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TRACKING POBRA'S ELUSIVE STATUTE OF LIMITATIONS DEFENSE

Rain O. Daugherty et al. v. City and County of San Francisco et al.

By Michael P. Stone, Esq. and Robert Rabe, Esq.

Government Code § 3304 (d) is a potent defense in any investigation and disciplinary action against a Public Safety Officer in California. In a nutshell, a "statute of limitations" defense or "plea in abatement" means that upon the determination of the date that an investigatory matter or interest comes to the attention of a Department member who is "authorized to initiate an investigation of the allegation" of misconduct, that date in time is said to have *triggered the limitations period of one* (1) year during which, the agency must complete its investigation and notify the officer if the agency determines to take disciplinary or adverse action against the accused member. It must notify the member of the proposed penalty during the one-year period. The accepted consequence for failure to meet the one-year statutory deadline is that the proposed discipline is time-barred and void, but the statute contains a long list of exceptions to the statutory penalty. These exceptions are listed in subparts (1) through (8) of § 3304. "Tolling" of § 3304, occurs when the running of the statute is *held in abeyance* for the period of time that the triggering event exists. For example, assume that the misconduct allegation *is also* the subject of a collateral criminal investigation or prosecution which, according to § 3304 (1); "tolls" the statute for the period that the criminal investigation or prosecution is pending.

Other exceptions to the running of the statutory period are: (2) *waiver* of statute defense by the affected officer; (3) reasonable extension required due to multi-jurisdictional investigation; (4) reasonable extension required because the matter involves multiple employees; (5) employee is *incapacitated* or *unavailable;* (6) where accused is defendant in a civil action involving the same facts; (7) the investigation concerns a matter that is also the focus of a criminal prosecution; and (8), it is a matter of workers' compensation fraud.

It can be readily seen that these exceptions to the "one year rule" are there so that the agency has the benefit of up to a full year to take care of

business, unimpeded by a procedural trap. In litigating POBRA cases for over 40 years, I have seen too many discipline cases time-barred because managers attempt to rely upon questionable application of a tolling provision, only to see a superior court issue a writ nullifying the discipline. The Court of Appeal, Third Appellate District, recently ordered its opinion in *Daugherty et al., v. City and County of San Francisco* (June 22, 2018, published in the official reports, at__Cal.App. 4th__, Nos. A145863 and A147385.)

This case arose out of a criminal corruption investigation of officers in the San Francisco Police Department (SFPD), which began in 2011 and was led by the United States Attorney's Office (USAO), with the assistance of select members of the criminal unit of SFPD's Internal Affairs Division (IAD-Crim). During the course of the investigation, search warrants for the cell phone records of former SFPD Sergeant Furminger - the central figure in the corruption scheme - led to the discovery in December 2012, of racist, sexist, homophobic, and anti-Semitic text messages between Furminger and nine SFPD officers. The criminal case proceeded to trial and resulted in a guilty verdict against Furminger and a co-defendant. Three days after the verdict, on December 8, 2014, the text messages were released by the USAO to the administrative unit of SFPD's Internal Affairs Division (IAD-Admin). After IAD-Admin completed its investigation of the text messages, the Chief of Police issued disciplinary charges against the officers in April 2015.

While the disciplinary proceedings were pending, Daugherty filed a petition for a Writ of Mandate, seeking to rescind the disciplinary charges on the grounds that they were untimely under § 3304 (d). The trial court granted the writ petition, finding the one-year statute of limitations began to accrue in December 2012, when the misconduct was discovered, and thus, the investigation of the officers' misconduct was not completed in a timely manner.

The Court of Appeal concluded that the one-year statute of limitations did not begin to run until the text messages were released by the USAO to IAD-Admin, because before then, the alleged misconduct was not and could not be discovered by the "person[s] authorized to initiate an investigation". Alternatively, the Court concluded the one-year statute of limitations was tolled until the verdict in the criminal corruption case because the text messages were the "subject of the criminal investigation." Thus, the April 2015 notices of discipline were timely, and the decision of the trial court was reversed.

In 2011, the San Francisco Public Defender accused SFPD officers at the Mission and Southern Stations of conducting illegal searches, stealing property and falsifying police reports regarding the legality of the searches. In response to these accusations, IAD-Crim opened criminal investigations into the alleged conduct. The USAO initiated its own criminal investigation. In June 2011, the USAO called a meeting with select members of SFPD. It was agreed at that meeting that the USAO would lead a single investigation into the matter, assisted by members of IAD-Crim.[1] The AUSA required all

[1]Investigations into potential criminal conduct by SFPD officers are handled by IAD-Crim, while disciplinary investigations are the purview of IAD-Admin. Where it is necessary to preserve confidentiality or protect the integrity of an ongoing criminal investigation, SFPD imposes a "wall between IAD-Crim and IAD-Admin", preventing any dissemination of criminal evidence to the disciplinary investigators, or to the remainder of SFPD.

agents, IAD-Crim officers and anyone working on the investigation to sign a non-disclosure agreement before they could become privy to the federal government's grand jury evidence. The AUSA instructed IAD-Crim members to maintain the confidentiality of information and evidence accumulated in the corruption investigation "up until the return of a verdict in the *Furminger* case." The IAD-Crim officers knew that they were not "at liberty to speak about anything regarding the ongoing criminal investigation."

