative agencies, such as the Commission, are entities of limited jurisdiction. Administrative agencies have only the powers that have been conferred on them, expressly or by implication, by statute or constitution. The Commission's jurisdiction in this case is based solely on Government Code section 3313. Absent Government Code section 3313, the Commission would have no jurisdiction to review and reconsider its decision on POBOR since the decision was adopted and issued well over 30 days ago.[20]

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[14] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[15] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[16] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[17] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[18] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[19] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[20] Government Code section 17559.

Thus, the Commission must act within the jurisdiction granted by Government Code section 3313, and may not substitute its judgment regarding the scope of its jurisdiction on reconsideration for that of the Legislature.[21] Since an action by the Commission is void if its action is in excess of the powers conferred by statute, the Commission must narrowly construe the provisions of Government Code section 3313.

Government Code section 3313 provides:

> In the 2005-06 fiscal year, the Commission on State Mandates shall review its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim and make any modifications necessary to this decision *to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal.4th 859 and other applicable court decisions.* If the Commission on State Mandates revises its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim, the revised decision shall apply to local government Peace Office Procedural Bill of Rights activities occurring after the date the revised decision is adopted. (Emphasis added.)

The Commission's jurisdiction on review is limited by Government Code section 3313, to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in *San Diego Unified School Dist.* ... and other applicable court decisions."

In addition, Government Code section 3313 states that "the revised decision shall apply to local government Peace Officer Procedural Bill of Rights activities *occurring after the date the revised decision is adopted.*" Thus, the Commission finds that the decision adopted by the Commission on this reconsideration or "review" of POBOR applies to costs incurred and claimed for the 2006-2007 fiscal year.

II. Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

In 1999, the Commission found that the test claim legislation mandates law enforcement agencies to take specified procedural steps when investigating or disciplining a peace officer employee.[22] The Commission found that Government Code section 3304 mandates, under specified circumstances, that "no punitive action ['any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment'], 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 Commission also found that the following activities are mandated by Government Code section 3303 when the employer wants to interrogate an officer:

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[21] *Cal. State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 346-347.

[22] Original Statement of Decision (AR, p. 862).

- When required by the seriousness of the investigation, compensating the peace officer for interrogations occurring during off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)
- Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)
- Providing the peace officer employee with access to a tape recording of his or her interrogation prior to any further interrogation at a subsequent time, as specified. (Gov. Code, § 3303, subd. (g).)
- Under specified circumstances, producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of reports or complaints made by investigators or other persons when requested by the officer. (Gov. Code, § 3303, subd. (g).)

Finally, Government Code sections 3305 and 3306 provide that no peace officer shall have any adverse comment entered into the officer's personnel file without having first read and signed the adverse comment. 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 into the personnel file. The Commission found that Government Code sections 3305 and 3306 impose the following requirements on employers before an adverse comment is placed in an officer's personnel file:

- To provide notice of the adverse comment to the officer.
- To provide an opportunity to review and sign the adverse comment.
- To provide an opportunity to respond to the adverse comment within 30 days.
- To note on the document that the peace officer refused to sign the adverse comment and to obtain the peace officer's signature or initials under such circumstances.

POBOR, by the terms set forth in Government Code section 3301, expressly applies to counties, cities, school districts, and special districts and the Commission approved the test claim for these local entities. Government Code section 3301 states the following: "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 legislation, however, does not apply to reserve or recruit officers,[23] coroners, or railroad police officers commissioned by the Governor.

Government Code section 3313 requires the Commission to review these findings to clarify whether the subject legislation imposes a mandate consistent with the California Supreme Court Decision in *San Diego Unified School Dist.* and other applicable court decisions.

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[23] *Burden v. Snowden* (1992) 2 Cal.4th 556, 569.

Generally, in order for test claim legislation to impose a reimbursable state-mandated program, the statutory language must mandate an activity or task on local governmental entities. If the statutory language does not impose a mandate, then article XIII B, section 6 of the California Constitution is not triggered and reimbursement is not required.

In the present case, although the procedural rights and protections afforded a peace officer under POBOR are expressly required by statute, the required activities are not triggered until the employing agency makes certain local decisions. For example, in the case of a city or county, agencies that are required by the Constitution to employ peace officers,[24] the POBOR activities are not triggered until the city or county decides to interrogate the officer, take punitive action against the officer, or place an adverse comment in the officer's personnel file. These initial decisions are not expressly mandated by state law, but are governed by local policy, ordinance, city charter, or memorandum of understanding.[25]

In the case of a school district or special district, the POBOR requirements are not triggered until the school district or special district (1) decides to exercise the statutory authority to employ peace officers, and (2) decides to interrogate the officer, take punitive action against the officer, or place an adverse comment in the officer's personnel file.

After the Commission issued its decision in this case, two California Supreme Court decisions were decided that address the "mandate" issue; *Kern High School Dist.* and *San Diego Unified School Dist.*[26] Thus, based on the court's ruling in these cases, the issue is whether the test claim legislation constitutes a state-mandated program within the meaning of article XIII B, section 6 in light of the local decisions that trigger the POBOR requirements.

As described below, the Legislature expressly declared its intent that the POBOR legislation is a matter of statewide concern and was designed to assure that effective police protection services are provided to all people of the state. The California Supreme Court found that POBOR protects the health, safety, and welfare of the citizens. Thus,

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[24] Article XI of the California Constitution provides for the formation of cities and counties. Section 1, Counties, states that the Legislature shall provide for an elected county sheriff. Section 5, City charter provision, specifies that city charters are to provide for the "government of the city police force."

[25] See *Baggett v. Gates* (1982) 32 Cal.3d 128, 137-140, where the California Supreme Court determined that POBOR *does not* (1) interfere with the setting of peace officers' compensation, (2) regulate qualifications for employment, (3) regulate the manner, method, times, or terms for which a peace officer shall be elected or appointed, nor does it (4) affect the tenure of office or purpose to regulate or specify the causes for which a peace officer can be removed. These are local decisions. But the court found that POBOR impinges on the city's implied power to determine the *manner* in which an employee can be disciplined.

[26] *Kern High School Dist., supra,* 30 Cal.4th 727; *San Diego Unified School Dist., supra,* 33 Cal.4th 859.

based on the facts of this case, the Commission finds that the Supreme Court's decision in *San Diego Unified School Dist.* supports the Commission's original finding that the test claim legislation constitutes a state-mandated program for cities, counties, school districts, and special districts as described below.

A. POBOR constitutes a state-mandated program even though a local decision is first made to interrogate the officer, take punitive action against the officer, or place an adverse comment in the officer's personnel file.

The procedural rights and protections afforded a peace officer under POBOR are required by statute. The rights are not triggered, however, until the employing agency decides to interrogate an officer, take punitive action against the officer, or place an adverse comment in an officer's personnel file. These initial decisions are not mandated by the state, but are governed by local policy, ordinance, city charter, or a memorandum of understanding.

Nevertheless, based on findings made by the California Supreme Court regarding the POBOR legislation and in *San Diego Unified School Dist.*, the Commission finds that the test claim legislation constitutes a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

After the Commission issued its Statement of Decision in this case, the California Supreme Court decided the *Kern High School Dist.* case and considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution.[27] In *Kern High School Dist.*, school districts requested reimbursement for notice and agenda costs for meetings of their school site councils and advisory bodies. These bodies were established as a condition of various education-related programs that were funded by the state and federal government.

When analyzing the term "state mandate," the court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[28] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[29]

The court also reviewed and affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, determining that, when analyzing state-mandate claims, the Commission must look at the underlying program to determine if the claimant's participation in the underlying program is voluntary or legally compelled.[30] The court stated the following:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a

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[27] *Kern High School Dist., supra*, 30 Cal.4th 727.

[28] *Id.* at page 737.

[29] *Ibid.*

[30] *Id.* at page 743.

> reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. (Emphasis in original.)[31]

Thus, the Supreme Court held as follows:

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.][32]

Based on the plain language of the statutes creating the underlying education programs in *Kern High School Dist.*, the court determined that school districts were not legally compelled to participate in eight of the nine underlying programs.[33]

The school districts in *Kern High School Dist.*, however, urged the court to define "state mandate" broadly to include situations where participation in the program is coerced as a result of severe penalties that would be imposed for noncompliance. The court previously applied such a broad construction to the definition of a federal mandate in the case of *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74, where the state's failure to comply with federal legislation that extended mandatory coverage under the state's unemployment insurance law would result in California businesses facing "a new and serious penalty – full, double unemployment taxation by both state and federal governments."[34] Although the court in *Kern High School Dist.* declined to apply the reasoning in *City of Sacramento* that a state mandate may be found in the absence of strict legal compulsion on the facts before it in *Kern*, after reflecting on the purpose of article XIII B, section 6 – to preclude the state from shifting financial responsibilities onto local agencies that have limited tax revenue– the court stated:

> In light of that purpose, we do not foreclose the possibility that a reimbursable state mandate under article XIII B, section 6, properly might be found in some circumstances in which a local entity is not legally compelled to participate in a program that requires it to expend additional funds.[35]

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[31] *Ibid.*

[32] *Id.* at page 731.

[33] *Id.* at pages 744-745.

[34] *City of Sacramento, supra*, 50 Cal.3d 51, 74.

[35] *Kern High School Dist., supra*, 30 Cal.4th 727, 752.

Thus, the court in *Kern* recognized that there could be a case, based on its facts, where reimbursement would be required under article XIII B, section 6 in circumstances where the local entity was not legally compelled to participate in a program.

One year later, the Supreme Court revisited the "mandate" issue in *San Diego Unified School Dist.*, a case that addressed a challenge to a Commission decision involving a school district's expulsion of a student. The school district acknowledged that under specified circumstances, the statutory scheme at issue in the case gave school districts discretion to expel a student. The district nevertheless argued that it was mandated to incur the costs associated with the due process hearing required by the test claim legislation when a student is expelled. The district argued that "although any particular expulsion recommendation may be discretionary, as a practical matter it is inevitable that some school expulsions will occur in the administration of any public school program" and, thus, the ruling in *City of Merced* should not apply.[36]

In *San Diego Unified School Dist.*, the Supreme Court did not overrule the *Kern* or *City of Merced* cases, but stated that "[u]pon reflection, we agree with the District and amici curiae that there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement under article XIII B, section 6 of the state Constitution and Government Code section 17514, whenever an entity makes an initial discretionary decision that in turn triggers mandated costs."[37] The court explained as follows:

> Indeed, it would appear that under a strict application of the language of *City of Merced*, public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, in *Carmel Valley* [citation omitted] an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. [Citation omitted.] the court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ – and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced* [citation omitted], such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence

[36] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 887.

