Internal Affairs Investigations

California Peace Officers' Association
555 Capitol Mall, Suite 1495 Sacramento, CA 95814
Phone: 916.263.0541 Fax: 916.520.2277
www.cpoa.org
# Internal Affairs Investigations
## Class Schedule

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Course Outline – Internal Affairs Investigations

Module 1 – Legal Requirements of the Internal Affairs Investigations

I. California Penal Code 832
   A. California Penal Code 832.5
      1. Complaints against officers
   B. California Penal Code 832.7
      1. Must release copy of the complainant's copy at the time complaint is filed
      2. Department may release data regarding number, type, or disposition of complaints as long as it does not identify individuals involved
      3. Complainant must be given disposition of case within 30 days of the date disposition was made

II. Public Safety Officers Procedural Bill of Rights Act (POBR)
   A. Government Code 3300 – 3313
      1. Govt. Code 3301
      2. Govt. Code 3302(a)
      3. Govt. Code 3303

III. Important Cases
   A. Skelly v. State Personnel Board (1975)
      1. Entitles officer to due process
      2. Notice of intended disciplinary action
      3. Copy of all materials upon which action is based
      4. Opportunity to respond orally or in writing to an impartial reviewer
   B. Lybarger v. City of Los Angeles (1985)
      1. Interprets Govt. Code 3303(e) and (h)
      2. Interrogated officer entitled to Miranda warning (if potential exists for criminal charges)
   C. Brady v. Maryland (1963)
      1. United States Supreme Court case in which the prosecution had withheld exculpatory evidence from the defendant
      2. Peace officers who have been dishonest are sometimes referred to as a “Brady” officer
      3. Prosecutors are required to notify defendants and their attorneys whenever a law enforcement official involved in their case has sustained record for lying in an official capacity
   D. Pasadena POA v. City of Pasadena
      1. Government Code 3303(g)
      2. California Supreme Court case in 1990 essentially decided that a law enforcement agency does not need to disclose documents and notes received in IA to accused officer prior to interrogation
E. City of Los Angeles v. Superior Court (Labio)
   1. Government Code 3303(c)
   2. Second District Court of Appeal Case in 1997 threw-out evidence from a conversation a supervisor had with an officer because the officer had not been advised of his rights under Government Code 3303(c)
   3. Officers statements can only be used for impeachment if the officer was questioned without being informed he/she was subject of investigation

F. Spielbauer v. County of Santa Clara
   1. California Supreme Court decided in 2009 affirming the right of agencies to issue Lybarger-type admonitions in internal affairs investigations
   2. Public agencies may impose disciplinary action on employees who refuse to answer questions in an IA after being ordered to do so

G. Otto v. Los Angeles Unified School District
   1. Second District Court of Appeals decided in 2001
   2. Written memorandum documenting counseling session may be considered punitive action

H. Upland POA v. City of Upland
   1. Fourth District Court of Appeals decided in 2003
   2. A peace officers right to a representative of his/her choice must be reasonable

I. Steinart v. City of Covina
   1. Second District Court of Appeals decided in 2006
   2. Limits interrogations of officers who are under investigation that could lead to punitive action

J. Garcetti v. Ceballos
   1. United States Supreme Court decided in 2006
   2. When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes

K. LA Police Protective League v. Gates
   1. Ninth Circuit Court of Appeals decided in 1990
   2. A police officer cannot be discharged for refusing to permit investigating officers with an administrative search warrant to search his home
   3. A police officer’s home cannot be invaded upon facts that would not permit the like invasion of the home of persons who are not police officers

L. Pitchess v. Superior Court
   1. California Supreme Court decided in 1974
   2. Request made by a defendant in a criminal actions for access to information in the personnel file of an arresting police officer
   3. Pitchess motion

IV. Criminal Investigations
   A. Bifurcated (handled separately from administrative investigation)
   B. Employee retains all Constitutional Rights
      1. 4th Amendment
      2. 5th Amendment
3. 6th Amendment
4. 14th Amendment
C. Generally handled prior to administrative investigation

V. Drug/Alcohol testing
A. An employee shall not be required (unless subject to random test procedure) to submit to blood, breath or urine test unless:
B. Employee exhibits objective symptoms of being under influence of alcohol and/or narcotic or drug
C. Reasonable and articulated suspicion that the employee has ingested or absorbed by the body in any other manner an alcoholic beverage, narcotic or drug

VI. Civilians employees
A. Public Safety Officers Procedural Bill of Rights Act does not apply
   1. Entitled to representation
   2. If represented by a union
   3. NLRB v. Weingarten, Inc. (420 U.S. 251)
B. Most agencies afford civilians with the same rights as sworn employees

VII. Probationary employees
A. Covered by Public Safety Officer Procedural Bill of Rights Act.
B. May be terminated without cause
   1. Entitled to “Lubey” hearing if terminated for misconduct
   2. If misconduct stigmatizes reputation
   3. Name clearing hearing

Module 2 – Process of the Internal Affairs Investigation

I. Purpose of the internal affairs investigation
   A. Integrity of Department is maintained
      1. System of internal discipline where objectivity, fairness, and justice are assured by intensive, impartial investigations and review
      2. Community can feel comfortable knowing the agency will investigate alleged misconduct
      3. If truly objective, officers are more comfortable with internal review
   B. IA investigation should allow the Department to determine real or potential causes of problems relating to human relations
      1. Remedy identified deficiencies
      2. Ensure proper corrective action is taken when appropriate
      3. Protect personnel from unwarranted criticism
      4. Clear those that are innocent of misconduct
      5. Establish fault of wrongdoers
      6. Facilitate prompt and just and disciplinary action or training
      7. Uncover defective procedures
C. Types of misconduct
   1. Minor misconduct
   2. Serious violations
   3. Differences between criminal investigation and internal affairs investigation

II. Intake of personnel complaints
   A. Citizens complaint
      1. Agency must have procedure for investigating citizen’s complaints
      2. May be made in the following manners:
      3. Complaint should not be refused due to perceived procedural defects
      4. False allegations
      5. Person making complaint should be immediately referred to IA investigator (if available), Watch Commander or supervisor
      6. Upon receipt of a citizen’s complaint, to do lust for the supervisor
      7. Complainant should be asked to provide written statement on agency complaint form
      8. Supervisor receiving complaint should immediately/as soon as possible
   B. Internally generated
      1. Policy/procedure violation
      2. Observation of criminal violation
      3. Notify chain of command

III. Conducting the internal affairs investigation
   A. Start and maintain chronological log
      1. Document time and date of everything investigator does
      2. Helps investigator recall events when writing final report
      3. Prevents duplication of work if case reassigned
   B. Visit scene
      1. Take photographs
      2. Obtain measurements if needed
      3. Look for security cameras that may have recorded incident
   C. Identify and interview civilian witnesses
      1. All potential witnesses should be indentified
      2. Should be tape or digitally recorded
      3. Obtain information from each witness
      4. Obtain a detailed statement
   D. Search warrants
      1. Must be an allegation of criminal activity
      2. Officer do not give up their 4th Amendment rights
      3. Consider seeking warrant from a judge or court other than that which the officer normally goes to
   E. Identify and interview law enforcement witnesses
      1. Should be tape recorded
      2. If witness becomes a subject in the investigation
3. Order law enforcement witnesses not to discuss interview or investigation with anyone

IV. Interview Involved Officer(s)
A. As a general rule, involved officer(s) should be interviews last
B. Remain professional at all times
   1. Don’t allow personal biases to cloud a fair and thorough investigation
   2. Investigator is a fact-finder
C. Provide officer with all Constitutional and Procedural rights afforded by law
   1. Government Code 3300 - 3313
   2. Miranda
   3. Lybarger

V. Internal affairs flow chart
A. Assists investigator with process of the internal affairs investigation from start to finish
   1. Flow chart will lay out direction to take investigation
   2. Provides consistency
   3. Assists new supervisors with investigative process

VI. Writing the report
A. Your agency will have specific policy/guidelines on the report format
B. Use proper grammar/punctuation
   1. Reports must be clear, concise and correct
   2. Don’t create own acronyms
   3. Write in chronological order
   4. Identify every employee and every witness involved
   5. Use formal language
   6. A well-written report will allow the adjudicator to make a quality decision
C. A poorly written report can invalidate the best investigation
   1. Opens door for challenges
   2. Does not allow the reviewer to arrive at the best/proper conclusion
D. Avoid bias in your writing
   1. Maintain objectivity
   2. Do not allow personal biases to affect the facts of the investigation
E. Have another internal affairs investigator or someone privy to the information proofread your investigative report

VII. Conclusion
A. Does investigator record opinion and conclusion in report
   1. This is strictly up to agency policy
   2. Investigator should be aware of policy on this matter prior to commencement of investigation
B. It is recommended the investigator does not participate or have a say in imposing discipline
   1. Helps to ensure unbiased investigation
2. Integrity of the internal affairs process
C. Complete report
D. Gather all evidence
E. Make findings of the allegations (depending on agency policy)
   1. Exonerated
   2. Sustained
   3. Not-Sustained
   4. Unfounded
   5. Misconduct not based on alleged complaint
F. Turn report in to chain of command
G. Expect occasional revisions and requests for additional information

Module 3 – Interviewing Complainants and/or Civilian Witnesses

I. Interviewing complainants and/or civilian witnesses
   A. Must be handled professionally
      1. Gives investigator and agency credibility
      2. Restores faith in law enforcement
   B. Don’t get tunnel vision
      1. Keep an open mind
      2. Actions may/may not have occurred regardless of personal biases or beliefs
      3. Accused actions of officer may be so egregious that it does not seem plausible, however actions may have occurred
   C. Obtain all information from complainant and/or witness
      1. All phone numbers
      2. Address
      3. E-mail address
      4. Driver’s license
      5. Date of birth
      6. If transient try and obtain their “hang out” location or family contact information
   D. Conduct interviews at sites and times convenient for complainants and/or witnesses
      1. If appropriate and practical
      2. Document compliance of exceptions in report
   E. Ask pertinent questions
      1. The initial contact could be only chance to “nail down” complainant’s statement
      2. Address delay in reporting, if any
      3. Assess sobriety and document findings or observations
      4. Nature of relationship with officer, if any
      5. Probe for specifics
      6. Allow complainant to tell the story from his/her perspective from the beginning to end.
F. Don’t conduct group interviews

G. If appropriate, take complainant and/or witness to scene
   1. Allows first-hand knowledge of scene
   2. Complainant and/or investigator can show investigator exactly where everyone was standing or viewed the incident

H. Check into background of complainant and/or witnesses
   1. Is this their first complaint
   2. Do they have personal grudge against officer or department
   3. Do they have a police record
   4. Has the complainant made prior to similar allegations

I. Attempt to corroborate or disprove story with additional evidence
   1. Video from nearby businesses
   2. Letters or documents

J. Take photographs as soon as possible
   1. Documents injuries
   2. Documents lack of injuries
   3. Preserves evidence

K. Tape record interview
   1. Locks in statements made by complainant
   2. Protects investigator against false accusations

L. If complainant is claiming injuries, request signed medical release for any medical facility they attended

II. Identifying unknown officers
    A. There are times when a complainant and/or witness wishes to file a case against an officer, however he/she doesn’t know their name
       1. Ask them to describe the officer
       2. If appropriate, ask them to describe the vehicle

III. Biased based policing complaints
    A. Gather and review all documents related to incident
    B. Questioning complainant and/or witness questions
       1. Why does complainant believe he/she was the subject of biased policing
       2. What behaviors on the part of the officer does the complainant believe support his/her allegation of biased policing
       3. Actions of officer at scene
       4. Could the officer have seen the complainants race or other factor for bias prior to stop

IV. Unlawful search complaints
    A. Actions of officer at scene
       1. Method of approach by officer
       2. What did the officer say
       3. Was consent sought or provided for search of person, vehicle, or residence
V. Substance abuse (alcohol or drugs) complaints
   A. Objective symptoms of substance abuse observed
      1. When
      2. Where
   B. Type and amount of substance used
      1. Used on-duty
      2. Used off-duty
   C. Any other witnesses to the substance abuse
   D. Officer involved in traffic collision
      1. Officer seated behind wheel
      2. Officer exit driver’s seat
      3. Admissions or statements made by officer
   E. Location of complainant and/or witness
      1. Distance from incident
      2. Obstructions to view
   F. Changes in officer’s personality
      1. Work
      2. Health
      3. Family life

VI. Domestic violence complaints
   A. Length and nature of relationship
      1. Current/past dating
      2. Married/divorced
      3. Engaged/cohabitating
   B. Children in common
      1. Names
      2. Dates of birth
   C. Living arrangements
   D. Prior incidents of domestic violence
      1. Reported
      2. Unreported
   E. Protective orders in effect
      1. Permanent restraining order
      2. Temporary restraining order
      3. Emergency protective order
   F. What form of violence or abuse has taken place
      1. Mental
      2. Physical
   G. How long has abuse been occurring
   H. Any log or diary documenting abuse
   I. Is there any pattern of alcohol or substance abuse
   J. Questions for the children (if any)
      1. What has he/she heard his parents say or do
      2. Did any abuse or neglect of the children occur
VII. Sexual misconduct complaints
A. Location of crime
B. Elements of crime
   1. What sexual acts were committed
   2. Tools, weapons, other objects or forced used
C. Nature of relationship
   1. When they met
   2. Where they met
   3. How long they have known each other
   4. Prior consensual sexual relationship
D. Offered favors or compensation for sexual acts
   1. Prostitute
   2. Massage parlor
   3. Craig’s list
   4. Magazine
   5. Escort
E. Threats or coercive statements
F. Statements made by officer
G. Did officer use condom
   1. Where is it
   2. Who provided condom
H. Did officer ejaculate
   1. If so, where
   2. Did complainant clean it up
I. Injuries sustained by the complainant or officer

VIII. Theft complaints
A. Provide detailed description of the property/money missing
   1. Bills or coins
   2. Denomination
   3. Total value
B. How did officer obtain money/property
C. Can complainant provide documentation of the money/property
   1. ATM Receipts
   2. Bank statements
D. When was property/money last seen
E. Did other officers or persons have access to the missing property/money
F. Did complainant see officer remove money/property
   1. Where was it placed
   2. Did officer count money
   3. Was complainant provided receipt for money/property
   4. Was anyone else present
G. Was complainant under influence of drugs/alcohol at time of incident
   1. What type
   2. How much
3. If arrested, did complainant sign money envelope/property sheet verifying amount deposited

IX. Common pitfalls of the interview process
   A. Asking leading questions
      1. Question that attempts to guide the subjects answer
      2. Those questions that contain the answer
   B. Failure to verify answers
   C. Badgering the interviewee
   D. Failure to tape record all witnesses
   E. Calling a person a liar
   F. Engaging in a confrontation with complainant and/or witness
   G. Helping a witness to speed-up the interview
   H. Failing to quote when necessary

Module 4 – Interviewing Subject Officer and Law Enforcement Witnesses

I. Interviewing Subject Officer and Law Enforcement Witnesses
   A. Interview of subject employee
      1. Potentially more difficult than interviewing non-employee
      2. Interview preparation
      3. Have a plan/strategy
      4. Interview
      5. Asking questions
      6. Interview challenges
      7. Code of Silence
In separate trials in a Maryland Court, where the jury is the judge of both the law and the facts but the court passes on the admissibility of the evidence, petitioner and a companion were convicted of first-degree murder and sentenced to death. At his trial, petitioner admitted participating in the crime but claimed that his companion did the actual killing. In his summation to the jury, petitioner's counsel conceded that petitioner was guilty of murder in the first degree and asked only that the jury return that verdict "without capital punishment." Prior to the trial, petitioner's counsel had requested the prosecution to allow him to examine the companion's extrajudicial statements. Several of these were shown to him; but one in which the companion admitted the actual killing was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted and sentenced and after his conviction had been affirmed by the Maryland Court of Appeals. In a post-conviction proceeding, the Maryland Court of Appeals held that suppression of the evidence by the prosecutor denied petitioner due process of law, and it remanded the case for a new trial of the question of punishment, but not the question of guilt, since it was of the opinion that nothing in the suppressed confession "could have reduced [petitioner's] offense below murder in the first degree." Held: Petitioner was not denied a federal constitutional right when his new trial was restricted to the question of punishment; and the judgment is affirmed. Pp. 84-91.

(a) Suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Pp. 86-88.
(b) When the Court of Appeals restricted petitioner's new trial to the question of punishment, it did not deny him due process or equal protection of the laws under the Fourteenth Amendment, since the suppressed evidence was admissible only on the issue of punishment. Pp. 88-91.

226 Md. 422, 174 A. 2d 167, affirmed. [373 U.S. 83, 84]

E. Clinton Bamberger, Jr. argued the cause for petitioner. With him on the brief was John Martin Jones, Jr.

Thomas W. Jamison III, Special Assistant Attorney General of Maryland, argued the cause for respondent. With him on the brief were Thomas B. Finan, Attorney General, and Robert C. Murphy, Deputy Attorney General.

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BRENNAN.

Petitioner and a companion, Boblit, were found guilty of murder in the first degree and were sentenced to death, their convictions being affirmed by the Court of Appeals of Maryland. 220 Md. 454, 54 A. 2d 434. Their trials were separate, petitioner being tried first. At his trial Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict "without capital punishment." Prior to the trial petitioner's counsel had requested the prosecution to allow him to examine Boblit's extrajudicial statements. Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit admitted the actual homicide, was
withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

Petitioner moved the trial court for a new trial based on the newly discovered evidence that had been suppressed by the prosecution. Petitioner's appeal from a denial of that motion was dismissed by the Court of Appeals without prejudice to relief under the Maryland Post Conviction Procedure Act. 222 Md. 442, 160 A. 2d 912. The petition for post-conviction relief was dismissed by the trial court; and on appeal the Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law and remanded the case for a retrial of the question of punishment, not the question of guilt. 226 Md. 422, 174 A 2d 167. The case is here on certiorari, 371 U.S. 812. i

The crime in question was murder committed in the perpetration of a robbery. Punishment for that crime in Maryland is life imprisonment or death, the jury being empowered to restrict the punishment to life by addition of the words "without capital punishment." 3 Md. Ann. Code, 1957, Art. 27, 413. In Maryland, by reason of the state constitution, the jury in a criminal case are "the Judges of Law, as well as of fact." Art. XV, 5. The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment. [373 U.S. 83, 86]

We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. The Court of Appeals relied in the main on two decisions from the Third Circuit Court of Appeals - United States ex rel. Almeida v. Baldi, 195 F.2d 815, and United States ex rel. Thompson v. Dye, 221 F.2d 763 - which, we agree, state the correct constitutional rule.

This ruling is an extension of Mooney v. Holohan, 294 U.S. 103,112 , where the Court ruled on what nondisclosure by a prosecutor violates due process:

"It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." In Pyle v. Kansas, 317 U.S. 213, 215 -216, we phrased the rule in broader terms:

"Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. Mooney v. Holohan, 294 U.S. 103." [373 U.S. 83, 87]

The Third Circuit in the Baldi case construed that statement in Pyle v. Kansas to mean that the "suppression of evidence favorable" to the accused was itself sufficient to amount to a denial of due process. 195 F.2d, at 820. In Napue v. Illinois, 360 U.S. 264, 269 , we extended the test formulated in Mooney v. Holohan when we said: "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." And see Alcorta v. Texas, 355 U.S. 28 ; Wilde v. Wyoming, 362 U.S. 607 . Cf. Durley v. Mayo, 351 U.S. 277, 285 (dissenting opinion).

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when
criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." 2 A prosecution that withholds evidence on demand of an accused which, if made available, [373 U.S. 83, 88] would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals. 226 Md., at 427,174 A. 2d, at 169.

The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment. In justification of that ruling the Court of Appeals stated:

"There is considerable doubt as to how much good Boblit's undisclosed confession would have done Brady if it had been before the jury. It clearly implicated Brady as being the one who wanted to strangle the victim, Brooks. Boblit, according to this statement, also favored killing him, but he wanted to do it by shooting. We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Boblit's hands that twisted the shirt about the victim's neck. ... [I]t would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence in considering the punishment of the defendant Brady.

"Not without some doubt, we conclude that the withholding of this particular confession of Boblit's was prejudicial to the defendant Brady....

"The appellant's sole claim of prejudice goes to the punishment imposed. If Boblit's withheld confession had been before the jury, nothing in it could have reduced the appellant Brady's offense below murder in the first degree. We, therefore, see no occasion to retry that issue." 226 Md., at 429-430,174 A. 2d, at 171. (Italics added.) [373 U.S. 83, 89]

If this were a jurisdiction where the jury was not the judge of the law, a different question would be presented. But since it is, how can the Maryland Court of Appeals state that nothing in the suppressed confession could have reduced petitioner's offense "below murder in the first degree"? If, as a matter of Maryland law, juries in criminal cases could determine the admissibility of such evidence on the issue of innocence or guilt, the question would seem to be foreclosed.

But Maryland's constitutional provision making the jury in criminal cases "the Judges of Law" does not mean precisely what it seems to say. 3 The present status of that provision was reviewed recently in Giles v. State, 229 Md. 370,183 A. 2d 359, appeal dismissed, 372 U.S. 767 , where the several exceptions, added by statute or carved out by judicial construction, are reviewed. One of those exceptions, material here, is that "Trial courts have always passed and still pass upon the admissibility of evidence the jury may consider on the issue of the innocence or guilt of the accused." 229 Md., at 383,183 A. 2d, at 365. The cases cited make up a long line going back nearly a century. Wheeler v. State, 42 Md. 563, 570, stated that instructions to the jury were advisory only, "except in regard to questions as to what shall be considered as evidence." And the court "having such right, it follows of course, that it also has the right to prevent counsel from arguing against such an instruction." Bell v. State, 57 Md. 108,120. And see Beard v. State, 71 Md. 275, 280,17 A. 1044,1045; Dick v. State, 107 Md. 11, 21, 68 A. 286, 290. Cf. Vogel v. State, 163 Md. 267,162 A. 705. [373 U.S. 83, 90]

We usually walk on treacherous ground when we explore state law, 4 for state courts, state agencies, and state legislatures are its final expositors under our federal regime. But, as we read the Maryland decisions, it is the court, not the jury, that passes on the "admissibility of evidence" pertinent to "the issue of the innocence or guilt of the accused." Giles v. State, supra. In the present case a unanimous Court of Appeals has said that nothing in the suppressed confession "could have reduced the appellant Brady's offense below murder in the first degree." We read that statement as a ruling on the admissibility of the confession on the issue of innocence or guilt. A sporting theory of justice might assume that if the suppressed confession had been used at the first trial, the judge's ruling that it was not admissible on the issue of innocence or guilt might have been flouted by the jury just as might have been done if the court had first admitted a confession and then stricken it from the record. 5 But we cannot raise that trial strategy to the
dignity of a constitutional right and say that the deprival of this defendant of that sporting chance through the use of a bifurcated trial (cf. Williams v. New York, 337 U.S. 241) denies him due process or violates the Equal Protection Clause of the Fourteenth Amendment. Affirmed.
IN THE SUPREME COURT OF CALIFORNIA

THOMAS SPIELBAUER, )
Plaintiff and Appellant, )
) SI 50402
v. ) Ct.App. 6 H029345
COUNTY OF SANTA CLARA et al, ) Santa Clara County
Defendants and Respondents. ) Super. Ct. No. CV03 1 889

Plaintiff, a deputy public defender, was investigated by his employer, the county, upon allegations that he had made deceptive statements to the court while representing a criminal defendant. During each of several attempts to interview plaintiff in the matter, a supervising attorney directed plaintiff to answer questions about the incident, told plaintiff that his refusal to cooperate would be deemed insubordination warranting discipline up to and including dismissal, but advised plaintiff—accurately—that no use in a criminal proceeding (i.e., criminal use) could be made of his answers. Nonetheless, on advice of counsel, plaintiff declined to answer, invoking his privilege against compelled self-incrimination under both the federal and state Constitutions. (U.S. Const., 5th Amend., cl. 3; Cal. Const., art. I, § 15.) He was terminated from employment on grounds of the deceptive court conduct, and for disobeying the employer's orders to answer questions.
Plaintiff sought mandate to obtain reinstatement, urging, among other things, that he could not be compelled, on pain of dismissal, to answer potentially incriminating questions unless he received, in advance, a formal grant of immunity from direct or derivative use of his answers in any criminal case against him. The trial court upheld the termination, but the Court of Appeal reversed. The appellate court found substantial evidence that plaintiff had engaged in deceptive court conduct. However, it agreed with plaintiff's contention that, having invoked his constitutional right against self-incrimination, he could not be compelled, by threat of job discipline, to answer his employer's questions unless his constitutional privilege was first supplanted by an affirmative grant of criminal use immunity coextensive with the constitutional protection. We granted review to address the latter issue.

We conclude that the Court of Appeal erred. United States Supreme Court decisions, followed for decades both in California and elsewhere, establish that a public employee may be compelled, by threat of job discipline, to answer questions about the employee's job performance, so long as the employee is not required, on pain of dismissal, to waive the constitutional protection against criminal use of those answers. Here, plaintiff was not ordered to choose between his constitutional rights and his job. On the contrary, he was truthfully told that, in fact, no criminal use could be made of any answers he gave under compulsion by the employer. In the context of a noncriminal public employment investigation, the employer was not further required to seek, obtain, and confer a formal guarantee of immunity before requiring its employee to answer questions related to that investigation.

Accordingly, we will reverse the judgment of the Court of Appeal.
CITY OF LOS ANGELES v. SUPERIOR COURT LABIO

The CITY OF LOS ANGELES, Petitioner, v. The SUPERIOR COURT of Los Angeles County, Respondent; Merinio LABIO, Real Party in Interest.

No. B112677. --

September 30, 1997

The City of Los Angeles ("City") seeks our review of a trial court order excluding statements made by a police officer who was not informed that he was under investigation nor told the nature of the investigation. We conclude that the officer is protected under the Public Safety Officers Procedural Bill of Rights Act (Gov.Code, § 3303 et seq., hereafter the "Act"; further code citations are to the Government Code unless otherwise indicated.) We also conclude that the trial court's order excluding the officer's statements in response to questioning during the City's case-in-chief was not an abuse of discretion. We modify the order, however, to allow introduction of the statements for impeachment.

FACTUAL AND PROCEDURAL SUMMARY

Officer Merinio Labio, real party in interest, was on duty as a Los Angeles Airport Police Officer during the night of January 18, 1996 and the following morning. Lieutenant Martinez was the watch commander on duty at the time. The airport police is an agency of the City. During this shift, a fatal traffic accident occurred on Imperial Highway.

Shortly after the accident, Lt. Martinez and Sgt. Hoffman stopped at Lucky's Donut Shop. The owner of the shop, Mr. Chau, told them he had seen a male Filipino officer drive past the accident scene in a marked police vehicle and, without stopping to render aid, the officer had proceeded to Dough Boy's Donut Shop. Shortly after this conversation, Lt. Martinez checked the deployment log to determine whether any officers on duty matched Mr. Chau's description. Officer Labio was the only Filipino officer on duty. Sgt. Hoffman then went to Dough Boy's and asked an employee there whether an officer had patronized the restaurant at the time of the accident. Sgt. Hoffman said he told this employee that he was trying to determine whether an officer had left a ticket book at the establishment. The employee confirmed that a male Filipino had been there at about the time of the accident. This information was related to Lt. Martinez who also spoke to Sgt. Montgomery, Officer Labio's immediate supervisor, to determine whether Officer Labio had permission to use a City vehicle. Lt. Martinez discovered that Officer Labio did not have permission to use a vehicle that evening and asked Sgt. Montgomery to write a report documenting that fact.
Later the same morning, a radio call was issued instructing Officer Labio to come to the Watch Commander's office. Officer Labio responded to the call. Upon Officer Labio's arrival, Lt. Martinez immediately began questioning him concerning his whereabouts and use of a City vehicle during his shift. Lt. Martinez also asked Officer Labio about the route he had taken in traveling to Dough Boy's. Sgt. Hoffman was present during this questioning.

Lt. Martinez had not informed Officer Labio that he was under investigation. Lt. Martinez did not give him Miranda warnings or inform him of his rights under the Act.

When Lt. Martinez questioned Officer Labio, he knew that passing by the scene of the accident without stopping to render aid was a serious offense and that the officer could face disciplinary action if the allegation were sustained. Lt. Martinez testified that if passing by the scene of the accident were a felony, at the time he interviewed Officer Labio he would have had probable cause to take him in custody. No other officer was interviewed by Lt. Martinez concerning his or her whereabouts at the time of the accident.

When Lt. Martinez questioned Officer Labio, he also realized the matter would have to be forwarded to the Department's Internal Affairs Division ("IAD"). Following the interview, Lt. Martinez filed a personnel complaint with the IAD.

Officer Labio was interviewed by IAD. Prior to his interview with IAD, he was fully informed of his rights under the Act. He was represented by counsel at this interview, and his counsel objected to introduction of statements made at the interview with Lt. Martinez. The basis of the objection was that Officer Labio had not been informed of his rights under the Act.

Officer Labio was terminated from his position effective June 14, 1996. Termination was based on allegations that he used a City vehicle without authorization, that he failed to stop at the scene of an accident, that he made an unauthorized detour to a doughnut shop, that his misconduct was reflected badly in the press, that he made false and misleading statements related to his actions on or about January 18, 1996 (i.e. at the interview with Lt. Martinez), and that he included false information in his daily field report.

Officer Labio requested an administrative hearing to review his termination. At the hearing he sought to exclude his statements made at the interrogation by Lt. Martinez on January 19, 1996 together with all evidence flowing from the questioning. The basis of that motion was Officer Labio's claim that Lt. Martinez had not advised him that he was under investigation, as required by section 3303, subdivision (e). The hearing officer ruled that he lacked jurisdiction to determine whether the evidence should be excluded. Following the procedure specified in section 3309.5, Officer Labio petitioned the superior court for relief. The court ultimately issued its order excluding all evidence related to the interview of Officer Labio on January 19, 1996. The City then petitioned for our review. We issued an alternative writ.
DISCUSSION

We granted an alternative writ in this case because the issue is of widespread public interest and because the trial court's order prevents petitioner from presenting a substantial portion of its case by excluding all information obtained during Lt. Martinez's interview with Officer Labio. (See Omaha Indemnity Co. v. Superior Court (1989) 209 Cal.App.3d 1266, 1272, 258 Cal.Rptr. 66 [listing factors to consider in determining the propriety of an alternative writ.]) Although generally an appeal is sufficient for relief, extraordinary relief is justified in this case in order to prevent substantial expenses from being imposed on the City and public in the event the City's arguments are entirely or substantially successful. (See City of Glendale v. Superior Court (1993) 18 Cal.App.4th 1768, 1777, 23 Cal.Rptr.2d 305; City of Oakland v. Superior Court (1996) 45 Cal.App.4th 740, 750, 53 Cal.Rptr.2d 120.)

II

The Act provides procedural guarantees to public safety officers under investigation. (Pasadena Police Officers Assn. v. City of Pasadena (1990) 51 Cal.Sd 564, 572, 273 Cal.Rptr. 584, 797 P.2d 608.) Police officers are included within the protected groups. The purpose of the Act is to maintain "'stable employer-employee relations[ ] between public safety employees and their employers.'" (People v. Velez (1983) 144 Cal.App.3d 558, 564, 192 Cal.Rptr. 686.) "['T]he 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." (Los Angeles Police Protective League v. City of Los Angeles (1995) 35 Cal.App.4th 1535, 1540, 42 Cal.Rptr.2d 23, quoting White v. County of Sacramento (1982) 31 Cal.Sd 676, 681, 183 Cal.Rptr. 520, 646 P.2d 191.) While granting certain rights to police officers, the Act balances the interests of the public in maintaining the integrity of the police force with the interest of the police officer in receiving fair treatment. (Pasadena Police Officers Assn. v. City of Pasadena, supra, 51 Cal.Sd at p. 568, 273 Cal.Rptr. 584, 797 P.2d 608.)

The parties dispute the applicability of section 3303, subdivision (c) to the present case. The City argues the subdivision does not apply because the case involves a commanding officer's routine questioning concerning the activities of an on-duty officer, excluded from the scope of the statute by section 3303, subdivision (i).

Section 3303 provides in pertinent part: "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, [f] (c) The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation."

The City does not dispute that Lt. Martinez was Officer Labio's supervisor and that he questioned Officer Labio on matters which could lead to punitive action. Nevertheless the City argues that subdivision (i) takes the questioning out of subdivision (c), which provides for informing this officer of the nature of the investigation.
Subdivision (i) states: "(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."

Tracking the language of subdivision (i), the City characterizes Lt. Martinez's questioning of Officer Labio as a routine contact within the normal course of duty.

Officer Labio argues subdivision (i) does not modify the entire section. We disagree. The paragraph at issue begins with the words "This section," not "this subdivision." "While we may grant in some instances the word 'section' may mean 'subdivision,' in other instances such an interpretation would be absurd." (People v. Castro (1985) 38 Cal.3d 301, 310, 211 Cal.Rptr. 719, 696 P.2d 111.) There is no indication that the paragraph relates only to subdivision (i), rather than to the entire section as it states.

The issue is whether Lt. Martinez's questioning of Officer Labio constituted routine or unplanned contact within the normal course of duty. We conclude the trial court reached the correct result that the questioning can only be characterized as part of an investigation of Officer Labio for sanctionable conduct.

Based on our reading of the statutory scheme, we conclude that the second paragraph of subdivision (i) is intended to cover innocent preliminary or casual questions and remarks between a supervisor and officer. It was included to avoid claims that almost any communication is elevated to an "investigation." The subdivision excludes routine communication within the normal course of administering the department. There probably are cases in which routine questions and remarks begin to shade into an investigation to which subdivision (i) does not apply. We need not decide just where that point is reached because it is clear that under our test an investigation was underway in this case.

Lt. Martinez checked the deployment logs to determine which officer on duty matched Mr. Chau's description. The only one who did was Officer Labio. Sgt. Hoffman went to Dough Boy's and questioned an employee, saying that he heard that an officer may have left a ticket book there. The sergeant heard that a Filipino officer-apparently Officer Labio-had indeed been there at the pertinent time. Sgt. Hoffman reported all of this to Lt. Martinez. Lt. Martinez spoke to Officer Labio's direct supervisor and learned that Officer Labio did not have permission to use a City vehicle.

Lt. Martinez then proceeded to question Officer Labio. By this time, Lt. Martinez had enough information that, as he said, he could have arrested Officer Labio for a felony offense if this
conduct amounted to a crime of that grade. Lt. Martinez was investigating violations of duty: driving past the scene of a serious accident without stopping to investigate or render aid, and unauthorized use of the police vehicle.

The City argues that notwithstanding the clear investigative nature of the questioning by Lt. Martinez, the Legislature intended that section 3303 apply only to investigations conducted by internal affairs units. There were indications that the Legislature was particularly concerned with investigations conducted by such units,- but we could only accept the narrow reading of the statute urged upon us by the City if we were to rewrite the law.

The terms "internal affairs department," or "internal investigative unit," or their equivalent do not appear in the Act. Instead the Legislature chose broad language: "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." (§ 3303, emphasis added.) The Legislature then exempted communication within the "normal course of duty, counseling, instruction, or informal verbal admonishment, or other routine or unplanned contact with a supervisor or any other public safety officer." It did not manifest any intent to have section 3303 apply solely to internal affairs units.

The legislative history provides additional indications of intent to extend protection to investigations conducted outside of the internal affairs department. The second paragraph of subdivision (i) currently states "[t]his section shall not apply to any interrogation of a public safety officer in the normal course of duty." It was previously stated in subdivision (h), "[t]his section shall not apply to any investigation or interrogation of a public officer in the normal course of duty." (Assem. Bill No. 301 (1975-1976 Reg. Sess.) § 1, emphasis added.) Deleting the word investigation suggests that the Legislature intended that the statute apply to investigations of a public safety officer by a supervisor, but that interrogation in the normal course of duty be exempt from procedural constraints.

Further, if the statute applied only to internal affairs units, the second paragraph of subdivision (i) would be superfluous. Routine communication or interrogation in the normal course of duty would necessarily have been outside the scope of a section that applies only to internal affairs communications.

More fundamentally, the City's position is contrary to the legislative purpose of the Act to protect police officers from abuse or arbitrary treatment. (See Pasadena Police Officers Assn. v. City of Pasadena, supra, 51 Cal.3d at 576, 273 Cal.Rptr. 584, 797 P.2d 608.) If an officer under investigation for a violation of law or department rules could be interrogated by his commanding officer outside the procedural protections of the Act, the protections afforded to police officers in the Act would be eviscerated.

The City next contends that cases construing section 3303 generally concern off-duty conduct and should not be applied to an investigation concerning on-duty conduct. Although some cases do address off-duty conduct, others review the conduct of officers while on duty. (See Williams v. City of Los Angeles (1988) 47 Cal.3d 195, 252 Cal.Rptr. 817, 763 P.2d 480; Lybarger v. City of Los Angeles (1985) 40 Cal.3d 822, 221 Cal.Rptr. 529, 710 P.2d 329;
Baggett v. Gates (1982) 32 Cal.Sd 128, 185 Cal.Rptr. 232, 649 P.2d 874.) The City cites no authority supporting a construction that would thus limit the Act, and we find no justification to rewrite the statute or restrict it in that way.

III

Section 3303 does not specify a remedy for violation of its provisions. Instead, remedies are addressed by section 3309.5. Subdivision (c) of that section provides: "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."

Although the trial court has broad discretion in fashioning a remedy, "the relief rendered must be 'appropriate[.]' " (Williams v. City of Los Angeles, supra, 47 Cal.3d at p. 204, 252 Cal.Rptr. 817, 763 P.2d 480.) We may intervene only if there has been an abuse of discretion. (Gertner v. Superior Court (1993) 20 Cal.App.4th 927, 930, 25 Cal.Rptr.2d 47.)

In Williams, our Supreme Court indicated factors to consider when determining the propriety of suppression as a remedy under section 3309.5. (Williams v. City of Los Angeles, supra, 47 Cal.3d at p. 205, 252 Cal.Rptr. 817, 763 P.2d 480.) The court held that suppression is not appropriate when the officer whose right was violated was not prejudiced and suppression is not likely to deter future violations of the Act. (Id. at p. 204, 252 Cal.Rptr. 817, 763 P.2d 480.) In Williams, suppression was not an effective deterrent because other incentives to avoid the specific violation in that case were already in place. (Ibid.) Although the Williams court did not find suppression appropriate in that particular case, it noted that suppression may be an appropriate remedy in other cases. (Id. at p. 202, 252 Cal.Rptr. 817, 763 P.2d 480.)

Hanna v. City of Los Angeles (1989) 212 Cal.App.3d 363, 367, 260 Cal.Rptr. 782, the court held suppression was warranted as a remedy for multiple violations of section 3303. The violations included denial of the police officer's request for representation, denial of access to a tape recording of his first interrogation prior to his second interrogation, and denial of access to investigative reports. (Id. at p. 370, 260 Cal.Rptr. 782.) The investigators also disregarded the officer's procedural rights in an effort to expedite the investigative process before the officer received tenure. (Id. at p. 371, 260 Cal.Rptr. 782.) The court concluded that these multiple violations may have affected the content of the officer's statements because the officer may have been ""too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors"" [citation]." (Id. at p. 374, 260 Cal.Rptr. 782.) In addition, having a representative present and a recording made of the interrogation may have helped the officer to support his position, as the court also found that the investigators' version of the officer's statements may have been affected. (Ibid.) Consequently, the court held suppression of the statements was warranted. (212 Cal.App.3d at p. 375, 260 Cal.Rptr. 782.)

