The Public Safety Officers’ Procedural Bill of Rights Act

Key Provisions

Presented by:
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POBR Enacted in 1977 to:

- **Curb abuses**
  - The “[p]rotection of peace officers from abusive or arbitrary treatment in their employment is the essence of the Act”
    
    *Pasadena POA v. City of Pasadena, 51 Cal. 3d 564 (1990)*

- **Maintain stable labor relations**
  - “[L]abor unrest and work stoppage among police officers pose an obvious threat to the health, safety and welfare of the citizenry ….”
    
    *Burden v. Snowden 2 Cal. 4th 672 (1992)*
POBR Rights Cannot Be Waived

- POBR rights and protections "constitute a matter of statewide concern" and serve an important public purpose (Govt. C. 3301)

- Civil Code section 3513 provides: "Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."
“Limited Waiver” Okay

“In sum, we conclude that a limited waiver of the Bill of Rights Act by an existing peace officer is enforceable …” where it is “a voluntary and knowing act done with sufficient awareness of the relevant circumstances and likely consequences.”

County of Riverside (Madrigal) at p. 806 (emphasis in original)
Post-Madrigal Waiver Cases:

- Blanket waiver not enforceable
- Waiver of the right to an administrative appeal in the context of a disciplinary settlement is permissible
  - *Lanigan v. City of Los Angeles* (October 4, 2011)
    - The police officer “avoided the risk of a more severe penalty - dismissal - by settling and accepting lesser discipline. He may not, through an action under [POBR] avoid the discipline to which he consented.”
The Right to Representation

Government Code Section 3303(i)
Right to Representation

Before the interview, the officer is entitled to the “representative of his or her choice, who may be present at all times during the interrogation.”

Government Code section 3303(i)
Limitations

- “The representative shall not be a person subject to the same investigation.”
  Government Code section 3303(i)
- The representative must be reasonably available.

  *Upland POA v. City of Upland*

“The officer must choose a representative who is reasonably available to represent the officer, and who is physically able to represent the officer at the reasonably scheduled interrogation.”
“It is the officer’s responsibility to secure the attendance of his or her chosen representative at the interrogation. If he or she is unable to do so, the officer should select another representative so that the interrogation may proceed at a reasonable hour.”
Factors in Deciding Who Should Provide Representation

- Source of complaint (internal v. external)
- Nature/complexity of the complaint
- Personal involvement or biases
- Subject officer’s history/reputation
- Involved personalities
- Politics
- Your level of experience and willingness to do the necessary preparation and advocacy
Representation Privilege

Statutory Communications Privilege is Limited in Scope:

“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 non-criminal matters”

Government Code section 3303(i)
CAUTION:

- If the allegations are potentially criminal in nature, do not provide representation in the administrative interview
  - No privilege
  - Rep may develop a conflict between his/her duty as a police officer and duty as a representative that could result in discipline
    - Alhambra POA v. City of Alhambra
Lessons from *Alhambra POA*.

- “The statute [Government Code section 3303(i)] may not reasonably be interpreted as authorizing an officer to locate and remove documentary evidence pertaining to the misconduct investigation of another officer *even if* the officer is acting as the other’s representative.”
Lessons from *Alhambra POA, cont.*

“The recognize that an officer acting as a representative may face difficult choices when it is unclear whether an investigation is criminal or administrative … but the Act provides no defense based on lack of knowledge.”
When Does an Employee Have the Right to Representation?
POBR Rights Apply When:

- An officer is under investigation
- and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department,
- on a matter “that could lead to punitive Action”
  - “Punitive action” is defined as “any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.”
- City of Los Angeles v. Superior Court (Labio)
 Routine or Unplanned Contacts

- Interrogation rights under section 3303 do not apply to any interrogation 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”.

  - Darvish v. City of Inglewood
    2003 Cal. App. Unpub. LEXIS 12115

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Govt’ C. 3303(i)
Weingarten Rights

- Employee has the right to union representation during any employer interrogation which may reasonably lead to disciplinary action
- Employee must request the representative
- Limited to union representation; no right to representative of choice, must take who is available.
Role of the Representative

- Representative does not have to be silent:
  The union representative is entitled to assist the employee by eliciting favorable facts and any extenuating circumstances.