[37] *Id.* at page 887.

> we are reluctant to endorse, in this case, an application of the rule of *City of Merced* that might lead to such result.[38]

Ultimately, however, the court did not resolve the issue regarding the application of the *City of Merced* case to the discretionary expulsions, and resolved the case on alternative grounds.[39]

In the present case, the purpose of POBOR, as stated in Government Code section 3301, is to assure that stable employment relations are continued throughout the state and to further assure that effective law enforcement services are provided to all people of the state. The Legislature declared POBOR a matter of statewide concern.

In 1982, the California Supreme Court addressed the POBOR legislation in *Baggett v. Gates*.[40] In *Baggett*, the City of Los Angeles received information that certain peace officer employees were engaging in misconduct during work hours. The city interrogated the officers and reassigned them to lower paying positions (a punitive action under POBOR). The employees requested an administrative appeal pursuant to the POBOR legislation and the city denied the request, arguing that charter cities cannot be constitutionally bound by POBOR. The court acknowledged that the home rule provision of the Constitution gives charter cities the power to make and enforce all ordinances and regulations, subject only to the restrictions and limitations provided in the city charter. Nevertheless, the court found that the City of Los Angeles was required by the POBOR legislation to provide the opportunity for an administrative appeal to the officers.[41] In reaching its conclusion, the court relied, in part, on the express language of legislative intent in Government Code section 3301 that the POBOR legislation is a "matter of statewide concern."[42]

The court in *Baggett* also concluded that the consequences of a breakdown in employment relations between peace officers and their employers would create a clear and present threat to the health, safety, and welfare of the citizens of the city, which would extend far beyond local boundaries.

> Finally, it can hardly be disputed that the maintenance of stable employment relations between police officers and their employers is a matter of statewide concern. The consequences of a breakdown in such relations are not confined to a city's borders. These employees provide an essential service. Its absence would create a clear and present threat not only to the health, safety, and welfare of the citizens of the city, but also to the hundreds, if not thousands, of nonresidents who daily visit there. Its effect would also be felt by the many nonresident owners of property and businesses located within the city's borders. Our society is no longer a

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[38] *Id.* at pages 887-888.

[39] *Id.* at page 888.

[40] *Baggett v. Gates* (1982) 32 Cal.3d 128.

[41] *Id.* at page 141.

[42] *Id.* at page 136.

> collection of insular local communities. Communities today are highly interdependent. The inevitable result is that labor unrest and strikes produce consequences which extend far beyond local boundaries.[43]

Thus, the court found that "the total effect of the POBOR legislation is not to deprive local governments of the right to manage and control their police departments but to secure basic rights and protections to a segment of public employees who were thought unable to secure them for themselves."[44]

In 1990, the Supreme Court revisited the POBOR legislation in *Pasadena Police Officers Assn. v. City of Pasadena (Pasadena)*.[45] The *Pasadena* case addressed the POBOR requirement in Government Code section 3303 to require the employer to provide an officer subject to an interrogation with any reports or complaints made by investigators. In the language quoted below, the court described the POBOR legislation and recognized that the public has a high expectation that peace officers are to be held above suspicion of violation of the laws they are sworn to enforce. Thus, in order to maintain the public's confidence, "a law enforcement agency *must* promptly, thoroughly, and fairly investigate allegations of officer misconduct ... [and] institute disciplinary proceedings." (Emphasis added.)

> Courts have long recognized that, while the off-duty conduct of employees is generally of no legal consequence to their employers, the public expects peace officers to be "above suspicion of violation of the very laws they are sworn ... to enforce." [Citations omitted.] Historically, peace officers have been held to a higher standard than other public employees, in part because they alone are the "guardians of peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them." [Citation omitted.] To maintain the public's confidence in its police force, a law enforcement agency must promptly, thoroughly, and fairly investigate allegations of officer misconduct; if warranted, it must institute disciplinary proceedings.[46]

Under a strict application of the *City of Merced* case, the requirements of the POBOR legislation would not constitute a state-mandated program within the meaning of article XIII B, section 6 "for the simple reason" that the local entity's ability to decide who to discipline and when "could control or perhaps even avoid the extra costs" of the POBOR legislation.[47] But a local entity does not decide who to investigate or discipline based on the costs incurred to the entity. The decision is made, as indicated by the Supreme Court, to maintain the public's confidence in its police force and to protect the health, safety,

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[43] *Id.* at page 139-140.

[44] *Id.* at page 140.

[45] *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564.

[46] *Id.* at page 571-572.

[47] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 887-888.

and welfare of its citizens. Thus, as indicated by the Supreme Court in *San Diego Unified School Dist.*, a finding that the POBOR legislation does not constitute a mandated program would conflict with past decisions like *Carmel Valley*, where the court found a mandated program for providing protective clothing and safety equipment to firefighters and made it clear that "[p]olice and fire protection are two of the most essential and basic functions of local government."[48] Moreover, the POBOR legislation implements a state policy to maintain stable employment relations between police officers and their employers to "assure that effective services are provided to all people of the state." POBOR, therefore, carries out the governmental function of providing a service to the public, and imposes unique requirements on local agencies to implement the state policy.[49] Thus, a finding that the test claim legislation does not impose a state-mandated program contravenes the purpose of article XIII B, section 6 "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill-equipped' to assume increased financial responsibilities" due to the tax and spend provisions of articles XIII A and XIII B.[50]

Accordingly, even though local decisions are first made to interrogate an officer, take punitive action against the officer, or to place an adverse comment in an officer's personnel file, the Commission finds, based on *San Diego Unified School Dist.* and the facts presented in this case, that POBOR constitutes a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

B. POBOR constitutes a state-mandated program for school districts and for special districts identified in Government Code section 3301 that employ peace officers.

Government Code section 3301, the statute that identifies the peace officers afforded the rights and protections granted in the POBOR legislation, expressly includes peace officers employed by school districts and community college districts pursuant to Penal Code section 830.32. Penal Code section 830.32 provides that members of a school district and community college district police department appointed pursuant to Education Code sections 39670 and 72330 are peace officers if the primary duty of the officer is the enforcement of law as prescribed by Education Code sections 39670 (renumbered section 38000) and 72330, and the officers have completed an approved course of training prescribed by the Commission on Peace Officer Standards and Training (POST) before exercising the powers of a peace officer.

POBOR also applies to special districts authorized by statute to maintain a police department, including police protection districts, harbor or port police, transit police, peace officers employed by the San Francisco Bay Area Rapid Transit District (BART),

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[48] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 887-888; *Carmel Valley Fire Protection Dist. v. State* (1987) 190 Cal.App.3d 521, 537.

[49] *San Diego Unified School, supra*, 33 Cal.4th at page 874.

[50] *Id.* at page 888, fn. 23.

peace officers employed by airport districts, peace officers employed by a housing authority, and peace officers employed by fire protection districts.[51]

While counties and cities are mandated by the California Constitution to employ peace officers,[52] school districts and special districts are not expressly required by the state to employ peace officers. School districts and special districts have statutory authority to employ peace officers.

Following the Supreme Court's decision in *Kern High School Dist.*, the Commission denied school district test claims addressing peace officer employees on the ground that school districts are not mandated by state law to have a police department and employ peace officers. In these decisions, the Commission acknowledged the provision in the Constitution (Cal. Const., art. 1, § 28, subd. (c)) that requires K-12 school districts to maintain safe schools. The Commission found, however, that there is no constitutional or statutory requirement to maintain safe schools through school security or a school district police department. Moreover, school districts have governmental immunity under Government Code section 845 and cannot be liable for civil damages for "failure to establish a police department or otherwise to provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service."[53] Comments on Government Code section 845 by the Law Revision Commission state that the immunity was enacted by the Legislature to prevent judges and juries from removing the ultimate decision-making authority regarding police protection from those (local governments) that are politically responsible for making the decision.[54]

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[51] Government Code section 3301; Penal Code section 830.1, subdivision (a) ["police officer of a district (including police officers of the San Diego Unified Port District Harbor Police) authorized by statute to maintain a police department"]; Penal Code section 830.31, subdivision (d) ["A housing authority patrol officer employed by the housing authority of a ... district ..."]; Penal Code section 830.33 ["(a) A member of the San Francisco Bay Area Rapid Transit District Police Department appointed pursuant to Section 28767.5 of the Public Utilities Code ... (b) Harbor or port police regularly employed and paid ... by a ... district ... (c) Transit police officers or peace officers of a ... district ... (d) Any person regularly employed as an airport law enforcement officer by a ... district ..."; and Penal Code section 830.37 ["(a) Members of an arson-investigating unit ... of a fire department or fire protection agency of a ... district ... if the primary duty of these peace officers is the detection and apprehension of persons who have violated any fire law or committed insurance fraud ...(b) Members ... regularly paid and employed in that capacity, of a fire department or fire protection agency of a ... district ... if the primary duty of these peace officers ... is the enforcement of law relating to fire prevention or fire suppression."

[52] See ante, footnote 21.

[53] See *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448.

[54] 4 California Law Revision Commission Reports 801 (1963).

Immunity under Government Code section 845 also applies to community college districts and special districts.[55]

Thus, based on the Supreme Court's holding in *Kern High School Dist.*, past decisions of the Commission have determined that local entities, such as school districts, are not entitled to reimbursement for activities required by the state when the activities are triggered by the discretionary local decision to employ peace officers.

This case presents different facts, however. Here, unlike the other cases, the Legislature expressly stated in Government Code section 3301 that POBOR is a matter of statewide concern and found that it was necessary to apply the legislation to all public safety officers, as defined. Government Code section 3301 states the following:

> 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 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.

Legislative declarations of policy are entitled to great weight by the courts "and it is not the duty or prerogative of the courts to interfere with such legislative finding unless it clearly appears to be erroneous and without reasonable foundation."[56]

Furthermore, in *San Diego Unified School Dist.*, the Supreme Court acknowledged the school district's argument that the due process hearing procedures were mandated when the district exercised its discretion and expelled a student, despite the *City of Merced* and *Kern* cases. The court stated the following:

> Indeed, the Court of Appeal below suggested that the present case is distinguishable from *City of Merced* [citation omitted], in light of article I, section 28, subdivision (c), of the state Constitution. That constitutional subdivision, part of Proposition 8 (known as the Victim's Bill of Rights initiative, adopted by the voters at the Primary Election in June 1982), states: "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure, and peaceful." The Court of Appeal below concluded: "In light of a school district's constitutional obligation to provide a safe educational environment ..., the incurring [due process] hearing costs ... cannot properly be viewed as a nonreimbursable 'downstream' consequence of a decision to seek to expel a student under

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[55] *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799; *Hernandez v. Southern California Rapid Transit Dist.* (1983) 142 Cal.App.3d 1063.