In 1994, subsequent to both the Williams and the Hanna decisions, the Legislature revised section 3303 by adding subdivision (f). That subdivision provides: "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." Subdivision (f) is subject to several qualifications, only one of which is argued here. Subdivision (f)(3) states: "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."

We review the record to determine whether there is a reasonable basis for suppression in the present case. Unlike the officer in Hanna, Officer Labio did not request representation, nor did he ask to have the proceedings tape recorded. But he might well have invoked both those rights, as he later did, had he been informed he was under investigation. In addition, suppression in this case may serve a deterrent effect. Unlike in Williams, in this case no other deterrent exists. We conclude that the trial court did not abuse its discretion insofar as it ordered suppression of Officer Labio's statement from the city's case-in-chief.

We next consider whether the statements should be admitted for impeachment. The City points out that in a criminal case statements of a defendant obtained in violation of Miranda v. Arizona, supra, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, while precluded from the People's case-in-chief, are allowed for impeachment. (See People v. May (1988) 44 Cal.3d 309, 243 Cal.Rptr. 369, 748 P.2d 307; People v. Moore (1988) 201 Cal.App.3d 877, 247 Cal.Rptr. 353.) Excluding Officer Labio's statements for impeachment would put the governmental employer in a worse position than the prosecution in a criminal case. It also would allow the officer to present evidence without fear of contradiction by his own words. We see no basis for such a rule. It certainly would be contrary to the Legislature's intent to reduce the extent of protection afforded in the administrative setting as compared to the criminal setting. (See Pasadena Police Officers Assn. v. City of Pasadena, supra, 51 Cal.Sd at 572, 273 Cal.Rptr. 584, 797 P.2d 608.)

The 1994 amendment to section 3303 adding subdivision (f) supports the conclusion that the statements should be admitted for impeachment. Section 3303, subdivision (f)(3) applies to civil proceedings. It specifies exceptions to the rule that statements obtained under duress, coercion, or threat of punitive action are excluded. Although the order under review in this case is a special proceeding under section 3309.5, rather than a civil action, it is inconsistent to admit statements obtained under coercion for impeachment while excluding statements gathered without informing the officer of the nature of the investigation. We conclude the trial court abused its discretion to the degree that its order excludes the statements from being introduced as impeachment at the administrative hearing. Of course, the admissibility as impeachment will depend on whether the statements satisfy the requirements for such evidence as well as other standard rules governing admissibility of evidence at an administrative hearing of this kind.

IV

Finally, Officer Labio seeks attorney's fees under Code of Civil Procedure section 1021.5, which allows a court to award attorney's fees 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 or of enforcement by one public entity
against another public entity, 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."

Although Officer Labio requested attorney's fees in the trial court, the court did not address the issue. We infer from its silence that it determined attorney's fees were not warranted. We review that decision for abuse of discretion. (Satrap v. Pacific Gas & Electric Co. (1996) 42 Cal.App.4th 72, 77, 49 Cal.Rptr.2d 348). We find no abuse of discretion. Officer Labio did not establish an important right that benefited a large class of persons. Instead, he sought to exercise a right already established for his personal benefit.

DISPOSITION

Let a peremptory writ of mandate issue directing the superior court to modify its order to allow the City to use statements at the administrative hearing for the limited purpose of impeachment if otherwise relevant. Real party shall have his costs in this proceeding.
U.S. Supreme Court


Graham v. Connor

No. 87-6571

Argued February 21, 1989

Decided May 15, 1989

490 U.S. 386

Syllabus

Petitioner Graham, a diabetic, asked his friend, Berry, to drive him to a convenience store to purchase orange juice to counteract the onset of an insulin reaction. Upon entering the store and seeing the number of people ahead of him, Graham hurried out and asked Berry to drive him to a friend's house instead. Respondent Connor, a city police officer, became suspicious after seeing Graham hastily enter and leave the store, followed Berry's car, and made an investigative stop, ordering the pair to wait while he found out what had happened in the store. Respondent backup police officers arrived on the scene, handcuffed Graham, and ignored or rebuffed attempts to explain and treat Graham's condition. During the encounter, Graham sustained multiple injuries. He was released when Conner learned that nothing had happened in the store. Graham filed suit in the District Court under 42 U.S.C. § 1983 against respondents, alleging that they had used excessive force in making the stop, in violation of "rights secured to him under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983." The District Court granted respondents' motion for a directed verdict at the close of Graham's evidence, applying a four-factor test for determining when excessive use of force gives rise to a § 1983 cause of action, which inquires, inter alia, whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm. Johnson v. Glick, 481 F.2d 1028. The Court of Appeals affirmed, endorsing this test as generally applicable to all claims of constitutionally excessive force brought against government officials, rejecting Graham's argument that it was error to require him to prove that the allegedly excessive force was applied maliciously and sadistically to cause harm, and holding that a reasonable jury applying the Johnson v. Glick test to his evidence could not find that the force applied was constitutionally excessive.

Held: All claims that law enforcement officials have used excessive force -- deadly or not - in the course of an arrest, investigatory stop, or other "seizure" of a free citizen are properly analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than under a substantive due process standard. Pp. 490 U. S. 392-399.
(a) The notion that all excessive force claims brought under § 1983 are governed by a single generic standard is rejected. Instead, courts must identify the specific constitutional right allegedly infringed by the challenged application of force, and then judge the claim by reference to the specific constitutional standard which governs that right. Pp. 490 U. S. 393-394.

(b) Claims that law enforcement officials have used excessive force in the course of an arrest, investigatory stop, or other "seizure" of a free citizen are most properly characterized as invoking the protections of the Fourth Amendment, which guarantees citizens the right "to be secure in their persons ... against unreasonable seizures," and must be judged by reference to the Fourth Amendment's "reasonableness" standard. Pp. 490 U. S. 394-395.

(c) The Fourth Amendment "reasonableness" inquiry is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation. Pp. 490 U. S. 396-397.

(d) The Johnson v. Glick test applied by the courts below is incompatible with a proper Fourth Amendment analysis. The suggestion that the test's "malicious and sadistic" inquiry is merely another way of describing conduct that is objectively unreasonable under the circumstances is rejected. Also rejected is the conclusion that, because individual officers' subjective motivations are of central importance in deciding whether force used against a convicted prisoner violates the Eighth Amendment, it cannot be reversible error to inquire into them in deciding whether force used against a suspect or arrestee violates the Fourth Amendment. The Eighth Amendment terms "cruel" and "punishment" clearly suggest some inquiry into subjective state of mind, whereas the Fourth Amendment term "unreasonable" does not. Moreover, the less protective Eighth Amendment standard applies only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. Pp. 490 U. S. 397-399.

827 F.2d 945. vacated and remanded.

REHNQUIST, C.J., delivered the opinion of the Court, in which WHITE, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, in which BRENNAN and MARSHALL, JJ., joined, post, p. 490 U. S. 399.
During the course of an investigatory interview at which an employee of respondent was being interrogated by a representative of respondent about reported thefts at respondent's store, the employee asked for but was denied the presence at the interview of her union representative. The union thereupon filed an unfair labor practice charge with the National Labor Relations Board (NLRB). In accordance with its construction in Mobil Oil Corp., 196 N. L. R. B. 1052, enforcement denied, 482 F.2d 842, and Quality Mfg. Co., 195 N. L R. B. 197, enforcement denied, 481 F.2d 1018, rev'd, post, p. 276, the NLRB held that the employer had committed an unfair labor practice and issued a cease-and-desist order, which, however, the Court of Appeals subsequently refused to enforce, concluding that an employee has no "need" for union assistance at an investigatory interview. Held: The employer violated 8 (a) (1) of the National Labor Relations Act because it interfered with, restrained, and coerced the individual right of an employee, protected by 7, "to engage in . . . concerted activities for . . . mutual aid or protection . . .," when it denied the employee's request for the presence of her union representative at the investigatory interview that the employee reasonably believed would result in disciplinary action. Pp. 256-268.

(a) The NLRB's holding is a permissible construction of "concerted activities for . . . mutual aid or protection" by the agency charged by Congress with enforcement of the Act. Pp. 260-264.
(b) The NLRB has the "special function of applying the general provisions of the Act to the complexities of industrial life," NLRB v. Erie Resistor Corp., 373 U.S. 221, 236, and its special competence in this field is the justification for the deference accorded its determination. Pp. 264-267.

485 F.2d 1135, reversed and remanded. [420 U.S. 251, 252]

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. BURGER, C. J., filed a dissenting opinion, post, p. 268. POWELL, J., filed a dissenting opinion, in which STEWART, J., joined, post, p. 269.

Patrick Hardin argued the cause for petitioner. With him on the brief were Solicitor General Bork, Peter G. Nash, John S. Irving, Norton J. Come, and Linda Sher.
Neil Martin argued the cause and filed a brief for respondent. *

[ Footnote * ] Jerry Kronenberg and Milton Smith filed a brief for the Chamber of Commerce of the United States as amicus curiae urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The National Labor Relations Board held in this case that respondent employer's denial of an employee's request that her union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action constituted an unfair labor practice in violation of 8 (a) (1) of the National Labor Relations Act, 1 as amended, 61 Stat. 140, because it interfered with, restrained, and coerced the individual right of the employee, protected by 7 of the Act, "to engage in ... concerted activities for... mutual aid or protection ----- "2 202 N. L. R. B. 446 (1973). [420 U.S. 251, 253] The Court of Appeals for the Fifth Circuit held that this was an impermissible construction of 7 and refused to enforce the Board's order that directed respondent to cease and desist from requiring any employee to take part in an investigatory interview without union representation if the employee requests representation and reasonably fears disciplinary action. 485 F.2d 1135 (1973). 3 We granted certiorari and set the case for oral argument with No. 73-765, Garment Workers v. Quality Mfg. Co., post, p. 276. 416 U.S. 969 (1974). We reverse. [420 U.S. 251, 254] 3

Respondent operates a chain of some 100 retail stores with lunch counters at some, and so-called lobby food operations at others, dispensing food to take out or eat on the premises. Respondent's sales personnel are represented for collective-bargaining purposes by Retail Clerks Union, Local 455. Leura Collins, one of the sales personnel, worked at the lunch counter at Store No. 2 from 1961 to 1970 when she was transferred to the lobby operation at Store No. 98. Respondent maintains a companywide security department staffed by "Loss Prevention Specialists" who work undercover in all stores to guard against loss from shoplifting and employee dishonesty. In June 1972, "Specialist" Hardy, without the knowledge of the store manager, spent two days observing the lobby operation at Store No. 98 investigating a report that Collins was taking money from a cash register. When Hardy's surveillance of Collins at work turned up no evidence to support the report, Hardy disclosed his presence to the store manager and reported that he could find nothing wrong. The store manager then told him that a fellow lobby employee of Collins had just reported that Collins had purchased a box of chicken that sold for $2.98, but had placed only $1 in the cash register. Collins was summoned to an interview with Specialist Hardy and the store manager, and Hardy questioned her. The Board found that several times during the questioning she asked the store manager to call the union shop steward or some other union representative to the interview, and that her requests were denied. Collins admitted that she had purchased some chicken, a loaf of bread, and some cake which she said she paid for and donated to her church for a church dinner. She explained that she purchased four pieces of chicken for which the price was $1, but that because the lobby department was out of the small-size boxes in which such purchases were
usually packaged she put the chicken into the larger box normally used for packaging larger quantities. Specialist Hardy left the interview to check Collins’ explanation with the fellow employee who had reported Collins. This employee confirmed that the lobby department had run out of small boxes and also said that she did not know how many pieces of chicken Collins had put in the larger box. Specialist Hardy returned to the interview, told Collins that her explanation had checked out, that he was sorry if he had inconvenienced her, and that the matter was closed.

Collins thereupon burst into tears and blurted out that the only thing she had ever gotten from the store without paying for it was her free lunch. This revelation surprised the store manager and Hardy because, although free lunches had been provided at Store No. 2 when Collins worked at the lunch counter there, company policy was not to provide free lunches at stores operating lobby departments. In consequence, the store manager and Specialist Hardy closely interrogated Collins about violations of the policy in the lobby department at Store No. 98. Collins again asked that a shop steward be called to the interview, but the store manager denied her request. Based on her answers to his questions, Specialist Hardy prepared a written statement which included a computation that Collins owed the store approximately $160 for lunches. Collins refused to sign the statement. The Board found that Collins, as well as most, if not all, employees in the lobby department of Store No. 98, including the manager of that department, took lunch from the lobby without paying for it, apparently because no contrary policy was ever made known to them. Indeed, when company headquarters advised Specialist Hardy by telephone during the interview that [420 U.S. 251, 256] headquarters itself was uncertain whether the policy against providing free lunches at lobby departments was in effect at Store No. 98, he terminated his interrogation of Collins. The store manager asked Collins not to discuss the matter with anyone because he considered it a private matter between her and the company, of no concern to others. Collins, however, reported the details of the interview fully to her shop steward and other union representatives, and this unfair labor practice proceeding resulted. 4

II

The Board's construction that 7 creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline was announced in its decision and order of January 28, 1972, in Quality Mfg. Co., 195 N. L R. B. 197, considered in Garment Workers v. Quality Mfg. Co., post, p. 276. In its opinions in that case and in Mobil Oil Corp., 196 N. L. R. B. 1052, decided May 12, 1972, three months later, the Board shaped the contours and limits of the statutory right.

First, the right inheres in 7's guarantee of the right of employees to act in concert for mutual aid and protection. In Mobil Oil, the Board stated:

"An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for [420 U.S. 251, 257] 'mutual aid and protection.' The denial of this right has a reasonable
tendency to interfere with, restrain, and coerce employees in violation of Section 8 (a) (1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action." Ibid.

Second, the right arises only in situations where the employee requests representation. In other words, the employee may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative.

Third, the employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action. 5 Thus the Board stated in Quality:

"We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative." 195 N. L. R. B., at 199. Fourth, exercise of the right may not interfere with legitimate employer prerogatives. The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that might be derived from one. As stated in Mobil Oil:

"The employer may, if it wishes, advise the employee that it will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by his representative. The employee may then refrain from participating in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of information obtained from other sources." 196 N. L. R. B., at 1052. The Board explained in Quality:

"This seems to us to be the only course consistent with all of the provisions of our Act. It permits the employer to reject a collective course in situations such as investigative interviews where a collective course is not required but protects the employee's right to protection by his chosen agents. Participation in the interview is then voluntary, and, if the employee has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions, he may choose to forego it unless he is afforded the safeguard of his representative's presence. He would then also forego whatever benefit might come from the interview. And, in that event, the employer would, of course, be free to act on the basis of whatever information he had and without such
additional facts as might have been gleaned through the interview." 195 N. L. R. B., at 198-199.

Fifth, the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview. The Board said in Mobil, "we are not giving the Union any particular rights with respect to predisciplinary discussions which it otherwise was not able to secure during collective-bargaining negotiations." 196 N. L. R. B., at 1052 n. 3. The Board thus adhered to its decisions distinguishing between disciplinary [420 U.S. 251, 260] and investigatory interviews, imposing a mandatory affirmative obligation to meet with the union representative only in the case of the disciplinary interview. Texaco, Inc., Houston Producing Division, 168 N. L. R. B. 361 (1967); Chevron Oil Co., 168 N. L. R. B. 574 (1967); Jacobe-Pearson Ford, Inc., 172 N. L. R. B. 594 (1968). The employer has no duty to bargain with the union representative at an investigatory interview. "The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation." Brief for Petitioner 22.

III

The Board's holding is a permissible construction of "concerted activities for... mutual aid or protection" by the agency charged by Congress with enforcement of the Act, and should have been sustained.

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 "[employees 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 [420 U.S. 251, 261] unjustly. 6 The representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview. Concerted activity for mutual aid or protection is therefore as present here as it was held to be in NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505-506 (CA2 1942), cited with approval by this Court in Houston Contractors Assn. v. NLRB, 386 U.S. 664, 668-669 (1967):

"'When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each of them assures himself, in case his turn ever comes, of the support of the one whom they are all then
helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts."

The Board's construction plainly effectuates the most fundamental purposes of the Act. In 1, 29 U.S.C. 151, the Act declares that it is a goal of national labor policy to protect "the exercise by workers of full freedom [420 U.S. 251, 262] of association, self-organization, and designation of representatives of their own choosing, for the purpose of... mutual aid or protection." To that end the Act is designed to eliminate the "inequality of bargaining power between employees ... and employers." Ibid. Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management." American Ship Building Co. v. NLRB, 380 U.S. 300, 316 (1965). Viewed in this light, the Board's recognition that 7 guarantees an employee's right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres is within the protective ambit of the section "read in the light of the mischief to be corrected and the end to be attained." NLRB v. Hearst Publications, Inc., 322 U.S. 111, 124(1944).

The Board's construction also gives recognition to the right when it is most useful to both employee and employer. 7 A single employee confronted by an employer [420 U.S. 251, 263] 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. In other words, respondent would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined. 8 At that point, however, it becomes increasingly difficult for the employee to vindicate himself, and the [420 U.S. 251, 264] value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them.

IV

The Court of Appeals rejected the Board's construction as foreclosed by that court's decision four years earlier in Texaco, Inc., Houston Producing Division v. NLRB, 408 F.2d 142 (1969), and by "a long line of Board decisions, each of which indicates - either directly or indirectly - that no union representative need be present" at an investigatory interview. 485 F.2d, at 1137.

The Board distinguishes Texaco as presenting not the question whether the refusal to allow the employee to have his union representative present constituted a violation of 8 (a) (1) but rather the question whether 8 (a) (5) precluded the employer from refusing to
deal with the union. We need not determine whether Texaco is distinguishable. Insofar as the Court of Appeals there held that an employer does not violate 8 (a) (1) if he denies an employee's request for union representation at an investigatory interview, and requires him to attend the interview alone, our decision today reversing the Court of Appeals' judgment based upon Texaco supersedes that holding.

In respect of its own precedents, the Board asserts that even though some "may be read as reaching a contrary conclusion," they should not be treated as impairing the validity of the Board's construction, because "[t]hese decisions do not reflect a considered analysis of the issue." Brief for Petitioner 25. 9 In that circumstance, and in the [420 U.S. 251, 265] light of significant developments in industrial life believed by the Board to have warranted a reappraisal of the question, 10 the Board argues that the case is one where "[t]he nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way ... and has modified and reformed its standards on the basis of accumulating experience." Electrical Workers v. NLRB, 366 U.S. 667, 674 (1961).

We agree that its earlier precedents do not impair the validity of the Board's construction. That construction in no wise exceeds the reach of 7, but falls well within the scope of the rights created by that section. The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect [420 U.S. 251, 266] of the national labor law would misconceive the nature of administrative decisionmaking. "'Cumulative experience' begets understanding and insight by which judgments ... are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process." NLRB v. Seven-Up Co., 344 U.S. 344, 349(1953).

The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board. The Court of Appeals impermissibly encroached upon the Board's function in determining for itself that an employee has no "need" for union assistance at an investigatory interview. "While a basic purpose of section 7 is to allow employees to engage in concerted activities for their mutual aid and protection, such a need does not arise at an investigatory interview." 485 F.2d, at 1138. It is the province of the Board, not the courts, to determine whether or not the "need" exists in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations. For the Board has the "special function of applying the general provisions of the Act to the complexities of industrial life," NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963); see Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 196 -197 (1941), and its special competence in this field is the justification for the deference accorded its determination. American Ship Building Co. v. NLRB, 380 U.S., at 316 . Reviewing courts are of course not "to stand aside and rubber stamp" Board determinations that run contrary to the
language or tenor of the Act, NLRB v. Brown, 380 U.S. 278, 291 (1965). But the Board's construction here, while it may not be required by the Act, is at least permissible under it, and insofar as the Board's application of that meaning engages in the "difficult and delicate responsibility" of reconciling conflicting interests of labor and management, the balance struck by the Board is "subject to limited judicial review." NLRB v. Truck Drivers, 353 U.S. 87, 96 (1957). See also NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); NLRB v. Brown, supra; Republic Aviation Corp. v. NLRB, supra. In sum, the Board has reached a fair and reasoned balance upon a question within its special competence, its newly arrived at construction of 7 does not exceed the reach of that section, and the Board has adequately explicated the basis of its interpretation.

The statutory right confirmed today is in full harmony with actual industrial practice. Many important collective-bargaining agreements have provisions that accord employees rights of union representation at investigatory interviews. Even where such a right is not explicitly provided in the agreement a "well-established current of arbitral authority" sustains the right of union representation at investigatory interviews which the employee reasonably believes may result in disciplinary action against him. Chevron Chemical Co., 60 Lab. Arb. 1066, 1071 (1973).

The judgment is reversed and the case is remanded with direction to enter a judgment enforcing the Board's order.

It is so ordered.

PASADENA POLICE OFFICERS ASSOCIATION et al., Plaintiffs and Appellants, v. CITY OF PASADENA et al., Defendants and Respondents.

(Opinion by Ashby, J., with Stephens, Acting P. J., and Hastings, J., concurring.) [147 Cal.App.3d 696]

COUNSEL

Gibson, Dunn & Crutcher, Richard C. Cornish and Richard Chernick for Plaintiffs and Appellants.


Victor J. Kaleta, Acting City Attorney, Terrence M. Anderson, Deputy City Attorney, O'Melveny & Myers, Clyde E. Tritt, Karen R. Growdon and John F. Daum for Defendants and Respondents.

OPINION

ASHBY, J.

Plaintiffs are employee organizations and active and retired members of the Pasadena Fire and Police Retirement System (the System). They brought this action for injunctive and declaratory relief and writ of mandate to declare invalid certain amendments to the pension plan as violative of the members' vested contract rights. The trial court rendered judgment for defendants, concluding that the amendments did not impair the members' vested contract rights. Plaintiffs appeal.

The provisions relating to the System are contained in article XV of the Pasadena City Charter. The System provides a basic monthly retirement benefit which at age 50 is equal generally to 2 percent of a member's final compensation for each year of service. Effective July 1, 1969, the charter was amended to provide for a cost of living allowance (COLA) in addition to the basic monthly benefit, calculated to adjust the basic monthly benefit by the annual percentage change in the consumer price index. The COLA benefit contained no cap or limit on such changes; it was fully adjustable to changes in the consumer price index. The 1969 amendments also applied to members who had retired prior to July 1, 1969, provided they elect within 180 days to be governed by the new plan. The plan provided that in addition to the amounts contributed by the employees and the city toward the basic monthly benefit, the employees and the city would each...
also contribute, for the first 10 years, 1 percent of salary toward the COLA benefit. [147 Cal.App.3d 700]

After a dramatic rise in COLA benefits due to high rates of inflation, agreement was reached with employee organizations to modify the System in 1977, and amendments were added (1) to increase the contribution rate to 2 1/2 percent until 1987 and (2) to close the System so as to limit the number of members covered by the uncapped COLA benefit, fn. 1 New employees hired after the effective date of the 1977 amendments are covered instead by the state Public Employees' Retirement System (PERS). The employees hired before the 1977 effective date were given an option whether to remain in the System or to join the state PERS. Most chose to remain in the Pasadena system, which had an unlimited COLA in contrast to the PERS COLA, limited to 2 percent per year.

Notwithstanding the increase in contribution rate for the COLA benefit, fiscal experience with the benefit continued to be unfavorable. Contributions toward the COLA benefit were insufficient to cover the amounts then being expended for retirees' COLA benefits. COLA benefits were paid, in effect, by borrowing from other portions of the System.

A citizens' committee appointed to study the problem suggested charter amendments to limit the liability of the System and the city for COLA benefits by placing a cap on such benefits. In June 1981 the voters approved the amendments here at issue limiting the COLA benefits.

The 1981 amendments capped future changes in the COLA, that is, any increase or decrease which becomes effective after July 13, 1981, at 2 percent. Members who retired after June 30, 1969, but before July 14, 1981, were excepted, but members who retired prior to June 30, 1969, were not. Active members who retired after July 13, 1981, were given three options which contained different formulas involving a 2 percent cap. Option three, which the trial court held was adequate to preserve the members' vested contractual rights, provided that a member could cease contributing to the System and could receive an unlimited COLA on a portion of the member's pension calculated by the ratio of the member's years of service prior to July 13, 1981, to his total years of service. For example, a member who had worked for 10 years prior to July 13, 1981, and who thereafter retired with 20 years of service would be entitled to an unlimited COLA on one-half his pension and no COLA on the other half.

This appeal involves three main questions: (1) whether the 1981 amendments impaired the vested rights of active members; (2) whether the 1981 [147 Cal.App.3d 701] amendments impaired the vested rights of members who retired prior to July 1, 1969; and (3) whether an unrelated 1980 amendment involving actuarial assumptions used in calculating the basic monthly benefit (not the COLA) impaired vested rights.

Active Members

[1] It has long been the rule in California that a public employee's pension constitutes an element of compensation and that the right to pension benefits vests upon the acceptance of employment even though the right to immediate payment of a full pension may not mature until certain conditions are satisfied. (Miller v. State of California (1977) 18 Cal.3d 808, 815 [135 Cal.Rptr.
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386, 557 P.2d 970; Betts v. Board of Administration (1978) 21 Cal.3d 859, 863 [148 Cal.Rptr. 158, 582 P.2d 614]; Kern v. City of Long Beach (1947) 29 Cal.2d 848, 855 [179 P.2d 799]; Dryden v. Board of Pension Commrs. (1936) 6 Cal.2d 575, 579 [59 P.2d 104].) Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity. (Betts v. Board of Administration, supra, 21 Cal.3d 859.) Very recently the Supreme Court has summarized this rule as follows: "By entering public service an employee obtains a vested contractual right to earn a pension on terms substantially equivalent to those then offered by the employer. [Citations.] On the employee's retirement after he has fulfilled pension conditions an immediate obligation arises to pay benefits earned." (Carman v. Alvord (1982) 31 Cal.3d 318, 325 [182 Cal.Rptr. 506, 644 P.2d 192].)

[2] Although stating that "[a]n employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system," the landmark case of Allen v. City of Long Beach (1955) 45 Cal.2d 128, 131 [287 P.2d 765], also placed "strict limitation on the conditions which may modify the pension system in effect during employment." (Betts v. Board of Administration, supra, 21 Cal.3d at p. 864.) "Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." (Allen v. City of Long Beach, supra, 45 Cal.2d at p. 131; italics added; Abbott v. City of Los Angeles (1958) 50 Cal.2d 438, 447-448 [326 P.2d 484]; Miller v. State of California, supra, 18 Cal.3d 808, 816; Betts v. Board of Administration, supra, [147 Cal.App.3d 702] 21 Cal.3d 859; Allen v. Board of Administration (1983) 34 Cal.3d 114, 120 [192 Cal.Rptr. 762, 665 P.2d 534].)

[3 a] The 1981 amendments to the COLA provisions were obviously disadvantageous to the employees. They substantially limited and reduced the protection which had previously been offered by a pension fully adjustable to changes in the cost of living. The city makes no claim that this detriment was compensated by comparable new advantages, fn. 2 Under the test laid down by the Supreme Court in Allen, and repeatedly reaffirmed by the Supreme Court, the 1981 amendments substantially reducing the cost of living benefits of the pension plan are invalid.

Defendants contend, however, that the amendments did not impair at all the vested contract rights of the active employees because they purport to be prospective only. It is argued that the pro rata formula in option three expressly preserves the right to an unlimited COLA on that portion of the pension which "already has been earned" by years of service prior to July 13, 1981. Defendants contend that just as a public employee's compensation might be reduced in the future, so also the pension rights which might be earned in the future can be reduced. Defendants argue that the Allen test requiring comparable new advantages should be construed to apply only to attempted modifications of pension rights "already earned" and that if such rights are preserved by a pro rata formula then the benefits to be earned in the future can be reduced.

Defendants' construction of Allen cannot be reconciled with portions of the Allen decision itself or later decisions. One of the amendments invalidated in Allen increased each employee's
contribution to the retirement system from 2 percent of his salary to 10 percent. (Allen v. City of Long Beach, supra, 45 Cal.2d at p. 130.) On the same page on which the Supreme Court announced its comparable new advantages test, it invalidated the increase in contribution rate, because "[t]he provision raising the rate of an employee's contribution to the city pension fund from 2 per cent of his salary to 10 per cent obviously constitutes a substantial increase in the cost of pension protection to the employee without any corresponding increase in the amount of the benefit payments he will be entitled to receive upon his retirement." (45 Cal.2d at p. 131.) In other words, where the employee's contribution rate is a fixed element of the pension system, the rate may not be increased unless the employee receives comparable new advantages [147 Cal.App.3d 703] for the increased contribution. (Wisley v. City of San Diego (1961) 188 Cal.App.2d 482, 486-487 [10 Cal.Rptr. 765]; City of Downey v. Board of Administration (1975) 47 Cal.App.3d 621, 631-633 [121 Cal.Rptr. 295]. See also Glaeser v. City of Berkeley (1957) 148 Cal.App.2d 614, 617 [307 P.2d 61]; Abbott v. City of San Diego (1958) 165 Cal.App.2d 511, 518-519 [332 P.2d 324]. Cf.International Assn. of Firefighters v. City of San Diego (1983) 34 Cal.3d 292, 299, 303 [193 Cal.Rptr. 871, 667 P.2d 675] [contribution rate actuarially based rather than fixed].) An increase in an employee's contribution rate operates prospectively only and in effect reduces future salary, yet in Allen the Supreme Court struck down such a change on the ground that it modified the system detrimentally to the employee without providing any comparable new advantages. [3b] The contribution rate cases, including Allen itself, are wholly inconsistent with defendants' argument that Allen means only that comparable new advantages must be provided when benefits already earned are modified retroactively. (See also Phillis v. City of Santa Barbara (1964) 229 Cal.App.2d 45, 66 [40 Cal.Rptr. 27] ["There is no merit in respondents' claim that the rule of the Allen and Abbott cases, requiring equal advantages to offset disadvantageous amendments to a pension plan, is confined in its application to employees who have fully earned their pension."].)

[5] Also inconsistent with defendants' theory is the Supreme Court's recent summary of the pension cases stating, "By entering public service an employee obtains a vested contractual right to earn a pension on terms substantially equivalent to those then offered by the employer." (Carman v. Alvord, supra, 31 Cal.3d at p. 325; italics added. See also California League of City Employee Associations v. Palos Verdes Library Dist. (1978) 87 Cal.App.3d 135, 139-140 [150 Cal.Rptr. 739].) This statement indicates the employee has a vested right not merely to preservation of benefits already earned pro rata, but also, by continuing to work until retirement eligibility, to earn the benefits, or their substantial equivalent, promised during his prior service. The language in Carman, "[T]erms substantially equivalent to those then offered" must refer to the rule of Allen that while benefits are not absolutely fixed, changes detrimental to the employee must be offset by comparable new advantages.

Although the 1981 amendments are couched in a formula which purports to make only a "prospective" reduction in benefits, the change is nevertheless a substantial reduction in the pension which could have been earned under the 1969 amendments. In Allen, supra, 45 Cal.2d at pages 131-132, the city attempted to change from a "fluctuating" pension (tied to the current salary paid for the rank which had been held by the retiree) to a "fixed" pension (tied to the salary previously earned by the retiree); in Babbitt v. [147 Cal.App.3d 704] Wilson (1970) 9 Cal.App.3d 288, 290 [88 Cal.Rptr. 623], the city attempted to change a disability retirement benefit from two-thirds of salary to one-half of salary. These reductions in benefits were held
invalid as to employees who had worked under the older more generous system. Here also the
benefit has in real terms been reduced. [6] The fact that the reduction is tied by a formula related
to the employee's years of service before the effective date of the amendments does not change
that reality, fn. 3

In support of the theory that a "prospective" reduction in benefits is permissible, defendants and
the trial court relied upon cases decided before Allen v. City of Long Beach, supra, and which
therefore cannot be regarded as good authority for defendants' argument. In 1947, the California
Supreme Court decided Kern v. City of Long Beach, supra, 29 Cal.2d 848, which held that an
amendment completely eliminating pension rights could not constitutionally apply to an
employee who had served while the pension system was in effect. In the course of that decision,
the Supreme Court stated that pension systems may be modified, concluding, however, that
"[t]he permissible scope of changes in the provisions need not be considered here, because the
respondent city ... has repealed all pension provisions." (Id, 29 Cal.2d at pp. 854-855.) It was not
until the 1955 decision in Allen v. City of Long Beach, supra, 45 Cal.2d at page 131, that the
Supreme Court, in elaborating on the question not reached in Kern, announced the additional
requirement that "changes in a pension plan which result in disadvantage to employees should be
accompanied by comparable new advantages." (Id See Cochran v. City of Long Beach (1956)
139 Cal.App.2d 282, 287 [293 P.2d 839].) Defendants rely upon a line of cases decided in the
interim, before the Allen test was formulated. This line of cases also [147 Cal.App.3d 705]
involved the Long Beach City Charter. Prior to its amendment in March 1945, the charter had
provided that a member of the police or fire departments was entitled to a 50 percent pension
after 20 years of service, and to a pension with an additional 1 2/3 percent for each year of
service beyond 20 years, up to 30 years (in other words, up to a 2/3 pension with 30 years of
service). The question presented in Palaske v. City of Long Beach (1949) 93 Cal.App.2d 120
[208 P.2d 764], was whether an employee as to whom the 1945 repeal of all pension rights was
ineffective by virtue of the Kern decision, was entitled not only to complete his 20 years of
service after the amendment so as to be eligible for a 50 percent pension, but also to earn the
additional 1 2/3 percent pension for each year of service beyond 20. Relying upon language in
Kern that a pension system may be modified, the Palaske court concluded "it appears that it was
within the power of the city to modify its pension plan to provide that on and after the effective
date of the amendment an employee who was entitled to retire might do so or not, as he saw fit,
but that if he chose to continue as an employee he could not thereby earn any additional pension
above that to which he was entitled on the effective date of the amendment. As stated by the
Supreme Court, the employee had the vested right only to a substantial or reasonable pension.
His contractual right to such a pension has not been impaired by legislation which, operating
prospectively, merely withdraws any right or option to earn a bonus by continuing in
employment after he has become eligible for retirement." (Id, 93 Cal.App.2d at p. 132.)

Before 1955, two additional Court of Appeal cases involving the same section of the Long Beach
City Charter followed the holding of Palaske. ([Albion] Allen v. City of Long Beach (1950) 101
Cal.App.2d 15, 20 [224 P.2d 792]; Allstot v. City of Long Beach (1951) 104 Cal.App.2d 441,
444 [231 P.2d 498].) When the Supreme Court decided the [Manning] Allen case in 1955, it
referred briefly to these decisions, without overruling them, stating only, "[T]he series of
decisions culminating in Allstot v. City of Long Beach, ...., which upheld a charter amendment
depriving employees of the opportunity to earn an increase in their pensions by remaining in
service after reaching retirement age, are distinguishable from the present case." (Allen v. City of Long Beach, supra, 45 Cal.2d at p. 133.) After Allen, one 1958 Court of Appeal case involving the same Palaske provision of the Long Beach City Charter concluded that the Palaske line of cases had not been overruled and was still good law. (Houghton v. City of Long Beach, supra, 164 Cal.App.2d 298, 310-312.) The Houghton decision was based in part, however, upon the city's reliance on the Palaske line of cases since 1949. (Id, 164 Cal.App.2d at p. 311.)

In our opinion, the Palaske line of cases cannot be reconciled with the comparable new advantages test of Allen and subsequent cases. The Palaske [147 Cal.App.3d 706] line should be limited to the Long Beach City Charter provision there in question in light of that city's reliance upon Palaske. The Palaske line should not be extended and does not support the amendment in this case which prevents the members of the Pasadena Fire and Police Retirement System from ever earning the fully adjustable pension promised them during their 1969 to 1981 years of service, fn. 4

Pre-1969 Retirees

The 1969 amendments gave the COLA benefit to the pre-1969 retirees "upon the election by the member or his surviving wife within 180 days of the effective date of this amendment" to be governed by the modified system. (Pasadena City Charter, art. XV, ?? 1508(b), 1509.8.) Accordingly, all eligible retirees and surviving spouses were sent a form in July 1969 for electing to accept the 1969 amendments. All but one returned the signed form electing to be governed by the 1969 amendments, fn. 5

[7] These members thereafter received substantial raises in their pensions, fully reflecting increases in the cost of living, pursuant to the COLA benefit, fn. 6 However, under the 1981 amendments, these pensions are limited in the future to a maximum 2 percent change on account of the COLA benefit. [8a] We hold the 1981 amendments cannot constitutionally be applied to the pre-1969 retirees who elected to be governed by the 1969 amendments.

Since these members had completed all their years of service and retired before any COLA benefit was enacted, they never gave services with the reasonable expectation that their pensions would be adjusted for changes in the cost of living. Thus, they had no vested contractual right, based on the contract in effect during their employment, to continuation of the COLA benefit. (Olson v. Cory (1980) 27 Cal.3d 532, 542 [178 Cal.Rptr. 568, 636 P.2d 532].)

However, the right of the pre-1969 retirees to continuation of the COLA benefit is based on a different contract. Prior to the exercise of their election, [147 Cal.App.3d 707] these members were receiving, under the existing system, a fixed pension which could not be reduced. (See Terry v. City of Berkeley (1953) 41 Cal.2d 698, 703 [263 P.2d 833].) Under the 1969 amendments, pensions were rendered fully adjustable, up or down with the changes in the cost of living. By electing to come under the 1969 system, these members gave up their fixed pension and subjected themselves to the potential of a reduction in their pension should the cost of living index decline. By so agreeing, the retirees gave consideration for the city's promise to pay a fully adjustable pension (Civ. Code, ? 1605) and a contract was formed, a contract entitled to
Defendants persuaded the trial court that no contract was formed because the contract is illusory, the theory being that the retirees' election was and is revocable at will at any time, therefore the retirees did not give up anything, hence no mutuality of obligation and no contract. We conclude that defendants' interpretation of the election requirement is unreasonable and is not supported by any substantial evidence. [9] The interpretation of a written instrument is a question of law for the appellate court. Even where extrinsic evidence in aid of interpretation was offered in the trial court, the appellate court is not bound by the trial court's findings if the extrinsic evidence is not in conflict, is not substantial, or is inconsistent with the only interpretation to which the instrument is reasonably susceptible. (Parsons v. Bristol Development Co. (1965) 62 Cal.2d 861, 865 [44 Cal.Rptr. 767, 402 P.2d 839]; Glendale City Employees' Assn. v. City of Glendale (1975) 15 Cal.Sd 328, 340 [124 Cal.Rptr. 513, 540 P.2d 609]; In re Marriage of Fonstein (1976) 17 Cal.3d 738, 746-747 [131 Cal.Rptr. 873, 552 P.2d 1169].)