National Labor Relations Board v. Weingarten
420 U.S. 251 (1975)
Weingarten Rationale

“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.”
Role of the Representative

- Has the right to speak, object and clarify questions during the interrogation, and to elicit additional information from client
- Persistent objections/interruptions out of line
- Permissible conduct is “somewhere between mandatory silence and adversarial confrontation”
- Establishing an Effective Advocacy Style
The Fundamentals of Providing Representation

What All Association Representatives Need to Know
Fundamental #1: Be Prepared

- Have a working knowledge of:
  - The collective bargaining agreement
  - Departmental Rules and Policies
  - Bill of Rights Act Provisions
  - Constitutional Protections afforded the officer under investigation

- Have a tape recorder available
Always Tape Record

- Under 3303(g):
  - Complete interrogation may be recorded
  - Officer has the right to bring a recording device and “record any and all aspects of the interrogation”
  - Can the officer or the department video record the interview?

- Surreptitious recordings prohibited
  - *Rattray v. City of National City*, 36 F.3d 1480 (9th Cir. 1994)
Fundamental #2: Know Who is Going to Be at the Interview

Before the interview, the officer is entitled to know:

- The name of the officer in charge
- Name(s) of interrogating officer(s)
- Name(s) of others attending

Government Code section 3303(b)
Fundamental #3
Know What the Investigation is About

- Before the interview, the officer must be informed about:
  - Whether the investigation involves criminal conduct (Government Code 3303(h))
  - The “nature of the investigation”
    - Government Code section 3303(c) states: “The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation.”
Nature of the Investigation

It is the receipt by the officer of *adequate content* and long enough in advance of the interrogation *to understand what the charges specifically are and to prepare* an adequate response.
Nature of the Investigation

“To say that an interrogation could be established for a particular time, the officer simply notified that [an interrogation] would take place and then be handed the written charges as he/she walked in the door would be *ludicrous*...”

Harlan Veal, Judge
San Mateo County Superior Court

*DiVincenzi v. City of Foster City*
Fundamental #3, continued: Getting additional information

- The officer or his/her representative can request to review or obtain documents or other materials beyond the mere nature of the investigation:

  “Although the statute does not compel pre-interrogation discovery, it does not preclude a law enforcement agency from providing such discovery…”

  Pasadena POA v. City of Pasadena
  51 Cal. 3d 564 (1990)
Fundamental #4: Client Preparation

- Thorough client interview
  - Case Assessment
  - Identification of Issues
- Review policies with client
- Review any available reports/recordings
- Manage expectations
Managing Client Expectations

- Explain representative’s role at interview
  - Can’t answer for the officer
  - Objections, breaks, other unexpected developments
  - Asking questions, interjecting
- Explain investigator’s role
- Explain rules of the interview
- Admonishments
Managing Client Expectations

- Explain client’s role
  - Department has the right to ask questions;
  - Not in best interest to be adversarial
    - Fact-finding, not argument
  - Stick to the facts, and stick to the truth
  - Admitting mistakes; being reflective
  - Be knowledgeable about policies and procedures

- Explain post-interview process
Fundamental #5: Honesty

Remind Client to:
- Be Truthful
- Be concise
- Be direct
- Listen to the question
- Answer the question
- Stay focused

Emphasize:
- Don’t embellish
- Don’t Exaggerate
- *Do not lie*
During the Interview

The Rules of the Game
Interrogation Conditions

- Under 3303(a), the interrogation must occur:
  - At a reasonable hour
  - When the officer is on-duty or during normal waking hours
    - If officer is off-duty, must be compensated

- Under 3303(d):
  - Session shall only be for a reasonable period given the gravity and complexity of the events
  - Officer has the right to attend to own personal physical necessities
Interrogation Rights

- To be questioned “by and through” no more than two interrogators at one time (3303(b))
- Under 3303(e) the investigators cannot:
  - Subject the officer to offensive language
  - Threaten the officer (except with insubordination if refuses to answer questions) or promise reward
  - Subject the officer to the media without his or her consent
  - Release home address or photograph to the media
  - Refuse to allow the officer to attend to personal physical necessities
Admonishments

- Miranda Warning
  - Under Government Code section 3303(h), if the officer could be charged with a criminal offense, “he or she shall be immediately informed of his or her constitutional rights”.