In December 2011 and after, federal investigators obtained search warrants for data from Furminger's cell phone. The search warrants yielded thousands of Furminger's text messages, from June 2011 to August 2012, including the offensive text messages relevant to this matter. The offensive content of the text messages, as well as the fact that the texts involved communications between officers and superior officers, revealed a comfort level between the officers and Furminger that led the investigators to suspect the officers were possibly engaged in illegal activities with Furminger.

On December 5, 2014, a federal jury convicted Furminger of conspiracy to commit theft, conspiracy against civil rights and wire fraud. Three days later, a meeting was held between the USAO and members of IAD-Admin, where the USAO lifted the confidentiality restriction and authorized IAD-Crim to release the text messages to IAD-Admin. The IAD-Admin investigators began reviewing the messages for racist and other highly offensive messages between Furminger and SFPD officers, and conducted interviews with the officers. On April 2, 2015, the Chief of Police filed disciplinary charges with the San Francisco Police Commission against the officers.

While the Commission proceedings were pending, Daugherty filed his petition for a writ of mandate in the San Francisco Superior Court. The trial court granted an application for a temporary stay order, which ordered the Commission to halt the administrative proceedings, pending a further hearing. The trial court held oral argument on the merits of the writ petition and the court issued an order granting the petition. The court found that the IAD-Crim had an obligation to initiate an administrative investigation of the officers' misconduct in December 2012, when they first learned of the offensive text messages. Additionally, the trial court held that "tolling" of the statute did not apply, because the officers, their conduct, and their text messages were not the "subject" of a criminal investigation.

The Court of Appeal noted that section 3304 (d)(1), triggers the statute of limitations upon discovery within a public agency by a person authorized to initiate an investigation. The Court remarked that the "reasonable implication from this language is that the statute of limitations is not triggered upon any employee's discovery, but upon discovery by persons who are either specifically or generally vested with the authority to commence an investigation into the misconduct" and concluded that "courts should apply an agency's designation of who is authorized to initiate investigations for purposes of POBRA." SFPD designated IAD-Admin as the investigative body for purposes of POBRA, and the Department's practice at the time was to allow IAD-Crim to complete a criminal investigation before IAD-Admin began its disciplinary investigation. Further, the Court held that the federal authorities' confidentiality restriction prevented the disclosure of the text messaging misconduct. "The text messages

belonged to the federal corruption investigation and remained subject to a federal protective order in the *Furminger* case." In fact, permitting an administrative investigation into the text messages while the corruption case was pending may have alerted Furminger and his co-defendants that their communications were being monitored - "potentially compromising the corruption investigation." Having agreed to the confidentiality restrictions in advance of the joint investigation led by the USAO, it was not for the SFPD to decide when the restrictions no longer applied. The Court concluded the trial court erred in finding that the statute of limitations accrued in December 2012, because the record "reveals the statute did not begin to accrue until late 2014, upon IAD-Admin's receipt of the records turned over by the USAO and IAD-Crim.

The Court also concluded that the limitations period was tolled while the text messaging misconduct was the "subject" of a pending criminal investigation and prosecution. (Section 3304 (d)(2)(A).) The trial court had concluded otherwise, because the criminal investigation did not involve the exact "same facts at issue in the conduct case", i.e., that "the conduct involved in the criminal and administrative investigations must be the same." The Court, however, held that tolling applies where the criminal investigation "includes" or "encompasses" the conduct in the administrative proceedings. The Court noted this was "a criminal conspiracy case in which the investigators sought to ascertain the full scope of the conspiracy by identifying persons of interest, gathering information on them, and winnowing the list down as each individual's involvement became clear. The text messages were a key investigative tool to aid in this effort because the investigators knew that Furminger, the central figure in the corruption scheme, conducted criminal activity via text messaging." It is sufficient for the statute, "that the text messages were examined by corruption investigators for a possible connection to the corruption scheme."

In all, the POBRA statute of limitations was suspended for approximately two years. The POBRA exceptions relevant in this case underscore the Legislature's recognition that, in light of the realities and importance of investigating officer misconduct, investigations may take longer than one year to complete. This case "involved such a situation, and the evidence did not show unfair, dilatory, or arbitrary actions on the part of SFPD." The Court remarked, "[f]or disciplinary proceedings to wait until the completion of this investigation was fully in keeping with the system that the Legislature created in POBRA."

Stay Safe!

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