The 1969 charter amendments specifically provided that the COLA benefit would go only to those pre-1969 retirees who elected, within 180 days of the effective date of the amendments, to be governed by such provisions. A retiree who failed to file an election within 180 days would be barred from receiving the benefit because of failure to comply with the 180-day requirement. Yet, under defendants' interpretation, the 180-day requirement is meaningless, and anyone who chose not to elect the benefits was foolish, because he or she could have had all the advantages of the 1969 amendments without ever giving up the right to revert to the prior fixed pension if it became advantageous to do so. Defendants' contention that the election requirement was a mere "administrative convenience" does not make sense. If defendants' interpretation were correct, the administratively convenient course would have been to grant COLA increases automatically to the retirees without requiring an election, while considering the former fixed pension [147 Cal.App.3d 708] as a floor beyond which the adjustable pension could not be reduced in the event of declines of the cost of living index, fn. 7

Although neither the 1969 charter amendments nor the 1969 election forms expressly state that the election is "irrevocable," neither do they state that the members' election is revocable at will. In the authorities cited by defendants, the contract expressly provided that one party's performance was at will. (See County of Alameda v. Ross (1939) 32 Cal.App.2d 135 [89 P.2d 460]; Shortell v. Evans-Ferguson Corp. (1929) 98 Cal.App. 650 [277 P. 519].) [10] In the absence of an express unilateral right of unrestricted cancellation, the obligations in a contract should be presumed to be real and not illusory (see Civ. Code, ?? 1614, 1615). fn. 8 The election form filed by the retirees states that "I hereby freely and voluntarily elect to accept all of the modifications provided in the 1969 Amendments to Article XV of the City Charter in accordance with the election requirements of Section 1508(a) and (b) thereof." (See Lyons v. Workmen's Comp. Appeals Bd. (1975) 44 Cal.App.3d 1007, 1012, 1021 [119 Cal.Rptr. 159].) By so electing, the retiree consented to a potential reduction of pension in the event of a decline in the cost of living index, and this was sufficient consideration to support a contract.

Defendants rely heavily on the fact that one retiree, Rollin Anderson, who originally elected to receive the COLA subsequently revoked his election. However, this example does not support
defendants' contention that the election was revocable at will and hence the contract illusory. Aside from the parties' stipulation that Anderson "subsequently revoked his election," the only evidence on the point was a letter from the secretary of the retirement board to Anderson dated July 25, 1969, which states: "In accordance with your request, I am returning the 'Declaration of Retired Members' which you signed and submitted." No evidence was introduced as to the ground for Anderson's request. He could have had legal grounds for revocation, in which case his revocation does not show that the election was revocable at will. Moreover, Anderson's change of mind came well within [147 Cal.App.3d 709] the 180-day period which the charter allowed for the retirees to make their decision.

[8b] We conclude therefore that there is no substantial evidence to support defendants' unreasonable construction of the election requirement to be a meaningless gesture rendering the contract illusory. In making their election to be governed by the 1969 amendments, the pre-1969 retirees gave sufficient consideration to bind defendants to pay the promised fully adjustable pension. [11] Such contract was constitutionally protected against impairment, fn. 9

Actuarial Assumptions

Plaintiffs also challenge a 1980 amendment to section 1503 of the charter, which concerned the actuarial assumptions used in calculating employees' contributions to the basic monthly benefits (not the COLA).

Section 1509.9 provides for the normal rate of contribution by the employee: "The normal rates of contributions by members to the Retirement System shall be such as will provide an average annuity at age 50 equal to 1/100 of the final compensation of members according to the tables adopted by the Retirement Board and modified from time to time pursuant to this Article, for each year of service rendered after entering the System, and shall be required as a deduction from the compensation of each member throughout the member's membership." The city contributes the remainder of the contributions required during any fiscal year. (? 1509.92.)

Section 1503 provides for the retirement board to approve mortality service and other tables and rates of contributions from members as recommended from time to time by the actuary. Section 1509.93 authorizes the board periodically to make an actuarial investigation into the mortality service and other experience under the System and any necessary revisions of the tables and rates being used by the System.

Since a member's basic retirement allowance is one-fiftieth of the member's final compensation times the member's number of years in service ? 1509.15), a critical actuarial assumption is the estimate of the final compensation [147 Cal.App.3d 710] of active members. Prior to July 1, 1977, the retirement board did not use a salary inflation assumption in calculating either member contributions or city contributions. According to the testimony of the actuary, a change in guidelines of the American Academy of Actuaries in June 1976 indicated that inflation should be reflected in all assumptions that inflation affected. On the recommendation of the actuary, the board after July 1, 1977, took salary inflation into account in calculating the city's required contributions. However, at that time the actuary did not recommend that the same assumption
about salary inflation be used in calculating employee contributions, due to uncertainty over legal ramifications, fn. 10

On June 9, 1980, the retirement board unanimously decided that as of June 30, 1980, "the actuary in determining contribution rates for the members and the City shall include an equal inflation factor in the future salary increase assumption."

Pursuant to the recommendation of the charter study committee, section 1503 of the charter was amended to require the board to apply the same assumptions to both the employee and the city contributions. The challenged amendment added to section 1503 by providing "[t]he same actuarial tables, rates, valuations and assumptions, including but not limited to assumptions concerning future investment return and salary inflation, shall be used in calculating member contributions pursuant to Section 1509.9 hereof as are used in calculating city contributions pursuant to Section 1509.92 hereof." The new salary inflation assumption had the effect of increasing employee contributions by about 50 percent for younger employees. (E.g., from 6 percent to 9 percent.)

[12] Plaintiffs contend that because the salary inflation assumption substantially increased employees' contribution rates, without any comparable new advantage, it violated vested contract rights under Allen v. City of Long Beach, supra, 45 Cal.2d at pages 130-131, and Wisley v. City of San Diego, supra, 188 Cal.App.2d at page 486.

However, this case is distinguishable because at all pertinent times the charter provided that the employees' contribution was to be an amount actuarially sufficient to provide an average annuity at age 50 equal to one-hundredth [147 Cal.App.3d 711] of final compensation according to the tables adopted by the retirement board, fn. 11 The employees' contribution was not absolutely fixed but was dependent upon actuarial tables and assumptions, which the board was authorized by the charter to determine and revise from time to time. As stated by the trial court, "Since the authority of the Retirement Board to adopt and approve actuarial assumptions has been a condition of the entitlement of members to pension benefits at all pertinent times, the decision of the Retirement Board, in the exercise of that authority, to use an assumption as to salary inflation in calculating members' contribution did not deprive plaintiffs or any System member of any vested right, nor did the subsequent incorporation into the Charter of the specific requirement that such an assumption be used."

The trial court presaged the Supreme Court's recent decision in International Assn. of Firefighters v. City of San Diego, supra, 34 Cal.3d 292. There, as here, the contribution rate required of the employees was substantially increased based upon the advice of the retirement system's actuary that, pursuant to the new guidelines of the profession, salary inflation be taken into account. The Supreme Court rejected the employees' argument that the increase in the contribution rate impaired their vested contract rights. The court held the increase was authorized by the express provisions of the retirement system which provided for an actuarially based rather than a fixed contribution rate. (Id, at pp. 299-303.)

That portion of the judgment relating to the actuarial assumption provisions of section 1503 is affirmed. Those portions of the judgment upholding the application of sections 1509.8 and
1508.81 as amended effective July 13, 1981, are reversed with directions to enter judgment for plaintiffs. The parties to bear their own costs on appeal.

We are asked to determine whether, in the absence of a collective bargaining Agreement, Government Code section 19851 mandates the payment of overtime compensation to correctional peace officers who work more than eight hours per day or 40 hours per week. The trial court held that it does not. We agree and affirm the judgment.

I. BACKGROUND

Section 19851 generally provides that, unless state employees are subject to a contrary memorandum of understanding (MOU), "It is the policy of the state that the workweek of the state employee shall be 40 hours, and the workday of state employees

1 All further statutory references are to the Government Code unless otherwise specified.
2 "If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling without further legislative action, except that if the provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual budgetAct." (§ 19851, subd. (b).)
eight hours, except that workweeks and workdays of a different number of hours may be established in order to meet the varying needs of the different state agencies. It is the policy of the state to avoid the necessity for overtime work whenever possible. This policy does not restrict the extension of regular working-hour schedules on an overtime basis in those activities and agencies where it is necessary to carry on the state business properly during a manpower shortage." (§ 19851, subd. (a).)

Plaintiff/appellant California Correctional Peace Officers' Association (CCPOA) is the exclusive recognized employee organization representing approximately 30,000 state employees in State Bargaining Unit Six (Unit Six). Defendant/respondent State of California (State), is the employer, and the California Department of Personnel Administration (DPA), is the Governor's representative and administrator of wages for state employees. In 2007, collective bargaining efforts to negotiate a new MOU failed and an impasse was declared by the state Public Employment Relations Board. Subsequent mediation was also unsuccessful, and on September 18, pursuant to section

3 Unit Six is made up of employees in multiple correctional peace officer classifications who work for the California Department of Corrections and Rehabilitation (CDCR) and the California Department of Mental Health.

4 "The Legislature created the DPA in 1981 for the purpose of managing the nonmerit aspects of the state's personnel system. [Citation.] The DPA succeeded to certain powers and duties formerly exercised by the State Personnel Board, the State Board of Control, the Department of General Services, and the Department of Finance. [Citation.] In general, the DPA has jurisdiction over the state's financial relationship with its employees, including matters of salary, layoffs and nondisciplinary demotions. [Citations.] For purposes of collective bargaining the director of the DPA was designated as the Governor's representative to meet and confer with recognized employee organizations under the Ralph C. Dills Act. [Citation.]" (Tirapelle v. Davis (1993) 20 Cal.App.4th 1317, 1322-1323, fn. omitted.)

"Prior to the enactment of the Dills Act in 1977, state employees' wages, hours and working conditions were determined by numerous provisions of the Government Code. The Dills Act expressly permits the DPA and the state employee unions to supersede certain statutory provisions governing state employees' wages, hours, and working conditions by agreeing to MOU's which conflict with these provisions. (Department of Personnel Administration v. Superior Court (1992) 5 Cal.App.4th 155, 175.)
3517.8, subdivision (b), the DPA then implemented its last, best, and final offer (LBFO). The LBFO continued the same schedule that was contained in a preceding 2001-2006 MOU—a regular work schedule for most Unit Six employees of up to 164 hours in a 28-day period. Under the LBFO terms, "overtime" for purposes of additional compensation is defined as "any hours worked in excess of one hundred sixty-four (164) hours in a twenty-eight (28) day work period."

The LBFO, and as we discuss post, three predecessor MOU's, distinguished overtime eligibility between those categories of employees who are "7k exempt" and those who are not. Under the federal Fair Labor Standards Act (FLSA; 29 U.S.C. § 201 et seq.), employees are generally permitted to work a maximum of 40 hours per workweek "unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." (29 U.S.C. § 207(a)(l).) However, section 207(k) (section 7(k)) of the FLSA provides an exemption for fire protection and law enforcement personnel. (29 U.S.C. § 207(k).) Public agencies do not violate the normal 40-hour overtime standard of the FLSA, with respect to law enforcement personnel (including security personnel in correctional institutions), who do not exceed 171 hours for a work period of 28 days. (29 C.F.R. § 553.230(b).) For any work in excess of those hours, the employee must be compensated "at a rate not less than one and one-half times the regular rate at which he is employed." (29 U.S.C. § 207(k).)

5 "If the Governor and the recognized employee organization reach an impasse in negotiations for a new memorandum of understanding, the state employer may implement any or all of its last, best, and final offer. Any proposal in the state employer's last, best, and final offer that, if implemented, would conflict with existing statutes or require the expenditure of funds shall be presented to the Legislature for approval and, if approved, shall be controlling without further legislative action, notwithstanding Sections 3517.5, 3517.6, and 3517.7. Implementation of the last, best, and final offer does not relieve the parties of the obligation to bargain in good faith and reach an agreement on a memorandum of understanding if circumstances change, and does not waive rights that the recognized employee organization has under this chapter." (§ 3517.8, subd. (b).)
In 2009, Kurt Stoetzl, a CCPOA member, and the CCPOA filed a first amended complaint seeking injunctive relief and backpay. In their first amended complaint, plaintiffs alleged that Unit Six employees routinely worked eight hours and 12 minutes per day, or a 41-hour workweek. Plaintiffs further alleged that defendants had a statutory obligation, under section 19851, to compensate Unit Six employees for time worked in excess of eight hours per day or 40 hours per week at an overtime rate, and failed to do so.

Defendants answered, denying the allegations and raising a number of affirmative defenses. The parties then filed cross-motions for summary judgment or summary adjudication. CCPOA argued that "Defendants were and are duty-bound, pursuant to . . . section 19851, to pay . . . employees in [Unit Six]. . . premium overtime wages for all hours worked in excess of 8 per day and 40 per week." Defendants argued that "section 19851 (a) does not impose a mandatory duty on the State to pay overtime simply because a state employee works more than an 8-hour day or 40-hour week."

In support of their motions, the parties presented evidence of their collective bargaining history. Between 1995 and 1998, CCPOA had no MOU with the state. In 1998, CCPOA and defendants agreed to a one-year MOU. Under that MOU, the parties agreed to operate under the 7(k) exemption to the FLSA, with the regular work schedule defined as 168 hours in a 28-day work period. The same work schedule was agreed to in a 1999-2001 MOU. The 2001-2006 MOU established a work schedule of 164 hours in a recurring 28-day period up to July 1, 2004, and of 164 hours in a recurring 28-day period following July 1, 2004. Accordingly, overtime was only paid for work exceeding
168 hours in a 28-day period under the first two MOUs, and for work exceeding 164 hours in a 28-day period under the 2001-2006 MOU.⁶

The trial court granted defendants' motion for summary judgment. The order states: "the [court finds no triable issue of material fact on the sole claim raised by Plaintiffs' [sic] in their First Amended Complaint namely, whether . . . section 19851 (a) imposes a mandatory legal duty, under the circumstances of this case, to pay overtime wages. On this issue, the [court finds in favor of [defendants as a matter of law." Accordingly, the court entered judgment in favor of defendants. Plaintiffs filed a timely notice of appeal from the judgment.

II. DISCUSSION

Plaintiffs contend that section 19851 requires the payment of overtime compensation to designated CCPOA employees who, since September 18, 2007, have been working a 41-hour workweek in the absence of a MOU. Defendants concede that section 19851 generally becomes operative in the absence of a MOU (§ 19851, subd. (b)), but argue that the statute nevertheless does not mandate the payment of

⁶ The parties disagree about why the 7(k) schedule was implemented. According to CCPOA's Chief of Labor, the work schedule was "designed as a method of achieving salary increases sought by the Union. Never during these negotiations did the State indicate a need to change from a 40-hour schedule to meet its operational needs." According to the CDCR's Undersecretary of Operations, "[t]he additional 12± minutes per workday are operationally necessary for employees working in correctional institutions. To begin with, CDCR requires that designated staff at correctional institutions occupy their posts for a full 8-hour shift. This is to allow for 3 rotating 8-hour shifts at these institutions to ensure appropriate coverage in the institutions. However, these same individuals require a short amount of additional time to perform pre-and post-activities, such as 'donning and doffing' uniforms, checking in and checking out assigned equipment, checking in and checking out on attendance records, and walking from their changing area to their posts. To account for the additional time necessary to complete these tasks, designated staff at correctional institutions are scheduled to a work schedule of 164 hours in a recurring 28-day period as described above. This not only accounts for the additional time involved in the aforementioned tasks, but ensures that CDCR's operational needs of having staff occupy their posts for a full 8-hour shift are still met." Since we are interpreting the statute, and not the MOU, the factual dispute is irrelevant to our decision.
overtime wages to Unit Six employees subject to a section 7(k) schedule. Under defendants' interpretation, the Government Code only requires compliance with the FLSA's overtime requirements for Unit Six employees. Specifically, defendants argue: "section 7(k) [of the FLSA] permits public agencies to employ law enforcement personnel, including security personnel, . . . such as [Unit Six] personnel, for up to 171 hours in a 28-day period without incurring overtime liability regardless of the number of hours an employee may work within any given workday or workweek."

Thus, a narrow question, and one apparently of first impression, is presented. Under the California statutory scheme and in the absence of an operative MOU, does section 19851 require the payment of overtime compensation anytime a CCPOA employee works more than eight hours in a day or 40 hours in a week, or do defendants need only demonstrate compliance with the overtime requirements of the FLSA? We conclude that section 19851 does not impose the requirement that plaintiffs urge. A. Standard of Review

We consider a question of law, which we review de novo. (Sangster v. Paetkau (1998) 68 Cal.App.4th 151, 163 ["we review the trial court's decision to grant or deny the summary judgment motion de novo"]; County ofAlameda v. Pacific Gas & Electric Co. (1997) 51 Cal.App.4th 1691, 1698 [statutory construction reviewed independently].)

"The primary duty of a court when interpreting a statute is to give effect to the intent of the Legislature, so as to effectuate the purpose of the law. [Citation.] To determine intent, courts turn first to the words themselves, giving them their ordinary and generally accepted meaning. [Citation.] If the language permits more than one reasonable interpretation, the court then looks to extrinsic aids, such as the object to be achieved and the evil to be remedied by the statute, the legislative history, public policy, and the statutory scheme of which the statute is a part. [Citation.] ... Ultimately, the court must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and it must avoid an interpretation leading to absurd consequences. [Citation.]" (In re Luke W. (2001) 88 Cal.App.4th 650, 655.) "' ' ' ' ' "When used in a statute [words]
must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear." [Citations.] Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. [Citations.]" (Phelps v. Stostad (1997) 16 Cal.4th 23, 32.)

B. Plain Language of the Statute

Although section 19851 was enacted in 1981 and its statutory predecessor (former section 18020) was enacted in 1945, plaintiffs are apparently the first to propose that section 19851 mandates the payment of overtime compensation to any state employee who works in excess of eight hours per day or 40 hours per week, without a collective bargaining agreement. (Stats. 1981, ch. 230, § 55, pp. 1168, 1188-1189; Stats. 1945, ch. 123, § 1, pp. 535-536.) Accordingly, we begin our inquiry with the language of section 19851 itself. As noted above, section 19851 provides in pertinent part that it is "the policy of the state that the workweek of the state employee shall be 40 hours, and the workday of state employees eight hours, except that workweeks and workdays of a different number of hours may be established in order to meet the varying needs of the different state agencies."

We find no plain language in section 19851 mandating that Unit Six employees be paid overtime wages for work in excess of eight hours per day or 40 hours per week.7 Plaintiffs' argument notwithstanding, the statutory language does not provide in any

7 We need not address the parties' arguments regarding whether, in this case, a workweek and workday "of a different number of hours [was established] in order to meet the varying needs of the different state agencies." (§ 19851, subd. (a).) Whether the 41-hour schedule was established to meet the employer's needs or the employees' is irrelevant. In their motion for summary adjudication, plaintiffs put it best: "Plaintiffs do not contend that section 19851 prevents Defendants from scheduling work beyond 8 hours per day, whether for 'agency need' or not. Rather, [p]laintiffs argue that if Defendants do—in the absence of a collective bargaining agreement that supersedes section 19851—schedule work hours beyond 8 hours per day or 40 per week, they must compensate such time at a premium overtime rate." The parties agreed with the trial court's framing of the issue below as one of pure statutory construction.
manner that state employees "shall be paid overtime compensation" for any such work. (§ 19851.) Overtime is only mentioned in the following two sentences: "It is the policy of the state to avoid the necessity for overtime work whenever possible. This policy does not restrict the extension of regular working-hour schedules on an overtime basis in those activities and agencies where it is necessary to carry on the state business properly during a manpower shortage." (§ 19851, subd. (a).) But, plaintiffs do not rely on these two sentences to support their argument. And this language does not directly address the question presented here.

Plaintiffs instead place their reliance on the use of the word "shall" in the first sentence of section 19851, subdivision (a). Pursuant to section 14, "[s]hall" is mandatory and 'may' is permissive." However, section 19851, subdivision (a), only provides that: "It is the policy of the state that the workweek of the state employee shall be 40 hours, and the workday of state employees eight hours, except that workweeks and workdays of a different number of hours may be established in order to meet the varying needs of the different state agencies." (Italics added.) The statute does not provide, as plaintiffs would have us infer, that state employees shall be paid overtime compensation for any work beyond 40 hours in a workweek or eight hours in a day. If the Legislature had so intended, it would have said so. We cannot "under the guise of statutory construction, 'rewrite the law or give the words an effect different from the plain and direct import of the terms used.' [Citation.]" (City of Pasadena v. AT&T Communications of California, Inc. (2002) 103 Cal.App.4th 981, 984.) Accordingly, we must disagree with plaintiffs' assertion that "the only reasonable interpretation of section 19851 is that state employees must be compensated at overtime rates when they
work beyond [eight] hours in a workday or 40 hours in a workweek without a collective bargaining agreement."

Plaintiffs argue that, in the absence of an MOU, section 19851 supersedes other statutory provisions, and "as a 'supersession' statute, [s]ection 19851 requires DPA to pay overtime at 8 hours per day and 40 hours per week unless the parties agree to [a] different work schedule in a collective bargaining agreement." "The Dills Act [§3512 et seq.] is a 'supersession statute,' designed so that, in the absence of a MOU, as is the case when an existing MOU has expired and the parties have bargained to impasse, numerous Government Code provisions concerning state employees' wages, hours and working conditions take effect." (Department of Personnel Administration v. Superior Court, supra, 5 Cal.App.4th at pp.174-175.) The argument is circular. The supersession language of section 19851 merely provides: "If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling without further legislative action, except that if the provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act." (§ 19851, subd. (b); see also

8 In arguing that an expression of state policy implies a mandatory public duty, plaintiffs rely on cases that are inapposite because they involved very different statutory language. (Uhl v. Badaracco (1926) 199 Cal. 270, 282-283 ["where persons or the public have an interest in having an act done by a public body 'may' in a statute means 'must'"];) see also Mass v. Board of Education (1964) 61 Cal.2d 612, 621-623 [construing former section 13516.5 of the Education Code, which provided that past salary may be paid to a teacher reinstated by court order]; Harless v. Carter (1954) 42 Cal.2d 352, 355-356 [construing statute providing " [if] the act or law establishing . . . [a power of public sale] fails to prescribe the time within which such official may act, said official may sell at any time prior to the expiration of four years after the due date of said bond" (italics added)]; Hollman v. Warren (1948) 32 Cal.2d 351, 356 [interpreting statute providing that the governor " 'may' appoint notaries in such number as he deems necessary"]; Lazan v. County of Riverside (2006) 140 Cal.App.4th 453, 460 [construing statute providing employer " 'shall apply for disability retirement' "];) Section 19851 does not provide that defendants may pay overtime compensation for any hours worked in excess of eight hours per day or 40 hours per week.
§ 3517.61[^9] ["for state employees in State Bargaining Unit 6, in any case where the provisions of... Section ... 19851 ... are in conflict with the provisions of a memorandum of understanding, the memorandum of understanding shall be controlling without further legislative action").] Plaintiffs do not explain how this language necessarily mandates the payment of overtime compensation for any work in excess of eight hours per day or 40 hours per week. It does not. Plaintiffs’ argument begs the question of what section 19851, subdivision (a), in fact provides.

In our view, the plain language makes clear that section 19851 only establishes a state policy for normal working hours. When we look at the statutory scheme as a whole it is all the more clear that the statute governing overtime compensation is, in fact, not section 19851, but rather section 19844. Section 19844, subdivision (a), provides: "The [department[^10]] shall provide the extent to which, and establish the method by which, ordered overtime or overtime in times of critical emergency is compensated. The department may provide for cash compensation at a rate not to exceed [one and one-half] times the regular rate of pay, and the rate may vary within a class depending upon the conditions of work, or the department may provide for compensating time off at a rate not to exceed [one and one-half] hours of time off for each hour of overtime worked. The provisions made under this section shall be based on the practices of private industry and other public employment, the needs of state service, and internal relationships." (Italics added.) "It is fundamental that 'the language of a particular code section must be construed in light of and with reference to the language of other sections accompanying it and related to it with a view to harmonizing the several provisions and giving effect to all of them.' [Citation.]" (Walker v. Superior Court (1988) 47 Cal.3d 112, 131; accord, Tesco Controls, Inc. v. Monterey Mechanical Co. (2004) 124 Cal.App.4th 780, 792 ["'we interpret a statute in context, examining other legislation on the same subject, to

[^9]: Section 3517.61 was enacted in 1998 to authorize and approve the 1998 CCPOA MOU. (Stats. 1998, ch. 820, pp. 5134-5136.)

[^10]: "'Department' means the [DPA]." (§ 19815, subd. (a).)
determine the Legislature's probable intent' "]; Smith v. Rhea (1977) 72 Cal.App.3d 361, 366 ["a specific provision should be construed with reference to the entire statutory system of which it is a part"].

Plaintiffs concede that the Legislature, in section 19844, delegated authority to DPA to provide for overtime compensation. (See also §§ 19843, subd. (a) ["after considering the needs of the state service and prevailing overtime compensation practices, [the DPA] may establish workweek groups of different lengths or of the same length but requiring different methods of recognizing or providing compensation for overtime"], 19849, subd. (a) ["[t]he department shall adopt rules governing hours of work and overtime compensation"]). But, plaintiffs do not claim that any DPA rule entitles Unit Six employees to payment for overtime here. If we were to interpret section 19851 as providing for automatic and mandatory overtime compensation any time a public employee exceeded eight hours of work per day or 40 hours of work per week, we would necessarily render section 19844 superfluous. How could DPA "provide the extent to which" overtime is compensated, if section 19851 already expressed the Legislature's determination that overtime compensation must be provided after eight hours in a day or 40 hours in a week? Accordingly, we cannot read section 19851 as plaintiffs suggest. (See Latin v. Watkins Associated Industries (1993) 6 Cal.4th 644, 659 [" [a]n interpretation that renders related provisions nugatory must be avoided ...; each sentence must be read not in isolation but in the light of the statutory scheme' "].)

Defendants' interpretation of the statutory scheme is consistent with its plain language. Defendants maintain that "[i]n those special circumstances addressed by the FLSA, section 19845 permits the State to utilize FLSA-authorized methods for paying overtime compensation." Section 19845, subdivision (a), provides: "Notwithstanding any other provision of this chapter, the department is authorized to provide for overtime payments as prescribed by the Federal Fair Labor Standards Act to state employees."
Plaintiffs concede that section 19845 constitutes "a delegation of authority from the Legislature to DPA to comply with federal overtime mandates ... ."\textsuperscript{11}

Plaintiffs argue that section 19845, subdivision (a), does not abrogate section 19851 because the two sections are located in different chapters of the Government Code.\textsuperscript{12} But, plaintiffs' argument presumes that section 19851 expressly provides for overtime compensation. As we have concluded, it does not. It is, in fact, sections 19843, 19844, and 19849 that address overtime compensation. And, sections 19843, 19844, and 19849 are found in the same chapter as section 19845.

Plaintiffs do not contend that section 7(k) of the FLSA does not apply to Unit Six employees. (See 29 C.F.R. § 553.21 l(f).) Nor do plaintiffs contend that the current schedule violates section 7(k) of the FLSA. The question is not whether the FLSA preempts California overtime law for public employees. It is settled that the FLSA does not preempt state regulation of wages, hours, and working conditions. (29 U.S.C. § 218(a); City of Sacramento v. Public Employees Retirement System (1991) 229 Cal.App.3d 1470, 1482; Rivera v. Division of Industrial Welfare (1968) 265 Cal.App.2d 576, 602-605.) Plaintiffs have failed to show, however, that California law in section 19851 sets a lower threshold for overtime payments to law enforcement personnel than that provided under the FLSA.

Contrary to plaintiffs' contention, section 19851.1 does not provide support for their interpretation of section 19851. Section 19851.1, subdivision (a)(l), provides:

\textsuperscript{11} Contrary to plaintiffs' implicit assertion, section 19845 does not address "[s]alary setting." Thus, section 19845 does not contravene section 19826, subdivision (b), which provides: "Notwithstanding any other provision of law, the department shall not establish, adjust, or recommend a salary range for any employees in an appropriate unit where an employee organization has been chosen as the exclusive representative pursuant to Section 3520.5." Accordingly, plaintiffs misplace their reliance on Tirapelle v. Davis, supra, 20 Cal.App.4th at page 1325 and footnote 10.

\textsuperscript{12} Plaintiffs did not raise this argument before the trial court. Nonetheless, we exercise our discretion to address this issue of law (and defendants' responsive argument). (See Waller v. Truck Ins. Exchange, Inc. (1995) 11 Cal.4th 1, 23-24.)
"Notwithstanding Section 19851, the Department of Corrections shall establish a standardized overtime cap for correctional officers not to exceed 80 hours per month."

Section 19851.1 only provides for an overtime cap. It says nothing about the overtime trigger. The overtime cap in section 19851.1 serves the same purpose regardless of whether overtime pay is triggered after eight hours in a day, 40 hours in a week, or 171 hours in 28 days. Section 19851.1 merely limits the maximum amount of overtime compensation that a correctional officer can earn, regardless of when such overtime compensation is triggered. Similarly, section 19852 is not rendered "surplusage" under defendants' interpretation of section 19851, as plaintiffs argue. Section 19852 provides: "When the Governor determines that the best interests of the state would be served thereby, the Governor may require that the 40-hour workweek established as the state policy in Section 19851 shall be worked in four days in any state agency or part thereof."

( Italics added. ) Again, section 19852 says nothing on the topic of overtime compensation.

A fundamental flaw of plaintiffs' arguments is that they presume that there must be a trigger for overtime compensation under state law that is more protective of public employees than what is provided by the FLSA. However, plaintiffs provide no authority for this underlying premise and we know of none. Plaintiffs seem to rely on a general assumption that any work in excess of eight hours per day or 40 hours per week constitutes "overtime," automatically triggering a requirement for additional compensation. With respect to private sector employees, overtime compensation is regulated by various Industrial Wage Commission wage and hour orders and Labor Code section 510. Labor Code section 510, subdivision (a), provides in relevant part: "Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee."

However, state and local government employees are exempted from the overtime rules applicable to private sector employees. ( Cal. Code Regs., tit. 8, § 11010 et seq.; Labor Code, § 510; Johnson v. Arvin-Edison Water Storage Dist. (2009) 174 Cal.App.4th 729, 733 ["unless Labor Code provisions are specifically made applicable to public employers, they only apply to employers in the private..."
We conclude that the plain language of section 19851 does not require payment of overtime compensation anytime a Unit Six employee works in excess of eight hours per day or 40 hours per week.¹³
Appellants, police officers in certain New Jersey boroughs, were questioned during the course of a state investigation concerning alleged traffic ticket "fixing." Each officer was first warned that: anything he said might be used against him in a state criminal proceeding; he could refuse to answer if the disclosure would tend to incriminate him; if he refused to answer he would be subject to removal from office. The officers' answers to the questions were used over their objections in subsequent prosecutions, which resulted in their convictions. The State Supreme Court on appeal upheld the convictions despite the claim that the statements of the officers were coerced by reason of the fact that if they refused to answer they could, under the New Jersey forfeiture-of-office statute, lose their positions. That statute provides that a public employee shall be removed from office if he refuses to testify or answer any material question before any commission or body which has the right to inquire about matters relating to his office or employment on the ground that his answer may incriminate him. On the ground that the only real issue in the case was the voluntariness of the statements, the State Supreme Court declined to pass upon the constitutionality of the statute, though the statute was considered relevant for the bearing it had on the voluntary character of the statements used to convict the officers. The officers appealed to this Court under 28 U.S.C. 1257 (2) and the question of jurisdiction was postponed to a hearing on the merits. Held:

1. The forfeiture-of-office statute is too tangentially involved to satisfy the requirements of 28 U.S.C. 1257 (2). The only bearing it had was whether, valid or not, the choice between being discharged under it for refusal to answer and self-incrimination rendered the statements products of coercion. The appeal is dismissed, the papers are treated as a petition for certiorari, and certiorari is granted. Pp. 495-496.

2. The threat of removal from public office under the forfeiture-of-office statute to induce the petitioners to forgo the privilege against self-incrimination secured by the Fourteenth Amendment rendered the resulting statements involuntary and therefore inadmissible in the state criminal proceedings. Pp. 496-500. [385 U.S. 493, 494]

(a) The choice given petitioners either to forfeit their jobs or to incriminate themselves constituted coercion. Pp. 496-498.
(b) Whether there was a "waiver" is a federal question. P. 498.
(c) Where the choice is "between the rock and the whirlpool" (Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593), the decision to "waive" one or the other is made under duress. P. 498.


Daniel L. O'Connor argued the cause for appellants. With him on the brief was Eugene Gressman.

Alan B. Handler, First Assistant Attorney General of New Jersey, argued the cause for appellee. With him on the brief were Arthur J. Sills, Attorney General, and Norman Heine.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellants were police officers in certain New Jersey boroughs. The Supreme Court of New Jersey ordered that alleged irregularities in handling cases in the municipal courts of those boroughs be investigated by the Attorney General, invested him with broad powers of inquiry and investigation, and directed him to make a report to the court. The matters investigated concerned alleged fixing of traffic tickets.

Before being questioned, each appellant was warned (1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer he would be subject to removal from office. 1 385 U.S. 493, 495

Appellants answered the questions. No immunity was granted, as there is no immunity statute applicable in these circumstances. Over their objections, some of the answers given were used in subsequent prosecutions for conspiracy to obstruct the administration of the traffic laws. Appellants were convicted and their convictions were sustained over their protests that their statements were coerced, 2 by reason of the fact that, if they refused to answer, they could lose their positions with the police department. See 44 N. J. 209, 207 A. 2d 689, 44 N. J. 259, 208 A. 2d 146.

We postponed the question of jurisdiction to a hearing on the merits. 383 U.S. 941. The statute whose validity was sought to be "drawn in question," 28 U.S.C. 1257 (2), was the forfeiture statute. 3 But the New Jersey Supreme Court refused to reach that question (44 N. J., at 223, 207 A. 2d, at 697), deeming the voluntariness of the statements the only issue presented. Id., at 220-222, 207 A. 2d, at 695-696. The statute is therefore too tangentially involved to satisfy 28 U.S.C. 1257 (2), for the only bearing it had was whether, valid or not, the fear of being discharged under it for refusal to answer on the one hand and the fear of self-incrimination on the other was "a choice between the rock and the whirlpool" 4 which made the statements products of coercion in violation of the Fourteenth Amendment. We therefore dismiss the appeal, treat the papers as a petition for certiorari (28 U.S.C. 2103), grant the petition and proceed to the merits.
We agree with the New Jersey Supreme Court that the forfeiture-of-office statute is relevant here only for the bearing it has on the voluntary character of the statements used to convict petitioners in their criminal prosecutions.

The choice imposed on petitioners was one between self-incrimination or job forfeiture. Coercion that vitiates a confession under Chambers v. Florida, 309 U.S. 227, and related cases can be "mental as well as physical"; "the blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v. Alabama, 361 U.S. 199, 206. Subtle pressures (Leyra v. Denno, 347 U.S. 556; Haynes v. Washington, 373 U.S. 503) may be as telling as coarse and vulgar ones. The question is whether the accused was deprived of his "free choice to admit, to deny, or to refuse to answer." Lisenba v. California, 314 U.S. 219, 241.

We adhere to Boyd v. United States, 116 U.S. 616, a civil forfeiture action against property. A statute offered [385 U.S. 493.497] the owner an election between producing a document or forfeiture of the goods at issue in the proceeding. This was held to be a form of compulsion in violation of both the Fifth Amendment and the Fourth Amendment. Id., at 634-635. It is that principle that we adhere to and apply in Spevack v. Klein, post, p. 511.

The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices we reviewed in Miranda v. Arizona, 384 U.S. 436. 464 -465, is "likely to exert such pressure upon an individual as to disable him from making a free and rational choice." We think the statements were infected by the coercion inherent in this scheme of questioning [385 U.S. 493.498] and cannot be sustained as voluntary under our prior decisions.

It is said that there was a "waiver." That, however, is a federal question for us to decide. Union Pac. R. R. Co. v. Pub. Service Comm., 248 U.S. 67. 69 -70: Stevens v. Marks, 383 U.S. 234. 243 -244. The Court in Union Pac. R. R. Co. v. Pub. Service Comm., supra, in speaking of a certificate exacted under protest and in violation of the Commerce Clause, said:

"Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary __ "Id., at 70.

Where the choice is "between the rock and the whirlpool," duress is inherent in deciding to "waive" one or the other.

"It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." Ibid. [385 U.S. 493.499]

In that case appellant paid under protest, in these cases also, though petitioners succumbed to compulsion, they preserved their objections, raising them at the earliest
possible point. Cf. Abie State Bank v. Bryan, 282 U.S. 765, 776. The cases are therefore quite different from the situation where one who is anxious to make a clean breast of the whole affair volunteers the information.

Mr. Justice Holmes in McAuliffe v. New Bedford, 155 Mass. 216, 29 N. E. 517, stated a dictum on which New Jersey heavily relies:

"The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control." Id., at 220, 29 N. E., at 517-518.

The question in this case, however, is not cognizable in those terms. Our question is whether a State, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee.

We held in Slochower v. Board of Education, 350 U.S. 551, that a public school teacher could not be discharged merely because he had invoked the Fifth Amendment privilege against self-incrimination when questioned by a congressional committee:

"The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury.... The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." Id., at 557-558.

We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.

There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one. Western Union Tel. Co. v. Kansas, 216 U.S. 1, Resort to the federal courts in diversity of citizenship cases is another. Terral v. Burke Constr. Co., 257 U.S. 529. Assertion of a First Amendment right is still another. Lovell v. City of Griffin, 303 U.S. 444; Murdock v. Pennsylvania, 319 U.S. 105; Thomas v. Collins, 323 U.S. 516; Lament v. Postmaster General, 381 U.S. 301, 305; Lament v. Postmaster General, 381 U.S. 301, 305–306. The imposition of a burden on the exercise of a Twenty-fourth Amendment right is also banned. Harman v. Forssenius, 380 U.S. 528. We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.

Reversed.
The City of Los Angeles and Los Angeles Police Chief Gates (collectively "appellants") appeal the denial of their motions for summary judgment, directed verdict, new trial, and judgment notwithstanding the verdict, and the jury award in favor of Los Angeles Police Officer Johnny Lee Jackson. Jackson brought this action after being discharged for refusing to comply with an order to provide a urine sample for drug testing. We hold that appellants' termination of Jackson because he refused to comply with the order violated his Fourth Amendment rights. Further, we hold that the jury was properly instructed on the
applicable Fourth Amendment standard, which required the police to demonstrate an articulable reasonable basis for suspecting Jackson of drug use before ordering him to submit to the urinalysis.

BACKGROUND

Los Angeles Police Department ("LAPD") Officers Leach and Jackson were assigned to the same police station. Sometime before February 1986, the Internal Affairs Division of the LAPD ("IAD") began conducting undercover surveillance of Officer John Leach, whom they suspected of illegal drug use. IAD undercover officers saw Jackson and Leach together on two separate occasions during their investigation.

On the afternoon of February 13, 1986, Jackson got into Leach's car, and the two drove to an apartment building in Hollywood. The building was known by the IAD officers to be the site of narcotics sales and use. Leach entered the building while Jackson remained in the car. Leach returned with a woman, and the three drove to another apartment building also considered by the IAD officers to be a location of illegal drug sales and use. Leach and the woman went into that building while Jackson again waited in the car. Leach returned alone, and the two drove to Leach's residence in North Hollywood.