- Lybarger/Garrity Admonishment
  - An order to give a statement
  - A warning that discipline could result from the failure to give a statement
  - A promise that the statement and the fruits of the statement will not be used in a subsequent criminal prosecution against the employee
Lybarger Admonishment

Because the statement is compelled under pain of insubordination or other threat of disciplinary action, the *Lybarger/Garrity* admonishment provides *limited protection* in both:

- State court civil actions
- Federal and state criminal prosecutions
POBR & Criminal Investigations

- POBR does **not** apply to criminal investigations conducted by an **outside** agency
  - (Govt. C. 3303 and 3304(a))

- Split of Authority on application to criminal investigations conducted by **employing** agency
  - *Van Winkle v. County of Ventura*
  - *CCPOA v. State of California*
Privilege Issues

- Representative Privilege (3303(i))
- Doctor/Patient Privilege
- Attorney/Client Privilege
- Priest/Penitent Privilege
- *No* Peer Counseling Privilege
Spousal Privilege

Orders Not to Talk

- Order not to talk while IA pending does not violate the 1st Amendment
  - *LAPPL v. Gates*
  - Must be narrowly drawn
    - Prohibits discussion only during IA not after
    - Did not prohibit discussion with rep or atty
    - Did not prohibit talking with officers about matters outside the investigation
  - Rationale: the interest in conducting a credible investigation and restoring public faith outweighs the 1st amendment
Other Investigation Issues

- **Second Interviews**: 3303(g)
  - Officer shall have access to the recording of the first interview prior to any further interrogation

- **Reassignment**: 3303(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”
Memos in lieu of interview

- POBR Rights still apply
  - Representation, Lybarger, advising of nature of investigation, reasonable deadline of preparation

- Pretextual requests to prepare supplemental police reports
Categories of Rights
Category One

- Rights that Apply When an Officer is Under Investigation and Subjected to Interrogation on a Matter that Could Lead to Punitive Action
  - Government Code section 3303, subsections (a) to (j)
Category Two

- Rights that Exist Whether or Not an Officer is Under Investigation and Subject to Interrogation
  - 3302: Political Activity
  - 3304: Administrative appeals, statute of limitations, protections from retaliation
  - 3305/3306: Adverse comments
  - 3306.5: Inspection of Personnel Files
  - 3307: Lie Detector Tests
  - 3308: Financial Disclosures
  - 3309: Locker Searches
  - 3309.5: Enforcement Provisions
  - 3312: Right to wear an American Flag Pin
Political Activity

Government Code 3302:

- (a) Except as otherwise provided by law, or whenever on duty or in uniform, no public safety officer shall be prohibited from engaging, or be coerced or required to engage, in political activity.

- (b) No public safety officer shall be prohibited from seeking election to, or serving as a member of, the governing board of a school district.
American Flag Pins

- Government Code 3312
- Wearing of American Flag Pins or other flag displays are permitted unless written notice is provided:
  - Stating that it violates rule, policy, or agreement
  - Identifying the provision that prohibits
- Employee has a right to appeal prohibition under grievance procedure
Locker & Storage Searches

- Gov’t C. 3309 prohibits searching lockers or “other spaces for storage” that are assigned to the officer and “owned or leased by the employing agency”, unless
  - The officer is notified beforehand; or
  - The officer is present; or
  - The officer gives consent; or
  - Pursuant to a valid search warrant

- *Mullican v. City of Ontario*
  2004 Cal. App. Unpub. LEXIS 3868
Personal Finances & Property

- Government Code section 3308
  - No public safety officer shall be “required or requested … 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)…”

  **Except:** where required for conflict of interest purposes; or assignment to specialized unit with “a strong possibility that bribes or other improper inducements may be offered.”
Lie Detector Tests

- Government Code 3307
  - Cannot be compelled
  - Comments on refusal prohibited
  - No testimony or evidence is admissible at any subsequent judicial or administrative hearing that the officer “refused to take or was subjected to” a lie detector test

- Voluntary Lie Detector Tests
  - *Yates v. County of Contra Costa (Unpublished)*
Investigation is Finished…

... What Happens Next?
Preparation of Final Report

- Findings of Fact
- Conclusions on Policy Violations
- Recommendations of Discipline
- Timely
- Witness Statements
- Documentation
- Modifications
SJPD Complaint Dispositions

- **Unfounded**: Investigation clearly established that the allegation is not true
- **Exonerated**: Investigation clearly established that the actions of the officer are not violations of law or policy
- **Not sustained**: Investigation cannot prove or disprove allegations
Sustained: Investigation disclosed sufficient evidence to prove clearly the allegation