[56] *Paul v. Eggman* (1966) 244 Cal.App.2d 461, 471-472.

> Education Code section 48915's discretionary provision for damaging or stealing school or private property, receiving stolen property, engaging in sexual harassment or hate violence, or committing other specified acts of misconduct ... that warrant such expulsion."[57]

In response, the Supreme Court stated that "[u]pon reflection, we agree with the District and amici curiae that there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement under article XIII B, section 6 of the state Constitution and Government Code section 17514, whenever an entity makes an initial discretionary decision that in turn triggers mandated costs."[58] The court explained as follows:

> Indeed, it would appear that under a strict application of the language of *City of Merced*, public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, in *Carmel Valley* [citation omitted] an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. [Citation omitted.] The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ – and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced* [citation omitted], such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence we are reluctant to endorse, in this case, an application of the rule of *City of Merced* that might lead to such result.[59]

The Department of Finance contends that the *San Diego Unified School Dist.* case does not support the finding that the test claim legislation constitutes a reimbursable state-mandated program for school districts. Finance acknowledges the language in *San Diego Unified School Dist.* declining to extend the *City of Merced* decision to preclude reimbursement whenever any entity makes a discretionary decision that triggers mandated costs. Finance argues, however, that the Supreme Court's findings are not

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[57] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 887, footnote 22.

[58] *Id.* at page 887.

[59] *Id.* at pages 887-888.

applicable to school districts since there is no requirement in law for school districts to form a police department. Finance states the following:

> In the *Carmel Valley Fire Protection District* case ((1987) 190 Cal.App.3d 521), unlike the situation here, the fire districts did not have the option to form a fire department and hire firefighters. In fact, the *San Diego Unified School Dist.* case cited *Carmel Valley* to make it clear that "[p]olice and fire protection are two of the most essential and basic functions of local government." (*San Diego Unified School Dist., supra*, 33 Cal.4th 859, 887-888, *Carmel Valley Fire Protection Dist., supra*, 190 Cal.App.3d 521, 537). Such is not the case for school districts and community college districts.
>
> As stated above, there is no requirement in law for these districts to form a police department and safe schools can be maintained without the need to hire police officers as is evidenced by the many school districts that do not have police departments. The fact that the Legislature has declared it necessary for POBOR to apply to all public safety officers is not the same as requiring their hiring in the first place. School districts could, indeed, control or even avoid the extra cost of the POBOR legislation by not forming a police department at all, which is materially different from fire protection services that must be provided by fire protection districts. POBOR activities that might be claimed by school districts are, instead, analogous to non-reimbursable activities in the *Department of Finance v. Commission on State Mandates [Kern High School Dist.]* case that flowed from an underlying exercise of discretion and those in past Commission decisions that denied reimbursement to school districts for other peace officer activities.

Finance, in response to the draft staff analysis, makes no comments with respect to special districts that also have the authority, but are not required, to employ peace officers.[60] At the hearing, however, Finance argued that its comments apply equally to special districts.

The Commission disagrees with the Department of Finance. The fire protection districts in *Carmel Valley* were not mandated by the state to be formed, as asserted by Finance. Fire protection districts are established either by petition of the voters or by a resolution adopted by the legislative body of a county or city within the territory of the proposed district. Once a petition has been certified or a resolution adopted, the local agency

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[60] See, for example, Public Utilities Code section 28767.5, which authorizes BART to employ peace officers:

> The district may employ a suitable security force. The employees of the district that are designated by the general manager as security officers shall have the authority and powers conferred by Section 830.9 of the Penal Code upon peace officers. The district shall adhere to the standards for recruitment and training of peace officers established by the Commission on Peace Officer Standards and Training …

formation commission must approve the formation of the district "with or without amendment, wholly, partially, or conditionally." A local election is then held and the district is created if a majority of the votes are cast in favor of forming the district.[61] Furthermore, the implication that the phrase "local government" in the *Carmel Valley* case excludes school districts is wrong. "Local government" is specifically defined in article XIII B, section 8 of the Constitution to include school districts and special districts. The definitions in article XIII B, section 8 apply to the mandate reimbursement provisions of section 6. Article XIII B, section 8 states in relevant part the following:

> As used in this article and except as otherwise expressly provided herein:
>
> (d) "Local government" means any city, county, city and county, school district, special district, authority, or other political subdivision of or within the state.

Therefore, the arguments raised by the Department of Finance do not resolve the issue. The Supreme Court in *San Diego Unified School Dist.* did not resolve the issue either. Rather, the court stated the following:

> In any event, we have determined that we need not address in this case the problems posed by such an application of the rule articulated in *City of Merced,* because this aspect of the present case can be resolved on an alternative basis.[62]

Thus, the Commission has the difficult task of resolving the issue for purposes of this claim. For the reasons below, the Commission finds that the POBOR legislation constitutes a state-mandated program for school districts and the special districts identified in Government Code section 3301 that employ peace officers.

Under a strict application of the *City of Merced* case, the requirements of the POBOR legislation would not constitute a state-mandated program within the meaning of article XIII B, section 6 for school districts and the special districts that employ peace officers "for the simple reason" that the ability of the school district or special district to decide whether to employ peace officers "could control or perhaps even avoid the extra costs" of the POBOR legislation.[63] But here, the Legislature has declared that, as a matter of statewide concern, it is necessary for POBOR to apply to all public safety officers, as defined in the legislation. As previously indicated, the California Supreme Court concluded that the peace officers identified in Government Code section 3301 of the POBOR legislation provide an "essential service" to the public and that the consequences of a breakdown in employment relations between peace officers and their employers would create a clear and present threat to the health, safety, and welfare of the citizens of the state.[64]

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[61] Health and Safety Code sections 13815 et seq.

[62] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 888.

[63] *Ibid.*

[64] *Baggett, supra*, 32 Cal.3d 128, 139-140.

In addition, in 2001, the Supreme Court determined that school districts, apart from education, have an "obligation to protect pupils from other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern." The court further held that California fulfills its obligations under the safe schools provision of the Constitution (Cal. Const., art. I, § 28, subd. (c)) by permitting local school districts to establish a police or security department to enforce rules governing student conduct and discipline.[65] The arguments by the school districts regarding the safe schools provision of the Constitution caused the Supreme Court in *San Diego Unified School Dist.* to question the application of the *City of Merced* case.[66]

The Legislature has also recognized the essential services provided by special district peace officers in Government Code section 53060.7. The special districts identified in that statute (Bear Valley Community Services District, Broadmoor Police Protection District, Kensington Police Protection and Community Services District, Lake Shastina Community Services District, and Stallion Springs Community Services District) "wholly supplant the law enforcement functions of the county within the jurisdiction of that district."

Thus, as indicated by the Supreme Court in *San Diego Unified School Dist.*, a finding that the POBOR legislation does not constitute a state-mandated program for school districts and special districts identified in Government Code section 3301 would conflict with past decisions like *Carmel Valley*, where the court found a mandated program for providing protective clothing and safety equipment to firefighters and made it clear that "[p]olice and fire protection are two of the most essential and basic functions of local government."[67] The constitutional definition of "local government" for purposes of article XIII B, section 6 includes school districts and special districts. (Cal. Const., art. XIII B, § 8.)

Accordingly, the Commission finds that POBOR constitutes a state-mandated program for school districts that employ peace officers. The Commission further finds that POBOR constitutes a state-mandated program for the special districts identified in Government Code section 3301. These districts include police protection districts, harbor or port police, transit police, peace officers employed by airport districts, peace officers employed by a housing authority, and peace officers employed by fire protection districts.

III. Does the test claim legislation constitute a new program or higher level of service and impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514?

Government Code section 3313 requires the Commission to review its previous findings to clarify whether the test claim legislation constitutes a new program or higher level of service and imposes costs mandated by the state consistent with the California Supreme

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[65] *In re Randy G.* (2001) 26 Cal.4th 556, 562-563.

[66] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 887, fn. 22.

[67] *Id.* at pages 887-888; *Carmel Valley Fire Protection Dist. v. State* (1987) 190 Cal.App.3d 521, 537.

Court Decision in *San Diego Unified School Dist.* and other applicable court decisions. The test claim legislation will impose a new program or higher level of service, and costs mandated by the state when it compels a local entity to perform activities not previously required, and results in actual increased costs mandated by the state. [68] In addition, none of the exceptions to reimbursement found in Government Code section 17556 can apply. The activities found by the Commission to be mandated are analyzed below.

Administrative Appeal

Government Code section 3304, as added by the test claim legislation, 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 in Government Code section 3303 as follows:

> "For the purpose of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary,[69] written reprimand, or transfer for purposes of punishment."

The California Supreme Court determined that the phrase "for purposes of punishment" in the foregoing section relates only to a transfer and not to other personnel actions.[70] 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.[71]

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.[72] 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

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[68] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar Unified School Dist.*, *supra*, 44 Cal.3d 830, 835.

[69] 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.

[70] *White* v. *County of Sacramento* (1982) 31 Cal.3d 676.

[71] *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.

[72] *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.

test claim legislation based on the source of the report, its contents, and its potential impact on the career of the officer.[73]

Thus, under Government Code section 3304, as it existed when the Statement of Decision was adopted, the employer is required to provide the opportunity for an administrative appeal to permanent, at-will or probationary peace officers for any action leading to the following actions:

- Dismissal.
- Demotion.
- Suspension.
- Reduction in salary.
- Written reprimand.
- Transfer for purposes of punishment.
- Denial of promotion on grounds other than merit.
- Other actions against the employee that results in disadvantage, harm, loss or hardship and impacts the career opportunities of the employee.

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 discretion of each local entity.[74] The courts have determined, however, that the type of hearing required under Government Code section 3304 must comport with due process standards.[75, 76]

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[73] *Id* at p. 353-354.

[74] *Binkley* v. *City of Long Beach* (1993) 16 Cal.App.4th 1795, 1806.

[75] *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.