After some time at Leach's residence, the two returned to the second apartment building. As before, Leach entered the building while Jackson waited in the car. The two left, with Leach driving in a manner characterized by the surveilling officers as "calculated to avoid being followed."

The IAD's undercover surveillance of Leach then ceased until February 20, 1986. On that day, undercover IAD officers saw Leach and Jackson leave the station together after both had finished their work shifts. Leach drove with Jackson to Exposition Park where, according to the officers, the two drank beer and talked. Later that evening, Leach returned alone to one of the buildings believed by police to be a "narcotics location."

The IAD officers then took Leach into custody. Pursuant to a warrant, the Officers searched Leach's car, uncovering "a tinfoil bindle which in size and shape was consistent with the packaging of cocaine."

Under orders from their captain, IAD officers went to Jackson's home on February 21, 1986, at 1:30 a.m., and ordered him to provide a urine specimen. Jackson objected. The officers then ordered Jackson to accompany them to Parker Center in downtown Los Angeles.

Once there, Jackson met with a union representative of the Los Angeles Police Protective League ("League"). Jackson then received a formal order to provide a urine sample under contemporaneous observation by an IAD officer in the public restroom for drug testing. He refused the order.

On July 24, 1986, Jackson was suspended without pay pending a hearing on the charge of insubordination. An administrative panel found Jackson guilty of refusing to comply with a lawful order, and recommended discharge from the LAPD. Police Chief Gates accepted the panel's finding, and terminated Jackson effective July 24, 1986. See Charter of the City of Los Angeles §§ 202(12)-(13).
Jackson pursued the grievance procedures available to him, which provided that his dispute with the LAPD be submitted to binding arbitration. The arbitrator concluded that the labor agreement between the League and the LAPD did not authorize compulsory urinalysis in Jackson’s case. A year and one-half later, the LAPD reinstated Jackson and restored his lost benefits, including back pay, in accordance with the arbitrator's decision.

Jackson filed this lawsuit claiming damages under 42 U.S.C. § 1983 for alleged violations of his Fourth, Fifth, and Fourteenth Amendment rights. The parties on both sides filed motions for summary judgment.3 The district court granted summary judgment for all defendants sued in their individual capacity, including Police Chief Gates, on grounds of qualified immunity.4 Appellants' motion for summary judgment on the issues of Jackson's Fourth Amendment claim and municipal liability was twice denied.

Following trial, the jury returned a verdict for Jackson of $154,747. The district court entered judgment on the verdict, and denied motions filed by appellants for a directed verdict, for judgment notwithstanding the verdict or, in the alternative, for a new trial. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291.

DISCUSSION

I. Fourth Amendment Claim

Appellants contend that the district court erred by denying their motion for summary judgment on Jackson's Fourth Amendment claim under 42 U.S.C. § 1983. Specifically, appellants argue that the order to Jackson to submit to a urinalysis drug test was reasonable under the Fourth Amendment even absent a reasonable individualized and articulated suspicion of drug use, impairment, or ingestion.

We review the district court's grant of a motion for summary judgment de novo. Kruso v. International Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir.1989), cert, denied, 496 U.S. 937, 110 S.Ct. 3217, 110 LEd.2d 664 (1990). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact, and whether the district court correctly applied the relevant substantive law. Tzung v. State Farm Fire and Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir.1989).

Appellants argue that the Supreme Court's decisions in National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384, 103 LEd.2d 685 (1989), and Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 109 S.Ct. 1402, 103 LEd.2d 639 (1989), require no degree of individualized suspicion before ordering a police officer to submit to an administrative drug test. Thus, they contend that the order compelling Jackson to submit to urinalysis was not constitutionally unreasonable. We do not agree that these cases support the result appellants suggest.

It is well established that a urinalysis drug test is a search within the meaning of the Fourth Amendment. See Von Raab, 489 U.S. at 665, 109 S.Ct. at 1390; Railway Labor, 489 U.S. at 617, 109 S.Ct. at 1412; International Bhd. of Teamsters v. Department of Transp., 932 F.2d 1292, 1299 (9th Cir.1991). To be deemed reasonable, a search generally must be supported by a warrant issued upon probable cause. Von Raab, 489 U.S. at 665, 109 S.Ct. at 1390. However, "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." Id.

In Von Raab, the Supreme Court considered the constitutionality of drug testing of U.S. Customs Service employees interested in transfer or promotion to positions involving exceptional duties.
such as drug interdiction and the use of firearms. The Court held that "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." Id. at 665-66, 109 S.Ct. at 1390 (emphasis added). Applying this balancing test, the Court concluded that the government's interests in safeguarding the national border and in public safety outweighed the privacy expectations of employees who sought certain promotions. Id. at 677, 109 S.Ct. at 1396.

In Railway Labor, the Court upheld the constitutionality of the drug testing of railway employees involved in certain accidents or who violated certain safety rules. The Court concluded that the government's compelling interest in ensuring public safety outweighed employee privacy concerns and justified post-accident drug testing even absent individualized suspicion. Railway Labor, 489 U.S. at 633, 109 S.Ct. at 1421.

The purpose of requiring the government to obtain a warrant, or to have probable cause or reasonable suspicion before conducting a search, is to prevent random or arbitrary intrusions by government agents. Id. at 621-22, 109 S.Ct. at 1415. Von Raab and Railway Labor provide an exception to this requirement where the government demonstrates a compelling safety interest.

In the present case, appellants demonstrate no special compelling interests under Von Raab or Railway Labor, which would justify a search because there was no triggering event or employment pre-promotion requirement involved.

Appellants also offer National Federation of Federal Employees v. Cheney, 884 F.2d 603 (D.C.Cir.1989) to support their contention that no degree of individualized suspicion is required for administrative drug testing of police officers. In National Federation, civilian police officers employed by the Army were subjected to random drug testing for administrative purposes with no "limiting factor" other than mere randomness. The court found the program constitutionally acceptable despite the absence of any individualized suspicion.

However, National Federation is inapposite to the present case. Jackson was not ordered to submit to urinalysis as part of a random drug testing program targeted at the entire police force. Rather, Jackson was singled out for testing based only on his association with another officer who was under IAD surveillance.

In sum, the IAD had no articulable, individualized basis for suspecting that Jackson was using narcotics. Nor was he tested through some random testing program being administered to the police force. Further, appellants demonstrate no special compelling interests which would justify the order given to Jackson. Thus, it was unreasonable under the Fourth Amendment for the IAD to order Jackson to provide a urine sample for drug testing.

B. Constitutional Basis for Jackson's Claim

The issue was raised whether Jackson's Fourth Amendment rights were actually violated since he did not comply with the urinalysis order. As the Supreme Court pointed out in Gardner v. Broderick, 392 U.S. 273, 276-79, 88 S.Ct. 1913, 1915-16, 20 LEd.2d 1082 (1968), it is improper to discharge an officer from duty to punish him for exercising rights guaranteed to him under the constitution. Thus, it is established law that no one should suffer harm by state action for asserting a constitutionally protected right.
The jury found that the order Jackson disobeyed required him to submit to an unconstitutional search. Because the right to be free from unreasonable searches is contained explicitly in the Fourth Amendment, it follows that the right to be free from adverse consequences for refusing to submit to an unreasonable search must also be found there.

Los Angeles Police Protective League v. Gates, 907 F.2d 879 (9th Cir. 1990), supports this proposition. There, we held that disciplining police officer Gibson for his refusal to accede to an unconstitutional search warrant violated his Fourth Amendment rights. Although we did not state that this protection was specifically enumerated under the Fourth Amendment, there was "little doubt that it was improper for the [City] to discipline Gibson when he refused to allow a search of his garage." Id. at 886.

In the present case, Jackson did not actually submit to the IAD order to provide a urine specimen for drug testing. However, it is not necessary for the physical search to have occurred. The City's firing of Jackson for his refusal to submit to the unconstitutional search is sufficient to maintain Jackson's claim that his Fourth Amendment rights were violated.

C. Jury Instructions

We review jury instructions to determine whether, "considering the charge as a whole, the court's instructions fairly and adequately covered the issues presented, correctly stated the law, and were not misleading." Thorsted v. Kelly, 858 F.2d 571, 573 (9th Cir. 1988). "The trial judge has substantial latitude in tailoring the instructions, and challenges to the formulation adopted by the court are reviewed for abuse of discretion." U.S. v. Beltran-Rios, 878 F.2d 1208, 1214 (9th Cir. 1989).

The district court instructed the jury that drug testing by urinalysis is a search within the meaning of the Fourth Amendment. In addition, the court instructed the jury that the search was reasonable only if supported by "an individualized, articulated reasonable suspicion, based on objective facts, of drug use, impairment, or ingestion." By returning a verdict for Jackson, the jury found that the order to Jackson was unreasonable according to the standard set out in the court's instructions.

Chief Gates and the City of Los Angeles argue that the district court's instructions were erroneous because they instructed the jury to apply an overly stringent standard for determining the reasonableness of compelled urinalysis. In addition, they contend that the court erred in refusing their proffered instructions that the Fourth Amendment does not require a finding of individualized suspicion to justify the reasonableness of the order to search Officer Jackson. We disagree.

Contrary to appellants' assertions, the jury instructions given represent an accurate interpretation of our Fourth Amendment case law and are consistent with recent Supreme Court decisions that we have already discussed. The district court concluded, and we agree, that the standards developed by the Supreme Court upholding the validity of random, post-accident, or pre-ascension drug testing programs against Fourth Amendment challenge are inapplicable to suspicion-based drug testing. Accordingly, the jury instructions were correct.

II. Municipal Liability under § 1983

The City contends that it cannot be liable because Jackson was not disciplined pursuant to an unconstitutional municipal policy. Specifically, it claims that because the injury suffered
by Jackson was not a product of a policy intended for the purpose of violating Jackson's constitutional rights, it was not liable for the harm caused by the unconstitutional order. Further, it contends that the actions of Police Chief Gates and the Police Board of Review do not create liability because neither party is a "final policy-maker" as required under 42 U.S.C. §1983.

Several requirements must be satisfied for a municipality to incur liability. First, the injury must amount to a constitutional deprivation. St. Louis v. Praprotnik, 485 U.S. 112, 121, 108 S.Ct. 915, 923, 99 LEd.2d 107 (1988). As noted above, the jury found that the drug testing order was unreasonable and thus violated Jackson's Fourth Amendment rights.

Second, the municipality will be held to have caused an injury only when the acts which produce it were sanctioned by the municipality. Pembaur v. City of Cincinnati, 475 U.S. 469, 478, 106 S.Ct. 1292, 1298, 89 LEd.2d 452 (1986). The City contends that it did not officially order or condone the police department's violation of Jackson's civil rights. Therefore, it claims that it did not sanction the action which resulted in Jackson's constitutional deprivation. Although the City cites to no authority, it further asserts that it cannot be held liable because it cannot be charged with knowing that punishing Jackson for refusing the order would amount to a Fourth Amendment violation. It contends that any other result would be to impose liability on a municipality whenever any interim action was later found to have violated a person's constitutional rights.

As noted above, the MOD specified the circumstances under which an officer could be subjected to a urinalysis order. See supra, note 5. Despite whether the City's policymakers knew that the order would subject the City to liability, they were aware that the order was arguably improper. Further, in this circuit a policy itself need only cause a constitutional violation; it need not be unconstitutional per se. McKinley v. City of Eloy, 705 F.2d 1110, 1117 (9th Cir. 1983).

In the present case, Jackson concedes that the City had no policy requiring unreasonable searches of its police officers. His termination was the result of the City's official municipal policy and custom manifested in the "obey now-grieve later" rule. Although this policy is not per se unconstitutional, Chief Gates' implementation of the policy resulted in a constitutional tort against Jackson. Thus, the City is liable to Jackson for civil damages, whether or not they intended the result or had full knowledge of the possible consequences of their actions.


Appellants contend that Chief Gates is not the final authority concerning the termination of an officer because ultimately the officer may submit the matter to arbitration for consideration under the collective bargaining agreement between the League and the City. Following a hearing, the arbitrator may require the City to reinstate the officer.

This contention is without merit as it completely misconstrues the roles of both Chief Gates...
and the arbitration board. Under the Charter of the City of Los Angeles, the applicable state law in this case, the police chief is clearly the final authority on disciplining officers. The arbitrator is a neutral entity who "is confined to interpretation and application of the collective bargaining agreement," thus merely implementing the intent of the parties. United Steel Workers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 LEd.2d 1424 (1960). The arbitrator has no authority to set or alter any policy whatsoever.

Alternatively, appellants contend that if Gates is found to be the "final policy-making authority," no violation ultimately occurred because Gates' final act was to reinstate Jackson. This contention is also without merit. The fact that the arbitration board required Gates to reinstate Jackson in no way alters the fact that it was Gates and the Police Review Board who caused Jackson's constitutional injury by firing him for refusing to follow an unconstitutional order.

Appellants cite Gearhart v. Thorne, 768 F.2d 1072 (9th Cir.1985), to support their assertion that Jackson was not entitled to damages and that reinstatement and back pay were adequate compensation because Jackson was only temporarily deprived of his property interest in his job. There, we held that the remedy of reinstatement and back pay provided by established grievance procedures fully satisfied a state employee's action against the state under § 1983. However, Gearhart is inapposite. Despite his First Amendment claim, Gearhart was ultimately found to have suffered no constitutional violation. He was therefore limited to the remedies provided by the grievance policy. Here, Jackson was found to have suffered a constitutional violation. This entitles him to receive damages as well as the arbitration award of back pay and reinstatement.

Appellants also cite McKinley v. City of Eloy as standing for the proposition that Jackson is not entitled to damages. This argument misapprehends our holding in that case. Although appellants correctly quote that "a person discharged for engaging in constitutionally protected activity is entitled to reinstatement", McKinley, 705 F.2d at 1116, we went on to uphold McKinley's jury award of monetary damages for emotional pain and suffering, as well as reinstatement and back pay.

Thus, where a constitutional violation has occurred, an individual may pursue remedies beyond those provided by established grievance procedures. Under the City's Charter, the delineated procedures "shall not be construed to in any way affect any other rights any officer... may have to pursue or assert any and all other legal rights or remedies in relation to his office." § 202(18). Although Jackson was ultimately reinstated, his year and one-half unemployment caused him substantial financial damage. Under § 1983 Jackson was entitled to sue for all consequential damages resulting from the violation of his Fourth Amendment rights.

In light of the above, the district court did not err in refusing to grant summary judgment on the issue of municipal liability.

III. Motions for JNOV, New Trial, and Directed Verdict

The district court's decision to grant or deny judgment notwithstanding the verdict is reviewed de novo. Peterson v. Kennedy, 771 F.2d 1244, 1256 (9th Cir.1985), cert, denied, 475 U.S. 1122, 106 S.Ct. 1642, 90 LEd.2d 187 (1986). We therefore apply the same standard as did the district court in considering a motion for judgment notwithstanding the verdict. Denial of such a motion is appropriate if the evidence and its inferences, considered as a whole, and viewed in the light most favorable to the non-moving party, cannot reasonably support a judgment in favor of the
moving party. The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1151 (9th Cir.1988); Transgo, Inc. v. Ajac Trans. Parts Corp., 768 F.2d 1001, 1014 (9th Cir.1985), cert, denied, 474 U.S. 1059, 106 S.Ct. 802, 88 L.Ed.2d 778 (1986). The district court's decision to grant or deny a motion for new trial is reviewed for abuse of discretion. Hard v. Burlington Northern R.R., 812 F.2d 482, 483 (9th Cir.1987). The standard for reviewing the district court's decision to grant or deny a motion for a directed verdict is the same as for a JNOV. Los Angeles Memorial Coliseum Comm'n v. National Football League, 791 F.2d 1356, 1360 (9th Cir.1986), cert, denied, 484 U.S. 826, 108 S.Ct. 92, 98 L.Ed.2d 53 (1987).

Appellants contend that the district court's denial of their motions for judgment notwithstanding the verdict, new trial, and directed verdict was improper. Prior to trial, the district court granted qualified immunity to the individual officers and Gates on the ground that the law was not clearly established in 1986 on the issue of whether one had the right to be free from compulsory drug testing in the absence of reasonable suspicion. Thus, the City contends, the jury could not reasonably have found the City liable to Jackson because the City's policy-makers were not aware that the order was unconstitutional. However, as noted above, one need not intend to commit a constitutional tort to be held liable for the result. Further, in light of the fact that the League and the LAPD had specifically addressed the issue of drug testing in the MOU, the LAPD had notice of the appropriate standard applicable to their officers.

The jury awarded Jackson $154,747 for damages resulting from the City's violation of his Fourth Amendment rights due to his improper termination. The verdict was not only one that could be reached by a rational jury; it was in accord with the weight of the evidence. Accordingly, the district court did not err in denying appellants' motions for directed verdict or JNOV, and did not abuse its discretion in denying a new trial.

IV. Fifth Amendment Claim

A. Procedural Due Process Claim

Both sides agree that Jackson's procedural due process rights were not violated in this matter. He received procedural due process when his grievance was heard and addressed by neutral arbitration. Under the collective bargaining agreement in force, Jackson was entitled to reinstatement and back pay—which he received.

We have held that federal courts will accord collateral estoppel to municipal administrative hearings that have sufficient judicial safeguards.8 Eilrich v. Remas, 839 F.2d 630, 632 (9th Cir.) cert, denied, 488 U.S. 819, 109 S.Ct. 60, 102 L.Ed.2d 38 (1988). Any further litigation concerning this issue would be inappropriate under the doctrine of collateral estoppel because Jackson already received the necessary opportunity for due process (i.e., he "had his day in court").9

B. Substantive Due Process Claim

Prior to trial, the district court granted the City's motion for summary judgment on Jackson's Fifth Amendment substantive due process claim. Although this claim was not raised by Jackson on appeal, we requested supplemental briefing on the issue.

To support a claimed violation of an individual's substantive due process rights, we have stated that the municipality's conduct must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." F.D.I.C. v. Henderson, 940 F.2d 465, 474 (9th Cir.1991) (quoting Lebbos v. Judges of Super. Ct., Santa
Clara County, 883 F.2d 810, 818 (9th Cir. 1989)).

Here, the district court found that the City's conduct did not constitute such a violation. The City's "obey now--grieve later" policy is not constitutionally defective on its face. Further, the individual officers who gave Jackson the order were found to be immune from suit because the "law regarding urine testing for drugs was not established at the time of this alleged violation." RT at 5. Although the City was ultimately found to have violated Jackson's Fourth Amendment rights by enforcing the policy against him, it cannot be maintained that the City's actions were wholly arbitrary or unreasonable. Thus, we affirm the district court's order dismissing Jackson's substantive due process claim.

AFFIRMED.

RYMER, Circuit Judge, dissenting:

I dissent, because I believe we are bound by Los Angeles Police Protective League v. Gates, 907 F.2d 879 (9th Cir. 1990), to ask whether the City or the LAPD ever adopted a policy of carrying out unconstitutional searches of police officers, 907 F.2d at 890. Because there is no evidence that it did, there is no basis for municipal liability.
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

STEPHANIE STEINERT,

Plaintiff and Appellant,

v.

CITY OF COVINA et al.,

Defendants and Respondents.

APPEAL from a judgment of the Superior Court of Los Angeles County. Dzintra Janavs, Judge. Affirmed.

Lackie & Dammeier, Dieter C. Dammeier and Michael A. McGill for Plaintiff and Appellant.

Liebert Cassidy Whitmore, Richard M. Kreisler and Jennifer R. Hong for Defendants and Respondents.

Stephanie Steinert, a police officer for the City of Covina whose employment was terminated for misconduct, filed a petition for writ of administrative mandamus alleging that she was denied the protections of the Public Safety Officers Procedural Bill of Rights
Handout 1-10

Act (Gov. Code, § 3300 et seq.) (the Act) while she was being interrogated by her supervisor. The trial court denied her petition, and she appeals. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Steinert was a police officer for the Covina Police Department. Her name arose as part of a routine informal audit performed by the California Department of Justice, which monitors use of its criminal records databases. The Covina Police Department learned from the Department of Justice that Steinert had performed a records search on an individual named Robert Tirado and had designated the search "TRNG," signifying training. Justice Department and Covina policies precluded the use of actual records for training purposes.

The support services manager at the Covina Police Department, Rachel Leo, examined their records for the day that Steinert had run the search in question, and found that Steinert had taken a vandalism report from Wendy Roff at approximately the same time that the record search was conducted. That vandalism report did not mention the name Robert Tirado, but a link between a location on the report and Tirado's rap sheet suggested that there was a possible connection between the victim and Tirado. Leo suspected that Roff had mentioned Tirado while reporting the vandalism and that this had prompted Steinert to run Tirado's criminal history in the course of taking the vandalism report.

Leo furnished this information to Steinert's commanding officer, Sergeant John Curley. Curley believed that it was likely that Tirado's name came up during Roff's vandalism report, even though Steinert had not put Tirado's name into the report. As long as Tirado's name had been mentioned in the context of the report-taking, Curley believed, the criminal history search itself was appropriate and the only problem was the

All further statutory references are to the Government Code.
"user error" of designating the search as for training rather than entering the crime report number associated with Roff's vandalism report.

Later that same morning, Curley called Steinert into his office. She remembered taking the vandalism report and told Curley that Roff had in fact mentioned Tirado when making the report. Roff's statement prompted Steinert to access Tirado's records. Curley instructed Steinert that in the future, she should make sure to include names such as Tirado's as "mentioned persons" in the crime report, and she should use a case number rather than "TRNG" when she performed record searches on individuals. Steinert took the instruction well. Curley asked one more question of Steinert: had she disclosed any of Tirado's confidential information to Roff? Steinert replied that she had not.

As a supervisor, Curley is required to perform audits of two crime reports per week, contacting the person who reported the crime to inquire whether the department and officer responded courteously and appropriately. Because Curley had already reviewed the crime report generated when Roff reported the vandalism, he decided to use that report as one of the two audited reports for the week. When he contacted victim Roff, she reported that Steinert had disclosed confidential information about Tirado when she made her crime report. With this information, Curley launched an internal affairs investigation of Steinert that ultimately led to her dismissal.

Steinert challenged her dismissal by a petition for writ of administrative mandamus. She requested that the trial court suppress her statements to Curley on the ground that the conversation in which it was elicited was an interrogation that could and did lead to punitive action and that she therefore should have been afforded the protections of the Act. The trial court denied the petition for administrative mandamus. Steinert appeals.

**DISCUSSION**

The Act protects the rights of police officers by establishing procedures for the interrogation of officers who are "under investigation and subjected to interrogation by
[their] commanding officer[s] ... that could lead to punitive action." (§ 3303.) The statute, however, does 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." (§ 3303, subd. (i).) This entire matter, therefore, hinges on the nature of the conversation between Steinert and Curley in which she lied to him about releasing Tirade's criminal history to Roff: was it an interrogation that could lead to punitive action—in which case she should have been afforded the Act's procedural protections—or was it a routine interrogation in the normal course of duty, counseling, or informal verbal admonishment, such that no violation of her rights occurred?

Relying on the fact that the misdesignation of the search as training violated searching policies, Steinert argued that punishment could have resulted from that action alone and that she was therefore interrogated as part of an investigation into her wrongdoing. Covina, in turn, claimed that there was no intent at all on Curley's part to punish her for the coding error, but merely to use the opportunity as a training moment. The encounter, as a result, was an interaction in the normal course of duty, not a protected interrogation. The trial court found that "[t]he conversation between [Steinert] and Sergeant Curley evidences a routine communication between a supervisor and a subordinate, and was not subject to [Gov. Code, ]§ 3303[, subdivision] (c) requirements."

We review the trial court's factual finding that the conversation between Steinert and Curley was a routine communication for substantial evidence. (Shafer v. Los Angeles County Sheriff's Dept. (2003) 106 Cal.App.4th 1388, 1396.)

Abundant evidence supports the trial court's finding. Leo believed that Steinert "had probably accessed the information for a legitimate reason; that there was a need to access it because the person's name came up in her preliminary investigation of the crime that was being reported to her and that she for some unknown reason just put '['training'] in there instead of the case report, maybe having a lapse of what she needed to put in there ...." When Leo informed Curley of the audit report indicating the impermissible use of an actual record for a search designated as training, she told Curley
that the search was most likely connected to the crime report that Steinert had taken at the same time and was therefore legitimate.

Curley thought that the report Steinert was taking "could have been one of the reasons why" Tirade's criminal records were accessed. Even though Tirade's name was not in that report, Curley believed that Steinert "could have had a perfectly good reason for running this person's name." Because Steinert was a police officer, as long as she had a need to run the search, the search was proper; the only issue would be the misdesignation of the search as a training search as opposed to the use of the case report number for identification. Curley explained: "[I]t gets back to the right to know and the need to know, and she definitely had the right to know, being a police officer. And in the case where a name was given to her, she had the need to know in the course of conducting her criminal investigation. A common mistake would be, you know, instead of writing the case number into the query, maybe, you know, employees may not know better and they might use training instead of the case number. The intent or the doing in good faith thinking is what would matter. Putting it as [']TRNG['] versus a specific case number would just be a simple training issue that can be dealt with with employees."

While the proper procedure was to use test records for training and to identify every investigative search with the associated report number, Steinert's mislabeling was not a substantial rule violation in the mind of Curley or Leo. Under certain circumstances, an officer who improperly designated an actual search as training could be subject to a written reprimand. It is not, however, mandatory to issue a written reprimand or more serious punishment every time a rule or regulation is breached. Curley believed that the misdesignation of a proper search and the failure to include the individual's name in a report was exactly the kind of situation that merited not a written reprimand but a

Leo testified that Steinert's misdesignation of the search did not jeopardize Covina's access to the state database, as the Department of Justice would "absolutely not" have restricted the department's access based on the labeling of the search as training. The entire purpose of the audit is "so that we will take care of any problems that we may have in a training capacity."
verbal direction to correct these procedural problems in the future. In fact, Curley felt that based on the circumstances as he understood them when he spoke with Steinert, he could not have issued her a written reprimand or greater discipline. When asked why, he answered, "My intention was to have a conversation with her dealing with a training issue that I believe was a common mistake that Stephanie made in the course of her duties as a front desk officer, and I didn't feel that the circumstances that I knew at the time, that any of it could lead to any punitive action against her." As Curley noted, "I caught a mistake of using the letters [']TRNG['] instead of a case number. Other than that . . . [s]he didn't do anything wrong." The improper designation "absolutely" could have been properly addressed by a training/educational meeting with him. Curley's position was echoed by Leo, who testified that as long as the research was done for legitimate purposes, "I would take it that all I need to do is retrain her in how to use it properly, end of story."

Curley considered this training to be part of his job as Steinert's supervisor. "[T]his would be a prime example of one using this as a training opportunity to try to educate on how to access the system because it can be complicated. So I would say that is almost a day-to-day function of a supervisor is [sic] to deal with issues just like this and to teach and train newer officers on how to use the system properly." Curley had no intent of issuing a reprimand when he spoke to her because he considered Steinert's conduct a "simple error" and decided "to treat this case as an opportunity to train Stephanie and to give her another perspective on what she should do in the future if somebody provides her a name, for example, this name Robert Tirado as a mentioned party and listing the case number as a reason for accessing files versus the letters

At the time he consulted Steinert, Curley knew no facts that would have caused him to believe that the search itself was improper, or that Steinert had in fact disclosed

This view was shared by Leo, who said that after looking into the records, she "was convinced it wasn't a misuse" of the criminal records database.
confidential information improperly. He did not give advisements pursuant to the Act because "that meeting was not likely to result in any punitive action against Stephanie. It was an opportunity to use my powers as a supervisor to train a newer employee." He reiterated, "[I] t was going to be an opportunity to train Stephanie in regards to a common error that was—or an error that was made using the letters ['']TRNG[''] to access a file that she had a right and a need to know." Curley did not intend to reduce his admonishment to Steinert to writing or to make any written record of the interaction.

Curley spoke with Steinert within a few hours of learning of the records issue. The conversation, a "general casual conversation," took place in Curley's office with the door open. It lasted less than five minutes. Steinert confirmed taking the vandalism report and that Roff had mentioned Tirade's name. Because the search itself was justified, to bring the incident to closure required "[n]othing more than the verbal admonishment of 'next time you may want to include this person, Robert Tirado, as a mentioned party and use the case number instead of the letters ['']TRNG,['']' and that was the extent of it." Curley said that Steinert was "[v]ery receptive and took the input well." When asked why he advised Steinert what to do in the future, Curley responded, "As a supervisor, it's my responsibility to train new officers in the course of their duties. I mean, common mistakes are made, and I just wanted to have a conversation with her, treat it as a training moment and move on."

During the conversation, Curley asked Steinert if she "gave this information [on Tirade's criminal history] to Wendy Roff or told her—disclosed any of the information or gave her any printouts of the information." Curley asked the question "in the interest of being thorough, my responsibility as a supervisor." Steinert said that she had not done so. Of course, Curley's subsequent audit of the crime report revealed that Steinert had in fact improperly disclosed information about Tirado to Roff. Had Curley not elected to audit that report and therefore not learned that Steinert had improperly disclosed confidential information about Tirado, the matter would have been resolved. Curley's discovery that Steinert had disseminated confidential information despite denying that she had, not the search designation issue, caused the internal affairs investigation: "The
focus of the investigation or allegation was lying to me. It had nothing to do with the conversation that we had about this accessing the information. In my mind, that was a done deal. We had already dealt with that issue."

"Where findings of fact are challenged on a civil appeal, we are bound by the "elementary, but often overlooked principle of law, that... the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,"" to support the findings below. [Citation.]" (SFPP v. Burlington Northern & Santa Fe Ry. Co. (2004) 121 Cal.App.4th 452, 462.) As shown above, the trial court's factual finding that the interaction between Steinert and Curley was a routine conversation between commander and subordinate in the course of duty is supported by substantial evidence. We then apply our independent judgment to the legal question of whether the Act applied. (Shafer v. Los Angeles County Sheriff's Dept., supra, 106 Cal.App.4th at p. 1396.) Independently applying the law to the facts as found by the trial court, we conclude that the interaction was an "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," and that by the terms of section 3303, subdivision (i), the Act did not apply.

This case is distinguishable from Steinert's primary authority, City of Los Angeles v. Superior Court (1997) 57 Cal.App.4th 1506. In that case, Officer Labio's supervisory officer received a report that a male Filipino officer failed to render aid at the scene of a fatal accident, proceeding instead to a donut shop. (Id. at p. 1510.) Departmental records showed that Labio was the only male Filipino officer on duty that night. (Ibid.) The donut shop confirmed that a male Filipino officer had been there that evening at about the time of the accident. (Ibid.) The commander also learned that Labio did not have permission to use a police vehicle that night. (Ibid.)

Armed with this information, Labio's commander called him into his office and questioned Labio about his whereabouts that evening and the use of the police vehicle during his shift. (City of Los Angeles v. Superior Court, supra, 57 Cal.App.4th at p. 1510.) At the time of the interrogation, Labio's commander knew that the conduct
constituted a serious offense that could lead to discipline, and he already had sufficient information to arrest Labio for a felony. (*Ibid.*) The questioning focused on matters likely to lead to punitive action and had no other purpose, but Labio was not informed that he was under investigation or advised pursuant to the Act. (*Ibid.*) The Court of Appeal held that under these circumstances the commander's questioning could "only be characterized as part of an investigation of Officer Labio for sanctionable conduct." (*Id.* at p. 1514.) It was not routine or unplanned contact in the normal course of duty: this was not a "routine communication within the normal course of administering the department" (*ibid.*), but the investigative culmination of a commander's substantial investigation and accumulation of enough information to arrest Labio for a felony.

In contrast, here Curley did not have information demonstrating that that Steinert had committed a crime, unlawfully accessed Tirade's information, or improperly released Tirade's information to the public. He did not suspect that such misconduct had occurred, believing that the only thing Steinert had done wrong was to designate a search as training instead of by a case number. He had no intention to punish Steinert, only to make sure she knew the proper procedure for future searches. In their brief conversation, Curley instructed Steinert that in the future she should use the case report number and make sure that she mentions the person whose name she has run in the police report. The evidence supports the trial court's conclusion that this was a remedial interaction and not the attempt to tighten the metaphorical noose around an investigated officer's neck that Steinert posits. Because of these significant factual differences, *City of Los Angeles v. Superior Court, supra,* 57 Cal.App.4th 1506 does not control the outcome here.

Section 3303, subdivision (i) is designed "to avoid claims that almost any communication is elevated to 'an investigation.'" (*City of Los Angeles v. Superior Court, supra,* 57 Cal.App.4th at p. 1514.) As Steinert was not entitled under these circumstances to the special protections of the Act, the trial court properly refused to suppress the evidence of Steinert's apparent lie to Curley and correctly denied the writ of administrative mandamus.
DISPOSITION

The judgment is affirmed. Respondent shall recover its costs, if any, on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

JOHNSON, J.
Law enforcement agencies have recently been contacted by various county district attorneys, demanding the dates of birth of all their officers so the D.A. can “run” them to determine if they have any criminal convictions. In most cases, the D.A.’s have stated that such action was necessary as a result of the mandate in *Brady v. State of Maryland*, (1963) 373 U.S. 83.

In *Brady*, the Supreme Court ruled, in part, that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”

In the case of *Kyles v. Whitley*, (1995) 514 U.S. 419, the U.S. Supreme Court found that the 14th Amendment places a duty on the prosecutors “to learn of any favorable evidence known to others acting on the government’s behalf in the case, including the police.”

This current demand for dates of birth appears to be an outgrowth of the publicized failure of the San Francisco District Attorney to disclose, to the defense, names of officers who had “Brady” material in their files and who were material prosecution witnesses.

On May 4, 2010, the San Francisco Chronicle reported that “more than 80 San Francisco police officers have criminal histories or misconduct records that the Police Department withheld and prosecutors did not disclose to defense attorneys in cases in which officers testified, a failure that could put hundreds of felony convictions in jeopardy. The potential fallout could be far more severe than that caused by the cocaine-skimming scandal at the San Francisco police drug lab, which prompted prosecutors to dismiss more than 600 narcotics cases, experts say.”

The article goes on to state that the reason for the failure to notify defense counsel of “Brady” officers, was the lack of a policy in the D.A.’s office to implement that requirement. It appears that many prosecutors in California had not developed nor implemented such policies. The Los Angeles Office of the District Attorney, however, has had such a policy in place for many years and it can be accessed on their website. Among its provisions, it created a panel to review all potential “Brady” matters and notify the defense when so required.

**DEMANDS FOR ALL OFFICERS’ DOB’S**

Pursuant to the *Brady* decision, several things are classified as “Brady material,” including convictions of crimes, and the prosecutor is required to disclose such information to the defense, even if the defense doesn’t ask for it. The concept is that the prosecutor’s job is not to secure a conviction but to ensure that justice is done. That means, among other things, that exculpatory evidence, or evidence which could be used to challenge the credibility of a material prosecution witness, must be disclosed. Failure to do so could result in the dismissal of charges and/or the reversal of a conviction.

Lael Rubin, a prosecutor with the Los Angeles County District Attorney’s Office, who oversees that county’s disclosure process and leads training seminars on the subject for prosecutors in California was quoted as saying that, “Depending on the nature of the failure to disclose (an officer’s crimes) and the officer’s role in the particular case, it could result in very serious cases being tossed out and serious offenders being released on the street.”

Nonetheless, the demand made upon law enforcement to disclose this information appears to be an overreaction by prosecutors to the situation in San Francisco. As such, it resulted in an overbroad demand for information about...
officers, even if they are NOT currently material witnesses in a case. In fact, District Attorneys are no different than any member of the public regarding access to confidential material. They have no right to access confidential personnel information of peace officers unless they have a need to know or duty to perform. Dates of birth have been found by the courts to be confidential personnel information.

**PENAL CODE AND PERSONNEL RECORDS**

P.C. 832.7(a) states, in part, that “(a) Peace officer ... personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code.”

P. C. 832.8 defines personnel records as follows: "As used in Section 832.7, "personnel records" means any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following:

(a) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information.

(b) Medical history.

(c) Election of employee benefits.

(d) Employee advancement, appraisal, or discipline.

(e) Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.

(f) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.”

**COURT RULINGS**

In 2001, the 4th District Court of Appeal held, in the case of *Garden Grove Police Department v. Superior Court (Reimann)*, 89 Cal.App.4th 430, that a trial court was in error when it ordered a police department to disclose the birth dates of three officers to the Orange County D.A. for the purpose of running criminal records checks. The court ruled that if the defendant wanted that information, he or she was required to file a discovery motion in accordance with Evidence Code 1043 and 1045 (“Pitchess” motion).

The defendant argued that dates of birth are not confidential since, for example, they appear on the officers’ drivers licenses, birth certificates, and loan applications and, therefore, a motion was not needed. However, the court held that “the issue isn’t whether a police officer can disclose his own birth date . . . the issue is whether the court, without complying with Evidence Code sections 1043 and 1045, can order the police department to disclose an officer’s birth date to the district attorney so the district attorney can run a criminal records check on an officer.” It cannot, said the Court of Appeal.

Furthermore, in 2007, the California Supreme Court, in the case of *Commission on Peace Officers Standards and Training (POST) v. Superior Court of Sacramento (L.A. Times)*, 42 Cal. 4th 278, ruled that certain information was not confidential, such as names of officers, their employing agencies or the dates of their hire and/or termination, however, their birth dates (and reasons for termination) were confidential personnel information. The Court noted that the superior court did not require POST to disclose such information and that the L.A. Times didn’t challenge the trial court’s judgment.

[Jones & Mayer submitted an amicus curiae brief from CSSA, CPCA and CPOA in support of POST and privacy rights of California law enforcement officers.]

**HOW THIS AFFECTS YOUR AGENCY**

Although, pursuant to *Brady*, prosecutors may be entitled to access the D.O.B. of officers, when the officers are material prosecution witnesses, in order to comply with their *Brady* obligations, they are not entitled to that information until that time.

As the Court of Appeal stated in the *Garden Grove* case, “motions for discovery of a police officer’s personnel file may be used to discover information to impeach an officer’s credibility.” However, that wouldn’t arise until or unless the officer will provide testimony in a prosecution.

Additionally, the only way for one to access that information is through the “Pitchess” process. If the prosecutor needs D.O.B.’s to comply with *Brady*, he or she can obtain them when relevant but, according to court decisions, he or she must also file a “Pitchess” motion.

As always it is imperative that you not rely upon this information but secure advice and guidance from your agency’s legal advisor on matters such as this. If you wish to discuss these cases in greater detail, please do not hesitate to contact me at (714) 446 – 1400 or via e-mail at mjm@jones-mayer.com.
The United States Supreme Court acted on June 17, 2010, to overturn the 2008 decision of the Ninth Circuit, U. S. Court of Appeals in the case of Quon v. Arch Wireless Operating Co.. In the case of City of Ontario v. Quon (June 17, 2010) 2010 U.S. Lexis 4972, the court ruled that government employers have the right to inspect employee text messages when reasonable.

FACTS OF THE CASE

Quon is a police officer for the City of Ontario and he, along with other officers, was issued a pager and allowed a quota of 25,000 test characters per month. The contract for service was with the Arch Wireless network. The department had a policy in place which alerted all employees that computers, e-mails and text messages were to be used for work only, and were subject to audit. However, the “operational reality” of the department was that officers were told by a lieutenant that audits would not be conducted and officers could send personal messages as long as they paid for any use exceeding the 25,000 characters per month.