No Finding: Complainant failed to follow through or officer no longer employed by SJPD

Complaint Withdrawn: by complainant

Penal C. 832.5 requires a separate file for frivolous, exonerated or unfounded complaints
Confidentiality of Findings

- No constitutional privacy right prohibits disclosure
- Penal Code section 832.7
  
  “Peace officer personnel records and records maintained … pursuant to 832.5, or information from these records, are confidential …”
832.7 Exceptions

- Evid. C. 1043 (Pitchess Motion)
- Complainant gets statement copy
- Data on the number, type, or disposition of complaints if no officer identification
- If the officer or representative knowingly makes a publicly false statement published in the media
- Grand Jury, A.G. or D.A. investigation into officer or agency misconduct
Confidentiality of Findings

- 832.7(e) Exception:
  - Complainant Must Receive Written Notice of Complaint Disposition Within 30-days
Notification to Officer

- Memorandum of Findings
- Counseling/Training Memo
- Notice of Intent to Discipline
- Different Rights of Inspection and Response Depending Upon Form of Disposition and Notice
Pre-Disciplinary Hearings
Pre-Disciplinary Hearings

- Due Process Right
  - The Fifth Amendment to the United States Constitution States: “No person shall be … deprived of life, liberty or property without due process of law.”
  - The type of process due depends on the type of interest impacted by the recommended discipline, i.e., a property or a liberty interest.
Disciplinary action which does not impact property rights

- Release from probation or from an at-will position
- Transfers
- Performance Evaluations
- Reprimands
- Denial of off-duty employment
- Compulsory Medical or Psychological exams
Liberty Interests

- Discipline that affects an employee’s reputation or imposes a stigma that forecloses the freedom to work in a profession or trade impacts the liberty interest and triggers due process protections

- Procedure due:
  - Name clearing hearing - “Lubey Hearing”
  - Employee must be given a meaningful opportunity to present his or her side of the story and correct factual errors
  - No automatic right to reinstatement
Skelly Hearings

- Required for Property Interest Deprivation
  - *Skelly v. State Personnel Board,* 15 Cal. 3d 194 (1975)

- Types of discipline impacting property rights:
  - Termination
  - Demotion
  - Suspension
  - Unpaid Leave of Absence
  - Involuntary Retirement
Differing Rights of Permanent and Probationary Employees

Permanent Employee

“Property right” to the job

Can only be disciplined for “just cause/good cause”

Right to a Skelly hearing;

Right to Appeal punitive action under 3304(b)

Probationary Employee

No property right to the job

Right to appeal discipline depends on MOU or Personnel Rules

Can be terminated at any time for any reason – cause not required and no appeal rights

But: liberty interest hearing if stigmatizing allegations are the reason for termination
Skelly Hearings

- Notice of Intent to Render Discipline
  Caution: Watch time limits for response
  - Failure to respond or note intent to respond can result in a waiver of the Skelly right
Skelly Requirements

Prior to the discipline being imposed, the officer must receive:

- Notice of the proposed action, including the reasons therefor;
- A copy of the charges and materials upon which the action is based; and
- The opportunity to respond, either orally or in writing, to the authority initially imposing discipline.
Handling *Skelly* Hearings

- Examine Notice and Basis for Recommendation
- Obtain and Analyze Entire All Documents and Materials Relied Upon
Getting Investigation Materials

- After the investigation is concluded, an officer is entitled to *all* investigation materials, including *all* underlying data, such as raw notes and taped witness statements.

  - Govt. C. 3253(g) 3303(g)
    - 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 that are deemed by the investigating agency to be confidential.”

- *San Diego Police Ofc Ass’n v. City of San Diego*

- *Gilbert v. City of Sunnyvale*
**San Diego Police Ofc Ass’n v. City of San Diego**


“If the City is correct that an accused officer is entitled to only the written complaints filed by third persons and the final written report prepared by investigators, but not to the underlying materials that might tend to show the complaints or reports were inaccurate, incomplete, or subject to impeachment for bias, the officer’s ability to establish a defense at the administrative hearing could be hampered and the rights protected by the Act undermined.”
Penal Code Section 135.5

Any person who knowingly alters, tampers with, conceals or destroys relevant evidence in any disciplinary proceeding against a public safety officer, for the purpose of harming that public safety officer, is guilty of a misdemeanor.
Getting Investigation Materials