[76] 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.) A hearing before the Chief of Police was found to be appropriate within the meaning of Government Code section 3304 in a case involving a written reprimand since the Chief of Police was not in any way involved in the investigation and the employee and his attorney had an opportunity to present evidence and set forth arguments on the employee's behalf. (*Stanton, supra*, 226 Cal.App,3d 1438, 1443.)

Finally, the courts have been clear that the administrative hearing required by Government Code section 3304 does *not* mandate an investigatory process. "It is an adjudicative process by which the [peace officers] hope to restore their reputations" and where "the reexamination [of the employer's decision] must be conducted by someone who has not been involved in the initial determination."[77]

In 1999, the Commission concluded that under certain circumstances, the administrative appeal required by the POBOR legislation was already required to be provided by the due process clause of the United States and California Constitutions when an action by the employer affects an employee's property interest or liberty interest. A permanent employee with civil service protection, for example, has a property interest in the employment position if the employee is dismissed, demoted, suspended, receives a reduction in salary, or receives a written reprimand. Under these circumstances, the permanent employee is entitled to a due process hearing.[78]

In addition, the due process clause applies when the charges supporting a dismissal of a probationary or at-will employee harms the employee's reputation and ability to find future employment. [79] For example, an at-will employee, such as the chief of police, is entitled to a liberty interest hearing (or name-clearing hearing) under the state and federal constitutions when the dismissal is supported by charges of misconduct, mismanagement, and misjudgment – all of which "stigmatize [the employee's] reputation and impair his ability to take advantage of other employment opportunities in law enforcement administration."[80] In *Williams v. Department of Water and Power*, a case cited by the City of Sacramento, the court explained that the right to a liberty interest hearing arises in cases involving moral turpitude. There is no constitutional right to a liberty interest hearing when an at-will employee is removed for incompetence, inability to get along with others, or for political reasons due to a change of administration.

> The mere fact of discharge from public employment does not deprive one of a liberty interest hearing. [Citations omitted.] Appellant must show her dismissal was based on charges of misconduct which "stigmatize" her reputation or "seriously impair" her opportunity to earn a living. [Citations omitted.] ... "Nearly any reason assigned for dismissal is likely to be to some extent a negative reflection on an individual's ability, temperament, or character. [Citation omitted.] But not every dismissal assumes a constitutional magnitude." [Citation omitted.]
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> The leading case of *Board of Regents v. Roth* (1972) 408 U.S. 564, 574 [unofficial cite omitted] distinguishes between a stigma of moral turpitude, which infringes the liberty interest, and other charges such as incompetence or inability to get along with coworkers which does not. The Supreme Court recognized that where "a person's good name,

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[77] *Caloca v. County of San Diego* (2002) 102 Cal.App.4th 433, 443-444 and 447-448.

[78] See original Statement of Decision (AR, p. 864).

[79] See original Statement of Decision (AR, pp. 863-866, 870).

[80] *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1807.

> reputation, honor or integrity is at stake" his right to liberty under the Fourteenth Amendment is implicated and deserves constitutional protection. [Citation omitted.] "In the context of *Roth*-type cases, a charge which infringes one's liberty can be characterized as an accusation or label given the individual by his employer which belittles his worth and dignity as an individual and, as a consequence is likely to have severe repercussions of which primarily affect professional life, and which may well force the individual down one or more notches in the professional hierarchy." [Citation omitted.][81]

Thus, the Commission found that, when a hearing was required by the due process clause of the state and federal constitutions, the activity of providing the administrative appeal did not constitute new program or higher level of service, or impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c).

The Commission found that the administrative appeal constitutes a new program or higher level of service, and imposes costs mandated by the state, in those situations where the due process clause of the United States and California Constitutions did not apply. These include the following:

- 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.
- 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.

As noted by the Commission in the Statement of Decision and parameters and guidelines, the Legislature amended Government Code section 3304 in 1998 by limiting the right to an administrative appeal to only those peace officers "who [have] successfully completed the probationary period that may be required" by the employing agency and to situations where the chief of police is removed. (Stats. 1998, ch. 786, § 1.) Thus, as of January 1, 1999, providing the opportunity for an administrative appeal to probationary and at-will peace officers (except when the chief of police is removed) is no longer a reimbursable state-mandated activity.

Thus, the issue is whether the activity of providing the opportunity for an administrative appeal is reimbursable under current law when (1) permanent peace officer employees are subject to punitive actions, as defined in Government Code section 3303, or denials of promotion on grounds other than merit; and when (2) a chief of police is subject to removal.

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[81] *Williams v. Department of Water and Power* (1982) 130 Cal.App.3d 677, 684-685.

As indicated above, under prior law, permanent employees were already entitled to an administrative hearing pursuant to the due process clause of the United States and California Constitutions if they were subject to the following punitive actions: dismissal, demotion, suspension, reduction in salary, or a written reprimand. In addition, an at-will employee, such as the chief of police, was entitled to a due process liberty interest hearing under prior law if the charges supporting the dismissal constitute moral turpitude that harms the employee's reputation and ability to find future employment. The County of Los Angeles argues, however, that under the California Supreme Court decision in *San Diego Unified School District*, reimbursement must be expanded to include all activities required under the test claim statute, including those procedures previously required by the due process clause. A close reading of the *San Diego Unified School District* case, however, shows that it does not support the County's position.

The County relies on the Supreme Court's analysis on pages 879 (beginning under the header "2. Are the hearing costs state-mandated?") through page 882 of the *San Diego Unified School District* case. There, the court addressed two test claim statutes: Education Code section 48915, which *mandated* the school principal to immediately suspend and recommend the expulsion of a student carrying a firearm or committing another specified offense; and Education Code section 48918, which lays out the due process hearing requirements once the mandated recommendation is made to expel the student. The court recognized that the expulsion recommendation required by Education Code section 48915 was mandated "in that it establishes conditions under which the state, rather than local officials, has made the decision requiring a school district to incur the costs of an expulsion hearing.[82] The Commission and the state, relying on Government Code section 17556, subdivision (c), argued, however, that the district's costs are reimbursable only if, and to the extent that, hearing procedures set forth in Education Code section 48918 exceed the requirements of federal due process.[83] The court disagreed. The court based its conclusion on the fact that the expulsion decision mandated by Education Code 48915, which triggers the district's costs incurred to comply with due process hearing procedures, did not implement a federal law. Thus, the court concluded that all costs incurred that are triggered by the state-mandated expulsion, including those that satisfy the due process clause, are fully reimbursable. The court's holding is as follows:

> [W]e cannot characterize any of the hearing costs incurred by the District, triggered by the mandatory provision of Education Code section 48915, as constituting a federal mandate (and hence being nonreimbursable). We conclude that under the statutes existing at the time of the test claim in this case (state legislation in effect through mid-1994), all such hearing costs – those designed to satisfy the minimum requirements of federal due process, and those that may exceed those requirements – are, with respect

[82] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 880.

[83] *Ibid.*

to the mandatory expulsion provision of section 48915, state mandated costs, fully reimbursable by the state.[84]

The POBOR legislation is different. The costs incurred to comply with the administrative appeal are *not* triggered by a state-mandated event, but are triggered by discretionary decisions made by local officials to take punitive action, or deny a promotion on grounds other than merit against a peace officer employee. Therefore, the Commission finds that the court's holding, authorizing reimbursement for *all* due process hearing costs triggered by a state-mandated event, does not apply to this case.

Rather, what applies from the *San Diego Unified School Dist.* decision to the administrative appeal activity mandated by Government Code section 3304 is the court's holding regarding discretionary expulsions. In the *San Diego* case, the court analyzed the portion of Education Code section 48915 that provided the school principal with the discretion to recommend that a student be expelled for specified conduct. If the recommendation was made and the district accepted the recommendation, then the district was required to comply with the mandatory due process hearing procedures of Education Code section 48918.[85] In this situation, the court held that reimbursement for the procedural hearing costs triggered by a local discretionary decision to seek an expulsion was not reimbursable because the hearing procedures were adopted to implement a federal due process mandate.[86] The court found that the analysis by the Second District Court of Appeal in *County of Los Angeles v. Commission on State Mandates* (*County of Los Angeles II*) was instructive.[87] In the *County of Los Angeles II* case, the court determined that even in the absence of the test claim statute, counties would be still be responsible for providing services under the constitutional guarantees of federal due process.[88]

This analysis applies here. As indicated above, permanent employees were already entitled to an administrative hearing pursuant to the due process clause of the United States and California Constitutions if they were subject to the following punitive actions: dismissal, demotion, suspension, reduction in salary, or a written reprimand. In addition, an at-will employee, such as the chief of police, was entitled to a due process hearing under prior state and federal law if the charges supporting the dismissal constitute moral turpitude that harms the employee's reputation and ability to find future employment.

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[84] *Id.* at pages 881-882.

[85] *San Diego Unified School Dist., supra*, 33 Cal.4th at pages 884-890.

[86] *Id.* at page 888.

[87] *Id.* at page 888-889; *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805. The test claim statute in *County of Los Angeles* required counties to provide indigent criminal defendants with defense funds for ancillary investigation services for capital murder cases. The court determined that even in the absence of the test claim statute, indigent defendants in capital cases were entitled to such funds under the Sixth Amendment of the federal Constitution. (*Id.* at p. 815.)

[88] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 888-889; *County of Los Angeles, supra,* 32 Cal.App.4th at page 815.

Thus, even in the absence of Government Code section 3304, local government would still be required to provide a due process hearing under these situations.

The City of Sacramento, however, contends in comments to the draft staff analysis that prior law does not require due process protections outlined by the Supreme Court in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, for employees receiving short-term suspensions, reclassifications, or reprimands. The City states that five-day suspensions, written reprimands and other lesser forms of punishment are covered by POBOR, but not *Skelly* and, thus, the administrative appeal required by POBOR is reimbursable for the lesser forms of punishment.

The City raised the same argument when the Commission originally considered the test claim, and the Commission disagreed with the arguments.[89] The Commission finds that the Commission's original conclusion on this issue is correct.

As discussed below, the City is correct that the *pre-disciplinary* protections outlined in *Skelly* do not apply to a short-term suspension or written reprimand. But prior law still requires due process protection, including an administrative hearing, when a permanent employee receives a short-term suspension, reprimand, or other lesser form of punishment. Thus, the administrative hearing required by the test claim legislation under these circumstances does not constitute a new program or higher level of service or impose costs mandated by the state.