When several officers, including Quon, continued to exceed the limit, the department decided to review the messages to determine if they were job related. The department said that, if they were job related, it would require increasing the number of messages officers were permitted to send each month. Therefore, the department asked Arch Wireless for copies of the transcripts and discovered that many of the messages were personal and/or sexual in nature, unrelated to work and, therefore, contrary to department policy.

Quon and others sued Arch, pursuant to the Stored Communications Act, for disclosing the transcripts, and sued the department for violating their Fourth Amendment rights under the U. S. Constitution and the Privacy Clause of the California Constitution.

The Ninth Circuit had held that Quon had a reasonable expectation of privacy and that the search of the text message records was unreasonable.

NO FOURTH AMENDMENT VIOLATION

The Supreme Court, on a 9 to 0 vote, held that, even assuming that Quon had a reasonable expectation of privacy in his text messages, the search was reasonable.

"The Court assumes arguendo that: (1) Quon had a reasonable privacy expectation; (2) [the City's] review of the transcript of text messages constituted a Fourth Amendment search; and (3) the principles applicable to a government employer's search of an employees' physical office apply as well to the electronic sphere." However, in reaching this decision, the Court repeatedly emphasized that the City had a legitimate work-related interest in the examination of those text messages.

The focus of the analysis was on the reasonableness of the search in light of the legitimate interest of the City and its Chief of Police in "searching" the transcript of the text messages. In arriving at that conclusion, the Court noted that the City of Ontario had a policy in place informing employees that electronic media such as these messages were subject to audit and examination by the City.

HOW THIS EFFECTS YOUR AGENCY
It is absolutely imperative that employers adopt, and make known to all employees, a policy which makes clear to the employees that there is no reasonable expectation of privacy in the use of the employer’s equipment. There should be clear policies regarding the use of the employer’s computers, the internet, cell phones, e-mail, text messaging devices, etc. which state that the employer reserves the right to monitor and log all network activity, with or without notice to the employee. It must be articulated that there is no confidentiality, on the part of the employee, when using the employer’s equipment.

Just as important as promulgating such policies is that they be enforced consistently and uniformly. Once an employer deviates from a stated policy, and allows an “informal” process to be established, the prohibitions or mandates set forth in the official policy are subject to challenge. Additionally, it is most important that the employer ensure that its supervisors and managers understand that their allowing deviations from official policies may result in their undermining the purpose of those policies and, perhaps, render them meaningless.

Finally, any search of an employee or the employee’s office or media is an area where all employers should confer with knowledgeable legal counsel for advice and guidance in order to avoid problems before they occur.

If you wish to discuss this in greater detail, please feel free to contact either of us at (714) 446 - 1400 or by e-mail at prc@jones-mayer.com or mjm@jones-mayer.com

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THE DISHONEST OFFICER – STILL BEING DEBATED

January 26, 2010

The following is a news article about the reinstatement of a Seattle officer who had been fired for lying. The basis of the Civil Service Commission’s decision was, apparently, that the discipline of termination for lying was too severe; that no one else had been fired for lying; that the “dishonesty rule” was not imposed in an “even handed” way; and that the proof had to be by “clear and convincing evidence.” Assuming what is in the article is accurate, this case should be an example for all law enforcement management on how not to proceed.

Following the news article is an article just published in CPOA’s “Peace Officer” magazine. In light of the Seattle decision, I thought it would be timely and of interest.

The issue of dishonesty and law enforcement continues to be viewed differently by different people. It needs to be constantly in the forefront of our concern and attention since it is an integral element of the profession.

Seattle Officer Fired for Dishonesty Gets Job Back

Posted: Monday, January 25, 2010
Updated: January 25th, 2010 03:03 AM E

Sara Jean Green
Seattle Times

A Seattle police officer fired last May for dishonesty will get his job back, along with back pay, after the city’s Public Civil Service Commission ruled that termination was too harsh. Officer Eric Werner, 31, instead will be assessed a 30-day suspension, which will mean a deduction from his back pay.

Werner maintained he forgot about punching an agitated man when he was initially questioned in 2007 by Seattle police during an investigation into the man’s complaint that he was repeatedly tazed.

Werner, during testimony last year before the commission, said he later remembered striking the man and decided to come clean while applying for a job with the Snohomish County Sheriff’s Office in May 2008. The hiring process included polygraph examinations. The Sheriff’s Office didn’t hire Werner, but it notified the Seattle Police Department of his disclosure and, after an internal investigation, he was fired last May by interim Police Chief John Diaz for violating the department’s honesty policy.

Werner, during testimony last year before the commission, said he later remembered striking the man and decided to come clean while applying for a job with the Snohomish County Sheriff’s Office in May 2008. The hiring process included polygraph examinations. The Sheriff’s Office didn’t hire Werner, but it notified the Seattle Police Department of his disclosure and, after an internal investigation, he was fired last May by interim Police Chief John Diaz for violating the department’s honesty policy.

Werner appealed his firing in what was viewed as a key test of the honesty policy, which presumes officers will be fired for dishonesty in their official duties and was a cornerstone of new rules adopted in 2008 to address community concerns about police accountability. Though the city and the Police Department could appeal the commission’s ruling in King County Superior Court, such a move is extremely rare. “The City Attorney’s Office is analyzing the decision, and considering whether to appeal. No decision has been made yet,” a spokeswoman for City Attorney Peter Holmes wrote in an e-mail today.

However, Werner’s name has now been added to the so-called “Brady list,” a list kept by the King County prosecutor’s office of potential witnesses whose honesty has been called into question, said spokesman Dan Donohoe. Most of the 52 names on the list are law-enforcement officers, though the list also includes two former State Patrol crime-lab
employees and a former employee of the King County Medical Examiner's Office, he said. The prosecutor's office will be required to notify defense attorneys whenever Werner is called to testify against a criminal defendant, Donohoe said.

Sgt. Rich O'Neill, president of the Seattle Police Officers' Guild, was pleased with the Public Civil Service Commission's ruling. He said the department didn't follow its own rules in applying the dishonesty policy. "Dishonesty is a very serious charge," he said, and to fire an officer, the department has to prove there is "clear and convincing evidence" that an officer lied about "a material fact" -- something O'Neill insists didn't apply in Werner's case.

Werner will receive back pay for all but a 30-day period that constitutes his unpaid suspension, O'Neill said. Werner, who joined the Seattle police in 2000, earned nearly $106,000 in 2008 in regular and overtime pay.

Two of the three commissioners believed "that termination was the inappropriate form of punishment given the facts and circumstances of the case," according to the ruling issued Thursday. Instead, they ruled a 30-day suspension -- the most severe punishment short of termination -- was more appropriate.

In their majority opinion, the two commissioners -- Seattle police Officer Joel Nark and Herb Johnson, a retired assistant Seattle police chief -- pointed out that other officers in past cases involving dishonesty "either received no suspension of duties or only temporary suspension of duties."

Concluding that the department doesn't apply the dishonesty rule in an evenhanded way, Nark and Johnson also pointed out that to date, "no other employee has been terminated based on dishonesty."

Terry Carroll, the third commissioner and a former Superior Court judge, authored a partial dissent and disagreed with the decision to overturn Werner's termination, saying common sense and the law "require we give some deference to the Chief's decision." He also wrote: "Although my colleagues are sincerely motivated, the opinion as to discipline appears based principally on sympathy for an officer with an apparent good record."

The original excessive-force investigation involving Werner cannot be reopened because of time-limit rules governed by the city's contract with the Seattle Police Officers' Guild, according to the Police Department's Office of Professional Accountability.

THE DISHONEST OFFICER -- STILL BEING DEBATED

By: Martin J. Mayer, General Counsel
California Peace Officers' Association

"When is a lie a lie?" "Is it acceptable to lie for the common good?" "Is an omission of material facts, in response to a question, a lie?"

These and other questions are still raised when a decision must be made by a law enforcement executive as to what charges should be lodged against a peace officer when the question of honesty is involved. There are very few acts of misconduct which are as damaging to a law enforcement officer's career than that of lying in his or her official capacity. As such, this issue continues to be analyzed and debated.

Subject of Debate

At the recently held annual conference of the International Association of Chiefs of Police (IACP) the Legal Officer's Section held a workshop dealing with "The Dishonest Officer." Two highly respected speakers discussed the questions set forth at the beginning of this article. Both of them, as well as members of the audience who spoke out, were in agreement that certain "lies" were completely and totally unacceptable and called for termination from employment. Among those were lying during a personnel investigation, lying in a criminal affidavit, lying by falsifying evidence, and lying under oath, to name just a few.

But then the debate focused on whether or not inaccuracies, or incomplete responses to specific questions, constituted "lies?" It was at that point that the debate became more intense. It should be noted that a lie is defined as a false statement made with the deliberate intent to deceive. It is not a mistake, it is not an inaccuracy based upon perception, and it is not inadvertence due to negligence. It is the willful, deliberate, intentional, intent to deceive and/or mislead.

Type of Lie

There was extensive discussion during the IACP workshop surrounding the concept of a "social" lie. By that, it was meant to describe a situation where someone is dishonest in a social setting, in an effort to avoid hurting someone's feelings. As an example, someone asks whether you think they look good in a particular dress or suit or because of a particular hair style and, in honesty, you do not think so, but in order to avoid hurting the individual's feelings you answer in the affirmative.

That is not the type of dishonesty referred to in disciplinary actions brought against peace officers. The dishonesty must relate, in some manner, to his or her official role and/or duty. Because the peace officer has the authority to take someone's freedom, to inflict physical harm upon them, to forcibly enter their private home, and to do so based upon their articulating lawful justification, the word of the peace officer must be sacrosanct.

Credibility and the Peace Officer

In Kolender vs. San Diego County Civil Service Commission (Berry), 132 Cal.App.4th 716 (2005), the California Court of Appeal stated that, "a deputy sheriff's job is a position of trust and the public has the right to the highest standard of behavior from those they invest with the power and authority of a law enforcement officer. Honesty, credibility and temperament are crucial to the proper performance of an officer's duties. Dishonesty is incompatible with the public
trust.”

The credibility of a peace officer is perhaps the most important characteristic of that officer, in order to be able to perform his or her duties. Recently, in a criminal prosecution against the chemical company W.R. Grace, U.S. District Judge Donald W. Malloy in Montana, delivered a jury instruction stating that the government “has violated its solemn obligation and duty in this case by suppressing or withholding material proof pertinent” to the credibility of a key witness. Subsequently the jury acquitted the defendant and the Judge dismissed the remaining charges.

The case of Brady vs. The State of Maryland, 373 U.S. 83 (1963) is the seminal case dealing with the government’s obligation to disclose evidence in order to insure a fair trial in any criminal prosecution. It has been held that “Brady material” involves exculpatory evidence, as well as evidence which could be used to challenge the credibility of a material prosecution witness. The duty to disclose such evidence, even if it isn’t requested, falls on the government prosecutor.

In a recent decision by the Ninth Circuit U.S. Court of Appeal, Tennison vs. City and County of San Francisco, 548 F.3d, 1293 (2008), the Court noted that Brady imposes a duty on police officers, as well as on prosecutors, to disclose exculpatory evidence. In citing to an earlier Ninth Circuit decision, the Court stated that “exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does.”

Furthermore, the Court, in citing to an earlier U.S. Supreme Court decision, stated that “Brady suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor.”

Law enforcement’s duty, therefore, is to notify the prosecutor of the existence of what might be “Brady material.”

For example, knowledge of dishonesty by a police officer may be known only to the law enforcement agency, but it might constitute “Brady material,” if that officer were a material prosecution witness, since it could be used to challenge that officer’s credibility. As such, the law enforcement agency would have a duty to disclose it to the prosecutor.

Impact on the System Caused by Dishonesty

We have seen, throughout the State of California, situations where prosecuting attorneys have taken the position that, absent additional corroborating evidence, the prosecutor will not move forward in a case where the only material witness is a “Brady officer.” That, obviously, undermines the ability of that officer to effectively carry out his or her duties as a law enforcement officer. It also, potentially, has a detrimental impact on the public’s safety if the testimony of an officer is not accepted as true.

Recently, I was designated an expert witness by the City of Los Angeles in a case where an officer was challenging the officer’s termination from employment based upon findings of dishonesty. The purpose of my expert testimony was to provide the court and the jury with my opinion about the adverse impact on a law enforcement agency when a dishonest officer is kept on the job. There were two primary concerns raised by me during my deposition. The first involved the potential negative impact on the officer’s ability to testify since, pursuant to Brady vs. The State of Maryland, the prosecutor would be required to notify defense counsel of the prior finding of dishonesty.

The second concern, however, was of a different nature: it involved the danger presented to other officers in the field if the “Brady officer” was needed to testify about actions taken by another officer. If the only witness available to testify that the subject officer’s actions were proper, was already tainted as a result of having been previously been found, by his or her own department, to have been untruthful in the past, the danger to the subject officer would be, potentially, monumental. The harm would not fall on the “Brady officer” but rather would fall on the subject officer, who acted properly, but had a witness whose credibility has been severely undermined and damaged.

HOW THIS AFFECTS YOUR AGENCY

To continue to debate whether or not law enforcement officers should be retained on the job, after determining that the officer has lied, seems strained at best. It is noted, over and over again, in multiple court decisions, that the credibility and honesty of a peace officer is fundamental to the proper performance of the officer’s duties.

Over fifty years ago, in the case of McCain vs. Sheridan, 160 Cal.App.2nd 174 (1958), the California Court of Appeal said that keeping the public trust is vital and “whatever weakens that trust tends to destroy our system of law enforcement. Accordingly, the courts have long recognized that a policeman’s tenure of office may be terminated for derelictions far less serious than violation of the criminal statutes governing citizens generally.”

As stated above, and citing from a much more recent Court of Appeal decision, Talmo vs. Civil Service Commission, 231 Cal.App.3d 210 (1991), a peace officer’s “…job is a position of trust and the public has a right to the highest standard of behavior from those they invest with the power and authority of a law enforcement officer. Honesty, credibility and temperament are crucial to the proper performance of an officer’s duties. Dishonesty is incompatible with the public trust.”

It is imperative, however, that rules and/or prohibitions be applied in an “even handed” manner and that due process be applied and followed in all cases. It is also important to bring these issues forward to all employees on a regular basis so all know the rules and what is expected of them in carrying out their duties. It shouldn’t be assumed that everyone keeps these things in the front of their minds – remind them.

As always, it is important to seek out advice and guidance from your agency’s legal counsel. If you wish to discuss this matter in greater detail, please feel free to contact me at (714) 446-1400 or via e-mail at mjm@jones-mayer.com.
The “right” of public sector employees to speak out on work-related issues does not, necessarily, have the protection of the First Amendment. Normally, one is permitted to express his or her opinion about government, its operations and its employees. It is considered protected speech when it involves matters of “public concern” and is expressed by a member of the public. However, if that individual is a public sector employee, and speaks out in that capacity, the situation is viewed differently.

For example, in the recent opinion entitled Kaye v Board of Trustees of the San Diego County Public Law Library (2009)179 Cal.App.4th 48, the Fourth District Court of Appeal held that when an employee makes statements pursuant to official job duties, the employee is not speaking as a private citizen for First Amendment purposes. Accordingly, if the employee makes negative statements constituting insubordination against his or her employer or management personnel pursuant to official job duties, neither the federal nor state constitutions will insulate the employee from discipline, including dismissal, for the employee’s speech.

PROCEDURAL AND FACTUAL BACKGROUND OF CASE

In February 2006, a representative from the Administrative Office of the Courts ("AOC") contacted the San Diego County Public Law Library ("Library") requesting a panel member for a program designed to help self-represented litigants with appeals. A Library staff member referred the AOC representative to Plaintiff, Michael Kaye. Because Kaye’s supervisor, Joan Allen-Hart, was on sick leave that week, Kaye requested permission to participate in the program from the Library’s director, Robert Riger. Riger approved Kaye’s request.

When Allen-Hart returned to work and learned of the invitation, she questioned its genesis and why the request had not been routed through either her or Riger first. Allen-Hart directed an inquiry into the matter. Angered by the inquiry, Kaye rescinded his acceptance to participate in the program.

Kaye thereafter sent Allen-Hart a lengthy email, which he copied to his coworkers, questioning Library management’s treatment of reference librarians, the assignment of Library personnel and criticizing recent schedule changes implemented by Allen-Hart. Kaye further stated that Allen-Hart’s implementation of the schedule changes was “hypocritical,” and “smack[ed] of autocracy.” Finally, Kaye asserted that the inquiry concerning the AOC program constituted a pretext to discipline him or harass him into an early retirement.

The day after Kaye sent the critical email, Kaye was placed on administrative leave pending an investigation of the email. Approximately two weeks later, Library management sent Kaye another letter notifying him that he was subject to discharge for “insubordination and serious misconduct.” In response, Kaye submitted a “post-termination administrative appeal” to the Library’s Board of Trustees. After considering the matter in two separate sessions, the Board voted to discharge Kaye.

Kaye subsequently filed a complaint for wrongful termination asserting various causes of action, including that his discharge violated the free-speech clause set forth in article I, section 2, subdivision (a) of the California Constitution. Kaye also asserted that his discharge violated the whistle-blower protections set forth in the California False Claims Act. The trial court granted summary adjudication as to each of the state law causes of action.

COURT OF APPEAL’S DECISION

The California Court of Appeal affirmed the trial court’s decision to grant summary adjudication in favor of the
In *Garcetti*, a deputy district attorney (Ceballos) claimed his employer retaliated against him for writing a memorandum questioning the truthfulness of an affidavit filed by a deputy sheriff that was used to support a search warrant. Ceballos recommended dismissal of the related criminal case. Ceballos’s superiors disagreed with his conclusions and did not dismiss the case. Ceballos then informed defense counsel that he believed the facts in the affidavit were untrue. As a result, the defense called Ceballos as its witness and he testified on behalf of the defendant. Ceballos claimed the District Attorney thereafter disciplined him in retaliation for exercising his First Amendment rights.

The employer asserted that the memorandum was not protected speech under the First Amendment to the United States Constitution because Ceballos wrote it as part of his employment duties as a deputy district attorney, and not as a private citizen. The Supreme Court agreed and granted judgment in favor of the employer.

The *Garcetti* Court observed that Ceballos wrote the memorandum as part of his regular job duties. Accordingly, Ceballos was speaking as a prosecutor fulfilling a responsibility to advise his supervisor about how to proceed with a pending case. Based upon this analysis, the *Garcetti* Court reasoned that restricting an employee’s speech, which owed its existence to a public employee’s professional responsibilities, did not infringe upon any liberties the employee might have enjoyed as a private citizen. Rather, the employer’s decision reflected its exercise of control over what the employer itself had commissioned of its employees. Consequently, the *Garcetti* Court held that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

The Court of Appeal in *Kaye* adopted the reasoning of the *Garcetti* decision, and found that there was no reasoned distinction between the Federal Constitution’s free speech clause and the California Constitution’s free speech clause for purposes of its determination of Kaye’s appeal. The Court further determined that Kaye’s speech consisted of an email made during the ordinary course of his duties as a public employee. Accordingly, the Court of Appeal concluded that Kaye could not establish his discharge violated the California Constitution’s free speech clause. The Court of Appeal further concluded that Kaye’s other causes of action did not have any merit. As such, the Court of Appeal affirmed the trial court’s judgment in favor of the employer.

**SPEECH BY A “POLICYMAKER” EMPLOYEE**

Attorneys Jim Touchstone and Kimberly Hall Barlow, partners with Jones & Mayer, recently defended a sheriff and a county, in the Federal District Court in Los Angeles, involving a First Amendment claim filed by a former lieutenant of the department who had served as chief of police services for a city which contracted with the sheriff.

The lieutenant decided to oppose the incumbent sheriff in the next election. He was not successful and, thereafter, was notified for demotion for making numerous critical comments regarding his employer, its policies, other members of the department, and its command staff, during the course of his political campaign for sheriff. Before the demotion became effective, the lieutenant retired. He then sued his employer, alleging a claim of retaliation in violation of the First Amendment.

Following a two-week jury trial, the District Court rendered a complete defense verdict for the employer in the case. Although the comments by the former lieutenant hadn’t been made as part of his employment duties, they were made as a candidate for office, the court ruled that he filed a “policy maker” role (in simple terms, one who is part of the management team and on whom the elected official is entitled to rely for support) and, therefore, in this case as well, his statements were not protected by the First Amendment.

**HOW THIS AFFECTS YOUR AGENCY**

The *Kaye* decision, in conjunction with the United States Supreme Court’s decision in *Garcetti*, provides that an employee may be subject to discipline, including termination, for negative speech about his or her employer if the speech is made pursuant to the employee’s official duties. The determination of whether an employee’s speech is made pursuant to his or her official duties, and appropriate discipline based thereon, must be made on a case-by-case basis, following a thorough investigation of the underlying facts and circumstances surrounding the employee’s speech.

Prior to disciplining an employee for his or her speech activities, we strongly urge you to confer with your agency’s legal counsel in advance of making any such decisions. Should you wish to discuss these issues in greater detail with counsel who have trial experience in litigating these issues on law enforcement’s behalf, please do not hesitate to contact Martin J. Mayer or Jim Touchstone at 714-446-1400, or via email at mjm@jones-mayer.com or jrt@jones-mayer.com, respectively.
“BRADY” OBLIGATION IMPOSED ON LAW ENFORCEMENT
March 18, 2009

On December 8, 2008, the Ninth Circuit U.S. Court of Appeals, in the case of Tennison v. City and County of San Francisco, (2008) 548 F.3d 1293 held that “exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does. That would undermine Brady by allowing the investigating agency to prevent production by keeping a report out of the prosecutor’s hands until the agency decided the prosecutor ought to have it ....”

Facts

John Tennison and Antoine Goff served 13 years in state prison for a murder of which both were, ultimately, declared factually innocent. After their release, they filed complaints under 42 U.S.C. sec. 1983 alleging, among other things, that two San Francisco P.D. homicide inspectors “withheld exculpatory evidence and manufactured and presented perjured testimony during the investigation and prosecution of Plaintiffs for the murder of Roderick Shannon.” The Inspectors filed an appeal after their motion for summary judgment, on the basis of absolute and qualified immunity from civil liability, was denied.

The primary factual issues in the case involved the failure of the Inspectors to provide the prosecutor with evidence which would have assisted the Plaintiffs in defending themselves in the criminal prosecution. Among the items not turned over to the prosecutor was a taped interview with another person who confessed to committing the murder, as well as notes from interviews with individuals whose testimony would also have been beneficial to the Plaintiffs in their defense.

The Inspectors argued, among other things, that (1) they had no duty to disclose the “confession” because they did not find it to be credible; (2) that they had placed the confession in their file and the prosecutor has access to the file; and (3) the Plaintiffs had to prove the Inspectors acted in bad faith in order to establish section 1983 liability.

Duty of Police Officers Versus Prosecutors

The Investigators argued that law enforcement could withhold material without creating a Brady violation; they claimed that “Brady imposes a duty on prosecutors, but not on police officers, to disclose exculpatory evidence.”

It had been argued by the Inspectors that the duty was the prosecutors, under the case of Brady v. State of Maryland, 373 U.S. 83 (1963), to seek out and find, among members of the “prosecution team,” any material which must be disclosed to the defense. However, the Ninth Circuit stated that, “the Inspector’s position is untenable in light of the Supreme Court’s admonition that “Brady suppression occurs when the government fails to turn over evidence that is known only to police investigators and not to the prosecutor.”

The Court cited to several prior decisions, from the United States Supreme Court and from federal courts of appeal, to support its holding that this duty is imposed on law enforcement, as well. For example, in the case of Newsome v. McCabe, 256 F.3d 747 (2001), the 7th Circuit U. S. Court of Appeals stated that “it was clearly established ... that police could not withhold exculpatory information about fingerprints and the conduct of a lineup from prosecutors.”

The obligation, therefore, on law enforcement is to make the prosecutor, not the defendant, aware of potential Brady material, so the prosecutor can fulfill his or her constitutional obligation to disclose such material to the defense. It is imperative to remember that failure to disclose such material will result in the reversal of a conviction, if one has been
Bad Faith

The Inspectors also argued that in order to establish a 1983 violation, the Plaintiffs had to prove that they acted in bad faith. However, the Court, again referring to prior decisions, rejected that argument. Citing to *Brady* itself, the *Tennison* court stated that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.” (Emphasis in original.)

It is also important to remember that, following the *Brady* decision, the U.S. Supreme Court ruled that the defense need not make a request for such material – the prosecutor has an affirmative obligation to disclose it, even if it is not requested.

The Court also noted that “*Brady* has no good faith or inadvertence defense.” What that means, among other things, is that even if the prosecutor negligently fails to disclose exculpatory material to the defense, it is no excuse. “Inadvertence” is not a defense to a *Brady* violation, any more than is the lack of knowledge by the prosecution due to the failure of law enforcement to notify the prosecutor of such material.

**HOW THIS AFFECTS YOUR AGENCY**

The *Tennison* decision is clear – the duty to disclose exculpatory, *Brady*, material falls on law enforcement, as well as on the prosecution. It will not be an acceptable argument, against a motion to reverse a conviction, to claim that *Brady* material was not produced because law enforcement failed to notify the prosecution of its existence.

Merely placing such evidence in a file, but not bringing it to the attention of the prosecution, will not fulfill law enforcement’s obligation to disclose such evidence. What constitutes exculpatory evidence, and what must be disclosed, is to be decided by the prosecution. But, in order to do that, the prosecutor must be aware of its existence.

As with all legal matters, we urge that you confer with your agency’s legal counsel for advice and guidance. As always, if you wish to discuss this case in greater detail, please don’t hesitate to contact me at (714) 446 – 1400 or via e-mail at mjm@jones-mayer.com.
"FEDERAL LAW UPHeld BARRING GUNS FROM THOSE CONVICTED OF DOMESTIC VIOLENCE"
February 25, 2009

On February 24, 2009, on a 7-2 vote, the United States Supreme Court, in the case of United States v. Hayes, upheld the provision of the federal Gun Control Act of 1968 (Act) which prohibits anyone convicted of a “misdemeanor crime of domestic violence” from possessing a weapon. The Act, which originally prohibited felons from possessing weapons, was extended in 1996, pursuant to what was known as the “Lautenberg Amendment,” to also cover those persons convicted of a domestic violence misdemeanor.

In 2004, Marion County, West Virginia, law enforcement responded to a 911 call reporting domestic violence involving Hayes. He consented to a search of his home where the officers discovered a rifle, and subsequently discovered he owned four other weapons. Because he had been convicted, ten (10) years before, of a misdemeanor crime of domestic violence, a federal grand jury indicted him under the federal Gun Control Act of 1968, 18 U.S.C. sec. 922(g)(9).

He moved to dismiss the indictment on the basis that the underlying misdemeanor from 1994 was not a “domestic violence” misdemeanor, but was West Virginia’s “generic battery law.” As a result, Hayes argued, he had not, in fact, been convicted of domestic violence and, therefore, was not barred from possessing a weapon.

The Supreme Court stated that “section 922(g)(9) makes it “unlawful for any person ... who has been convicted in any court of a misdemeanor crime of domestic violence ... [to] possess ... any firearm or ammunition.” Section 921(a)(33)(A) defines “misdemeanor crime of domestic violence” as follows: “(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.”

The Court then held that the underlying statute need not specifically refer to a domestic relationship existing between the offender and victim, but that “instead, in a section 922(g)(9) prosecution, it suffices for the Government to charge and prove a prior conviction that was, in fact, for “an offense ... committed by” the defendant against a spouse or other domestic victim.”

Although the Court held that a domestic relationship must be proven by the prosecution, it also concluded that it need not be articulated as a requirement in the charge for which the abuser is convicted or pleads guilty. “More sensibly read, then, section 922(a)(33)(A) defines “misdemeanor crime of domestic violence” as a misdemeanor offense that (1) has, as an element, the use [of force], and (2) is committed by a person who has a specified domestic relationship with the victim.”

Furthermore, said the Court, to construe “section 922(g)(9) to exclude the domestic abuser convicted under a generic use-of-force statute ... would frustrate Congress' manifest purpose. Firearms and domestic strife are a potentially deadly combination nationwide.”

HOW THIS AFFECTS YOUR AGENCY

This decision establishes that a conviction under a “generic” battery statute will be considered a conviction of domestic violence if it involves actual or threatened force against a person who is considered a domestic victim. If the elements of the crime, as set forth in section 922(g)(9), are present, the prohibition on possessing weapons and/or ammunition will apply.

It is also imperative to note that this applies to law enforcement officers and there are no exemptions for them.
contained in the federal law. As a result, if peace officers are convicted of battery against a domestic victim, they are barred forever more from possessing weapons or ammunition. Peace officers with such a conviction, therefore, would be unable to thereafter fulfill the essential elements of their job.

We urge that you confer with your agency’s legal advisor on all matters involving legal interpretation. As always, if you wish to discuss this case in greater detail, please do not hesitate to contact me at (714) 446 – 1400 or via e-mail at mjm@jones-mayer.com.
"A PERSONNEL COMMISSION'S REDUCTION OF A PENALTY MUST BE JUSTIFIED"
February 17, 2009

While a personnel board, civil service commission, or hearing officer has discretion to alter the discipline imposed against a public sector employee, the exercise of that discretion has to be based on reason. On February 10, 2009, in the case of County of Santa Cruz v. Civil Service Commission of Santa Cruz (Jack), the Sixth District Court of Appeal ruled that the Commission exceeded “the bounds of reason” when it set aside the Sheriff’s demotion of former Sergeant George Jack, and substituted a 30 day suspension in its place.

Facts of the Case

Sgt. Jack had been notified that a female subordinate, Correctional Officer “H”, had complained that he had harassed her and was discriminating against her because she was female. The sergeant was told by Chief Deputy Don Bradley that there was to be an investigation and he “ordered Jack not to contact “H” or discuss the allegations with her.” Immediately thereafter Jack contacted “H”, called her three times on her cell phone and ordered her to go with him “for a ride.” In fact, he sat in a car with her, in a parking lot, for three hours where he, basically, harangued her about filing the complaint. He then ordered her to not tell anyone of their discussion and to not talk to the Chief Deputy anymore.

After the meeting, Jack left a phone message for the Chief Deputy telling him that “H” “approached me and asked for a few minutes.” He went on to say that he agreed to meet with her, he listened to her, and “we’ve worked this all out.” The next day, when the Chief Deputy contacted “H” to confirm that information, she stated that it was “a flat out lie.”

As a result, an internal affairs investigation was initiated and concluded that Jack had violated numerous policies including making false statements; insubordination; willful disobedience to orders; and conduct unbecoming an officer.

The Sheriff demoted Sgt. Jack, who had been with the department for many years, to deputy sheriff. Jack appealed the demotion to the Civil Service Commission which, after a hearing, issued a statement that “the preponderance of the evidence does not establish just cause for Sergeant Jack’s demotion ... but does justify a 30 day suspension with no back pay.” Despite a request by the County, the Commission refused to issue findings supporting its decision.

The County then filed a Peremptory Writ of Mandate seeking reversal of the Commission’s decision to reinstate Jack as a sergeant. The superior court denied the writ petition, ruling that the Commission did not abuse its discretion, and the County appealed to the Court of Appeal.

Amicus Support from CSSA and CPCA

When the County of Santa Cruz decided to petition the Court of Appeal for review, it asked for support from the California State Sheriffs Association (CSSA) and the California Police Chiefs Association (CPCA) in the form of an amicus curiae brief. The County believed, as stated in a letter to the two associations, that it was important for the Court of Appeal to hear from other chief law enforcement executives why the modification of the discipline imposed by the Sheriff was improper and, potentially, harmful to other law enforcement agencies by setting a bad precedent.

Both CSSA and CPCA voted to authorize participation and Jones & Mayer, as general counsel to the associations,
prepared and submitted such a brief. The primary points raised in the amicus brief were that the discipline imposed was justified and should not be reduced without good cause shown by the Commission.

The brief pointed out that two of the sustained charges, which were ultimately upheld by the Commission, included two of the most serious offenses which could be committed by peace officers - dishonesty and insubordination. In fact, the associations noted in the brief that, in their opinion, the Sheriff should have terminated the sergeant, not just demote him, since the dishonesty finding would be detrimental to his ability to function, even as a deputy sheriff.

Ironically, this issue was raised by counsel for the sergeant who argued that if dishonesty was so serious a violation to cause a long term sergeant to be demoted, why wasn’t he fired? During oral argument before the Court of Appeal, this question was posed to me, as counsel for amici, by the Court. I was able to point out that, although the Sheriff chose demotion rather than termination (because of the long tenure of Jack with the department), amici had noted in its brief that, had it been up to them, the recommendation would have been termination. In any event, we argued that there was no justification for the Commission to reduce the penalty even further.

**Insubordination and Dishonesty are Major Violations**

The Court of Appeal held that "the public is entitled to protection from unprofessional employees whose conduct places people at risk of injury and the government at risk of incurring liability." The Court found that "Jack's interference in the internal investigation of the gender bias claim placed the County at risk of liability, and exposed the governmental entity to the prospect of litigation. In particular, the California Fair Employment and Housing Act (FEHA) provides that employers take reasonable steps to prevent harassment from occurring."

The County had argued to the Commission that the case of Kolender v. San Diego County Civil Service Commission, (2005) 132 Cal. App. 4th 716, supported its position. In Kolender, the Court of Appeal held that the Commission abused its discretion by reinstating a deputy who lied to protect another deputy who had abused an inmate. In the Santa Cruz case, the Commission disagreed stating that Jack’s behavior wasn’t as important, or as serious, as that in Kolender.

In addition to the absurdity of the Commission’s reasoning, the superior court judge held that Jack had only lied in an internal matter and, therefore, there was no harm to the public.

The Court of Appeal, however, held that "Jack's dishonesty and disobedience of the order not to contact "H" during the internal investigation is no less serious or important than the deputy's lies to protect his colleague in Kolender. The honesty and integrity of a Sergeant in the Sheriff's department is paramount to the public safety and trust, and breach of that trust is cause for great concern. The fact that the dishonesty in this case related to an internal employment investigation rather than an investigation of inmate abuse does not make the misconduct any less troubling."

Furthermore, the Court, in citing to prior decisions, held that law enforcement officers "are guardians of the 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."

**A Commission’s Obligation to Justify its Decision**

The Court noted that the Commission refused to do its duty, and make specific findings, until the Santa Cruz Superior Court ordered it to do so. After the court's order, the Commission concluded that "Jack made false statements, was insubordinate and was willfully disobedient ...." Even then, the Commission continued to refuse to justify its decision to reduce the penalty. Those findings, state the Court of Appeal, "did not support a reduction of the penalty; rather, they provided a basis for the original demotion ordered by the Sheriff."

The Court of Appeal acknowledged that "case law is clear that the standard of review of Commission decisions is abuse of discretion..." but, it continues, "in circumstances such as this, where the Commission made specific findings that are inconsistent with its action in reducing the penalty, ... then error is shown. Here, the Commission’s findings do not support its action. We find no reasonable mind could conclude, based on these findings, a reduction of Jack’s penalty was warranted."

**HOW THIS AFFECTS YOUR AGENCY**

It is important to remember that, unless your city or county has agreed to final and binding arbitration, the employer has as much right to appeal an adverse decision of a personnel board, civil service commission or hearing officer, as does the employee. The decision by this Commission was wrong - on many counts - and the Sheriff and County realized it was important to appeal.

If you lose at "step one" - in this case, the superior court ruling that the Commission did not abuse its discretion - that doesn’t mean you should give up. If you believe in your case, the process allows taking the decision of that one superior court judge to the court of appeal, for review by a panel of three judges. That's what Santa Cruz did - and they prevailed.

Obviously, disciplinary action should only be taken when it is necessary and appropriate. However, once that process is started, it is imperative that the employer carry through in its efforts to support its action. Not only is it important in that individual case, but it sets a precedent and sends a message that, when such action has been taken, the employer will do all it is legally permitted to do, in order to sustain its justifiable action.

As always, we urge that you confer with your agency’s legal counsel in matters such as this. However, if you wish to discuss this case in greater detail, please feel free to contact me at (714) 446-1400 or via e-mail at mjm@jones-mayer.com.
The California Court of Appeal, Second Appellate District, recently ruled that officers do not have a constitutional or statutory right to confer, as a group, with legal counsel following an officer involved shooting.

In the case of the Association for Los Angeles Deputy Sheriffs v. County of Los Angeles, (2008) 166 Cal. App. 4th 1625, the Court held that a policy of the Los Angeles County Sheriff’s Department (LASD), which permits “members [of the department] who were either involved in or witnessed [a deputy involved shooting] may consult individually with legal counsel or labor representatives ... [but] ... shall not consult with legal counsel and or labor representatives collectively or in groups...,” prior to being interviewed.

Officers Can Consult With Attorneys

The Association for Los Angeles Deputy Sheriffs (ALADS) challenged that policy claiming that the trial court's denial of its motion for a preliminary injunction implied that the policy “not only prohibits deputies from meeting in a group with one lawyer, but also prohibits deputies from consulting separately with more than one lawyer from the same law firm." The Court of Appeal disagreed, stating that "multiple deputies may consult with the same lawyer (in individual sessions) or with different lawyers from the same law firm."

The Court noted that the Department’s policy "expressly protects a deputy’s right to meet with counsel individually." Furthermore, the Court held that “an official interrogation following an officer-involved shooting incident ‘occurs at a crucial time’ and that, correspondingly, the officer should have legal representation in the event he or she so desires counsel."

LASD's Restriction is Reasonable

ALADS also claimed that the restriction on multiple deputies meeting with legal counsel collectively was unreasonable, and that the lower court misread the decision in Upland POA v. City of Upland, (2003) 111 Cal. App.

4th 1294, when it relied on it to conclude the LASD policy was reasonable. However, this Court noted that the Upland court “ruled that a police officer’s choice of counsel must reasonably accommodate his or her department’s interests in conducting a prompt and efficient investigation of an officer-involved shooting incident.” Furthermore, stated the Court, Upland "permits a police agency to impose ‘reasonable’ limits on a police officer’s statutory right under POBR to consult with counsel of his or her choosing during an interrogation regarding an officer-involved shooting."

The Court continued, stating that "the trial court's assessment of reasonableness was not incorrect as a matter of law and, thus, the court’s decision to deny a preliminary injunction (preventing the application of the LASD policy) should not be reversed."

The Department’s policy, held the Court, "only precludes an officer from getting together in a group with other officers and a lawyer, the objective of the policy being to assure the collection of accurate witness accounts before the recollection of witnesses can be influenced by the observation of other witnesses."

HOW THIS AFFECTS YOUR AGENCY

This case reaffirms the long established principle that officers involved in critical incidents, such as an officer involved shooting, have the right to confer with legal counsel prior to giving statements to their departments regarding what
occurred. However, there is no right to meet collectively with other involved officers and the attorney, and jointly discuss the incident, prior to each individual officer/witness being interviewed.

In order to ensure the ability to enforce such a procedure, a policy should be established and implemented. If that results in a change in past practice, it will require that the agency first meet and confer with its employees' bargaining unit.