- Agency’s Affirmative Action or EEO Investigation
  - Seligsohn v. Day
      - An investigation of alleged misconduct by a peace officer conducted by the agency’s affirmative action office and not the police department is still accessible under 3305
Handling *Skelly* Hearings

- **To *Skelly* or not to *Skelly***
  - “Let’s make a deal”
  - Accepting Discipline/No Challenge
  - Resignation versus Termination

- **Hearing should be carefully outlined and choreographed**
  - “Showing your cards”
  - Client participation during *Skelly*
  - Apology/Request for Leniency
  - Recording *Skelly* Hearings
Consider Timeliness

3304(d) Statute of Limitations:

_No punitive action_ … shall be undertaken for an act, omission, or other allegation of misconduct _if the investigation is not completed within one year_ of the agency’s discovery “by a person authorized to initiate an investigation” …

3303: “For the purposes 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.
Statute of Limitations: 3304(d) [Continued]

“Punitive action” includes sustained findings

- Arvizu v. City of Oakland
  - “The statutory prohibition against imposing discipline after the expiration of the one-year limitations period under 3304(d) includes a prohibition against reference to, or inclusion of, a sustained finding to an allegation of misconduct in an officer’s personnel file where the investigation is not concluded within one year.”

- See also, Caloca v. County of San Diego and Hopson v. City of Los Angeles
Consider Timeliness

3304(d) Limitations period begins running upon:

“Discovery “by a person authorized to initiate an investigation”

★ Arvizu v. City of Oakland

★ Lexipol Policy 340

Failure of any employee to promptly and fully report activities on their own part or the part of any other employee where such activities may result in criminal prosecution or discipline under this policy.
Statute of Limitations: 3304(d) [Continued]

When is a dishonesty allegation “discovered” for 3304(d) purposes?

- *Arvizu v. City of Oakland*
- *Alameida v. State Personnel Board*  
- *Crawford v. City of Los Angeles*  
  (2009) 175 Cal. App. 4th 249
Consider Timeliness

3304(d) Statute of Limitations:

...In the event the agency determines that discipline may be taken, it shall complete its investigation and notify the public safety officer of its proposed discipline by a Letter of Intent or Notice of Adverse Action articulating the discipline ... within that year....
Exceptions to 3304(d)

- Written waiver
- Incapacity or Unavailability
- Allegation of Workers Comp Fraud
- Tolling: Civil or Criminal Actions
- Reasonable Extension: multi-jurisdictional or where more than one employee involved
3304(d) Exceptions, Cont.

- **Breslin v. City/County San Francisco**
  - Considered whether discipline was timely served considering all applicable tolling periods and reasonable extensions
  - The time within which an act provided by law is to be done is computed by excluding the first day and including the last, unless that last day is a holiday (Code Civ. Proc. Section 12)
Skelly Hearings:
The Just Cause Analysis
Just Cause: Elements

- Notice/forewarning/foreknowledge
- Violation of a rule or regulation
- Full, fair, and complete investigation
- Equal or Disparate Treatment
- Appropriate Penalty
Just Cause: Notice

- Did the employee know or have reason to know that if he/she engaged in the alleged conduct discipline could result
  - Clear and understandable rules
  - Dissemination of rules
  - Past practice
  - Training
Just Cause: Rule Violation

- Have the charges been factually proven
  - The employer has the burden of proof
    - Preponderance of evidence
    - Clear and convincing evidence
    - Beyond a reasonable doubt
  - Employer must prove all the elements of the offense charged
  - Grant of discretion to employees
Just Cause: Investigation

- Did the employer conduct a thorough, fair and complete investigation into the incident
  - Were all witnesses interviewed, both exculpatory and inculpatory
  - Were procedural rules followed
  - Was the physical evidence preserved and analyzed appropriately
Just Cause: Disparate Treatment

- Was the employee treated in a similar or identical manner to that of other employees charged with similar or identical misconduct

  *i.e., was the employee treated more harshly by the employer than other similarly situated employees*
Just Cause: Penalty

- Was the penalty appropriate under the circumstances
  - Need to consider both positive and negative aspects of work history
  - Mitigating factors should be taken into account, including provocation, state of mind, emotional/physical condition at time
- Is the employee likely to engage in similar misconduct in the future or can he/she be rehabilitated
THE END