Skelly involved the discharge of a permanent civil service employee. The court held that such employees have a property interest in the permanent position and the employee may not be dismissed or subjected to other forms of punitive action without due process of law. Based on the facts of the case (that a discharged employee faced the bleak prospect of being without a job and the need to seek other employment hindered by the charges against him), the court held that the employee was entitled to receive notice of the discharge, the reasons for the action, a copy of the charges and materials upon which the action is based, and the right to a hearing to respond to the authority imposing the discipline *before* the discharge became effective.[90] The Supreme Court in *Skelly* recognized, however, that due process requirements are not so inflexible as to require an evidentiary trial at the *preliminary* stage in every situation involving the taking or property. Although some form of notice and hearing must preclude a final deprivation of property, the timing and content of the notice, as well as the nature of the hearing will depend on the competing interests involved.[91]

Three years after *Skelly*, the Supreme Court decided *Civil Service Association v. the City and County of San Francisco*, a case involving the short-term suspensions of eight civil service employees.[92] The court held that the punitive action involved with a short-term suspension is minor and does not require pre-disciplinary action procedures of the kind

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[89] See original Statement of Decision (AR, pp. 865-866).

[90] *Skelly, supra*, 15 Cal.3d 194, 213-215.

[91] *Id.* at page 209.

[92] *Civil Service Association v. City and County of San Francisco* (1978) 22 Cal.3d 552.

required by *Skelly*.[93] But the employees were still entitled to due process protection, including the right to a hearing, since the temporary right of enjoyment to the position amounted to a taking for due process purposes.[94] The court held as follows:

> However, while the principles underlying *Skelly* do not here compel the granting of predisciplinary procedures there mentioned, it does not follow that the employees are totally without right to hearing. *While due process does not guarantee to these appellants any Skelly-type predisciplinary hearing procedure, minimal concepts of fair play and justice embodied in the concept of due process require that there be a 'hearing,' of the type hereinafter explained.* The interest to be protected, i.e., the right to continuous employment, is accorded due process protection. While appellants may not in fact have been deprived of a salary earned but only of the opportunity to earn it, they had the expectancy of earning it free from arbitrary administrative action. [Citation omitted.] This expectancy is entitled to some modicum of due process protection. [Citation and footnote omitted.]
>
> For the reasons state above, however, we believe that such protection will be adequately provided in circumstances such as these by procedures of the character outlined in *Skelly*, (i.e., one that will apprise the employee of the proposed action, the reasons therefore, provide for a copy of the charges including materials upon which the action is based, and the right to respond either orally or in writing, to the authority imposing the discipline) *if provided either during the suspension or within reasonable time thereafter*.[95] (Emphasis added.)

Thus, the court held that the employees that did not receive a hearing at all were entitled to one under principles of due process.[96] As indicated in the Commission's original Statement of Decision, the Third District Court of Appeal in the *Stanton* case also found that due process principles apply when an employee receives a written reprimand without a corresponding loss of pay.[97]

Therefore, in the following situations, the Commission finds that the Commission's original decision in this case was correct in that Government Code section 3304 does not constitute a new program or higher level of service, or impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c), since the administrative appeal merely implements the due process requirements of the state and federal Constitutions:

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[93] *Id.* at page 560.

[94] *Ibid.*

[95] *Id.* at page 564.

[96] *Id.* at page 565.

[97] *Stanton, supra,* 226 Cal.App.3d 1438, 1442.

- When a permanent employee is subject to a dismissal, demotion, suspension, reduction in salary, or a written reprimand.
- When the charges supporting the dismissal of a chief of police constitute moral turpitude, which harms the employee's reputation and ability to find future employment, thus imposing the requirement for a liberty interest hearing.

The due process clause, however, does not apply when a permanent employee is transferred for purposes of punishment, denied a promotion on grounds other than merit, or suffers other actions that result in disadvantage, harm, loss or hardship that impacts the career opportunities of the permanent employee. In addition, the due process clause does not apply when local officials want to remove the chief of police under circumstances that do not create a liberty interest since the chief of police is an at-will employee and does not have a property interest in the position. Providing the opportunity for an administrative appeal under these circumstances is new and not required under prior law. In addition, none of the exceptions in Government Code section 17556 to the finding of costs mandated by the state apply to these situations.

Accordingly, the Commission finds that Government Code section 3304 constitutes a new program or higher level of service and imposes costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for providing the opportunity for an administrative appeal in the following circumstances only:

- When a permanent employee is transferred for purposes of punishment, denied a promotion on grounds other than merit, or suffers other actions that result in disadvantage, harm, loss or hardship that impacts the career opportunities of the permanent employee.
- When local officials want to remove the chief of police under circumstances that do not create a liberty interest (i.e., the charges do not constitute moral turpitude, which harms the employee's reputation and ability to find future employment).

Interrogations

Government Code section 3303 prescribes protections that apply when "any" peace officer is interrogated in the course of an administrative investigation that might subject the officer to the punitive actions listed in the section (dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment). 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, or other routine or unplanned contact with, a supervisor. In addition, the requirements do not apply to an investigation concerned solely and directly with alleged criminal activities.[98]

The Commission found that the following activities constitute a new program or higher level of service and impose costs mandated by the state:

[98] Government Code section 3303, subdivision (i).

- When required by the seriousness of the investigation, compensating the peace officer for interrogations occurring during off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)
- Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)
- Tape recording the interrogation when the peace officer employee records the interrogation. (Gov. Code, § 3303, subd. (g).)

Government Code section 3313 directs the Commission to review these findings in order "to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859 and other applicable court decisions." The Commission finds that neither the *San Diego Unified School Dist.* case, nor any other court decision published since 1999, changes the Commission's conclusion that these activities constitute a new program or higher level of service and impose costs mandated by the state. Thus, these activities remain eligible for reimbursement when interrogating "any" peace officer, including probationary, at-will, and permanent officers that might subject the officer to punitive action.

The Commission also found that Government Code section 3303, subdivision (g), requires that:

- The peace officer employee shall have access to the tape recording of the interrogation if (1) any further proceedings are contemplated or, (2) prior to any further interrogation at a subsequent time.
- 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 confidential.

The Commission found that providing the employee with access to the tape prior to a further interrogation at a subsequent time constitutes a new program or higher level of service and imposes costs mandated by the state. However, the due process clause of the United States and California Constitutions already requires the employer to provide an employee who holds either a property or liberty interest in the job with the materials upon which the punitive, disciplinary action is based. Thus, the Commission found that even in the absence of the test claim legislation, the due process clause requires employers to provide the tape recording of the interrogation, and produce the 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 confidential, to the peace officer employee when:

- a permanent employee is dismissed, demoted, suspended, receives a reduction in pay, or 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 charges of moral turpitude, which support the dismissal.

Under these circumstances, the Commission concluded that the requirement to provide these materials 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 these materials merely implements the requirements of the United States Constitution.

The Commission finds that the conclusion denying reimbursement to provide these materials following the interrogation when the activity is already required by the due process clause of the United States and California Constitutions is consistent with the Supreme Court's ruling in *San Diego Unified School Dist.* The costs incurred to comply with these interrogation activities are *not* triggered by a state-mandated event, but are triggered by discretionary decisions made by local officials to interrogate an officer. Under these circumstances, the court determined that even in the absence of the test claim statute, counties would still be responsible for providing services under the constitutional guarantees of due process under the federal Constitution.[99]

Thus, the Commission finds that the Commission's decision, that Government Code section 3303, subdivision (g), constitutes a new program or higher level of service and imposes costs mandated by the state for the following activities, is legally correct:

- Provide the employee with access to the tape prior to any further interrogation at a subsequent time, or if any further proceedings are contemplated and the further proceedings fall within the following categories:

  (a) the further proceeding is not a disciplinary punitive action;

  (b) the further proceeding is 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);

  (c) the further proceeding is a transfer of a permanent, probationary or at-will employee for purposes of punishment;

  (d) the further proceeding is a denial of promotion for a permanent, probationary or at-will employee for reasons other than merit;

  (e) the further proceeding is an action against a permanent, probationary or at-will employee that results in disadvantage, harm, loss or hardship and impacts the career of the employee.

- Produce transcribed copies of any notes made by a stenographer at an interrogation, and copies of reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer following the interrogation, in the following circumstances:

  (a) when the investigation *does not* result in disciplinary punitive action; and

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[99] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 888-889; *County of Los Angeles, supra,* 32 Cal.App.4th at page 815.

(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; or
- 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.

In comments to the draft staff analysis, the Counties of Orange, Los Angeles, and Alameda, and the City of Sacramento contend that the interrogation of an officer pursuant to the test claim legislation is complicated and requires the employer to fully investigate in order to prepare for the interrogation. The County of Orange further states that "[t]hese investigations can vary in scope and depth from abuses of authority, the use of deadly force, excessive force when injuries may be significant, serious property damage, and criminal behavior." These local agencies are requesting reimbursement for the time to investigate.

The Commission disagrees and finds that investigation services are not reimbursable. First, investigation of criminal behavior is specifically excluded from the requirements of Government Code section 3303. Government Code section 3303, subdivision (i), states that the interrogation requirements do not apply to an investigation concerned solely and directly with alleged criminal activities. Moreover, article XIII B, section 6, subdivision (a)(2), and Government Code section 17556, subdivision (g), state that no reimbursement is required for the enforcement of a crime.

The County of Los Angeles supports the argument that reimbursement for investigative services is required by citing Penal Code section 832.5, which states that each department that employs peace officers shall establish a procedure to investigate complaints. Penal Code section 832.5, however, was not included in this test claim, and the Commission makes no findings on that statute. The County of Los Angeles also cites to the phrase in Government Code section 3303, subdivision (a), which states that "[t]he interrogation shall be conducted ..." to argue that investigation is required. The County takes the phrase out of context. Government Code section 3303, subdivision (a), states the following:

> 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.

Government Code section 3303, subdivision (a), establishes the timing of the interrogation, and requires the employer to compensate the interrogated officer if the interrogation takes place during off-duty time. In other words, the statute defines the process that is due the peace officer who is subject to an interrogation. This statute does not require the employer to investigate complaints. When adopting parameters and guidelines for this program, the Commission recognized that Government Code section 3303 does not impose new mandated requirements to investigate an allegation, prepare for the interrogation, conduct the interrogation, and review responses given by officers and/or witnesses to an investigation.[100]

Thus, investigation services go beyond the scope of the test claim legislation and are ***not*** reimbursable. As explained by the courts, POBOR deals with labor relations.[101] It does not interfere with the employer's right to manage and control its own police department.[102]

Finally, the County of Orange contends that "[s]erious cases also tend to involve lengthy appeals processes that require delicate handling due to the increased rights under POBOR." For purposes of clarification, at the parameters and guidelines phase of this claim, the Commission denied reimbursement for the cost of defending lawsuits appealing the employer action under POBOR, determining that the test claim did not allege that the defense of lawsuits constitutes a reimbursable state-mandated program.[103] Government Code section 3313 does not give the Commission jurisdiction to change this finding.