There are differing opinions regarding the separating of officers under such circumstances. What is accomplished as a result of this decision is that each agency can reach its own conclusion as to how it will proceed. As such, and as we always note, it is important to secure appropriate legal advice and guidance, from your agency's legal counsel, prior to an incident occurring. Trying to establish a procedure after the fact is, all too often, too little, too late.

Should you wish to discuss this case in greater detail, please feel free to contact me at (714) 446-1400 or via e-mail at mjm@jones-mayer.com.
POBR DOES NOT APPLY TO CRIMINAL INVESTIGATIONS

Last year, a superior court judge ruled that if an employing agency was conducting a criminal investigation of an officer, it must afford the officer all rights under the Public Safety Officers Procedural Bill of Rights Act (POBRA), as it would during an internal, administrative, investigation. On December 26, 2007, the California Court of Appeal, Second District, ruled in the case of Van Winkle v. County of Ventura, et al that the (POBRA) "...protections do not apply to officers subject to criminal investigations conducted by their employers." (Emphasis added.)

Jones & Mayer, as counsel for the California State Sheriffs Association (CSSA) and the California Police Chiefs Association (CPCA), prepared and submitted an amicus brief supporting the Ventura County Sheriff's Office in its appeal. The Court of Appeal referred specifically to part of that brief in its published decision.

In the Van Winkle case, a Ventura County deputy sheriff was suspected of embezzling property (guns) from the sheriff's department and, as a result, was the subject of a sting operation conducted by the Sheriffs Major Crimes Bureau (MCB). Following a pretext call to him, and his agreement to sell the weapons, Van Winkle was arrested and subsequently interviewed by a MCB detective. He waived his Miranda rights and admitted to the theft. The Ventura Sheriff fired Van Winkle and used his incriminating statements to MCB to support the termination action.

Van Winkle alleged that the Sheriff violated his POBRA rights by (1) interviewing him during the criminal investigation without first giving him the admonishments required by POBRA; and (2) by using his voluntary statements to MCB in the disciplinary case. The trial court agreed with Van Winkle that, based on dicta contained in California Correctional Peace Officers Association v. State of California, (2000) 82 Cal.App.4th 294, the interview by the MCB detective required POBR admonishments. In CCPOA, the court stated in a footnote that "...criminal investigations of law enforcement officers by their employers fall within POBRA."

The Van Winkle court noted that "CCPOA is distinguishable," noting that, in CCPOA, "it was an investigation of prison guards concerning a prior incident involving..." their alleged instigation of an attack on an inmate. The Van Winkle court points out that in CCPOA, "their employer, the Department of Corrections, threatened the guards with criminal and disciplinary action for not cooperating with the (criminal) investigation." The court of appeal had ruled that, under the unique and egregious circumstances of CCPOA, the protections of POBRA applied. However, the circumstances in that case were very different than those in Van Winkle.

Criminal Investigations and POBRA

The language in POBRA (Gov't Code sections 3300 - 3312) specifically states that it does not cover "an investigation concerned solely and directly with alleged criminal activities." [In fact, those protections are unnecessary since the accused is protected by the Fifth Amendment of the U.S. Constitution.] The California Supreme Court, in Pasadena POA v. City of Pasadena (1990) 51 Cal.3d 564, held that the protections of POBRA "apply when a peace officer is interrogated in the course of an administrative investigation that might subject the officer to punitive action...." (Emphasis added.)

The Van Winkle court noted that the Ventura County Sheriff takes significant steps to separate a criminal from administrative investigation. "The sheriff's department disciplinary investigators and its IAU do not investigate crimes and did not participate in the MCB criminal investigation." (Obviously, internal affairs investigates acts which could also be violations of criminal laws but they are looking at whether the conduct violates department policy.)

The Court states that "the Legislature unambiguously delineated the investigations they (law enforcement employers) could institute. It defined the ones subject to POBRA, such as disciplinary actions, from those which were not (eg, routine investigations and criminal investigations). In CCPOA, the court concluded that section 3303, subdivision (i),
covers only non-employer law enforcement agencies. But there is no language in the Act which supports this interpretation."

The court then states that the Legislature "...did not intend POBRA to limit or interfere with legitimate criminal investigations, or to impede an agency's efforts to police itself." Taking further exception with the prior decision, the Van Winkle court stated that, "the court in CCPOA ... believed law enforcement employers will routinely violate POBRA. But the court had no evidence to support its speculation that they would be scofflaws. Nor did it have the authority to alter the legislative definition of the exempt investigations without legislative guidance."

Furthermore, the court ruled that Van Winkle was advised he was the subject of a criminal investigation, not an administrative one; that he was aware of that fact since he had been arrested and was in custody; that he waived his Miranda rights; and he was advised that, because it was a criminal investigation, the MCB detective could not order him to talk. "There is no evidence in this record to show that he was confused about the nature of this investigation or his rights."

HOW THIS AFFECTS YOUR AGENCY

The issue of a law enforcement employer conducting both a criminal investigation regarding alleged officer misconduct (eg. off duty DUI or domestic violence), and an internal disciplinary investigation, is now being raised as a result of the superior court’s ruling in Van Winkle, citing to the CCPOA decision. Hopefully, the Court of Appeal ruling will put that matter to rest, however, agencies should be aware of the potential problems raised by conducting both investigations. There appears to be no doubt that agencies can conduct both investigations but they, like the Ventura Sheriff, must be able to demonstrate that the two are totally separate, one from the other.

Running "parallel track" investigations means ensuring that those involved in the criminal investigation have no access to compelled statements (nor the "fruit of the poisonous tree") obtained from the subject employee. From a totally practical perspective, the problem is, virtually, eliminated if the employing agency refers the criminal investigation to another, appropriate, law enforcement agency and remains uninvolved in that investigation. For example, police departments could ask the county sheriff to conduct the criminal investigation of one of its officers; the sheriff could ask the office of the district attorney or the attorney general to investigate if a deputy sheriff is the target; and so on. This approach is something to consider, although not a requirement.

As always, it is imperative to seek the advice and guidance of your individual legal counsel when confronted with legal issues. However, if you wish to discuss the case set forth above, in greater detail, feel free to contact me at (714) 446-1400 or by e-mail at mj@jones-mayer.com.
To: All Police Chiefs and Sheriffs  

From: Martin J. Mayer  

UPLAND POA v. CITY OF UPLAND  

December 18, 2003  

California Supreme Court Affirms: A Peace Officer's Right to a Representative of His/Her Choice Under Cal. Gov't Code § 3303(i) Must be Reasonable  

We are most pleased to inform you that, on December 18, 2003, the California Supreme Court denied the Upland POA's petition to review the Court of Appeal's decision, as well as the POA's request for depublication of the case of Upland POA v. City of Upland, 111 Cal. App. 4th 1294.  

The issue in the Upland case involved the POA attorney calling just before a scheduled interrogation to inform the department he was unavailable. The interrogation was re-scheduled to another date, selected by the attorney. On the next date the attorney called just before the interview and stated he was, once again, unavailable. The POA attorney refused to send another member of his firm, stating that the Peace Officers Bill of Rights Act allowed the officer to specify the "representative of his or her choice," and no other person would suffice. The Chief insisted the interview proceed.  

The California Court of Appeal, Fourth Appellate District, had unanimously ruled that an officer's "right" to a representative of his or her choice, at an I.A. interrogation, must be read to include a "reasonable requirement." Our firm submitted an amicus brief on behalf of the California Police Chiefs' Association ("CPCA") and California State Sheriffs' Association ("CSSA") supporting the Upland Police Department.  

Following the Court of Appeal's decision, and in response to Upland POA's petition for review and subsequent request for depublication, we responded with opposition on behalf of CPCA and CSSA. (For further discussion of the facts, please refer to our previous Client Alert Vol. 18, No. 17 which can be accessed via our website.)  

HOW THIS EFFECTS YOUR DEPARTMENT  

The California Supreme Court has affirmed the Court of Appeal's finding that a reasonableness requirement must be read into the language provided by Cal. Gov't Code § 3303(i). Therefore, we strongly suggest applying the standard of reasonableness in making the decision when to "draw the line" and require the interview to proceed, absent the officer's "representative of choice." It will be necessary to justify it, if challenged.  

Once again, the influence law enforcement management can have in major court decisions has been
That influence is even greater when both chiefs and sheriffs are joined together in support or opposition of a law enforcement issue.
Respondents James Lubey and George Hood were probationary members of the uniformed ranks of the Police Department of the City and County of San Francisco. A citizen made unsworn charges of misconduct against each of them. The matter was referred to the police department's internal affairs bureau and an investigation was started. The officers were interrogated and thereafter furnished with an unverified complaint, or statement of the charges. A memorandum reciting those and other charges not made known to the officers, was then forwarded by the internal affairs bureau to the police chief or police commission, with a recommendation that the officers be tried for misconduct. The contents of the memorandum were never made known to the officers. [98 Cal.App.3d 344]

About two and a half months after the investigation's start, upon a few hours' notice, the probationary officers were summoned to the police chiefs office. They were told "that he intended to dismiss [them] and that the purpose of the meeting was to provide [them with] the opportunity to address the charges against them to give reasons why they should not be terminated." At the meeting's close the officers were handed written notices of termination of employment, effective that day, "for misconduct on the charges made ..." (Italics added.) The termination notices had been prepared and signed prior to the meeting.
The complaining citizen was not present at the meeting, and the officers were not shown the evidence against them. As later found by the superior court, they were not permitted to call and examine witnesses, and they did not have the chance to perform an independent investigation or to present evidence. Nor had they been given prior notice of all of the charges or of the purpose of the meeting. As to such of the charges of which they had been informed, the officers have generally denied them.

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

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

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

The City has appealed from the judgment.

[1a] We choose first to consider the appellate issue described by the City as: "Whether the provisions of San Francisco Charter Section 8.340 specifically dealing with the discipline of probationary employees [98 Cal.App.3d 345] of the City and County of San Francisco prevails over Section 8.343 dealing with the termination of police officers in general." (Italics added.)

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

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

It will be seen that the City has mischaracterized the instant issue. Section 8.340 deals with the "termination," not "discipline," of probationary employees. Section 8.343 is concerned with the "discipline" and "dismissal," not "termination," of police officers generally. Here, as noted, the probationary police officers were expressly "terminated" for "misconduct."
A review of the constitutional principles of due process, claimed by the officers to be applicable in the circumstances of their case, becomes appropriate.

[2] It is settled law that a probationary (or nontenured) civil service employee, at least ordinarily, may be discharged without a hearing or judicially cognizable good cause. (Perry v. Sindermann, 408 U.S. 593, 596 [33 L.Ed.2d 570, 576, 92 S.Ct. 2694]; Board of Regents v. Roth, 408 U.S. 564, 578 [33 L.Ed.2d 548, 561, 92 S.Ct. 2701]; Bogacki v. Board of Supervisors, 5 Cal. 3d 771, 782 [97 Cal.Rptr. 657, 857 P.2d 537]; cert. den., 405 U.S. 1030 [31 L.Ed. 2d 488, 92 S.Ct. 1301]; McNeill v. Butz (4th Cir. 1973) 480 F.2d 314, 319; Kestler v. City of Los Angeles, 81 Cal.App.3d 65, 65 [97 Cal. Rptr. 657]; Healdsburg Police Officers Assn. v. City of Healdsburg, 57 Cal.App.3d 444, 450 [129 Cal.Rptr. 216]; Daniel v. Porter (W.D.N.C. 1975) 391 F. Supp. 1006.) Such a discharge does not deprive the employee of a vested, or property, right. (Codd v. Velger, 429 U.S. 624, 628 [51 L.Ed.2d 92, 97, 97 S.Ct. 882]; Board of Regents v. Roth, supra, pp. 578-579 [33 L.Ed.2d pp. 561-562]; Bogacki v. Board of Supervisors, supra, pp. 782-783; McNeill v. Butz, supra, p. 319.) A public agency may constitutionally "employ persons subject to removal at its pleasure" (Bogacki v. Board of Supervisors, supra, p. 782), for ""[unquestionably, a broad discretion reposes in governmental agencies to determine which [probationary] employees they will retain"

But there is an important exception to this rule, which is founded upon the Fourteenth Amendment. It arises where there is a deprivation of the "liberty" guaranteed all persons by that amendment's due process clause. The exception will be applied where the probationary employee's job termination, or dismissal, is based on charges of misconduct which "stigmatize" his reputation, or "seriously impair" his opportunity to earn a living (Paul v. Davis, 424 U.S. 693, 702 [47 L.Ed.2d 405, 414, 96 S.Ct. 1155]), or which "might seriously damage his standing or associations in his community" (Board of Regents v. Roth, supra, 408 U.S. 564, 573 [33 L.Ed.2d 548, 558]; and to the same effect see McNeill v. Butz, supra, 408 F.2d 314, 319; Daniel v. Porter, supra, 391 F.Supp. 1006, 1010). fn. 1

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

[1b] Here, as noted, charges of misconduct were levied against the two probationary police officers. Without even pretense of due process, or "notice and opportunity for hearing appropriate to the nature of the [98 Cal.App.3d 347] case," or opportunity "to refute the charges" or "to clear their names," the officers' employment was terminated "for misconduct on the charges made ..." It must fairly be said that their reputations were thereby "stigmatized," their chances of future employment in their chosen field,
and elsewhere, "seriously impaired," and their standing in the community "seriously damaged."

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

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

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

Manifestly, an ambiguity appears.

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

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

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

It follows that the action of the City's police chief dismissing Probationary Officers Lubey
and Hood "for misconduct on the charges made" without due process as provided by
charter section 8.343 was in violation of the City's charter, and the Fourteenth
Amendment, fn. 3 It will accordingly be set aside.

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

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

Our remaining problem concerns the final disposition of the probationary police officers' action. We are aided by Board of Regents v. Roth, supra, 408 U.S. 564, 570, footnote 7
[33 L.Ed.2d 548, 556], by [98 Cal.App.3d 349] the recent decision of Ofsevit v. Trustees of Cal. State University & Colleges, 21 Cal.Sd 763, 775-778 [148 Cal.Rptr. 1, 582 P.2d
88], and by the cases there relied upon, i.e., NLRB v. Rutter-Rex Mfg. Co., 396 U.S. 258,
1977) 433 F.Supp. 531, 537. Although of differing factual contexts, we find this authority
to be reasonably applicable here.

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

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

Racanelli, P. J., and Newsom, J., concurred.
Professional Standards Bureau
Internal Affairs Group

Investigative Strategies
Ensuring Accurate, Professional, and Thorough Investigations

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(This is a quick reference guide only and should not be used as a source document.)

February 2010
INVESTIGATIVE FORMAT HEADINGS

Investigative Responsibility
Identify Investigating Officer, contact information and division of assignment. Also inform the adjudicator that if any supplemental is needed, it must be requested on a 15.2.

Statute Issues
Address statute issues, tolling considerations and statute date determination in bold type.

Background (Optional)
Explain any past history related to the present complaint. In domestic violence cases this would include past incidents, status of the marriage, children in common and their ages.

Summary of Investigation
Give brief overview of the complaint, including the complainant's perspective, the officer's perspective and what the investigation revealed.

Allegations
Formally list and number all allegations. Include indented responses to highlight the merits of each allegation.

Facts Not in Dispute
Highlight facts that are irrefutable or not in dispute. Opinions or perspectives are not to be included in this section.

Timeline
Chronological sequence of events using source documents, electronic media or radio transmissions, rather than recollection, when possible.
Standards of Review
Provide adjudicator with the written policies, procedures or laws violated, as alleged.

Statements
Include paraphrased statement of each interview, excluding the "lead-in" information.

Evidence
Document all evidence collected and preserved. Include statement to explain the meaning and/or significance of each item.

Photographs
Document all photographs including a statement to explain the meaning and/or significance of each.

Canvassing
Document canvassing efforts to identify and locate witnesses and surveillance camera videos. Include specific names, addresses, and dates. If it was not done, explain why and who approved it.

Investigator's Notes
Document and explain discrepancies, changes in allegations, pertinent additional information, variance from required procedure and fulfillment of Investigative (Consent Decree) requirements.

Addenda
List all reference documents, photographs, videos and other materials related to the complaint investigation.
INVESTIGATIVE REQUIREMENTS
(Formerly Consent Decree Requirements)

Canvassing
Canvass the scene to locate witnesses and surveillance camera videos, where appropriate. Document specific names, addresses, and dates under Canvassing heading.

Evidence
Collect and preserve appropriate evidence. Document under Evidence heading in report.

Notifications
Notify involved officers and the supervisors of involved officers regarding complaint, except when complaint is deemed confidential. Document in Chronological Record.

Interviews
- Conduct interviews at sites and times convenient for complainants and witnesses, when practicable and appropriate. Document compliance or exceptions in an Investigator's Note.
- Record all interviews. Document compliance or exceptions in an Investigator's Note.
- Do not conduct group interviews. Document compliance or exceptions in an Investigator's Note.
- Interview involved supervisors relative to their actions at scene. Document compliance or exceptions in an Investigator's Note.
- Identify all inconsistencies in officer and witness statements and document within the investigation.
GENERAL COMPLAINT INTAKE

The quality of a preliminary complaint investigation significantly impacts its outcome. A thorough preliminary investigation can make the difference between resolving a complaint (such as exonerated, unfounded or sustained) and not resolving it.

The minutes and hours immediately following an incident, sometimes referred to as the "golden hour," are critical to gathering key evidence which might otherwise be lost. In many instances, witnesses are difficult to locate later or decide to not cooperate with the investigation. Evidence that is present at the scene is nearly always impossible to locate or recreate later in the investigation. It is vitally important that the initial intake and investigation be thorough.

Standards of Review

Special Order No. 1, 2003, Department Complaint Process - Revised.


Case Preparation

- Identify all parties involved (complainant, witnesses, involved employees and supervisors at scene). For non-employees, obtain:
  Name and verify identity (document driver license or ID No. and date of birth);
Addresses (home and business or transient's "hang outs"); Telephone numbers (home, cell and business); and, Best time to be re-contacted.

- Anticipate the need for specialized assistance or expertise. Use Department resources and experts to assist you.
- Collect and preserve evidence.
- Photograph scene, and if possible, include photos from each involved party's vantage point.
- Cause photographs to be taken of injuries or claims of injuries.
- Obtain any audio/video recordings or in-car camera recordings of the incident. Check nearby businesses and City streets for video cameras.** Do not retain originals in case package.
- Canvass location for witnesses as soon as possible after the incident occurs.
  a Interview complainant and witnesses immediately, if possible, including all vehicle passengers, if vehicle was involved.
- Record all interviews and promptly book recordings at SID Electronics.**
- Include involved vehicle information and description in the preliminary investigation (year, make, model, license plate, color, tinted windows, if relevant).
- Obtain all pertinent documents related to the incident, including but not limited to Daily Work Sheets, DFARs, FIs, sergeant's logs, arrest reports, traffic citations, dispatch records and timekeeping records.
- Preplan the investigation and interviews using the Internal Affairs Investigative Strategies. For instance, if the complainant is alleging biased policing, use the Biased Policing Investigation
Protocol. If the complainant is alleging unlawful search, use the Constitutional Policing Issues and Unlawful Search Investigative Strategies.

- Do not meet with complainants alone. Have a partner to take notes for you.

**Note:** Do not maintain original recordings or photographs in case packages. Book all items according to procedure. Copies may be kept in packages.

**Complainant Interview Questions**

Ask pertinent questions. Remember, the initial contact could be our only chance to "nail down" the complainant's statement.

- Address reasons for delay in reporting, if any.
- Assess sobriety.
- Nature of the relationship with the accused, if any.
- Probe for specifics (who, what, when, where, why, how) and address all inconsistencies.
- Allow the complainant to tell the story from his/her perspective from the beginning to the end. *Then*, go back and ask follow up questions and probe for specific information.

**Witness Interview Questions**

- Nature of the relationship with the complainant and/or accused, if any.
- What was seen and heard?
- What was the witness' proximity to the incident?
- Probe for specifics (who, what, when, where, why, how) and address all inconsistencies.
CONSTITUTIONAL POLICING ISSUES

Law

Detentions - police may...

  
  Order driver out of the vehicle once it's lawfully stopped.

  
  Order passenger out of the vehicle once it's lawfully stopped.

- *Terry v. Ohio*, 392 U.S. 1 (1968)
  
  Stop and briefly detain for investigative purposes if the officer has a reasonable suspicion supported by *specific* and *articulable* facts that the individual is involved in criminal activity. Conduct pat down search of outer clothing to search for weapons if the officer has reasonable suspicion supported by *specific* and *articulable* facts that the person is armed.


Allows for "pretext stops." Officer's stop of a vehicle is reasonable where there is probable cause to believe a traffic violation has occurred.
**Florida v. Royer, 460 U.S. 491 (1983)**

An individual may not be detained even momentarily without reasonable, objective grounds for doing so; and the refusal to listen to or answer an officer's questions, without more, does not furnish those grounds.

An investigatory detention must not last longer than necessary to effectuate the purpose of the stop. Officers must use the least intrusive means reasonably available to verify or dispel suspicion in a short period of time.

"Where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of authority."


Mere presence in high crime/narcotics area ^ reasonable suspicion.

Presence in high crime area in combination with one or more other factors (i.e., flight from officers) may justify reasonable suspicion.


Must consider the totality of the circumstances in determining whether there is reasonable suspicion.
Parole/Probation Searches - California:
  Officers must be aware of person's *parole* status **prior to a search of residence** in order to justify the search.

Searches of Vehicles Incident to Arrest:
• *Arizona v. Gant* 129 S. Ct. 1710 (2009)
  Places additional limitations on the ability to conduct vehicle searches. Police officers may only search the passenger compartment of a vehicle incident to the arrest of an occupant if: (1) the officer has a reasonable belief that evidence relevant to the offense of arrest may be found in the vehicle; or (2) the arrestee is not yet secured and is within reaching distance of the vehicle at the time of the search.
BIASED POLICING INVESTIGATION
PROTOCOL


Standards of Review

Policy & Procedures

Department Manual Section 1/345, Policy Prohibiting Biased Policing - Discriminatory conduct on the basis of race, color, ethnicity, national origin, gender, gender identity, gender expression, sexual orientation, or disability in the conduct of law-enforcement activities is prohibited. Police-initiated stops or detentions, and activities following stops or detentions, shall be unbiased and based on legitimate, articulable facts, consistent with the standards of reasonable suspicion or probable cause as required by federal and state laws.

Department personnel may not use race, color, ethnicity, national origin, gender, gender identity, gender expression, sexual orientation, or disability (to any extent or degree) in conducting stops or detentions, except when engaging in the investigation of appropriate suspect-specific activity to identify a particular person or group.

Department personnel seeking one or more specific persons who have been identified or described in part by their race, color, ethnicity, national origin, gender, gender identity, gender expression, sexual orientation, or disability, may rely in part on race,
color, ethnicity, national origin, gender, gender identity, gender expression, sexual orientation, or disability, only in combination with other appropriate identifying factors and may not give race, color, ethnicity, national origin, gender, gender identity, gender expression, sexual orientation, or disability, undue weight.

**Investigative Strategies**

**Case Preparation**

- Gather and review all documents related to the incident, including but not limited to DFARs, FIs, sergeant's logs, arrest reports, traffic citations, and any audio/video recordings or in-car camera recordings of the incident.
- If applicable and/or feasible, determine final outcome of any related traffic citation or legal proceeding, which complainant alleges was a result of biased policing.
- If CP alleges officer selectively enforced law, allowing persons of other minority status to avoid similar enforcement, examine enforcement activities for the day around time of incident. Document in Investigator's Note.
- Obtain photographic and visual documentation such as tinting of vehicles, diagrams of locations, etc.
- Canvass location, interview all witnesses.
- Generally, all CPs should be interviewed. However, in some instances, letters or other correspondence may provide specific enough information to not require an
interview. Decisions to not interview CPs shall be approved by IAG Section OICs. Consideration should be given to sufficient specificity in correspondence, ability to interview the CP, length of time from the incident to the date of correspondence, other existing reviews such as court proceedings, etc. The decision to not interview CP shall be documented in an Investigator's Note. Generally, all accused officers shall be interviewed. In some unusual instances, accused officers may not need to be interviewed when there is overwhelming probable cause or video evidence strongly refutes the allegation. The decision to not interview accused officers shall be documented in an Investigator's Note.

Complainant Questions

Why does complainant believe he/she was the subject of biased policing? Probe for specific articulation.
What behaviors on the part of the officer(s) does the complainant believe support his/her allegation of biased policing? Probe for specific articulation.
Actions of officer(s) at scene?
Could the officer have seen the complainant's race or other factor for bias prior to the stop? Direction of approach of officer?
CP searched? Location searched? Type of search? Scope of search?
Length of detention?
Vehicle windows tinted if driving? Window position at time of stop? (Obtain photo of windows.)
Complainant's definition or understanding of biased policing? Probe for specific articulation.
Other statements made by officer that indicate bias?
Officer provide explanation for detention or stop?

**Officer Questions**

Reason for the stop, search or detention?
Obtain details specific to conclusionary statements such as, "officer safety," "uncooperative," "high crime area" or "consensual encounter." Require articulation.
Location of officer when first encountered CP?
Did officer(s) know the race or other factor of bias of subject prior to the stop or detention? Was race or bias category (minority status, etc.) a factor in the stop or detention? If the answer is "yes," have the officer(s) explain. If there was a search associated with the stop or detention, ask the officer(s) to articulate the reason(s), scope, type and intent of the search. Lighting conditions, distance when the officer(s) made the observations?
Windows tinted? Position of windows at time of initial observation?

**Additional Questions for Officer - Other than Self-Initiated Activities:**

- Outside information, which lead to detention, such as a radio call, citizen flag down, etc.?
• If outside initiated information caused the detention, determine if the detention was reasonable (i.e., the complainant, in fact matched the description in the radio call). Determine what factors the officer relied upon in concluding that the suspect matched the description of the call.
• Determine if the officer completed any documentation related to the stop, and include this documentation as addenda. If there are no other extenuating circumstances and the reason for the detention, search or other law enforcement activity is reasonable, legal and justified, no further investigation is necessary. (Officer interviews must be conducted.)

Case Review

All completed personnel complaint investigations containing an allegation of biased policing shall be reviewed by the Section Officer in Charge and the Commanding Officer, Criminal Investigation Division, or the Commanding Officer, Administrative Investigation Division, and finally, the Commanding Officer of Internal Affairs Group, before distribution for adjudication.
UNLAWFUL SEARCH

Case Preparation

• Gather and review all documents related to the incident, including but not limited to DFARs, FIs, sergeant's logs, arrest reports, traffic citations, dispatch records, and any audio/video recordings or in-car camera recordings of the incident.
• If applicable and feasible, determine the final outcome of any related traffic citation, legal proceeding, which complainant alleges was a result of the search and/or arrest.
• Canvass location, interview all witnesses.
• Consider constructing timeline of incident events using irrefutable documents when possible.

Complainant Questions

• Mode of dress?
• Actions of officer at scene?
• Actions of complainant just prior to contact with accused?
• Describe method of approach by officer... red light and siren, casual approach, etc.
• CP searched? Location searched? Type of search? Scope of search?
• Complainant's recollection of incident events timeline, including length of detention?
• Complainant's definition or understanding of state of law relative to lawfulness of search? Probe for specific articulation.
• Other statements made by officer(s) that may indicate motive for search?
• Did officer provide an explanation for detention or stop?
• Was consent sought or provided for search of person, vehicle or residence?

Accused -Witness Questions

• Discussions prior to stop?
• Establish prior knowledge by accused or witness of the complainant prior to stop (parole, probation, search conditions.)
• Manner which officer approached complainant?
• Actions of complainant just prior to contact?
• Description of complainant’s clothing?
• Location prior to encounter with complainant?
• Description of complainant's actions during the encounter?
• Did the encounter change from a consensual encounter to a detention or arrest...if so, at what point?
• Reason for the stop, search or detention? Scope of search?
• Outside information which lead to detention, such as a radio call, citizen flag down, etc.?
• Obtain details specific to conclusionary statements such as, "officer safety," "uncooperative," "high crime area" or "consensual encounter." Require articulation of justification for search.
• Location of officer when first encountered complainant?
• Permission sought to search person, vehicle or residence?
• Any exigent circumstances articulated by officer for search...particularly of residence?
• Other officers or supervisor respond to the scene?
FALSE IMPRISONMENT


Standards of Review

Training Bulletin April 2006: Legal Contacts with the Public.

The purpose of this bulletin is to assist officers in identifying and articulating the unique and specific details of encounters which may lead to an arrest. Topics, which are covered to varying extent, are:

« Fourth Amendment rights;
• Consensual encounter, detention, arrest
• Patdown search;
• Reasonable suspicion;
• Probable cause.

References are also included for further research on these and other topics.

Legal Bulletins published by Legal Affairs Division:

• March 15, 1995 - Distinguishing Between Detentions and Arrests
• January 31, 1996 - Case Law Summaries, Detentions and Arrests
• October 15, 1996 - Detentions

Case Preparation

• Gather and review all documents related to the incident, including but not limited to DFARs, FIs, sergeant's logs, arrest reports, traffic citations,
dispatch records, and any audio/video recordings or in-car camera recordings of the incident.

- If applicable and feasible, determine final outcome of any related criminal proceedings.
- Canvass location, interview all witnesses.
- Consider constructing timeline of incident events using irrefutable documents when possible.

**Complainant Questions**

- Detail sequence of events.
- Actions of complainant just prior to contact with accused? Demeanor?
- Mode of dress?
- Actions of officer at scene?
- Describe method of approach by officer...red lights and siren, casual approach, vehicle obstructing complainant's path?
- Complainant searched? Location searched? Type of search? Scope of search?
- Length of detention?
  - Complainant's perception of the detention or stop...did s/he feel free to leave?
- Statements made by officer(s) that would indicate arrest, detention or consensual encounter?
- Did the officer(s) provide explanation for detention or stop?
- Additional officers or supervisors respond to the scene? Their actions?

**Accused - Witness Officer Questions**

- Discussions prior to stop?
- Prior knowledge by accused or witness officer of the complainant prior to stop (parole, probation, search conditions)?
- Actions of complainant just prior to and during the contact?
Description of complainant's clothing?
Detail the sequence of events and investigative actions.
Outside information, which lead to detention, such as a radio call, citizen flag down, etc.?
Type of stop initiated...consensual encounter, detention, arrest?
Manner in which officer approached complainant?
*Require specifics regarding the officer's actions at the time of the stop, such as position of the vehicle in relation to complainant, emergency lights activated, complainant's path blocked, commands, handcuffing, handguns drawn, etc.*
Reason for the stop, detention or arrest?
Did the encounter change from a consensual encounter to a detention or arrest? Why and at what point?
Scope and justification for any search?
Legal justification for each law enforcement action?
Was the complainant given an explanation for the stop?
Actions of any other officers or supervisors who respond to the scene?
SUBSTANCE ABUSE

Standards of Review

Review Employee MOU prior to any sobriety test.

Department Manual Section (DM) 3/836, Administering Sobriety Tests to Department Employees

An order to an employee to submit to chemical testing for drugs or alcohol must be based on objective symptoms of intoxication or reasonable suspicion that ingestion has occurred.

Typically, the basis for most substance abuse investigations is one or more of the following,

- Objective symptoms,
- Reasonable and articulable suspicion of ingestion such as:
  - A recognized pattern of progressively diminishing performance;
  - Statement(s) from an informant (complainant); or
  - Acknowledgment from the employee of a substance abuse problem.

If objective symptoms are observed or there is reasonable suspicion, request the employee to submit to testing. If employee refuses, request the first available officer of appropriate rank to order the employee to submit to testing. If a chemical test was administered outside the City, those test results shall be used for the administrative investigation.
Prior to requesting or ordering an employee to submit to a chemical test, consult:

- Employee's current MOD regarding any restrictions on chemical testing;
- Commanding Officer of IAG; and
- Employee's commanding officer (I/O's discretion).

Available Chemical Tests

- Breath test - When only alcohol intoxication is suspected. See DM Section 4/343.38.
- Urine test - Preferred method of testing for drug or alcohol ingestion. See DM Section 4/343.42.
- Blood test - Should be used only as a last resort or under special circumstances. See DM Section 4/343.40.

Case Preparation

- Gather and review all documents related to the incident, including, but not limited to, DFARs, FIs, sergeant's logs, arrest reports, traffic citations, dispatch records and any audio/video recordings or in-car camera recordings of the incident.
- If applicable and feasible, determine final outcome of any related legal proceedings.
- Attempt to corroborate the basis of the allegations.
- Observe and document objective symptoms.
- Consider the assistance of a DRE.
- Canvass location and interview all witnesses.
- Check the accused employee's work history, increased absences, and changes in behavior, productivity and sick time usage.
Determine whether the accused was operating a vehicle or other type of conveyance.
Check the accused employee’s arrest and DMV records for unreported arrests.
If there is a history of substance abuse, determine if a Settlement Agreement ("contract") was in effect.
For cases involving controlled substances, consider obtaining a search warrant for the employee's locker, work area, vehicle and/or residence.

Complainant/Witness Questions

• Objective symptoms of substance abuse observed? Where, when?
• Type and amount of substance used? Where, when?
• Substance used on or off duty?
• Were there any other witnesses to the substance abuse?
  
  Observe traffic collision? Driver seated behind steering wheel, exiting driver's seat, staggering?
  
• Witness location, distance from vehicle, obstructions to view?
• Passengers observed?
• Other witnesses to traffic collision?
• Admissions or statements made by accused?
• Accused have any history of substance abuse? Arrested? Where, when?
• Changes in accused employee's personality, work, health, family life?

Accused Questions

• What type and amount of substance was consumed or ingested? Where, when? With whom?
Circumstances leading to substance abuse?  
History and frequency of substance abuse? Prior arrests? Where, when?  
Changes in personality, work, health, family life?  
Under the care of a physician?
DOMESTIC VIOLENCE

Standards of Review

Field Notebook Divider, Domestic Violence Laws, LAPD Form No. 18.30.02: Provides guidance on domestic violence investigations and cites pertinent California Penal Code sections.

Seizure of Firearms at Domestic Violence Incidents: Peace officers at the scene of a domestic violence incident involving threat to human life or physical assault shall take temporary custody of any firearm or deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present (Penal Code Section 12028.5; OCOP Notice May 7, 2008; Special Order No. 4, 2006).

Determining the Dominant Aggressor: It is important to determine which party was the dominant aggressor. It is neither a crime nor domestic violence to defend one's self. Section 13701 of the Penal Code defines the dominant aggressor as the most significant aggressor, rather than the first aggressor (Operations Order No. 4, 2004).

Case Preparation

- Note the complainant's emotional and physical condition.
- Ensure all evidence is gathered and preserved, e.g. bloodied clothing, damaged phones/property.
- Ensure photographs are taken of injuries or lack of injury to complainant and accused, both the day of and a day or two after the incident.
Ensure photographs are taken of scene and damaged property, e.g. broken furniture, holes in walls, damaged phones, phone cords pulled from the wall, evidence of alcohol consumption, general disarray.

Canvass location and interview all witnesses, including children, "fresh complaint" witnesses, neighbors, and local law enforcement. Parental consent to interview a minor is not required for a criminal investigation within the City. Gather and review all documents related to the incident, including but not limited to DFARs, FIs, sergeant's logs, arrest reports, dispatch records and any audio/video recordings. Ensure firearms or other weapons were temporarily seized. Consult IAG command for advice due to complexity of DV gun laws. Obtain prior crime/arrest reports and dispatch records from within the City and from outside agencies.

Check for protective orders in effect and obtain an Emergency Protective Order, if applicable. If an officer is named on a protective order, s/he is restricted from possessing firearms.

Complainant Questions

Length and nature of relationship, e.g. current/past dating, married/divorced, engaged or cohabitating?
Children in common, their names and dates of birth?
Living arrangements.
Prior incidents of domestic violence, reported and unreported?
Protective orders in effect?
What form the violence or abuse has taken?
How long has the abuse been occurring?
• Any log or diary documenting the abuse?
• Is there a pattern of alcohol or substance abuse?
  • Identity of the person who first saw the complainant after the incident (fresh complaint witness)?
  • Identity of the person with whom the complainant first spoke about the incident (fresh complaint witness)?

Questions for the Children

• What has the child seen/heard his parent(s) do/say?
• Did any abuse or neglect of the children occur?

Questions for Neighbors or Other Witnesses

• What have neighbors seen or heard? Evidence of abuse, e.g. injuries, statements, yelling, fighting, police cars, etc.
• How frequent were the occurrences and when was the last incident?
• Who called police?
• Did witness observe how physical injury occurred?
• Statements by the complainant and/or accused after the incident?
• Description of the complainant and/or accused after the incident?

Fresh Complaint Witness Questions

Fresh complaint witnesses may provide details about the complainant's appearance and emotional state
immediately after the incident and may lend credibility to the complainant's statements.

- Date and approximate time the complainant first mentioned the incident?
- Statements by the complainant after the incident?
  » Description of the complainant after the incident?

Accused Questions

- Detailed account of the incident, including why it occurred.
- History of domestic violence?

For criminal investigations within the City of Los Angeles

Bifurcate the criminal and administrative investigations.

For the criminal portion of the investigation, administrative rights do not apply. There is no right to an employee representative. Do administer Miranda admonition, but not Lybarger admonition. If the accused employee waives Miranda, do the interview. If no Miranda waiver, do not interview. Do not compel a statement for the criminal portion of the investigation.

When conducting the administrative portion of the investigation, the investigating officer shall administer the Administrative Admonition of Rights ("Lybarger admonition") and compel a statement. The compelled statement, under the threat of insubordination, constitutes a statement made under duress and cannot be used against the employee in a criminal proceeding.
SEXUAL MISCONDUCT

Case Preparation

• Ensure all evidence is gathered and preserved. Evidence may exist at the scene of the assault, on the complainant and on the accused. Consider seizing, booking or printing the following: bedding, clothing belonging to the complainant and the accused employee, used condoms left at scene and other items which may have biological evidence or which may have been handled by the accused employee (latent prints).

• Ensure victim of sexual assault is transported to a Sexual Assault Response Team (SART) facility for a medical/forensic examination. Generally, forensic evidence should be collected within 96 hours of a sexual assault. However, in some cases, evidentiary examinations should be conducted after 96 hours. Obtain advice from experts when uncertain.

• If applicable, obtain an Authorization to Release Medical Information from the complainant.
• Determine whether there are any photographs, video recordings, telephone/cell phone records, e-mails or other documentation.
• Canvass the location and interview all witnesses. Witnesses can be crucial to sexual assault investigations. "Fresh complaint" witnesses may provide details about the complainant’s appearance and emotional state immediately after the incident and may lend credibility to complainant’s statements.
• Consider using pretext telephone calls as an investigative tool.

Complainant Questions

Coordinate the investigation to minimize the number of complainant interviews (criminal, administrative and medical/forensic interview).

• Location of occurrence.
• Elements of the crime (sexual acts committed).
  » MO and identity of the accused.
• Nature of the relationship with the accused?
• How and when the complainant and accused met?
• Prior consensual sexual relationship?
• Tools, weapons, other objects or force used?
• Offered favors or compensation for sexual acts?
• Alcohol or narcotics involved?
• Provided anything to drink by the accused?
• Any items the accused touched?
• Threats or coercive statements?
• Statements made by accused (verbatim).
• Behavior and appearance of accused (birthmarks, tattoos, scars).
• Did the accused ejaculate and, if so, where?
• Condom used? Where discarded?
• Injuries sustained by the complainant or accused.
• Were there any witnesses?
• Identity of person who first saw the complainant after the incident (fresh complaint witness).

