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TRAINING BULLETIN

December 2014

SUPREME COURT RULES POBRA HEARING OFFICERS MAY HEAR AND DECIDE *PITCHESS* MOTIONS

RSA Member Kristy Drinkwater Wins Due Process Case Before California High Court

By Michael P. Stone, Esq.

San Francisco, December 1, 2014.

The California Supreme Court today published its much-awaited decision in the closely-watched case, *Riverside County Sheriff's Department v. Stiglitz (Kristy Drinkwater, Real Party In Interest*) No. S206350. The case concerns the authority and power of hearing officers who preside over disciplinary appeals for California peace officers pursuant to the Public Safety Officers Procedural Bill of Rights Act (POBRA) at *Government Code §§3300 et seq.* §3304(b) grants all peace officers a statutory right to a due process administrative appeal whenever they are subjected to "punitive action" in their employment.

The *Drinkwater* Case

Kristy Drinkwater was dismissed from her job as a correctional deputy with the Riverside County Sheriff's Department (RCSD), on allegations of time card irregularities that resulted in her unjust enrichment. As a member of the Riverside Sheriffs' Association (RSA) Drinkwater was protected by the Memorandum of Understanding (MOU) between RSA and the County of Riverside and she was entitled to use the appeal process that is reserved for RSA members in Article XII of the MOU.

Principles of 14th Amendment Due Process as well as *Government Code 3304(b)* and Article XII guarantee that discharged non-probationary Department peace officers are entitled to a full-blown evidentiary appeal before a neutral hearing officer selected from an agreed-upon panel of neutrals.

MOU Article XII Hearings

Hearing Officers on the panel are vetted and mutually-selected by RSA and County representatives. Each Hearing Officer possesses

many years of experience in conducting, presiding over and deciding employment-related appeals. They regularly rule on parties' motions, objections and the admissibility of evidence offered by the parties.

One of the recognized defenses available to disciplined employees is that of "disparate penalty". That is, does the penalty for the sustained misconduct appear reasonable and fair? Or, does it seem to be excessive and beyond what is reasonable? How can the appellant, aggrieved by an excessive penalty, go about proving up that defense?

Some agencies utilize a disciplinary matrix, or guide, which displays the range of penalties thought to be appropriate for certain categories of misconduct. These are helpful if the appellant can show that the penalty prescribed by the employer does not square with the disciplinary matrix, and there are no aggravating factors present.

Another effective way of demonstrating that the penalty is excessive is by showing that other employees have received lenient penalties for the same misconduct with no discernible difference in aggravating or mitigating facts, such that the excessive nature of the penalty in the instant case is readily apparent to the trier of fact.

Agencies do not typically publish disciplinary records and punishments, because the records are confidential. Some do publish regularly "summaries of discipline" that show the rank of each unidentified employee, a description of the misconduct, and the penalty prescribed. Research of these summaries is often helpful to showing disparity. Some disparate penalty evidence can be drawn from the personnel records of other similarly-situated employees. That is, the records show the similarity of the conduct, but the penalties are dramatically different, for no apparent reason. Thus, the penalty is disproportionate in severity. However, obtaining discovery of confidential personnel record information is problematic, and depends upon the extent to which the appellant is able to obtain the relevant information from an uncooperative employer.

The *Pitchess* Progeny

In 1974, the Supreme Court decided the case of *Pitchess v. Superior Court*, 11 Cal.3d 531, which held that a criminal defendant could discover evidence in the records of the arresting deputies that would tend to show that the deputies were prone to use excessive force and that they were the aggressors, while the defendant only defended himself. So the term "*Pitchess* discovery" became a common reference to criminal motions for discovery of confidential police personnel records. Then in 1978, the Legislature passed SB 1436 which created statutory procedures regulating discovery of law enforcement personnel records, including the now familiar "*Pitchess* motion".

This Supreme Court decision focuses on whether Drinkwater's so-called *Pitchess* motion could be filed with, heard, and ruled upon by the administrative hearing officer presiding over her appeal. The Department's position was that, "only judges and courts" can entertain *Pitchess* motions; not non-judicial arbitrators and hearing officers.

In response to Drinkwater's motion filed in her appeal, RCSD sued the Hearing Officer (Law Professor Jan Stiglitz) who found that good cause supported Drinkwater's motion and who ordered RCSD to produce the records for *in camera* review. The Superior Court granted the RCSD petition, ordering Hearing Officer Jan Stiglitz to deny the Drinkwater motion. Drinkwater appealed.

The Fourth District Court of Appeal reversed the Superior Court in an opinion that held (for the first time), that hearing officers in POBRA appeals can hear and decide these motions.

RCSD then petitioned the Supreme Court in an effort to overturn the Court of Appeal which published its unanimous decision in the Official Reports.

The Supreme Court granted review, and after another round of briefing, including *Amicus Curiae* ("Friend of the Court") briefs filed by the PORAC Legal Defense Fund, the Los Angeles Police Protective League (LAPPL), the Association of Los Angeles Deputy Sheriffs (ALADS), the Association of Orange County Deputy Sheriffs (AOCDS), the Long Beach Police Officers Association (LBPOA), the Southern California Alliance of Law Enforcement (SCALE), in support of Drinkwater.

The Supreme Court in a 5-2 decision affirmed the Court of Appeal decision, holding that these discovery motions can be brought before, heard and decided by neutral hearing officers, like Jan Stigitz.[1]

The case is a very important refinement in the due process rights of officers under the Public Safety Officers Procedural Bill of Rights Act (POBRA) at §3304(b), by making it possible to discover relevant information for the disparate penalty defense.

[1] Two of the Justices joined in a concurring and dissenting opinion (Werdegar, J. and Baxter, J.). They concurred that hearing officers could entertain *Pitchess* motions and grant them if warranted. However, they believe that hearing officers do not have the power to compel agencies to produce personnel records, and that only a judicial officer should conduct the *in camera* review called for in *Evidence Code* §§915 and 1045.