Nevertheless, when adopting parameters and guidelines for this program, the Commission recognized the complexity of the procedures required to interrogate an officer, and approved several activities that the Commission found to be reasonable methods to comply with the mandated activities pursuant to the authority in section 1183.1, subdivision (a)(4), of the Commission's regulations. For example, the Commission authorized reimbursement, when preparing the notice regarding the nature of the interrogation, for reviewing the complaints and other documents in order to properly prepare the notice. The Commission also approved reimbursement for the mandated interrogation procedures when a peace officer witness was interrogated since the interrogation could lead to punitive action for that officer. Unlike other reconsideration statutes that directed the Commission to revise the parameters and guidelines, the Commission does not have jurisdiction here to change any discretionary findings or add any new activities to the parameters and guidelines that may be

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[100] Analysis adopted by the Commission on the Parameters and Guidelines, July 22, 2000 (AR, p. 912).

[101] *Sulier v. State Personnel Bd.* (2004) 125 Cal.App.4th 21, 26.

[102] *Baggett, supra*, 32 Cal.3d 128, 135.

[103] Analysis adopted by the Commission on the Parameters and Guidelines, July 22, 2000 Commission hearing (AR, pp. 904-906).

considered reasonable methods to comply with the program. The jurisdiction in this case is very narrow and limited to reviewing the Statement of Decision to clarify, as a matter of law, whether the test claim legislation constitutes a new program or higher level of service and imposes costs mandated by the state consistent with the California Supreme Court Decision in *San Diego Unified School Dist.* and other applicable court decisions.[104]

Adverse Comments

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. 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;[105]
- to provide an opportunity to review and sign the adverse comment;
- 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 and to obtain the peace officer's signature or initials under such circumstances.

As noted in the 1999 Statement of Decision, the Commission recognized that the adverse comment could be considered a written reprimand or could lead to other punitive actions taken by the employer. If the adverse comment results in a dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer or the comment harms an 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 of the state and federal constitutions.[106] Under such circumstances, the Commission found 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, the Commission recognized that pursuant to Government Code section 17556, subdivision (c), the costs incurred in

[104] However, any party may file a request to amend the parameters and guidelines pursuant to the authority in Government Code section 17557.

[105] The Commission found 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, the Commission found that the officer must receive notice of the comment before he or she can read or sign the document.

[106] *Hopson, supra,* 139 Cal.App.3d 347.

providing notice and an opportunity to respond do not impose "costs mandated by the state". The Commission finds that this finding is consistent with *San Diego Unified School Dist.* since the local entity would be required, in the absence of the test claim legislation, to perform these activities to comply with federal due process procedures.[107]

However, the Commission found that 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* specifically required by the case law interpreting 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 obtain the peace officer's signature or initials under such circumstances.

The Commission approved these two procedural activities since they were not expressly articulated in case law interpreting the due process clause and, thus, exceed federal law. The City of Sacramento contends that these activities remain reimbursable.

The Commission finds, however, that the decision in *San Diego Unified School Dist.* requires that these notice activities be denied pursuant to Government Code section 17556, subdivision (c), since they are "part and parcel" to the federal due process mandate, and result in "de minimis" costs to local government.

In *San Diego Unified School Dist.*, the Supreme Court held that in situations when a local discretionary decision triggers a federal constitutional mandate such as the procedural due process clause, "the challenged state rules or procedures that are intended to implement an applicable federal law -- and whose costs are, in context, de minimis -- should be treated as part and parcel of the underlying federal mandate."[108] Adopting the reasoning of *County of Los Angeles II*, the court reasoned as follows:

> In *County of Los Angeles II*, supra 32 Cal.App.4th 805 [unofficial cite omitted], the initial discretionary decision (in the former case, to file charges and prosecute a crime; in the present case, to seek expulsion) in turn triggers a federal constitutional mandate (in the former case, to provide ancillary defense services; in the present case, to provide an expulsion hearing). In both circumstances, the Legislature, in adopting specific statutory procedures to comply with the general federal mandate, reasonably articulated various incidental procedural protections. These protections are designed to make the underlying federal right enforceable and to set forth procedural details that were not expressly articulated in the case law establishing the respective rights; viewed singly or cumulatively, they do not significantly increase the cost of compliance with the federal mandate. The Court of Appeal in *County of Los Angeles II* concluded that, for purposes of ruling upon a claim for reimbursement, such incidental procedural requirements, producing at most de minimis added cost, should be viewed as part and parcel of the underlying federal

[107] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 888-889.

[108] *Id.* at page 890.

> mandate, and hence nonreimbursable under Government Code section 17556, subdivision (c). We reach the same conclusion here.[109]

The Commission finds that obtaining the officer's signature on the adverse comment or indicating the officer's refusal to sign the adverse comment, when the adverse comment results in a punitive action protected by the due process clause, are designed to prove that the officer was on notice about the adverse comment. Since providing notice is already guaranteed by the due process clause of the state and federal constitutions under these circumstances, the Commission finds that the obtaining the signature of the officer or noting the officer's refusal to sign the adverse comment is part and parcel of the federal notice mandate and results in "de minimis" costs to local government.

Therefore, the Commission finds that, under current law, the Commission's conclusion that obtaining the signature of the peace officer on the adverse comment or noting the officer's refusal to sign the adverse comment, when the adverse comment results in a punitive action protected by the due process clause is not a new program or higher level of service and does not impose costs mandated by the state. Thus, the Commission denies reimbursement for these activities.

Finally, the courts have been clear that an officer's rights under Government Code sections 3305 and 3306 are not limited to situations where the adverse comment results in a punitive action where the due process clause may apply. Rather, an officer's rights are triggered by the entry of "any" adverse comment in a personnel file, "or any other file used for personnel purposes," that may serve as a basis for affecting the status of the employee's employment.[110] In explaining the point, the Third District Court of Appeal stated: "[E]ven though an adverse comment does not directly result in punitive action, it has the potential for creating an adverse impression that could influence future personnel decisions concerning an officer, including decisions that do not constitute discipline or punitive action."[111] Thus, the rights under sections 3305 and 3306 also apply to uninvestigated complaints. Under these circumstances (where the due process clause does not apply), the Commission determined that the Legislature, in statutes enacted before the test claim legislation, established procedures for different local public employees similar to the protections required by Government Code sections 3305 and 3306. Thus, the Commission found no new program or higher level of service to the extent the requirements existed in prior statutory law. The Commission approved the test claim for the activities required by the test claim legislation that were not previously required under statutory law.[112] Neither *San Diego Unified School Dist.*, nor any other

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[109] *Id.* at page 889.

[110] *Sacramento Police Officers Assn. v. Venegas* (2002) 101 Cal.App.4th 916, 925.

[111] *Id.* at page 926.

[112] For example, for counties, the Commission approved the following activities that were not required under prior statutory law:

> If an adverse comment is related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

case, conflicts with the Commission's findings in this regard. Therefore, the Commission finds that the denial of activities following the receipt of an adverse comment that were required under prior statutory law, and the approval of activities following the receipt of an adverse comment that were *not* required under prior statutory law, was legally correct.

CONCLUSION

The Commission finds that the *San Diego Unified School Dist.* case supports the Commission's 1999 Statement of Decision, which found that the POBOR legislation constitutes a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for counties, cities, school districts, and special districts identified in Government Code section 3301 that employ peace officers.

The Commission further finds that the *San Diego Unified School Dist.* case supports the Commission's 1999 Statement of Decision that the test claim legislation constitutes a partial reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for all activities previously approved by the Commission except the following:

- The activity of providing the opportunity for an administrative appeal to probationary and at-will peace officers (except when the chief of police is removed) pursuant to Government Code section 3304 is no longer a reimbursable state-mandated activity because the Legislature amended Government Code section 3304 in 1998. The amendment limited the right to an administrative appeal to only those peace officers "who successfully completed the probationary period that may be required" by the employing agency and to situations where the chief of police is removed. (Stats. 1998, ch. 786, § 1.)

- 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.

If an adverse comment is not related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for:

- 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.

- The activities of obtaining the signature of the peace officer on the adverse comment or noting the officer's refusal to sign the adverse comment, pursuant to Government Code sections 3305 and 3306, when the adverse comment results in a punitive action protected by the due process clause[113] does not constitute a new program or higher level of service and does not impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c).

[113] Due process attaches when a permanent employee is dismissed, demoted, suspended, receives a reduction in salary, or receives a written reprimand. Due process also attaches when the charges supporting a dismissal of a probationary or at-will employee constitute moral turpitude that harms the employee's reputation and ability to find future employment and, thus, a name-clearing hearing is required.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

PARAMETERS AND GUIDELINES ON:

Government Code Sections 3301, 3303, 3304, 3305, and 3306

As Added and Amended by Statutes 1976, Chapter 465; Statutes 1978, Chapters 775, 1173, 1174, and 1178; Statutes 1979, Chapter 405; Statutes 1980, Chapter 1367; Statutes 1982, Chapter 994; Statutes 1983, Chapter 964; Statutes 1989, Chapter 1165; and Statutes 1990, Chapter 675 (CSM 4499)

Directed by Government Code Section 3313, Statutes 2005, Chapter 72, Section 6 (Assem. Bill (AB) No. 138), Effective July 19, 2005.

Case Nos.: 05-RL-4499-01 and 06-PGA-06

Peace Officer Procedural Bill of Rights

AMENDED PARAMETERS AND GUIDELINES PURSUANT TO GOVERNMENT CODE SECTION 17557; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 6

(*Amended on March 28, 2008*)

AMENDED IN PART PURSUANT TO *DEPARTMENT OF FINANCE V. COMMISSION ON STATE MANDATES* (2009) 170 CAL.APP.4TH 1355; JUDGMENT AND WRIT ISSUED MAY 8, 2009, BY THE SACRAMENTO COUNTY SUPERIOR COURT, CASE NO. 07CS00079

(*Amended on July 31, 2009*)

AMENDED PARAMETERS AND GUIDELINES

The attached Amended Parameters and Guidelines of the Commission on State Mandates are hereby adopted in the above-entitled matter.