Accused Questions

• Nature of the relationship with the complainant?
• What happened, where and when?
• Alcohol or narcotics consumed?
• Did the complainant make any statements?
• Were there any witnesses?
• Sexual contact denied? Consensual? Forced? Probe for specifics, particularly if DNA was found.

Witness Questions

• Aware of prior relationship between complainant and accused?
• Nature of relationship shared by the complainant and accused?
• Date and approximate time the complainant first mentioned the incident?
• Statements by the complainant after the incident.
• Description of the complainant after the incident.
HANDCUFFING

Standards of Review

Training Bulletin November 2008

The principle reason for handcuffing an arrestee is to maintain control of the individual and to minimize the possibility of a situation escalating to a point that would necessitate using a higher level of force or restraint. The decision to use restraining procedures and devices depends on common sense and good judgment. While felony arrestees shall normally be handcuffed, the restraining of misdemeanants is discretionary. The purpose of this Bulletin is to examine discretion in handcuffing and handcuffing techniques.

Discretion in Handcuffing

The handcuffing of an arrestee is not based on rigid criteria. It is determined by the nature of each situation as perceived by the officer. There may be extenuating circumstances which would make handcuffing a felony arrestee inappropriate. To ensure the effective and appropriate use of handcuffs, it is necessary to place the responsibility for the handcuffing of arrestees with the involved officer. Officers should evaluate all available facts concerning each arrestee prior to determining whether or not to use handcuffs. The varied nature of each arrest situation makes it unrealistic to provide specific and detailed guidelines regarding handcuffing.

When restraining an individual, the following factors should be considered: the possibility of the arrestee escaping or the incident escalating, a potential threat
to the officers and other persons, and the knowledge of the arrestee's previous encounters with law enforcement.

**Case Preparation**

- Gather and review all documents related to the incident, including but not limited to DFARs, FIs, sergeant's logs, arrest reports, traffic citations, dispatch records, and any audio/video recordings, or in-car camera recordings of the incident.
- Ensure photographs are taken of injuries or lack of injury to complainant.
- Canvass location, interview all witnesses.

**Complainant Questions**

- Handcuffs double-locked?
- Complainant report handcuffs too tight? If so, when first noticed? When, where and to whom reported?
- Complainant’s definition of "too tight"? Require articulation of ability to move wrist, hands, etc.
- Request handcuffs to be loosened? Response?
- Advise the watch commander that the handcuffs were too tight? If so, actions taken?
- Handcuffs become tighter after application?
- Did complainant report any injuries from the handcuffs? If so, to whom? Medical treatment offered? *Attempt to obtain an Authorization to Release Medical Information.*
- Wrist or arm injuries prior to handcuffing? If so, what type of injury and to whom reported?
- Complainant wearing a watch, bracelet, or anything else which would interfere with the handcuffs?
• Did complainant pull against the handcuffs?
• Any altercation prior to handcuff application?

Accused -Witness Questions

• Why was the complainant handcuffed?
• Complainant's actions prior to handcuffing?
  Altercation, rigid, passive, etc.?
• Handcuffs double locked?
  Complainant report handcuffs too tight? If so, 
  when, where and to whom? Actions taken or not taken and why?
• Watch commander advised by the complainant 
  that the handcuffs were too tight? If so, actions 
  taken and by whom? If no action taken, why?
• Did complainant report any injuries from the 
  handcuffs? If so, to whom? Medical treatment 
  offered? Attempt to obtain an Authorization to 
  Release Medical Information.
• Wrist or arm injuries prior to handcuffing? If so, 
  what type of injury and to whom reported?
  Complainant wearing a watch, bracelet, 
  or anything else which would interfere with 
  the handcuffs?
• Did complainant pull against the handcuffs?
• Any altercation prior to handcuff application?
• Handcuffs ever inspected, by whom and any 
  action taken as a result of inspection?
• Handcuffs applied other than Department 
  authorized?
• More than one set of handcuffs applied?
THEFT

Standards of Review

Field Notebook Divider, Reporting Stolen (or Lost) Property, LAPD Form No. 18.39.00: Provides guidance on documenting and describing lost or stolen property.

Case Preparation

- Gather and review all documents related to the incident, including but not limited to DFARs, FIs, sergeant’s logs, arrest reports, property reports, property receipts, traffic citations, dispatch records, related financial records, as well as any audio/video recordings or in-car camera recordings of the incident.
  - Canvass location, interview all witnesses.
  - If applicable, consider obtaining a search warrant for Department facility, desk, locker, residence, vehicle, etc.
  - Consider constructing timeline of incident events using irrefutable documents when possible.

Complainant Questions

- Provide detailed description of the property/money missing (bills and coins by denomination and total value).
- How, when, where and from whom did complainant obtain the property/money?
- Provide any documentation of the property/money, such as ATM receipts, statements etc.
- Where was the property/money last seen by complainant?
• Actions of complainant just prior to missing the property/money?
• Any purchases made or checks cashed prior to detention? What, where, when?
• Was complainant under the influence of alcohol/drugs at the time of the incident? What type, how much?
• Describe nature of contact with officer.
• Was complainant searched? Type of search and by whom?
• Did other officers or persons have access to the missing property/money?
• Did complainant see officer remove the property/money? Where was it placed?
• When was the property/money first noticed missing?
• When and to whom was the property/money first reported missing?
• Who was present when the money was counted?
• Was complainant given a receipt for the property/money?
• If arrested, did complainant sign the money envelope verifying the amount deposited? If so, is the complainant claiming a discrepancy in the amount? Why?

Accused - Witness Questions

• Detail the sequence of events.
• Was the complainant searched? What type of search and by whom?
• Did other officers or supervisors respond to the incident?
• Who had access to the missing property/money?
• Did you see the property/money before it was missing? Where and when?
Who counted the missing money/inventoried the property?
Did the amount claimed by complainant match the amount counted by the other person(s)? If not, was the discrepancy documented?
IDENTIFYING UNKNOWN ACCUSED

Case Preparation

• Gather and review all documents related to the incident, including but not limited to Daily Work Sheets, DFARs, FIs, sergeant's logs, arrest reports, traffic citations, dispatch records, timekeeping records, and any audio/video recordings or in-car camera recordings of the incident.
• Consider constructing timeline of incident events.
• Canvass location and interview all witnesses immediately, if possible, for detailed descriptions of involved officers and their clothing.
• Observe plain clothes officers immediately, if possible, to corroborate clothing descriptions.
• Consider use of a photo lineup.
• Determine the role of all involved officers.
  « Utilize all available Department resources to check names (e.g. Mobile Digital Computer (MDC), Communications Division, Area Command Center (ACC), Department Roster, DFARs, Daily Work Sheets, and Information Technology Division).
• Give special attention to name spelling, alternative spellings and unique spellings. Even a single name could reveal an identity if that name is unique.

Complainant/Witness Questions

• Describe, in detail, each officer involved in the incident, including unusual or prominent characteristics, clothing or uniform. Could the officer be from another agency?
Describe accused's vehicle in detail (make, model, color, markings, decals, light bar, damage, etc).
Did the complainant/witness hear police radio communications? What was heard?
How long, under what lighting conditions, and from what distance did the complainant/witness see the accused? Photograph the scene from different perspectives noting obstacles that may have obscured his/her view.
Has the complainant/witness had prior contact with the accused? Where, when and under what circumstances?
Did the accused officer speak with an accent?
What was the role of each involved officer (first responding, arrest, back-up, transport, etc.)?
Was the accused referred to by name or nickname?
Did the accused provide information related to his/her employment (division, type of assignment)?
Would the complainant/witness be able to identify the accused from a photo line-up?
Interview Lead-in
(Non-Employee Witness)

This is a digitally recorded interview of Complaint Investigation, CF No. _________.
Today’s date is __________ and the time is __________. The location of this interview is

Present to be interviewed is:
Name ________________
Address ________________
Telephone _____________
DOB ______ CDL/ID ______

This interview is being conducted by:
Name ________________ Serial No.
Name ________________ Serial No.

Also present during this interview is:
Name ___

Is the time and location of this interview convenient for you (the witness)? ______

This interview will be stored under the last name of the witness and the CF No. and assigned a Job No. at a later date.
Internal Affairs Investigations
Interview Techniques

Questioning Strategies*

*Based on a book by David Binder, Professor of Law at UCLA

**T Funnel Questioning**

Two basic components:

A series of two or more questions seeking a narrative response concerning a subject or occurrence

A series of closed or leading questions seeking additional information related to the subject or occurrence

This pattern is called a T-Funnel because the questions are broader or more open at the top and narrower or more closed at the bottom.

**Example of a t-funnel question**

- Start on the top and make sure you go to the bottom of the T

```
Open Open Open Open Open Open Open Open
Open Open Open Open Open Open Open Open
Open Open Open Open Open Open Open
Closed Closed Closed Closed Closed
Closed Closed Closed Closed
Closed Closed Closed
Closed
Closed
```

**Series of T-Funnels (T within a T)**

Parking issues or topics

**Benefits of T-Funnel Questioning**

T-Funnel questioning promotes thoroughness
The open questions will exhaust a subjects independent recall
The closed questions (used carefully) will stimulate recall (These may be omitted or used very sparingly)
The open questions tend to minimize the subject’s ability to hide evidence
Interview Questions
Page 2

The T-Funnel has the ability to cover a topic, subject or event

Notes

Note taking
Parking
Partner during interviews

Preparing for the Interview

Review the case
Review the applicable laws
Review the protocols regarding each investigation
Questions and areas to examine:
  *Non-cat UOF – PC, Graham v. Conner,
  *Handcuffs too tight – did you (check them, double lock them, suspect say anything)
  *Unlawful arrest – PC, 4th Amend, witnesses, suspect statements
  *Search and seizure - PC, 4th Amend, witnesses, suspect statements

Finishing with “Have you told me everything” question

Questions regarding a “Basis for a conclusion, opinion, or belief.”

Conclusions and opinions are often liberally offered by witnesses and subjects
T-Funnels can be used to learn the basis for those conclusions and opinions

Dealing with Problems in Questioning Subjects

✓ Subject provides minimal information – how to stimulate recall

Visualization

Ask subject to take a second and visualize the event

Documents

Show the subject documents to help recall

Timeline questioning

Seek the earliest event and move forward in sequence
Identify dates of events or interval between events
Check for gaps
Benefit is that it provides a chronology of events
Overcome “quick timelines” by using the term “The very next thing” question
  Subject can't or won't recall events in a timeline –
  Use approximate times
  Specific instances “of which you are aware”
Interview Questions
Page 3

Use documents to assist recall
Abandon and go back to T-Funnel
✓ Hints in lieu of complete answers

Subjects will often mask answers with hints instead of giving complete information.

That was the SUBSTANCE of the discussion
Those are the MAIN THINGS we talked about
That was ABOUT IT

All of these hint that possibly the subject knows further information

✓ Dealing with I don’t recall, I don’t remember, I can’t remember everything

Convey an expectation that recall is possible – “Tell me what you do recall”
Bracket to obtain best estimate
Documents to stimulate recall
Use closed questions if can’t establish with open questions –
  Q – Who was present during the arrest of the suspect
  A – I was there along with my partner, but I can’t recall who else was there
  Q – Was Officer Smith there
  A – that’s right he was

✓ Dealing with I don’t know

I don’t know is sometimes a synonym for “I don’t remember”
Example – question asked for subject to estimate the speed of a vehicle. You receive the answer that I don’t know. The subject may mean that he once knew, but no longer remembers.

Q – Officer Smith, what time did you arrive at the location
A – I don’t know
Q – When you say you don’t know, do you mean that you have never known
A – I mean I don’t know right now
Q – When you say you don’t know right now, does that mean at one time you knew, but since forgot
A – yes

✓ Asking why

You can uncover important information by not only asking “what,” but “why.”
“Why” ferrets out information about motivations that affect the inferences that may be drawn from events
“Why” should always be asked when a statement contains information about actions that are contrary to the way you would expect the average person to act.
Tends to show the statement lacks credibility without a reasonable explanation
Elicit the Bases of Conclusions and Opinions

Q – Describe everything that occurred at the meeting
A – It was awful….they basically forced me out of my job

The conclusion that “They forced me out of my job” omits the concrete happenings on which the conclusion was based

Leading Questions

A leading question is one that attempts to guide the subjects answer.

Leading questions are those questions that contain the answer. In common law systems that rely on testimony by witnesses, a leading question is a question that suggests the answer or contains the information the examiner is looking for. For example, this question is leading:

• You were at Duffy's bar on the night of July 15, weren't you?

It suggests that the witness was at Duffy’s bar on the night in question. The same question in a non-leading form would be:

• Where were you on the night of July 15?

This form of question does not suggest to the witness the answer the examiner hopes to elicit. Leading questions will generally be answerable with a yes or no (though not all yes-no questions are leading), while non-leading questions are open-ended. Depending on the circumstances, leading questions can be objectionable or proper. The propriety of leading questions generally depends on the relationship of the witness to the party conducting the examination. An examiner may generally ask leading questions of a hostile witness or on cross-examination, but not on direct examination.

It is important to distinguish between leading questions and questions that are objectionable because they contain implicit assumptions. The classic example is:

• Have you stopped beating your wife?

This question is not leading, as it does not suggest that the examiner expects any particular answer. It is however objectionable because it assumes (among other things) that the witness (1) was married and (2) had in fact beat his wife in the past, facts which (presumably) have not been established. A proper objection would be that this question assumes facts not in evidence or lacks foundation.
Leading questions are acceptable if they restate facts already in evidence. Taking a witness back to another point in the interview

**Summarization**

End with a summary question to help recall event. Also lets subject know you are noting responses

**Inconsistent statements**

Ask for an explanation to determine if it is a credibility issue or there is a credible explanation for the inconsistency

**Responding to Implausibility**

A statement is implausible when it juxtaposes two or more facts that in light of ordinary experience usually do not go together

Determining an implausibility (IF…….THEN…..BECAUSE)

A statement is implausible:

- An employee is fired claiming a Skelly violation, as he had no chance to respond to the charges.
- The facts surrounding the discharge did not upset the employee

IF the employee was fired without having the chance to respond to the charges
THEN you would expect the employee to be upset
BECAUSE loss of job, status, income, inability to pay bills, etc.

Questions should be directed at the inconsistencies to magnify the implausibility
Always ask for explanations. There is always a possibility that it can be explained
Disciplinary Due Process Flow Chart

Employee Misconduct

Complaint External/Internal

Administrative Investigation

Administrative Report

Management Review and recommendation

Disciplinary Decision

Notice of Intent to Discipline

Request for Skelly Hearing

No → Notice of Adverse

Yes → Skelly Hearing

Notice of Adverse Decision

Personnel Board

Superior Court
Administrative Investigation Decision Diagram

Incident occurs or issue arises

1. Is the incident clearly a violation of policy or law?
   - Yes: Internal Investigation
   - No: Could the employee be subjected to discipline if the violation occurred?

2. Could the employee be subjected to discipline if the violation occurred?
   - Yes: Internal Investigation and PIP or Counseling
   - No: Is there a mix of possible misconduct and performance problems?

3. Is there a mix of possible misconduct and performance problems?
   - Yes: Use of Force
     - If complaint of excessive force, conduct internal investigation
     - If ordinary use of force, interview all except focus, until you believe no misconduct, then interview focus
   - No: This is most likely a performance problem that can be handled through counseling, performance improvement plan or other non-disciplinary method

Prior to interview with focus employee all rights must be observed.
Complaint Interview Questions?

The following topics are common scenarios/allegations for personnel complaints:

**Allegation - Handcuffs Are Too Tight**

Investigator questions to the complainant:

- Did you tell the officers and when?
- Who inspected the handcuffs? And, then what happened? What did the officer do? Who inspected them?
- Were you injured from the handcuffs? If so, did you tell any one?
- Did you have any prior injuries? Did you tell a supervisor? Was a supervisor present?
- Did anyone photograph your injuries?
- Did the officer explain to that handcuffs sometime can be uncomfortable?
- Did the officers offer you medical assistance?
- Did you advise the watch commander during your intake process?
- Where were you when you told the officers they were too tight?
- When did you first notice that your handcuffs were too tight?
- Did the handcuffs become tighter after they were applied?
- What was the officer(s) response when you ask for the handcuffs to be loosened?
- After the handcuffs were applied were you moving around?
- Was there only one set of handcuffs used?
Allegation - Racial Profiling

- Does your vehicle have tinted windows? If so, was/were your window(s) up or down before noticing the officer(s)?
- When did you first notice the officer?
- Did the officer provide a reason for your stop? Did you commit a violation?
- What were the lighting conditions?
- What direction were you travelling versus the officer?

Note: Did the complainant contest the citation?

- Why do believe the stop was racial profiling?
- What did the officer say or do that made you believe that you were stopped because of your race?
- Did the officers/supervisor explain why they stopped and the reason why?
- Did the officers lead you to believe that you were being racially profiled?
- Did the CP make the complaint at the scene that day and were there any supervisors at the scene?
- Was anyone else present in the vehicle at the time of the stop?
- Which officer do you believe racially profiled you? What was the race of the officer(s)?
- What race of are you?
- Did you bring this issue to the attention of the court and if so what was the response?
- Was there a search of your vehicle?
• Did the officers tell you why they were conducting a search, and did they ask your permission?

• Were you under the influence?

• Are you presently under prescription medications?

• What were you doing prior to the stop?

• If there is a delay in reporting - what is the reason why?

• If arrested, at any point did you complain to the Watch Commander?

Questions to the Officers:

• What was the officer's reason for the stop?

• Did you know there race or ethnicity prior to the stop?

• Was their race or ethnicity the reason for the stop? If so, why?

• What were the lighting conditions?

• The distance from the complainant when the officers first made the observation?

• Were the windows up or down?

• What was the reason for the search?

• What detail were you working at the time?

Investigator Note: Audit the officers' citations, arrest reports, FI Card, FDRs, if necessary.
Allegation - Theft of Money

Complainant Questions:

• How much money did you have?
• How do you know that you had that much money.
• Who gave you the money, how did you obtain the money. (Get the contact information pertaining the money.)
• If ATM or bank transaction was made ask for receipt and location (check for security photos or video).
• Did anyone see with the money? Who was the last person that observed you with the money?
• Where did you store your money when you did have it?
• What were you doing prior to losing your money?
• When did you notice your money was missing?
• What denominations did you have?
• Did or anyone else have access to the money?
• Who did you first report your money missing to? Did you make the report right away? And, if not why?
• At the time, did the officers count your money in your presence?
• Was there a supervisor present at the scene?
• Was it the same amount you were booked with?
• Were you under the influence on any when you lost your money? How much did you ingest?

• How many officers had searched you and had access to your money?

• Did you see the officer remove your money? And, if so, where did they place it or conceal it?

• Did you make any purchases prior to your detainment or stop?

• If a large amount of money - what's the source of obtainment? Determine the source, i.e. under the table, who?

• If they cashed a check - where did they cash it?

• If arrested, did you read and sign the money envelope? Were there any discrepancies recorded? If there were, why were they not recorded?
Identifying Unknown Officers

- Describe the officer, i.e. gender, approx. age, hair color, clothing, weight, scars, tattoos, facial hair, eye color, badge, name plate, and race.
- Did the officers have a body odor?
- What was the officer wearing? Uniform/Plainclothes-describe?
- Uniform, i.e. color, equipment carried, stripes on shirt?
- What did the officer say?

- Vehicle - make and model (color, markings, dents)?
- Did you see this officer only one time or multiple times?

- What was your distance?
- Did the officer have an accent?
- Did the officer have any jewelry?

- Would you be able to identify the officer in a photograph?
- Did the officer give you a business card or citation?
- Did you hear any other officer(s) call the officer in question by name?
- Did they tell you what division they were assigned to?
Allegation - Sexual Misconduct

Investigator Questions for the Victim:

• Where were you prior to the contact with the officer?

• How did you meet the officer?

• Have you seen the officer before?

• Describe the officer in detail? Refer to the "Unknown Officer" questions.

• Who was the first person you told and what did you tell them?

• Were there any witnesses?

• What parts of your body did the officer touch or injure? If any, please describe in detail?

• Did the officer put their mouth on you?

• Did the officer reveal is penis? If so, what did it look like?

• Did the officer ejaculate on you, your clothing, surround materials?

• What did the officer say?

• Were you intoxicated or under the influence of any type of substance(s)?

• Did the officer appear to be intoxicated or under the influence of any type of substances(s)?

• What did the officer do?

• Was there any force? Describe all force if used and how were you impacted physically?
• Follow questions for unknown officer if it applies?

• Did the officer show a weapon, badge, baton, or handcuffs

• Did you see any numbers engraved on their weapon/gun?

• Did you hear a police radio or scanner of any kind?

• Did you smell any type of body odor, cologne, breath, etc.?

• Did you scratch or possibly leave any marks on the officer?

• Did the officer acquire any injuries during the sexual altercation? If so, describe.

• Did the officer offer any compensation/favors for the sexual act?

• Have you had any previous relations with the officer?

• Did the officer touch any of your property - purse, wallet, clothing or jewelry?

• If the officer had any hat, bandana, cigarette, toothpick, condom?

**Question Pertaining to Location:**

• Lighting conditions, flooring, furniture, paintings, noise, smell, etc.

• Vehicle: Any imperfections, radio, contents, seat and wheel covering, tinted windows, color of vehicle, stain on seats, leather or cloth seats, position of rear view mirror (ceiling or attached to front windshield).

**Investigator Notes:**

• Victim's cell phone for triangulating the location.

• Consider pretext phone calls.
COMPLAINANT/WITNESS INTERVIEW LEAD-IN

On tape at:_____________________________     Today’s date is:____________________

This a tape-recorded interview of______________Area Personnel Complaint Investigation

CF#______________________

The investigation interview is being conducted by_____________________________________

Serial No.:______________________ of _________________________________

and ____________________________________________ Serial No.:__________________

of__________________________________________________________________________

The location is:________________________________________________________________

Present to be interviewed is:

Name:__________________________________________  DOB (or Serial #):_____________

Cal OP:___________________________ or Other ID:_________________________________

Address:__________________________________________________ Zip:_______________

Home Phone:______________________ Cell Phone:________________________

Work Phone:_______________________ Work Address:______________________________

The interview is being recorded on Tape No._______________________ Side_________

Or The interview is being digitally recorded.
Tips on Questioning Difficult Witnesses

I. Witnesses can be difficult because of the way that they answer (or don’t answer) questions:

   A. It may be the way that a witness recalls an occurrence
      1. Difficulty in separating what he/she saw (or heard) from what they learned later.
      2. Opinion about what occurred can trump the facts as actually experienced by the witness.

   B. It can be the way the witness recounts an occurrence
      1. Use of limited vocabulary.
      2. Use of jargon.
      3. Limited story-telling skills
         a). Facts recounted in temporal order; ability to tell a story so the listener can tell which person is being described,

   C. It can be a bad attitude towards being questioned or the fact that the witness has his/her own agenda.

II. Common Types of Difficult Witnesses:

   A. The Answer-Only-What-Was-Asked Witnesses

   B. The Unfocused Witness- Aka: The Doesn’t-Answer-What-Was Asked Witness

   C. The Witness Who Will Not Commit

   D. The Overly Hostile Witness

III. Questioning Techniques for Handling These Difficult Witnesses

   A. Use simple questions- delivered one at a time in a logical order
      1. After Overview questioning

   B. Focus those simple questions on the facts of the case, rather than on opinions or more complex issues
E. Listening for Qualifying Words and Ask about Them

1. Train your ear to pick up the use of qualifier phrases
   a. Kinda, sort of, like, maybe, could of etc.

2. These may be just verbal tics, but they may also indicate a level
   of uncertainty in what they witness just said.

3. Follow up on these statements with questions. The easiest way
   to do this is to repeat back the phrase that was just used and
   ask the witness if he/ she was certain of this description or was
   indicating that he/ she wasn’t 100% certain.

F. Getting to “No” (or I don’t know)

1. Pushing the limits of what the witness knows by going back,
   rephrasing what was said and asking the witness if, other than
   what you just said, is there any more?

   Q: Who was there in the room when the officer made the
      arrest?

   A: X and Y were there.

   Q: Did you see them there in the room at the time of the arrest?

   A: Yeah, we were standing there together.

   Q: Other than X and Y, was anyone else in the room when the
      officer made the arrest?

   A: Well, Z may have been there.

   Q: Did you see Z there?

   A: Not really, but he may have been there.

   Q: Why do you think Z may have been there?

   A: After it was over, Z told me that it was a shame what
      happened.

   Q: Other than X and Y who were standing there with you, and Z
      who may have been there, was anyone else in the room at
      the time the officer made the arrest?
SAMPLE EMPLOYEE INTERVIEW

This OUTLINE CONFORMS TO THE STANDARDS SET FORTH BY AB301 (3300 Government Code):

"The date of this interview is ____________ ."

"The time is

"Present in the room are ________________ (name/rank/command of all present)."

"This interview is being conducted because ___________ (list violations here, if desired)

"At this time, I will advise you of your rights as per AB301:

A. You have the right to have a representative of your choice present during this interview:

   IF THEY HAVE A REPRESENTATIVE: "AND YOU HAVE CHOSEN ______ ," THEN PROCEED DOWN TO SECTION (b) AND CONTINUE...

   1. "An attorney;
   2. An Association member; or
   3. Anyone else not connected with this investigation."

B. "You have the right to make your own tape recording of this interview. At the end of the investigation, you will be furnished with a copy of all documents concerning this investigation and of all tape records, if you desire."

"Do you understand these rights?

Advise Miranda if any potential for criminal behavior exists (next page). If Miranda is not waived, do Lybarger admonishment (next page). OFFICER CAN WAIVE ACTUAL READING OF MIRANDA, BUT YOU MUST ESTABLISH HIS KNOWLEDGE.

"(Employee's name), I will order you to answer any and all questions asked of you in a truthful and accurate manner. Failure to do so may be deemed insubordination and result in administrative discipline up to and including termination of your employment.

"Do you understand this order?"
"Did you have an opportunity to review your report?"

"When did you?"

"Is this report correct and true?"

**NOW BEGIN YOUR INTERVIEW**

At the **CONCLUSION** of the interview, give this admonishment:

"(Employee/Officer), I am going to order you to not discuss this interview or investigation with anyone other than your representative or myself. Do you understand?"

**MIRANDA ADVISEMENT**

- You have the right to remain silent.
- Anything you say may be used against you in court.
- You have the right to an attorney before and during questioning.
- If you cannot afford an attorney one will be appointed for you before questioning, if you wish.

**MIRANDA WAIVER**

"Do you understand each of these rights that I have explained to you?"

**LYBARGER WARNING - (ONLY if Miranda is not waived)**

Once the Miranda rights have been given, the "LYBARGER" admonishment is applied and the employee **must** be informed of the following:

- "While you have the right to remain silent with regard to any criminal investigation, you do not have the right to refuse to answer my administrative questions.
- This is strictly an administrative investigation. I am, therefore, now ordering you to discuss this matter with me.
- If you refuse to discuss this matter, your silence can be deemed insubordination and result in administrative discipline, up to and including termination.
- Any statement you make under compulsion of the threat of such discipline cannot be used against you in a later criminal proceeding."
SAMPLE

DATE

(OFFICER UNDER INVESTIGATION)

(ADMINISTRATIVE INVESTIGATION INVESTIGATOR)

ADMINISTRATIVE INVESTIGATION INTERROGATION #11-##

An Administrative Investigation is currently being conducted into the events which occurred on (Date). The investigation is a result of (Give a brief description of the event which prompted the investigation).

You are to report to (location) on (date) at (time) to answer questions relative to this Administrative Investigation. (Name, rank, command) will be the officer in charge of the interrogation. The following officers will also be present during the interrogation: (list by name, rank and command). All questions during the interrogation shall be asked by and through no more than two interrogators at one time.

The complete interrogation will be recorded. You will have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. You have the right to bring your own recording device and record any and all aspects of the interrogation. You will be entitled to all reports and/or complaints made by investigators or other persons, except those which are deemed by the Department to be confidential. No notes or reports which are deemed to be confidential by the Department will be entered into your personnel file.

You have the right to be represented by a representative of your choice who may be present at all times during the interrogation. This representative shall not be a person subject to the same investigation. Your representative shall not be required to disclose, nor be subject to any punitive action for refusing to disclose, any information received from you while under investigation in non-criminal matters.

The employer shall not cause the public safety officer under interrogation to be subjected to visits by the press, (nor will your home address or photograph be given to the press or news media) without your expressed consent.

If prior to or during the interrogation it is deemed that you may be charged with a criminal offense, you shall be immediately informed of your constitutional rights. You are advised that your rights are fully outlined in the Public Safety Officers Procedural Bill of Rights Act, Government Code Sections 3300 - 3311.

If you have any questions prior to the interview, please do not hesitate to contact (list name and phone number of administrative investigator).
Assessing Witness Credibility

By
Jeff Noble, Commander (ret.)
Irvine Police Department

There is an adage in conducting investigations that physical evidence does not lie, but people do. This adage is accepted as true because items of physical evidence lack the human characteristics of pride, greed, envy, anger and lust that motivate people to be deceptive in their actions and words. This ability of human beings to provide false witness necessitates the investigator to take steps to assess the credibility of all witnesses. And although intentional deceptive conduct is troublesome, these intentional acts are not the only assault on witness credibility. Witnesses also get the facts wrong due to their perceptions, beliefs and cognitive abilities that mislead them into believing what did not occur. These mistaken beliefs may be much more difficult to discern as the witness may be entirely convinced of their self-deception even in the face of overwhelming evidence to the contrary.

Recognizing that all witnesses are susceptible to error and that they may have reason to be deceitful, investigators should not be automatically inclined to believe the story of the witnesses who are interviewed during the course of an investigation. Rather, investigators and adjudicators can and should make determinations on the witnesses’ credibility. It is the credibility of witnesses that affects the believability and trustworthiness of their statements and it is the credibility of witnesses that provides the investigator a basis to rely on a witness’ statements as factual, or to choose between conflicting stories to determine the truth of the matter under investigation.

Credibility then becomes a significant factor in all investigations and statements are only deemed to be factual propositions if the person making the statement is judged credible. It is for this reason that the investigator must understand and properly apply the appropriate criteria for making credibility assessments. A credible witness is one who is competent to give evidence and someone who is worthy of belief. In deciding what testimony to believe, consider the witness’ intelligence, the opportunity the witness had to see or hear the things that they are testifying about, the witness’ memory, any motives or bias that witness may have for testifying in a certain manner, whether the witness said something different at an earlier time, the reasonableness of the statements that have been given and the consistency with other evidence that has obtained in the case. Simply stated, the investigator should ask - Does the witness’ testimony make sense in light of all of the facts and circumstances associated with the case?

Because the determination of credibility assessments is so crucial to the outcome of the case, making a credibility assessment requires more than merely asserting the investigator’s unreasoned opinion. The grounds for rejecting or disbelieving evidence must be clearly stated with specific and clear reference to evidence items that support the investigator’s conclusions. This generally includes an obligation to provide examples of the reasons for not accepting the testimony offered by the witness and by explaining how and why these reasons impacted the witness’ credibility.
To aid the investigator to establish whether a particular witness’s testimony is credible, a number of factors, many of which are subjective, must be assessed. These factors include the following:

- The witness’s demeanor;
- The extent of the witness’s capacity to perceive, recollect or communicate;
- The extent of the witness’s opportunity to perceive;
- The witness’s character and reputation for honesty;
- The existence or non-existence of a bias, interest or other motive;
- A statement previously made by the witness that is consistent or inconsistent with his or her statements;
- The existence or non-existence of any fact testified to by the witness;
- The witness’s attitude toward the action in which they testify or toward the giving of testimony;
- The witness’s admission of untruthfulness;
- Prior bad acts committed by the witness that are probative of untruthfulness;
- Prior inconsistent statements;
- Certain criminal convictions;
- The inherent plausibility of the witness’ account;
- Consistency between the witness’ written and oral statements;
- Consistency of statements with the physical evidence and other witness’ statements;
- The extent to which the witness’ statements are corroborated or contradicted;
- Consistency with common experience;
- Internal consistency;
- The witness’s recollection is consistent with established facts;
- The witness’s background, training, education or experience affected the believability of the witness’ testimony; and
- Detail.

It is only after making these assessments that an investigator may make a credibility determination to believe all of a witness’ statements, part of their statements, or none of their statements.

**Demeanor**

Demeanor evidence is comprised of nonverbal cues from a witness’ gestures or tone of voice. These nonverbal cues can be construed as expressive, meaningful movements that may be interpreted by the investigator to determine the truth of the statements made by the witness. Responses from a witness that are frank and spontaneous are much more likely to be believed than a response that is hesitant or reticent. Similarly, gestures like avoiding eye contact, stuttering, stammering, or actions that are inconsistent with the witness’ statements may be used to impeach the witness’ statements. For example, if a witness is interviewed immediately after a highly emotional event like witnessing a drive-
by shooting, but they give their statement in a calm, deliberate and detached way, the investigator may tend to believe that the witness is being dishonest.

Although demeanor evidence is appropriately used by investigators, judges and juries, the investigator must be cautious because their evaluation of the meaning of a witness’ demeanor may be very misleading. Unfortunately for the investigator, an intentionally deceptive witness could effectively use nonverbal cues to deceive the investigator and a truthful witness may be so nervous that they act in a manner that would cause the investigator to believe the witness is being untruthful. Like many of the factors included as part of a credibility assessment, the demeanor of a witness may raise the suspicions of an investigator and may be the basis of further inquiry, but it is a unique case where demeanor evidence alone was sufficient to undermine the credibility of a witness’ statements in their entirety.

**Capacity**

Witness capacity refers to the witness’ cognitive ability to observe, understand, remember and relate the events that they have sensed either by seeing, hearing, smelling, or touching and their physical ability to employ the sense in question. A cognitive or physical deficiency that would have an affect on the witness’ ability to accurately relate their observations would impact the level of credibility that may be granted to the witness. The key in determining witness capacity is to conduct an inquiry to determine witness’s ability to observe, remember and recall.

Capacity can be affected by a wide variety of circumstances including physical limitations, mental health issues, or a lessened state of awareness caused by the ingestion of a substance. Physical limitations that may impact the ability of a witness include a person’s vision, or a limitation on any of their senses that were employed to perceive the event. For example, if a person requires corrective lens to maintain a competent level of vision the investigator must determine if the witness was wearing the lens at the time of the event. Although the investigator should make a determination of possible physical impairment, physical impairment alone is not a ground to make the witness statements incompetent, rather the extent of impairment is a factor relating to the credibility of the statements made by the witness.

Similarly, the mental health of a witness may affect their ability to observe, understand, recall or communicate their perception of the event. Such a cognitive deficiency must be examined to determine the extent of the witness’ abilities to establish their overall credibility. Other limitations on capacity may be temporary in nature and may have impacted the witness’ ability during the event. For example, if the witness was intoxicated to any level on an alcoholic beverage, drug or narcotic, or if the witness had taken any medication that may have affected their cognitive ability to observe or comprehend the event, a capacity issue may be raised.
Opportunity to Perceive

The ability of the witness to have seen or perceived what they are testifying about is a crucial element to support the credibility of the witness. The opportunity to perceive an event involves much more than the consideration of view obstructions and distance. The degree of attention paid by the witness is also a significant factor. Police officers seek this type of information routinely during their investigations of criminal matters. For example, when someone witnesses a vehicle collision and claims that one of the drivers ran a red light, officers seek to determine when the witness looked at the signal, where the witness was located when they looked at the signal, and the witness’ physical and cognitive ability to perceive. In traffic collisions, the sound or sight of the collision is often what brings the witness’ attention to the event and in many cases it is only after the collision does the witness look at the signal.

Understanding that it is the event itself that frequently causes the witness to focus their attention, a well thought out series of questions will enable the investigator to learn when the witness turned their attention to the events and whether the witness had a vantage point to see the events as they have described. Questions like, “Were you surprised, frightened, sleepy or intoxicated when the event occurred? Did the event occur rapidly and unexpectedly?” will help the investigator to determine the witness’ state of mind just prior to the event to learn if the circumstances were conducive to accurate perception.

To learn the witness’ opportunity to hear, see, or perceive the event, the following areas of inquiry should be made:

1.) The witness’ degree of attention;
2.) The location of the witness compared with the location of the event;
3.) Whether the witness’ view was partially or completely obstructed;
4.) Environmental factors like rain, wind, fog, and lighting conditions;
5.) The level of certainty demonstrated by the witness;
6.) The length of time between the event and the witness statement;
7.) Whether the witness’ identification was made spontaneously and remained consistent thereafter or whether it was the product of suggestion; and
8.) The nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly.

Character

Another factor used to determine the credibility of a witness is to show that the witness has a character of truthfulness. Courts allow testimony on a witness’ character for veracity because the truthfulness of the witness’ statements is put into issue when they take the witness stand. In federal court, there are three ways to prove a character of untruthfulness. First, testimony may be offered of specific instances of untruthfulness. Second, testimony may be offered by another witness who has personal knowledge of the target witness. This second witness may testify as to their opinion of the target witness.
And finally, testimony may be presented by a witness who has knowledge of the target witness’ reputation in the community for truthfulness.

A witness’ testimony may also be discredited based on certain prior criminal convictions on the presumption that a person convicted of these types of crimes does not possess the values necessary to prevent them from perjuring their testimony. Generally the courts will allow this information if the prior conviction involves crimes that include dishonesty or false statements, felonies or other crimes if the court determines that the probative value of the evidence outweighs the prejudicial effect. Most courts will not allow evidence of prior convictions more than ten years old to be admitted to impeach a witness’ testimony, or evidence of a conviction when the witness was a juvenile.

Character evidence may establish a presumption of dishonesty, but that presumption may be overcome with evidence that rebuts the testimony, or with evidence that tends to corroborate the witness’ statements. The introduction of character evidence is therefore not an automatic bar to the witness’ statements, but this evidence should be considered as part of the overall credibility assessment. Character evidence, like other credibility assessment factors, may give cause to deem trustworthy all of the witness’ statements, some of the witness’ statements, or none of the witness’ statements.

**Bias**

Bias as a term used to describe a relationship between a party and a witness which might lead the witness to slant their testimony either in favor of, or against, a party involved in the matter under investigation. This includes family relationships, compensation of witnesses, pending criminal charges, or anything which would provide the witness with a motivation to lie. The slant in the witness’ testimony may be a conscious or unconscious decision that is induced by a witness’ like, dislike, or fear of a party, or by the witness’ self-interest. Evidence of a bias tends to discredit the witness’ testimony and the investigator may properly diminish the value of the witness’ statements based on the level of bias that has been discovered.

Evidence of a bias may come directly from the witness’ statements as when a witness acknowledges that they have some type of relationship with the party involved in the investigation, or when they declare any set of circumstances that may create a reasonable motivation to be dishonest. Evidence of bias may also be developed indirectly through other witnesses, documents or records that reveal a relationship or opportunity exists for some bad purpose by the witness.

