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WHO CAN "INITIATE" AN INVESTIGATION UNDER POBRA

Ochoa v. County of Kern

Court of Appeal, Fifth Appellate District - filed April 12, 2018

By Robert Rabe, Esq.

Arthur Ochoa was a deputy employed by the Kern County Sheriff's Office (KCSO). On March 22, 2013, Priscilla S. informed Deputy Chaidez that Ochoa harassed her. On that same day, Chiadez submitted an interoffice memorandum documenting the allegation to Sergeant Bittle, Ochoa's superior. On March 25, 2013, Bittle received Chaidez's memorandum and "started an investigation ... to determine what the nature of the complaint was." He tried to contact Priscilla S. without success. On March 27, 2013, Bittle submitted an interoffice memorandum concerning Priscilla's allegation and his attempts to contact her to Commander Hansen. On May 6, 2013, Chief Deputy Zimmerman signed a KCSO "Personnel Complaint" authorizing internal affairs to investigate Priscilla's harassment claim against Ochoa. Senior Deputy Levig was appointed to conduct the investigation. On August 11, 2014, Levig served Ochoa with a "Notice of Proposed Disciplinary Action - Termination," which cited numerous violations of Civil Service Commission Rules and KCSO Policies and Procedures. Following a *Skelly* hearing, Ochoa was terminated.

Ochoa filed a petition in the Superior Court for a writ of mandate. The trial court conducted a hearing during which several individuals testified about KCSO procedures. Bittle testified he "was not authorized to initiate an internal affairs investigation." As a sergeant, he "ha[s] to look into ... allegations to find out what they were all about." Bittle stated he had "the ability

to investigate subordinates" and "discipline [them] for [policies and procedures] violation[s]" but "would not impose any discipline beyond a written reprimand." Simpson testified a sergeant "did not have the authority to initiate an internal affairs investigation" and "only the Sheriff, the Undersheriff, or Chief Deputies can authorize the initiation of an internal affairs investigation." "[H]is authority was limited to gathering enough facts to make his chain of command aware of the nature of the allegations." Levig testified "no one below the rank of a Chief Deputy has the ability to authorize an administrative investigation." Zimmerman testified he authorized an internal affairs investigation and, pursuant to KCSO policy, "only a Chief Deputy can initiate an internal affairs investigation of a deputy". A sergeant, on the other hand, "cannot initiate an internal affairs investigation" Instead, a sergeant "can conduct fact-finding if there is an allegation" to "determine [ ] if the allegation is criminal or administrative in nature."

The Public Safety Officer Procedural Bill of Rights Act (POBRA), requires the investigation of misconduct to be completed within one year of the "discovery by a person authorized to initiate an investigation of the allegation." (*Govt. Code* § 3304 (d)(1).) Ochoa claimed that the KCSO failed to complete the administrative investigation of his alleged misconduct and notify him of the proposed disciplinary action within one year of the agency's discovery by a person authorized to initiate the investigation. The superior court entered an order and judgment denying his petition, stating "Bittle was not authorized to initiate an investigation within the meaning" of the relevant section.

On appeal, Ochoa again claimed his termination was time barred because the KCSO sergeant initiated an investigation of his alleged misconduct on March 25, 2013, and an internal affairs investigator notified him of the proposed termination on August 11, 2014. The Department argued that since the sergeant who initiated the investigation on March 25, 2013, was not authorized by department policy to initiate an internal affairs investigation, the sergeant's investigation did not start the one-year limitations period. The Court of Appeal concluded; "although the sergeant could not initiate an internal affairs investigation, he was 'a person authorized to initiate an investigation' of the allegation within the meaning of [POBRA]." Citing *Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 322, the Court of Appeal noted that the "apparent purpose" of the statute "is to ensure that an officer will not be faced with the uncertainty of a lingering investigation, but will know within one year of the agency's discovery of the officer's act or omission that it may be necessary for the officer to respond in the event he or she wishes to defend against possible discipline." The Court remarked that a KCSO sergeant is authorized to initiate some sort of inquiry into a subordinate's alleged wrongdoing, so it had to determine whether the "inquiry" by the sergeant constituted an "investigation" under POBRA. The Court concluded that when Bittle

forwarded his interoffice memorandum, that launched AN inquiry that eventually led to Ochoa's termination. "The statute of limitations period, therefore, commenced March 25, 2013."[1]

One can see from this case how important it is to know that a department's policy cannot artificially extend the time to conduct an investigation under POBRA, by limiting those who may "initiate" an internal affairs investigation to a few command officers. It is vital for an officer to consult with an attorney who is familiar with the issues that may arise under POBRA at the start of any investigation process.

Stay Safe!

Robert Rabe is Stone Busailah, LLP's writs and appeals specialist. His 40 years practicing law include 16 years as a Barrister, Supreme Court of England and Wales, practicing in London, England.

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[1]The Court ultimately concluded that a concurrent criminal investigation into Ochoa's misconduct sufficiently tolled the limitations period. The Court then affirmed the trial court's order and judgment denying Ochoa's petition.