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PAULA HIGASHI, Executive Director Dated: August 4, 2009

Adopted: July 27, 2000
Corrected: August 17, 2000
Amended: December 4, 2006
Amended: March 28, 2008
Amended: July 31, 2009

AMENDED PARAMETERS AND GUIDELINES

Government Code Sections 3301, 3303, 3304, 3305, 3306

As Added and Amended by Statutes 1976, Chapter 465;
Statutes 1978, Chapters 775, 1173, 1174, and 1178;
Statutes 1979, Chapter 405; Statutes 1980, Chapter 1367; Statutes 1982, Chapter 994; Statutes 1983, Chapter 964; Statutes 1989, Chapter 1165; and Statutes 1990, Chapter 675

Peace Officers Procedural Bill of Rights
05-RL-4499-01(4499)
06-PGA-06

BEGINNING IN FISCAL YEAR 2006-2007

I. SUMMARY AND SOURCE OF THE MANDATE

In order to ensure stable employer-employee relations and effective law enforcement services, the Legislature enacted Government Code sections 3300 through 3310, known as the Peace Officers Procedural Bill of Rights (POBOR).

The test claim legislation provides procedural protections to peace officers employed by local agencies and school districts[1] 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.

In 1999, the Commission approved the test claim and adopted the original Statement of Decision. The Commission found that certain procedural requirements under POBOR were rights already provided to public employees under the due process clause of the United States and California Constitutions. Thus, the Commission denied the procedural requirements of POBOR that were already required by law on the ground that they did not impose a new program or higher level of service, or impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c). Government Code section 17556, subdivision (c), generally provides that the Commission shall not find costs mandated by the state for test claim statutes that implement a federal law, unless the test claim statute mandates costs that exceed the federal mandate. The Commission approved

[1] 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."

the activities required by POBOR that exceeded the requirements of existing state and federal law.

On July 27, 2000, the Commission adopted parameters and guidelines that authorized reimbursement, beginning July 1, 1994, to counties, cities, a city and county, school districts, and special districts that employ peace officers for the ongoing activities summarized below:

- Developing or updating policies and procedures.
- Training for human resources, law enforcement, and legal counsel.
- Updating the status of cases.
- Providing the opportunity for an administrative appeal for permanent, at-will, and probationary employees that were subject to certain disciplinary actions that were not covered by the due process clause of state and federal law.
- When a peace officer is under investigation, or becomes a witness to an incident under investigation, and is subjected to an interrogation by the employer that could lead to certain disciplinary actions, the following costs and activities are eligible for reimbursement: compensation to the peace officer for interrogations occurring during off-duty time; providing prior notice to the peace officer regarding the nature of the interrogation and identification of investigating officers; tape recording the interrogation; providing the peace officer employee with access to the tape prior to any further interrogation at a subsequent time or if any further specified proceedings are contemplated; and producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of complaints of reports or complaints made by investigators.
- Performing certain activities, specified by the type of local agency or school district, upon the receipt of an adverse comment against a peace officer employee.

A technical correction was made to the parameters and guidelines on August 17, 2000.

In 2005, Statutes 2005, chapter 72, section 6 (AB 138) added section 3313 to the Government Code to direct the Commission to "review" the Statement of Decision, adopted in 1999, on the *Peace Officer Procedural Bill of Rights* test claim (commonly abbreviated as "POBOR") to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859 and other applicable court decisions.

On April 26, 2006, the Commission reviewed its original findings and adopted a Statement of Decision on reconsideration (05-RL-4499-01). The Statement of Decision on reconsideration became final on May 1, 2006.

The Commission found that the *San Diego Unified School Dist*. case supports the Commission's 1999 Statement of Decision that the test claim legislation constitutes a partial reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for all activities previously approved by the Commission for counties, cities, school districts, and

special districts identified in Government Code section 3301 that employ peace officers, except the following:

- The activity of providing the opportunity for an administrative appeal to probationary and at-will peace officers (except when the chief of police is removed) pursuant to Government Code section 3304 is no longer a reimbursable state-mandated activity because the Legislature amended Government Code section 3304 in 1998. The amendment limited the right to an administrative appeal to only those peace officers "who successfully completed the probationary period that may be required" by the employing agency and to situations where the chief of police is removed. (Stats. 1998, ch. 786, § 1.)
- The activities of obtaining the signature of the peace officer on the adverse comment or noting the officer's refusal to sign the adverse comment, pursuant to Government Code sections 3305 and 3306, when the adverse comment results in a punitive action protected by the due process clause[2] does not constitute a new program or higher level of service and does not impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c).

The Statement of Decision adopted by the Commission on this reconsideration applies to costs incurred and claimed for the 2006-2007 fiscal year.

On February 6, 2009, the Third District Court of Appeal, in *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1357, determined that POBOR is not a reimbursable mandate as to school districts and special districts that are permitted by statute, but not required, to employ peace officers who supplement the general law enforcement units of cities and counties.

On May 8, 2009, the Sacramento County Superior Court issued a judgment and writ in Case No. 07CS00079, pursuant to the Third District Court of Appeal's decision in *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, requiring the Commission to:

a. Set aside the portion of its reconsideration decision in "Case No. 05-RL-4499-01 Peace Officer Procedural Bill of Rights" (reconsideration decision) that found that the Peace Officer Procedural Bill of Rights program constitutes a reimbursable state-mandated program for school districts, community college districts, and special districts that are permitted by statute, but not required, to employ peace officers who supplement the general law enforcement units of cities and counties;

b. Issue a new decision denying the portion of the reconsideration decision approving reimbursement for school districts, community college districts, and special districts that are permitted by statute, but not required, to employ peace officers who supplement the general law enforcement units of cities and counties; and

[2] Due process attaches when a permanent employee is dismissed, demoted, suspended, receives a reduction in salary, or receives a written reprimand. Due process also attaches when the charges supporting a dismissal of a probationary or at-will employee constitute moral turpitude that harms the employee's reputation and ability to find future employment and, thus, a name-clearing hearing is required.

c. Amend the parameters and guidelines consistent with this judgment.

This judgment does not affect cities, counties, or special police protection districts named in Government Code section 53060.7, which wholly supplant the law enforcement functions of the County within their jurisdiction.

Accordingly, on July 31, 2009, the Commission amended the decision to deny reimbursement to school districts, community college districts, and special districts that are permitted by statute, but not required, to employ peace officers who supplement the general law enforcement units of cities and counties.

II. ELIGIBLE CLAIMANTS

Counties, cities, a city and county, and special police protection districts named in Government Code section 53060.7 that wholly supplant the law enforcement functions of the county within their jurisdiction are eligible claimants.

School districts, community college districts, and special districts that are permitted by statute, but not required, to employ peace officers who supplement the general law enforcement units of cities and counties are not eligible claimants entitled to reimbursement.

III. PERIOD OF REIMBURSEMENT

The period of reimbursement for the activities and reasonable reimbursement methodology in this parameters and guidelines amendment begins on July 1, 2006.

Pursuant to Government Code section 17560, reimbursement for state-mandated costs may be claimed as follows:

1. A local agency may, by February 15 following the fiscal year in which costs are incurred, file an annual reimbursement claim for that fiscal year.
2. In the event revised claiming instructions are issued by the Controller pursuant to subdivision (c) of section 17558 between November 15 and February 15, a local agency filing an annual reimbursement claim shall have 120 days following the issuance date of the revised claiming instructions to file a claim.

Reimbursable costs for one fiscal year shall be included in each claim. If total costs for a given year do not exceed $1,000, no reimbursement shall be allowed, except as otherwise allowed by Government Code section 17564.

There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, an eligible claimant may file a reimbursement claim based on the reasonable reimbursement methodology described in Section V A. or for actual costs, as described in Section V. B.

For each eligible claimant, the following activities are reimbursable:

A. <u>Administrative Activities (On-going Activities)</u>

1. Developing or updating internal policies, procedures, manuals and other materials pertaining to the conduct of the mandated activities.

2. Attendance at specific training for human resources, law enforcement and legal counsel regarding the requirements of the mandate. The training must relate to mandate-reimbursable activities.

3. Updating the status report of mandate-reimbursable POBOR activities. "Updating the status report of mandate-reimbursable POBOR-activities" means tracking the procedural status of the mandate-reimbursable activities only. Reimbursement is not required to maintain or update the cases, set up the cases, review the cases, evaluate the cases, or close the cases.

B. Administrative Appeal

1. The administrative appeal activities listed below apply to permanent peace officer employees as defined in Penal Code 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. The administrative appeal activities do not apply to reserve or recruit officers; coroners; railroad police officers commissioned by the Governor; or non-sworn officers including custodial officers, sheriff security officers, police security officers, and school security officers.[3]

The following activities and costs are reimbursable:

a. Providing the opportunity for, and the conduct of an administrative appeal hearing for the following disciplinary actions (Gov. Code, § 3304, subd. (b)):

- Transfer of permanent-employees for purposes of punishment;
- Denial of promotion for permanent-employees for reasons other than merit; and
- Other actions against permanent employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

b. Preparation and review of the various documents necessary to commence and proceed with the administrative appeal hearing.

c. Legal review and assistance with the conduct of the administrative appeal hearing.

d. Preparation and service of subpoenas.

e. Preparation and service of any rulings or orders of the administrative body.

f. The cost of witness fees.

g. The cost of salaries of employee witnesses, including overtime, the time and labor of the administrative appeal hearing body and its attendant clerical services.

[3] *Burden v. Snowden* (1992) 2 Cal.4th 556, 569; Government Code section 3301; Penal Code sections 831, 831.4.

The following activities are **not** reimbursable:

a. Investigating charges.

b. Writing and reviewing charges.

c. Imposing disciplinary or punitive action against the peace officer.

d. Litigating the final administrative decision.

2. Providing the opportunity for, and the conduct of an administrative appeal hearing for removal of the chief of police under circumstances that do not create a liberty interest (i.e., the charges do not constitute moral turpitude, which harms the employee's reputation and ability to find future employment). (Gov. Code, § 3304, subd. (b).)

The following activities and costs are reimbursable:

a. Preparation and review of the various documents necessary to commence and proceed with the administrative appeal hearing.

b. Legal review and assistance with the conduct of the administrative appeal hearing.

c. Preparation and service of subpoenas.

d. Preparation and service of any rulings or orders of the administrative body.

e. The cost of witness fees.

f. The cost of salaries of employee witnesses, including overtime, the time and labor of the administrative appeal hearing body and its attendant clerical services.

The following activities are **not** reimbursable:

a. Investigating charges.

b. Writing and reviewing charges.

c. Imposing disciplinary or punitive action against the chief of police.

d. Litigating the final administrative decision.