In most cases, investigators can effectively deal with witness bias by adjusting the weight that they grant to the statements. Statements from an individual who has a strong bias may be granted little or no weight or discounted completely. However, statements may be granted significant weight if there is evidence that tends to corroborate their statements, even if the witness displays a bias. Although the finder of fact ultimately has the power to grant or remove weight of a witness’ testimony based on evidence of bias, the investigator must document evidence of bias in their report to allow the reviewing
authority, whether it be the district attorney in a criminal case or the chief of police in an administrative case, to assign weight to the credibility of witnesses as they prepare to try or adjudicate the matter.

Prior Inconsistent Statements

The existence of contradictions or discrepancies in the evidence of a witness’ statements is a well-accepted basis for finding a lack of credibility. Statements made by the witness to others before the witness speaks to the investigator may be used to either support or discredit the witness’ credibility. If the statements made to the investigator are consistent with the witness’ prior statements the consistency would tend to show that the witness is acting in good faith. On the hand, if a witness makes statements that are inconsistent with their prior statements, these changes will likely discredit the witness.

Prior statements by witnesses may be made orally, in writing, or may be statements of others that are adopted by the witness. Adopted statements occur when another person makes a statement and the witness either agrees or disagrees with the statement, or when the witness engages in some nonverbal conduct that indicates that the witness supports or denies the other person’s statement, or when the witness remains silent when a reasonable person would have spoken to dispute the statement. Prior statements may also include omissions of material facts from a prior statement by the witness which under the circumstances should have been included in the prior statement.

Inconsistencies, misrepresentations or concealment of evidence should not lead to a finding of a lack of credibility where the inconsistency, misrepresentation or concealment is not material to the matter under investigation. It is entirely reasonable that some trivial facts will be omitted, or that a witness will not mention a piece of evidence that they believe to be unimportant. The key to making such a determination is whether a reasonable person would believe that the information is both important and material to the investigation.

Inherent Plausibility

A witness’ credibility can be destroyed if the witness testifies about a series of events that are beyond the realm of possibility. Consider a complainant in a police misconduct case who insists that the officer implanted a tracking device on the complainant’s brain. This factually implausible claim is grounds to discount the complainant’s allegations in their entirety. Similarly, consider an eyewitness who misidentifies an individual as a robbery suspect when the identified individual was imprisoned at the time of the crime. The inherent impossibility of a suspect escaping from prison, committing a crime and then returning to their cell, all without being noticed would render the witness’ identification useless. Certainly, a later identification of another suspect by the same witness would be called into question, but the witness may still be considered credible to testify to events that occurred at the robbery, particularly when their statements are corroborated by other evidence.
When considering a credibility assessment of inherent plausibility, it is generally not sufficient to simply indicate that the witness’ story is implausible. The investigator must be able to articulate why the testimony is being rejected and why it is clearly outside the boundaries of reasonableness. Claims that are irrational, farfetched, or highly imaginative require sound analysis that marries the claim with the evidence to reveal inconsistencies. Similarly, extraordinary claims require extraordinary evidence and absent this exceptional evidence the claims may be disregarded.

**Corroboration**

Corroborating evidence is evidence that is independent and confirms supports or strengthens other evidence that renders the other evidence more probable. Corroborating evidence may consist of two witnesses who testify independently of one another to the truth of the same proposition, or by other direct or circumstantial evidence. Certainly a noteworthy example of the use of corroborating evidence to support a claim was the situation involving President Clinton and Monica Lewinsky. Lewinsky publicly claimed that she had sexual relations with the President placing the credibility of a young White House intern against the credibility of the President of the United States who vigorously denied the allegations. Ultimately it was the corroborating evidence of a stained dress that resolved the credibility question in favor of the intern.

Corroborating evidence is perhaps the investigator’s strongest tool in their search for witness credibility. Evidence that refutes possible discrediting circumstances or that supports the assertions of the witness serve to bolster the witness’ testimony. Where evidence that contradicts the witness’ version of events aids to undermine the witness’ credibility.

**Recollection**

In deciding whether or not to believe a witness one needs to recognize that people sometimes hear or see things differently and often they do not recall every detail of the event. Even when a witness had an excellent opportunity to observe an event, other factors may impair the witness’ ability to recall the facts of the incident accurately. These factors may include the apparent insignificance of the event at the time that it occurred. Sometimes witnesses will only have the opportunity to view a limited portion of the event in question and that limited portion, although later deemed to be very important, may appear to have little consequence at the time. The event may be something that is repetitive in the witness’ experience and this repetitiveness may have caused the witness not to observe the event as closely as they may have otherwise and the lack of significance may cause the witness to not recall all of the details of the event.

To make a determination whether a contradiction is an innocent misrecollection, lapse of memory, or an intentional false statement, one should consider whether the witness’ ability to recall portions of the incident is based on factors like time, ability to perceive, or if the portions of the event that cannot be recalled are trivial or important matters. Other factors that may be helpful to making a determination include whether the witness
recorded the event in some manner close in time to its occurrence, whether they have had an opportunity to review their notes to refresh their memory, or if the witness cannot distinguish this event from other similar events that they may have witnessed.

More troublesome than a lack of recollection, particularly in an administrative investigation where a police officer is a witness, is evidence of a selected recollection. Few things will cause an investigator to question the credibility of a witness more than the witness can recall only those portions of the events that are beneficial and they display a dim or faulty recollection of portions of the event that may indicate misconduct. This lack of detail and apparent inability to recall all of the facts that the witness had the opportunity to perceive may be applied to diminish the credibility of the witness.

**Witness’ Background, Training, Education or Experience**

The witness’ background, training, education and experience play a role in their ability to understand technical or unique factors that they may have viewed. For example, an individual with prior police or military experience may have a greater ability to recognize the caliber of a fired weapon from its sound alone, or have the ability recognize a type of weapon after only catching a glimpse from a distance. Where witnesses who have specialized abilities may be granted greater credibility as to their assessments of pieces of evidence that are with their range of skills, witness who lack these skills or who must rely on common experience may have a decreased level of credibility particularly when they testify to their observations that appear to be beyond the range of common experience.

**Detail**

The quantity of detail provided by a witness is a factor in considering the witness’ credibility. Generally, a truthful account is sufficiently detailed as to places, time and events and can be recounted in a chronological manner. The level of detail in the statement will reveal that some of the facts recounted are both very specific and unique to the event, rather than general statements that may apply to many different events. Investigators are appropriately skeptical of witnesses who can only provide a vague description of the event that they had an opportunity to view, or those who provide an exacting detail to events that they had a poor or incomplete opportunity to observe.

**Conclusion**

The assessment of witness credibility is an essential function during the course of all investigations. It is the witness’ credibility that lays the foundation of the witness’ ability to relate their observations to others in a persuasive and convincing manner. There are many factors that may serve to diminish or bolster the witness’ credibility and cause the investigator to believe all of the witness’ statement, parts of their statements, or none of their statements. It is the investigator’s obligation to analyze the evidence and make a determination of credibility based on sound reasoning and provide examples of their reasoning as part of their investigative report.
Orange County Sheriff-Coroner Department  
550 N. Flower St. Santa Ana, Ca 92702  
Internal Investigations

Miranda Warning

1. You have the right to remain silent. (Do you understand?)
2. Anything you say may be used against you in court. (Do you understand?)
3. You have the right to an attorney before and during any questioning. (Do you understand?)
4. If you cannot afford an attorney, one will appointed for you before questioning. (Do you understand?)

Waiver: Can we talk about what happened?

Lybarger Advisement

_Name & Title_, in the event that you refuse to waive your Miranda rights, and according to the Lybarger vs Los Angeles decision, I must advise you that the interview at this point will be administrative, and no part of this interview or information that is derived from this interview may be used in a criminal investigation. However, at the same time, since this is administrative, I must remind you that you must answer the questions and, should you refuse to answer any of the questions, that at some future date you may be charged with insubordination.

Do you understand?

_____________________________  ______________________
Signature                        Date

_____________________________
Interviewer                      Date
WEB SITES FOR INVESTIGATORS

**Associations**

- American Board of Criminalistics
- American Correctional Association
- American Society of Criminology
- American Society of Industrial Security - ASIS International
- Canadian Assoc of Violent Crime Analysts
- California Financial Crimes Investigators Assoc
- Federal Bar Association
- Forensics Science Society
- High Tech Crime Investigation Association
- Intl Assoc of Chiefs of Police
- Intl Assoc of Crime Analysts
- Intl Accoc of Financial Crimes Investigators
- Intl Assoc of Law Enforce. Intel Analysts
- Intl Assoc of Law Enforcement Planners
- Intl City/County Management Association
- Intl CPTED Association
- Intl Society of Crime Prev. Practitioners
- Justice Research & Statistics Association
- National Association of Attorneys General
- National District Attorneys Association
- National Futures Association
- National Sheriffs Association
- Urban and Regional Information Systems Assoc

**Clearinghouses**

- Automated Index of CJ Info Systems
- Central Banking Resource Center
- Federal Reserve National Information Center
- FedWorld Information Network
- Financial Crimes Enforcement Network
- FirstGov: U.S. Government Information Source
- IACP Law Enforcement Info Management
- Integrated Justice Information Systems
- Nat’l Center for Missing & Exploited Children
- National Check Fraud Center
- Nat’l Clearinghouse on Child Abuse & Neglect
- National Technical Information Service
- NCJRS Justice Information Center
- Partnerships Against Violence Network
- Privacy Rights Clearinghouse
- Securities Class Action Clearinghouse
- Transactional Access Records Clearinghouse
- United Nations Crime and Justice Info Network
- U.S. Government Printing Office GPO Access
Consumer Protection Sites

- http://www.insurancefraud.org/ (Coalition Against Insurance Fraud)
- http://www.consumerworld.org/ (Consumer World)
- http://www.consumer.gov/idtheft (Site for victims to report ID Theft)
- http://www.fraud.org/ (National Fraud Information Center)
- http://www.netscams.com/ (Net Scam/Alert)
- http://antiphishing.org (Anti-Phishing working group)
- http://www.oip.usdoj.gov/ovc (Office for Victims of Crime)
- http://www.taf.org/ (Taxpayers Against Fraud)

Criminal Justice Information & Resources

- www.einformation.usss.gov (USSS financial crimes site)
- http://www.leginfo.ca.gov/ (California Law and Resources)
- http://members.tripod.com/~BlueThingy/index.html (Canadian Criminal Justice Resource Page)
- http://www.communitypolicing.org/ (Community Policing Consortium)
- http://www.copnet.com/ (CopNet)
- http://police.sas.ab.ca/homepage.html (CopNet Police Resources)
- http://www.criminology.fsu.edu/cjlinks/ (Criminal Justice Links)
- http://www.fbi.gov/publications/leb/leb.htm (ID Theft Data Base-password protected)
- http://govinfo.kerr.orst.edu/ (Forensics Science Resources)
- http://www.homeoffice.gov.uk/rds/index.htm (Government Information Sharing Project)
- http://www.jibc.bc.ca/ (Justice Institute of British Columbia)
- http://www.leolinks.com/ (Law Enforcement Links)
- http://www.met.police.uk/ (Metropolitan Police Service)
- www.nw3c.org (National White Collar Crime Center-training & resources)
- http://www.officer.com/ (Officer.com)
- https://leads.cdc.state.ca.us (Parole data base, password protected)
- http://www.policeforum.org/ (Police Executive Research Forum)
- http://www.rcmp-grc.gc.ca/ (Royal Canadian Mounted Police)
Directories/Search Engines

http://www.acronymfinder.com/  Acronym Finder
http://www.altavista.com/  AltaVista
http://www.bigyellow.com/  Big Yellow pages
http://www.search.com/  C/Net
http://www.emailman.com/finger/  eMailman Finger
http://www.globalyp.com/world.htm  Global Yellow Pages
http://www.google.com/  Google
http://www.infospace.com/  InfoSpace
http://www.iaf.net/  Internet Address Finder
http://www.forensicsweb.com  Shortcut to ISP contact list
http://www.lycos.com/  Lycos
http://www.metacrawler.com/  Metacrawler
http://www.stpt.com/  Starting Point
http://www.surfpoint.com/  Surf Point LinkExchange
http://www.switchboard.com/  Switchboard (for personal and business)
http://www.555-1212.com/  Telephone Information Source
http://www.wi-fi.org  Extensive information source on Wi-Fi
http://www.wi-fizone.org/zonefinder.asp  Locate wireless Hot-Spots
http://www.webcrawler.com/  WebCrawler
http://www.worldemail.com/  World EMail Directory
http://www.yahoo.com/  Yahoo

GIS/Mapping Sources

http://www.policefoundation.org/docs/library.html  Crime Mapping News
http://www.directionsmag.com/  Directions Magazine
http://www.geospatal-online.com/  GeoSpatial Solutions Magazine
http://www.gislinx.com/  GISLinx
http://www.gisworld.com/  GISPlace
http://www.gisportal.com/  GIS Portal
http://www.geo.ed.ac.uk/home/giswww.html  GIS WWW Resource List
http://www.nlectc.org/  NLECTC Crime Mapping & Analysis Program
http://www.spatialnews.com/features/crimemaps/crimere  Spatial News Crime Mapping Resources

Grants and Grant Research

http://www.cfda.gov/  Catalog of Federal Domestic Assistance
http://www.fdncenter.org/  Foundation Center
http://www.tgci.com/  Grantsmanship Center
http://www.nng.org/  National Network of Grantmakers
http://www.packfound.org/  Packard Foundation
http://www.sternfund.org/  Stern Family Fund
http://www.usdoj.gov/10grants/index.html  U.S. Department of Justice Grants
Intelligence/CounterIntelligence

Center for the Study of Intelligence
Central Intelligence Agency
Criminal Intelligence Services of Canada
Factbook on Intelligence
Kim-Spy Intelligence & Counter Intelligence
Intelligence Professional
Intelligence Technologies International
Interagency International Fugitive Lookout
INTERPOL
Terrorism Research Center
United States Intelligence Community
United States National Security Agency

Investigative Resources

Accurint - pay data base
AutotrackXP
ChoicePoint
Computer Crime Related Links
Computer Incident Advisory Capability
CrimeType Publishing Company-Inv Resources
Dialog
Dun & Bradstreet
How the crooks learn how to do it
Economic Research Service (USDA)
Equifax
Experian
Family Tree Maker's Genealogy Site
Informus
InterNet Bankruptcy Library
Internet Scam Busters
Internet Tracing tools
Investigator’s Guide to Sources of Information
Investigative Links and Resources
Investigator’s Toolbox
KnowX Public Records Searches
LEXIS\-\-\-\-NEXIS
Identify Mastercard Bank Identification Numbers
Merlin Information Services-pay site/free sites
National Insurance Crime Bureau
Merlin Information Services-pay site/free sites
National Insurance Crime Bureau
Research It
Sex Offender.Com
Social Security Number Allocations
Identifies "bar code" information-Universal Product Co...
http://www.ancestry.com/ssdi/advanced.htm  Social Security Death Index
http://www.transunion.com/  Trans Union
http://www.virtuallibrary.com/index2.html  Virtual Librarian
www.visariskusa.com  Identify Visa Card Bank Identification Numbers
http://www.mostwanted.org/  World's Most Wanted

Law/Legal/Federal Agencies
http://www.customs.ustreas.gov/  Customs Service
http://www.commerce.gov/  Department of Commerce
http://usinfo.state.gov/  Department of State Int’l Information Programs
http://www.ustreas.gov/  Department of Treasury
http://www.usdoj.gov/dea/  Drug Enforcement Administration
http://www.epa.gov/  Environmental Protection Agency
http://www.fbi.gov/  Federal Bureau of Investigation
http://www.bop.gov/  Federal Bureau of Prisons
http://www.fcc.gov/  Federal Communications Commission
http://www.loc.gov/  Federal Legislation (to search for Bills, etc.)
http://www.ustreas.gov/secret-service/  Federal Register
http://www.usdoj.gov/marshals/  Immigration and Naturalization Service
http://www.loc.gov/law/index.html  International Constitutional Law
http://www.law.com/  Law.com
http://www.internets.com/slegal.htm  Law Databases
http://www.loc.gov/  Library of Congress
http://www.treas.gov/usss/  Secret Service
http://www.law.emory.edu/fedcircuit  U.S. Court of Appeals Federal Circuit
http://www.gsa.gov/  U.S. General Services Administration
http://www.usps.gov/  U.S. Marshals Service
http://www.findlaw.com/casecode/supreme.html  U.S. Postal Service
http://www.whitehouse.gov/  U.S. Supreme Court Cases
http://www.whitehouse.gov/  White House

News Services
http://www.apbonline.com/  APB Online
http://www.ap.org/  Associated Press
http://www.cnn.com/  CNN Interactive
http://www.mediafinder.com/  Media Data Research Service

Publications (Information/Technology Related)
http://www.nlectc.org/txtfiles/policetech.html  Evolution and Development of Police Tech
http://www.fcw.com/  Federal Computer Week
http://www.govtech.net/  Government Technology
http://www.urban.org/hnjp/pdf/indispensable.pdf  Indispensable Information – Data Collection and
www.urban.org/hnjp/pdf/indispensable.pdf  Information Mgmt for Healthier Communities
http://www.law-enforcement.com/  Law Enforcement Product News
http://www.letonline.com/  Law Enforcement Technology
Law Technology News
NLECTC Technology News Summary
StatSoft Electronic Statistics Textbook
ZDNet

Statistics
Demographics and Census Data
Economic Statistics Briefing Room
NCJRS Statistics Publications
Government Information Sharing Project
JRSA’s Incident-based Reporting Resource Ctr
Grass Roots
Population Reference Bureau
Sourcebook of CJ Statistics
Stat-USA
U.S. Bureau of Justice Statistics
U.S. Bureau of Labor Statistics
U.S. Bureau of Transportation Statistics
U.S. Census Bureau
U.S. Office of Highway Safety

Technical Assistance Providers (Technology Related)
Center for Criminal Justice Technology
Center for Technology in Government
Institute for Law and Justice
Natl Law Enforcement and Corrections Technology Center
Office of Law Enforcement Technology
Regional Info Sharing Systems Program
Technical Assistance

Training (Analyst-specific)
Alpha Group
Anacapa Sciences
Cal State Crime & Intel Analysis Certif Program
Canadian Police College
Natl Law Enforcement and Corrections Technology Center
Police Training Calendar
Rio Hondo Crime Mapping

Please contact me with any changes, additions, or deletions.  Vernon Wallace, (Ret) Lieutenant Sac Sheriff 
vernonw@sac.sticare.com
CLIENT ALERT
January 27, 2012

TO: All Police Chiefs and Sheriffs

FROM: Bruce D. Praet, Attorney at Law

RE: What To Do About Video Evidence

The recent proliferation of video recording devices raises a number of challenging questions for law enforcement. With surveillance cameras on virtually every corner, cell phones in the hands of almost every man, woman and child and the welcomed addition of dash-cams, lapel-cams and Taser-cams, it is truly the naïve law enforcement officer who believes that he/she is not being videotaped in every situation. While some may view this as "big brother" somehow infringing on the ability to perform an officer's job, the informed officer should view such recordings as corroboration of their professionalism.

Not only have such recordings (both video and audio) saved countless officers from frivolous complaints, but even the courts have strongly endorsed the value of such recordings to verify an officer's testimony and often impeach testimony to the contrary. [See: Scott v. Harris, 550 U.S. 372 (2007) - dash-cam video relied upon to eliminate disputed facts.] While the cost of such equipment is often cited as a reason to avoid its purchase, the elimination of just one lawsuit or favorable disposition of even a few citizen complaints far outweighs such a comparatively minimal cost. As a collateral benefit, officers equipped with recording devices perform with increased confidence and professionalism. However, the existence of such recordings raises some additional questions:

1. Should Officers Be Permitted to View Recordings Prior to Providing Statements or Writing Reports?

On balance, the answer is that officers should absolutely be permitted to review recordings before providing statements or writing reports. While some critics and even prosecutors have argued that eyewitnesses might conform or even fabricate their testimony to fit a video recording, there is at least one major distinction between the civilian witness and an involved officer - there is no doubt that the officer was present at the involved event while some witnesses seem to mysteriously come forward only after a video has appeared in the media or on You-Tube.

Unlike civilian witnesses, it is well established that officers often experience distorted perceptions during tense encounters like shootings in which peripheral vision is narrowed and their senses of time, distance and other conditions may be slowed or even accelerated. A video recording will not show anything an officer could not have observed under normal conditions, but it may often assist the involved officer in putting the situation into the proper perspective. While an officer shown to engage in
misconduct must be held accountable for such actions, it is unfair and misleading to require or even allow an officer to provide a distorted statement/report when a recording exists. Placing an officer in such an untenable position will inevitably lead to impeachment or even an allegation of perjury in court.

Moreover, it is widely known that few recordings tell the entire story. Camera angle, lighting and other factors often suggest one version when simple clarification by an involved officer can quickly put the video into a proper perspective.

2. Can Officers Seize Recordings?

Unfortunately, this question usually arises when emotions are high during an arrest or other encounter in which officers discover that the incident was recorded by a civilian witness with a cell phone or other device. Before addressing the legal aspects of this dilemma, a more practical approach should be considered:

a. If it is believed that an independent recording of an officer encounter exists, it may prove more fruitful to have an uninvolved officer/supervisor prevail upon the civilian to voluntarily (i.e. without coercion) permit the camera to be briefly borrowed so that a copy of the recording can be made. [It may also be beneficial to suggest that the civilian accompany the camera while the copy is made in order to dispel any suggestion of destruction or alteration.]

b. A distinction should also be made between recordings made of officer involved incidents and those which are reasonably believed to show evidence of an independent crime such as a robbery, hit and run, etc. While a civilian will hopefully be less reluctant to voluntarily allow access to such video evidence in these situations, officers will at least be better able to minimally justify briefly seize the recording device until a warrant can be obtained to access the contents. [Cf. Scott v. Coeur D'Alene, 2010 U.S. Dist. LEXIS 96529 - reasonable belief camera contains evidence of a crime may outweigh minimal Fourth Amendment intrusion. But, see: Gonsalves v. Cleveland, 2011 U.S. Dist. LEXIS 112694 (N.D. Ind.) - seizure of in-store video without warrant sufficient to raise Fourth Amendment claim.]

Many officers might suggest that they should be permitted to seize an independent recording of their actions as "evidence", but Murphy's Law dictates that such action will inevitably end badly with a questionable arrest or even the use of force. Notwithstanding the undeniable conclusion that compelling an individual to involuntarily relinquish a recording constitutes a seizure under the Fourth Amendment, most courts have instead analyzed this situations under the First Amendment.

This analysis began when police seized a video camera from a news crew filming at a crime scene. In Channel 10 v. Gunnarson, 337 F.Supp. 634 (D. Minn. 1972), the Court held that such a seizure violated the media's First Amendment rights. Most recently, however, the courts have extended this First Amendment protection to the seizure of
video cameras from civilians filming the conduct of officers in public. Gilk v. Cunniffe, 655 F3d 78 (1st Cir. 2011). More importantly, the Court in Gilk held that this First Amendment right is now "clearly established" so as to preclude the defense of qualified immunity. [Cf. Smith v. Cumming, 212 F3d 1332 (11th Cir. 2000)]. While some officers have attempted to seize video recordings as evidence of violations of state laws prohibiting recordings of private conversations (e.g. Washington, California, et al), such seizures have been held to raise First Amendment claims. Fordyce v. Seattle, 55 F3d 436 (9th Cir. 1995).

While honey will almost always prevail over vinegar, the best alternative approach for seizing recordings as evidence would appear to be a warrant.

As always, we're very pleased to keep you informed of the latest legal issues affecting your agencies. For those agencies subscribing to Lexipol, we continue to review and update policies in light of all new information. For more information regarding Lexipol, please don't hesitate to call at (949) 484-4444 or visit us at www.Lexipol.com.
AGREEMENT REGARDING PROPOSED DISCIPLINE

This document represents an agreement between the City of Los Angeles, the Los Angeles Police Department and the Chief of Police, William J. Bratton (hereinafter collectively referred to as “the City”) and Officer John Doe, Serial #12345, a member of the Los Angeles Police Department (hereinafter referred to as “Doe”)

WHEREAS the City has conducted an investigation regarding alleged misconduct involving Doe, which has resulted in personnel complaint, CF #12-000000 being brought against Doe, and,

WHEREAS the parties desire to reach a settlement in the above-referenced disciplinary proceedings in lieu of further administrative or judicial adjudication of these charges, and,

NOW THEREFORE, the City and Doe, in consideration of the mutual covenants within, agree as follows:

1. The City shall amend the personnel complaint, CF #12-000000 as follows:

   Count One. Between April 28, 2006 and July 12, 2006, you, while on and off duty, engaged in behavior that you knew or should have known would reflect negatively on the Department.

   Count Two. On or about July 12, 2006, you, while off duty, failed to follow the advice and direction given by your commanding officer.

   Note: Original Count Nos. 1 and 2 were combined and amended to conform to proof and will be Count No. 1 of this agreement. Original Count No.3 was amended to conform to proof and will be Count No. 2 of this agreement.

   The City will find said charges to have been sustained against Doe, and will impose a reduced disciplinary penalty of 22 SUSPENSION DAYS, if Doe submits a signed letter of resignation, which will be held in abeyance and not executed unless he violates any of the terms and/or conditions of this AGREEMENT REGARDING PROPOSED DISCIPLINE (AGREEMENT). Doe further understands that, should he fail to comply with any of the terms and/or conditions of this AGREEMENT, his letter of resignation from the Los Angeles Police Department previously submitted shall immediately take effect.

   By acceptance of the above charges as sustained and the penalty imposed, Doe agrees that there is a factual basis for said discipline and penalty. Doe accepts his penalty to be served at a time determined by the Chief of Police or his representatives. Doe acknowledges that the charges
sustained and the discipline imposed will be reflected in his personnel record and TEAMS report.

2. Doe will not initiate or pursue any further legal remedy of whatever kind against the City or its employees, any claims against the City and its employees, any appeals or other administrative proceedings, nor seek any other remedies available under the Los Angeles City Charter, state or federal law arising from the facts and circumstances which gave rise to the investigation, the personnel complaint, and its resolution as reflected in this AGREEMENT. Notwithstanding any language to the contrary herein, the parties expressly agree that Doe shall retain all legal rights and remedies to which he is entitled as a matter of law in any Workers Compensation action or to receive such Workers Compensation benefits as are allowed by law resulting from the incident which gave rise to the investigation.

3. Doe agrees and acknowledges that any or all of the documents described in this AGREEMENT (including this AGREEMENT) shall be entered into his “general” personnel file (as defined in Penal Code §832.5) or any other file used for personnel purposes, and that said documents can be construed as comments adverse to his interests. Therefore, Doe understands and acknowledges that these documents will be part of his personnel records as comments adverse to his interests. In addition, he understands that he holds certain due process rights under the Los Angeles City Charter, state and federal law and that both the Los Angeles City Charter and state law provide specific due process procedures to be accorded a peace officer when such disciplinary actions are taken. Doe, by signing this AGREEMENT, acknowledges that he has been apprised of his due process rights and the procedures available to contest such disciplinary action, and, that he hereby explicitly waives all rights and remedies available either under the Los Angeles City Charter or state law in order to effectuate this AGREEMENT.

4. Effective upon signing this AGREEMENT, Doe accepts and agrees that if he acquires any future complaints, while on and/or off duty, based on actions that occur after signing this AGREEMENT, were he engages in any acts of harassment toward any officer(s) of an outside agency and/or fails to cooperate with any on duty officer(s) of an outside agency, who are conducting an official investigation and/or fails to comply with a written direct order given by his commanding officer(s), which are sustained by the Chief of Police, he shall immediately resign from the Department.
5. In consideration for the City doing the actions set forth herein and for the City’s acting in compliance with the promises and representations set forth in this AGREEMENT, Doe hereby releases and forever discharges the City, its past, present and future officers, directors, attorneys, agents, servants, representatives, and employees, and its past, present and future boards, commissions, departments, subsidiaries, affiliates, partners, predecessors, successors-in-interest and assigns, and all other persons, firms, or corporations, of and from any and all past, present or future claims, demands, obligations, actions, causes of action, rights, damages, costs, expenses, and compensation of any nature whatsoever, whether for compensatory, punitive or any other form of damages, which he now has, or which may hereafter accrue or otherwise be acquired, on account of, or in any way growing out of or related to, any matters, acts or omissions arising out of, or related to, the claims which are the subject of this investigation, the personnel complaint, and its resolution as reflected in this AGREEMENT, including, but not limited to, without limitation, any and all known or unknown claims for bodily and personal injuries to Doe, and the consequences thereof, which have resulted or may result from the alleged acts or omissions of the City. This release and discharge shall be a fully binding and complete settlement between the parties to this AGREEMENT and all parties represented by or claiming through such parties.

6. Doe further understands and agrees that the consideration provided for this AGREEMENT is intended to and does release and discharge any and all claims or damages under the Age Discrimination in Employment Act of 1967, as amended, 29 U. S. C. Section 621, et seq. Doe represents that before signing this AGREEMENT, he has consulted with an attorney of his own choosing regarding the release of any such claims that he may have as a result of the alleged acts or omissions of the City and Doe has been advised that he has twenty-one (21) days to consider this AGREEMENT and that he has seven (7) days after the date on which he signs this AGREEMENT within which to revoke it. Doe knowingly and intentionally waives the twenty-one (21) day period for consideration of this AGREEMENT and the seven (7) day revocation period.
7. Doe further understands and agrees that the actions taken, are intended to and does release and discharge any and all claims or damages which he does not know or suspect to exist at the time of his execution of this AGREEMENT and Doe does hereby waives any rights under Section 1542 of the Civil Code of the State of California which reads as follows: 

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR."

8. This AGREEMENT contains the entire agreement between Doe and the City with regard to the matters set forth in it and shall be binding upon and inure to the benefit, jointly and severally, of Doe and the City and the executors, administrators, personal representatives, heirs, successors and assigns of each. Any prior agreements, promises, negotiations or representations, whether written or oral, relating to the subject matter of this AGREEMENT which are not expressly set forth in this AGREEMENT are of no force or effect. Any amendment or modification of this AGREEMENT must be in writing, and signed by both parties.

8. In entering into this AGREEMENT, each of the parties represent that he/it has had the opportunity to seek the advice of his/its counsel of choice regarding the terms of this AGREEMENT, that those terms are fully understood and voluntarily accepted by each of the parties.

Jurisdiction over any disputes arising from this AGREEMENT shall be in the Superior Court of the County of Los Angeles.

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This AGREEMENT consists of five pages.

I, THE UNDERSIGNED EMPLOYEE OF THE LOS ANGELES POLICE DEPARTMENT HAVE CAREFULLY READ AND CONSIDERED EACH PROVISION IN THE AGREEMENT. IN ADDITION, I ACKNOWLEDGE THAT THE DEPARTMENT HAS ENCOURAGED ME TO CONSULT WITH LEGAL COUNSEL OF MY CHOICE AND I HAVE HAD THE OPPORTUNITY TO DO SO. I HAVE ALSO CAREFULLY CONSIDERED BOTH THE ADVANTAGES AND DISADVANTAGES THE AGREEMENT WOULD GIVE ME. IN RECOGNITION OF THOSE ADVANTAGES, I HEREBY KNOWINGLY AND VOLUNTARILY WAIVE MY RIGHT TO AN ADMINISTRATIVE APPEAL OR JUDICIAL REVIEW OF THE DEPARTMENT'S ADJUDICATION OF OR PENALTY FOR THE ALLEGED MISCONDUCT UNDERLYING THE AGREEMENT.

Dated: ____________________________

John Doe

Dated: _____________________________

Chief of Police

APPROVED AS TO CONTENT AND FORM:

Dated: ______________________________

Representative for the employee

Dated: ______________________________

Representative for the City of Los Angeles
PROFESSIONAL STANDARDS BUREAU  
Investigative Plan of Action

Investigator ________________________________  CF No. ________________________________

OIC / Section ______________________________ Date _____________ Completion goal _____________

Complainant ________________________________ Department □

- Visit the scene.
- Prepare a sketch or diagram of the location.
- Interview complainant. Tape or explain why not.
- Interview witnesses. Tape or explain why not.
- Obtain all logs (W/C, Sgt, DFARs, etc.)
- Ensure all employees are identified.
- Request arrest paperwork.
- Review prior radio calls at location.
- Obtain and review communications tapes, 911 tapes and printout.
- Canvass for surveillance cameras.
- Review in-car camera.
- Conduct a daylight search of the location.
- See if the location was ever an abated nuisance.
- Examine previous crime reports filed by the complainant.
- Request search warrant folder.
- Request medical records.
- Interview EMS/FD personnel.
- Interview hospital employees regarding initial statements.
- Conduct NIN and LA Clearing House check.
- Obtain copies of accused employee’s evaluations, NTCs and CCEs.
- Obtain DMV information and photo (LAPD home page) on accused.
- Obtain prisoner treatment medical information.
- Obtain sick history.
- Conduct an audit of citations written by the accused officer.
- Conduct an audit of arrests made by the accused officer.
- Debrief prisoners who accused has arrested.
- Audit computer runs made by the accused employee.
- Obtain off-duty employment history.

- Subpoena telephone records.
- Conduct background checks of individuals associated with accused, including complainant (criminal only).
- Conduct AutoTrak profile of accused.
- Contact OCVD for information.
- Access Cal-Gangs for information (criminal only).
- Conduct warrant check on complainant and accused (criminal only).
- Conduct parking citation history on subject vehicle. Compare to 3.19 at location.
- Request ISD conduct surveillance.
- Request EES conduct an audit.
- Re-interview ____________________________.
- Confer with Advocate Section.
- Confer with DA’s JSID and CA’s office.
- Obtain a search warrant.
- Perform an administrative container search.
- Obtain IOD paperwork.
- Obtain property reports and view the property.
- Record license plates at location.
- Conduct background checks on license plates.
- Notify the complainant of the disposition of the case and send reply letter.
- Check AFI for gun information.
- Review gun card of accused (Davis Range).
- Review citation issuance history of accused.
- Review complainant’s citation history.
- Review local, state and federal arrest history of accused.
- Ensure accused photo is in folder. If booked, use Cal Photo (LAPD home page).
- Contact welfare fraud investigators.
- Contact Postal Police.
- Other ________________________________
PROFESSIONAL STANDARDS BUREAU
INITIAL RESPONDER CHECKLIST

☐ Document when notified and by whom. Begin a chronological log.

☐ Upon arrival, summon an ambulance if there are injuries, if not already done.

☐ Document which law enforcement official(s) was contacted.

☐ Determine scope of investigation. How many investigators are needed?
   - Size of involved area
   - Number of witnesses
   - Expertise of investigators (are subject matter experts needed?)
   - Language skills

☐ Determine location and condition of involved parties and the accused.

☐ Separate involved parties to avoid audible or visual contact.

☐ Identify and protect evidence.

☐ Canvas for surveillance cameras.

☐ If a weapon was involved in a criminal act, consider confiscating it. Do this if the responsible jurisdiction or entity (e.g., CIID) has not already done so.

☐ If a crime occurred in an outside jurisdiction refer to criminal/administrative protocols for PSB.

☐ Remove children from the immediate area.

☐ Interview all persons involved separately, on tape, including victim, person calling the police, percipient witnesses (including children), fresh complaint witnesses and officers. Tape all interviews or explain why not.

☐ Interview friends, neighbors, relatives etc., for a historical perspective (e.g., domestic).

   **Note:** You may need to remind officers of their obligation to provide a public safety statement. The responding or witness officers are not entitled to an employee representative prior to giving this information (Government Code 3301[j] or 3303[i]).

☐ Document emotional and physical condition of complainant or involved parties.

☐ Obtain photographs of the scene and injuries, if any.

☐ Oversee the collection of physical evidence, and consider SID. Consider videotaping applicable portions of the investigation.

☐ Obtain a voluntary or compelled urine specimen or GCI test if applicable.

☐ Obtain documents (crime reports, protective or court orders, notes written by accused employees [as opposed to notes taken by responding officers]).

☐ Offer an EPO if applicable.

INITIAL RESPONDER CHECKLIST (CONTINUED)
- Obtain alternate telephone numbers of witnesses or victims, along with identifying information (driver’s license or ID number). Place into case package, not into the investigation.

- Obtain a release of medical information authorization and medical records.

- Obtain a waiver for financial records if applicable.

- Follow-up at the hospital with medical treatment. Obtain the name of the treating physician.

- Obtain all available reports from the agency of jurisdiction and identify a contact person at that agency and their lead investigator, including a telephone number.

- If criminal, consider obtaining a search warrant.

- If administrative only, consider an administrative container search.

- Notify and apprise the on-call lieutenant. In cases of serious criminal misconduct, and with the concurrence of the on-call captain, consider asking the accused employee for their resignation.

- Initiate a Complaint Form or other action if so directed by the lieutenant or captain.

- Keep the on-call captain informed.
Law

*Detentions - police may...*

  - Order driver out of vehicle once it’s lawfully stopped.

  - Order passenger out of the vehicle once it’s lawfully stopped.

- **Terry v. Ohio**, 392 U.S. 1 (1968)
  - Stop and briefly detain for investigative purposes if the officer has a reasonable suspicion supported by *specific* and *articulable* facts that the individual is involved in criminal activity.
  - Conduct pat down search of outer clothing to search for weapons if the officer has reasonable suspicion supported by *specific* and *articulable* facts that the person is armed.

  - Allows for “pretext stops.”
  - Officer’s stop of a vehicle is reasonable where there is probable cause to believe a traffic violation has occurred.

  - An individual may not be detained even momentarily without reasonable, objective grounds for doing so; and the refusal to listen to or to answer an officer’s questions, without more, does not furnish those grounds.
  - An investigatory detention must not last longer than necessary to effectuate the purpose of the stop.
  - Officers must use the least intrusive means reasonably available to verify or dispel suspicion in a short period of time.
  - “Where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of authority.”

  - Mere presence in high crime/narcotics area ≠ reasonable suspicion.
  - Presence in high crime area *in combination with* one or more other factors (e.g., flight from officers) may justify reasonable suspicion.

  - Must consider the totality of the circumstances in determining whether there is reasonable suspicion.

**Parole/Probation Searches - California:**

  - Officers must be aware of person’s parole status prior to a search of residence in order to justify the search.

**Searches of Vehicles Incident to Arrest:**

- **Arizona v. Gant** 129 S. Ct. 1710 (2009)
  - Places additional limitations on the ability to conduct vehicle searches.
  - Police officers may only search the passenger compartment of a vehicle incident to the arrest of an occupant if: (1) the officer has a reasonable belief that evidence relevant to the offense of arrest may be found in the vehicle; (2) or the arrestee is not yet secured and is within reaching distance of the vehicle at the time of the search.
We hope you enjoyed this CPOA training. Please visit our website at www.cpoa.org for additional trainings.

Leading in Crisis: Response and Mitigation of Critical Incidents
Patrol Ops - Field Leadership
Leadership Primer for Commanders
Canine Program Management
Current Legal Issues in Law Enforcement
Legislative Update
Officer Involved Shootings for Supervisors and Management
Pitchess Motion Update
Peace Officers' Bill of Rights
Public Records Act
Internal Affairs Investigations
Leadership Development Course
Use of Force/Liability/Litigation: Breaching the Minefield