C. Interrogations

The performance of the activities listed in this section are eligible for reimbursement only when a peace officer, as defined in Penal Code 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, is under investigation, or becomes a witness to an incident under investigation, and is subjected to an interrogation by the commanding officer, or any other member of the employing public safety department, that could lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment. (Gov. Code, § 3303.)[4]

[4] Interrogations of reserve or recruit officers; coroners; railroad police officers commissioned by the Governor; or non-sworn officers including custodial officers, sheriff

Claimants are not eligible for reimbursement for the activities listed in this section when an interrogation of a peace officer is 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. Claimants are also not eligible for reimbursement when the investigation is concerned solely and directly with alleged criminal activities. (Gov. Code, § 3303, subd. (i).)

The following activities are reimbursable:

1. When required by the seriousness of the investigation, compensating the peace officer for interrogations occurring during off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)

   Preparation and review of overtime compensation requests are reimbursable.

2. Providing notice to the peace officer before the interrogation. The notice shall inform the peace officer 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. The notice shall inform the peace officer of the nature of the investigation. (Gov. Code, § 3303, subds. (b) and (c).)

   The following activities relating to the notice of interrogation are reimbursable:

   a. Review of agency complaints or other documents to prepare the notice of interrogation.

   b. Identification of the interrogating officers to include in the notice of interrogation.

   c. Preparation of the notice.

   d. Review of notice by counsel.

   e. Providing notice to the peace officer prior to interrogation.

3. Recording the interrogation when the peace officer employee records the interrogation. (Gov. Code, § 3303, subd. (g).)

   The cost of media and storage, and the cost of transcription are reimbursable. The investigator's time to record the session and transcription costs of non-sworn peace officers are **not** reimbursable.

4. Providing the peace officer employee with access to the recording prior to any further interrogation at a subsequent time, or if any further proceedings are contemplated and the further proceedings fall within the following categories (Gov. Code, § 3303, subd. (g)):

   a. The further proceeding is not a disciplinary action;

   b. The further proceeding is a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty

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security officers, police security officers, and school security officers are not reimbursable. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 569; Government Code section 3301; Penal Code sections 831, 831.4.)

interest is not affected (i.e., the charges supporting the dismissal does not harm the employee's reputation or ability to find future employment);

c. The further proceeding is a transfer of a permanent, probationary or at-will employee for purposes of punishment;

d. The further proceeding is a denial of promotion for a permanent, probationary or at-will employee for reasons other than merit;

e. The further proceeding is an action against a permanent, probationary or at-will employee that results in disadvantage, harm, loss or hardship and impacts the career of the employee.

The cost of media copying is reimbursable.

5. Producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer, in the following circumstances (Gov. Code, § 3303, subd. (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 employee for purposes of punishment;
   - A denial of promotion for a permanent, probationary or at-will employee for reasons other than merit; or
   - 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.

   Review of the complaints, notes or recordings for issues of confidentiality by law enforcement, human relations or counsel; and the cost of processing, service and retention of copies are reimbursable.

The following activities are **not** reimbursable:

1. Activities occurring before the assignment of the case to an administrative investigator. These activities include taking an initial complaint, setting up the complaint file, interviewing parties, reviewing the file, and determining whether the complaint warrants an administrative investigation.
2. Investigation activities, including assigning an investigator to the case, reviewing the allegation, communicating with other departments, visiting the scene of the alleged incident, gathering evidence, identifying and contacting complainants and witnesses.

3. Preparing for the interrogation, reviewing and preparing interrogation questions, conducting the interrogation, and reviewing the responses given by the officer and/or witness during the interrogation.

4. Closing the file, including the preparation of a case summary disposition reports and attending executive review or committee hearings related to the investigation.

D. Adverse Comment

Performing the following activities upon receipt of an adverse comment concerning a peace officer, as defined in Penal Code 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. (Gov. Code, §§ 3305 and 3306.): [5]

Counties

(a) If an adverse comment *is* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

1. Providing notice of the adverse comment;
2. Providing an opportunity to review and sign the adverse comment;
3. Providing an opportunity to respond to the adverse comment within 30 days; and
4. Noting the peace officer's refusal to sign the adverse comment and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is not* related to the investigation of a possible criminal offense, then counties obtained are entitled to reimbursement for:

1. Providing notice of the adverse comment: and
2. Obtaining the signature of the peace officer on the adverse comment; or
3. Noting the peace officer's refusal to sign the adverse comment and obtaining the signature or initials of the peace officer under such circumstances.

Cities and Special Police Protection Districts

(a) 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:

1. Providing notice of the adverse comment;
2. Providing an opportunity to review and sign the adverse comment;

[5] The adverse comment activities do not apply to reserve or recruit officers; coroners; railroad police officers commissioned by the Governor; or non-sworn officers including custodial officers, sheriff security officers, police security officers, or school security officers. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 569; Government Code section 3301; Penal Code sections 831, 831.4.)

3. Providing an opportunity to respond to the adverse comment within 30 days; and

4. Noting the peace officer's refusal to sign the adverse comment and obtaining the signature or initials of the peace officer under such circumstances.

(b) 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:

1. Providing notice of the adverse comment;

2. Providing an opportunity to respond to the adverse comment within 30 days; and

3. Obtaining the signature of the peace officer on the adverse comment; or

4. Noting the peace officer's refusal to sign the adverse comment and obtaining the signature or initials of the peace officer under such circumstances.

The following adverse comment activities are reimbursable:

1. Review of the circumstances or documentation leading to the adverse comment by supervisor, command staff, human resources staff, or counsel to determine whether the comment constitutes a written reprimand or an adverse comment.

2. Preparation of notice of adverse comment.

3. Review of notice of adverse comment for accuracy.

4. Informing the peace officer about the officer's rights regarding the notice of adverse comment.

5. Review of peace officer's response to adverse comment.

6. Attaching the peace officers' response to the adverse comment and filing the document in the appropriate file.

The following activities are **not** reimbursable:

1. Investigating a complaint.

2. Interviewing a complainant.

3. Preparing a complaint investigation report.

V. CLAIM PREPARATION AND SUBMISSION

Claimants may be reimbursed for the Reimbursable Activities described in Section IV above by claiming costs mandated by the state pursuant to the reasonable reimbursement methodology or by filing an actual cost claim, as described below:

A. Reasonable Reimbursement Methodology

The Commission is adopting a *reasonable reimbursement methodology* to reimburse local agencies for all direct and indirect costs, as authorized by Government Code section 17557, subdivision (b), in lieu of payment of total actual costs incurred for the reimbursable activities specified in Section IV above.

1. Definition

The definition of reasonable reimbursement methodology is in Government Code section 17518.5, as follows:

(a) *Reasonable reimbursement methodology* means a formula for reimbursing local agency and school districts for costs mandated by the state, as defined in Section 17514.

(b) A reasonable reimbursement methodology shall be based on cost information from a representative sample of eligible claimants, information provided by associations of local agencies and school districts, or other projections of local costs.

(c) A reasonable reimbursement methodology shall consider the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner.

(d) Whenever possible, a *reasonable reimbursement methodology* shall be based on general allocation formulas, uniform cost allowances, and other approximations of local costs mandated by the state rather than detailed documentation of actual local costs. In cases when local agencies and school districts are projected to incur costs to implement a mandate over a period of more than one fiscal year, the determination of a reasonable reimbursement methodology may consider local costs and state reimbursements over a period of greater than one fiscal year, but not exceeding 10 years.

(e) A reasonable reimbursement methodology may be developed by any of the following:

(1) The Department of Finance.
(2) The Controller.
(3) An affected state agency.
(4) A claimant.
(5) An interested party.

2. Formula

The reasonable reimbursement methodology shall allow each eligible claimant to be reimbursed at the rate of $ 37.25 per full-time sworn peace officer employed by the agency for all direct and indirect costs of performing the activities, as described in Section IV, Reimbursable Activities.

The rate per full-time sworn peace officer shall be adjusted each year by the Implicit Price Deflator referenced in Government Code section 17523.

Reimbursement is determined by multiplying the rate per full time sworn peace officer for the appropriate fiscal year by the number of full time sworn peace officers employed by the agency and reported to the Department of Justice.

B. ACTUAL COST CLAIMS

Although the Commission adopted a reasonable reimbursement methodology for this mandated program, any eligible claimant may instead choose to file a reimbursement claim based on actual costs.

Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

Claimants may use time studies to support salary and benefit costs when an activity is task-repetitive. Time study usage is subject to the review and audit conducted by the State Controller's Office.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified above. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described above. Additionally, each reimbursement claim must be filed in a timely manner.

1. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

a. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

b. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

c. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the

number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

d. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

e. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element B. 1. a. Salaries and Benefits, for each applicable reimbursable activity.

f. Training

Report the cost of training an employee to perform the reimbursable activities, as specified in Section IV of this document. Report the name and job classification of each employee preparing for, attending, and/or conducting training necessary to implement the reimbursable activities. Provide the title, subject, and purpose (related to the mandate of the training session), dates attended, and location. If the training encompasses subjects broader than the reimbursable activities, only the pro-rata portion can be claimed. Report employee training time for each applicable reimbursable activity according to the rules of cost element B.1.a, Salaries and Benefits, and B.1.b, Materials and Supplies. Report the cost of consultants who conduct the training according to the rules of cost element B.1.c, Contracted Services.

2. Indirect Cost Rates

a. Local Agencies

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in 2 CFR Part 225 (the Office of Management and Budget

(OMB) Circular A-87). Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in 2 CFR Part 225 (OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in 2 CFR Part 225 (OMB Circular A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

i. The allocation of allowable indirect costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B)) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or

ii The allocation of allowable indirect costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B)) shall be accomplished by (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[6] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the application of a reasonable reimbursement methodology

[6] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

must also be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING REVENUES AND OTHER REIMBURSEMENTS

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from any source, including but not limited to, service fees collected, federal funds and other state funds shall be identified and deducted from this claim.

VIII. STATE CONTROLLER'S REVISED CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558, subdivision (c), the Controller shall issue revised claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the revised parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The revised claiming instructions shall be derived from the test claim decision and the revised parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(2), issuance of the revised claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon the revised parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The Statement of Decision (CSM 4499) and the Statement of Decision on Reconsideration (05-RL-4499-01) are legally binding on all parties and provide the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim, and in *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355. The administrative record, including the Statement of Decision and the Statement of Decision on Reconsideration, is on file with the Commission.