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## TRAINING BULLETIN

### REMOVAL FROM SWAT TEAM NOT PUNITIVE ACTION

**Perez v. City of Westminster, G050718, November 29, 2016**

Brian Perez ("Perez"), an officer with the Westminster Police Department, was given a notice of intent to terminate his employment, based on an alleged lack of honesty and cooperation in the investigation. Perez appealed the decision to terminate his employment and, following a Skelly hearing, the Chief of Police concluded the allegations against Perez could not be sustained. Perez's employment was not terminated, but he was removed from the SWAT team and the honor guard, and while he remained a field training officer, he was not assigned any trainees. Perez sued for violation of his rights under the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) (the "Act" or "POBRA"). The trial court found the removal of Perez from the SWAT team and the honor guard, and the failure to assign trainees to him as a field training officer did not violate the Act. Perez appealed that decision and the Court of Appeal

affirmed, stating "[s]ubstantial evidence amply supported the trial court's decision."

The facts underlying this case occurred on November 18, 2007, when Perez, along with other City of Westminster officers, responded to a disorderly conduct call outside a Westminster bar. Perez observed a suspect being detained. The suspect later complained a police officer (not Perez) struck him in the face.

Perez was interviewed on November 25, 2007 as part of the investigation of the excessive force complaint. Perez was not represented by counsel at this interview, and was not given any Miranda or Lybarger warnings, nor was he advised that he had the right to be represented by counsel at the interview. Perez told investigators that he had not observed anyone striking the suspect or using excessive force. Perez was then told a videotape of the incident existed, which showed the suspect

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being struck by one of the officers, and also showed that he [Perez] had been close to the incident.

Perez was again interviewed on December 10, 2007. At the second interview, he had an attorney present, and was given Miranda and Lybarger warnings. Perez again stated he had not seen any act of excessive force used on the suspect, but explained that just because he had not seen any act of excessive force used on the suspect, that did not mean the act had not occurred.

On January 29, 2008, Perez received a notice to terminate his employment, reading, in part: "Though you were not the subject officer in the administrative investigation your complete and honest cooperation was required. Your version of the November 18th arrest of Dr. Rubin is inconsistent with the other officers present and the multiple video recordings of the parking lot where the arrest took place; it is apparent you were in a position to witness the incident involving Dr. Rubin and Officers Stouffer, Reyes, and Lumba."

Perez appealed the decision to terminate his employment. On March 12, 2008, Chief of Police Hall sent a letter to Perez's attorney, reading, in relevant part: "After careful consideration of information provided by you and Officer Perez . . . , along with detailed review of the investigation report and video images, I have concluded there is insufficient evidence to sustain findings that Officer Perez violated Westminster Police Department Policy and Procedure by knowingly making false or misleading statements during an internal affairs investigation and failing to report improper activities

by other police personnel. Accordingly, the disposition of this matter will be one of "not sustained." This finding should not be misunderstood by Officer Perez as exoneration or one of innocence. It is strictly my conclusion the department has failed to meet the evidentiary burden necessary to sustain a finding of severe misconduct."

Although Perez was returned to his employment, he was excluded from the honor guard and the SWAT team, on the ground the internal affairs investigation was causing him "obvious stress and upset and therefore it was not in [his] best interest to continue on these assignments and programs." After the investigation, Perez was never assigned to duty as a field training officer.

On March 20, 2008, Perez filed a written claim with the City pursuant to Government Code section 945.4. The City did not respond. Perez filed a complaint on April 8, 2009, alleging that the decision to remove Perez from his SWAT team and honor guard assignments, and the decision to not assign any trainees to him, violated POBRA. The City's challenge to his filing that complaint resulted in an unpublished Court of Appeal opinion, *Perez v. City of Westminster* (March 8, 2011, G042965). The trial of this case was ultimately heard by the court, which found that the decision to not assign any trainees to him, did not violate the Act, and entered a judgment of dismissal.

Government Code section 3304 prohibits punitive action against a public safety officer for exercising his or her rights under the Act, and

requires that an administrative appeal be permitted when punitive action is taken. The punitive actions alleged by Perez were his removal from the SWAT team and honor guard, and the refusal to place a trainee with him as a field training officer. The court found that "Perez was not subject to any punitive action, as that term is defined by statute. Government Code section 3303 states, "[f]or 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." The Court noted that the SWAT team and honor guard were collateral assignments, not formal, full-time assignments. Removal from those collateral assignments was not considered discipline, but was part of the Chief of Police's "normal management of the department." The memorandum of understanding between the City of Westminster and the police bargaining unit provides that the nonassignment of a trainee to a field training officer is not a disciplinary or punitive action." Finally, the Court commented, "[t]he removal of Perez's collateral duties did not result in a reduction of salary, which is normally required to establish a punitive action. The loss of prestige or the loss of the ability to earn overtime pay is not sufficient. (See *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 845 [officer did not violate any departmental policy, but supervisor concluded his continued presence "was not conducive to a cooperative, productive working relationship"; officer's reassignment without loss of pay or rank was not punitive action, despite officer's "assertion that his work as a detective is less heroic than his job as a pilot"].) Perez did not cite any case

in which the loss of additional, overtime pay was recognized as a punitive action under the Act. The cases cited by Perez involved the loss or decrease in the peace officer's salary.

The Chief of Police testified that he had authorized Perez's removal from the SWAT team, not as punishment, but because he had lost confidence in Perez's honesty and ability to work cooperatively with others. Similarly, the Chief of Police authorized Perez's removal from the honor guard, stating, "because I lost confidence in him, and I thought there was compelling information he hadn't been truthful in the initial investigation. And the honor guard is an important ceremonial duty. It bestows honor. And I didn't think it was an appropriate place to have him, at that moment." Finally, the Chief of Police testified he had not removed Perez from the honor guard or the SWAT team, or not assign him to duty as a field training officer, because he had exercised his rights under the Act. Based on such evidence the Court of Appeal concluded that the evidence supporting the trial court's finding was "more than substantial", and affirmed the judgment.

At one point, around the time Perez was reinstated, the Chief of Police told his attorney that "Perez did not have a promising career with the City's police department." We need not feel too sorry for Officer Perez, however, because on March 6, 2014, a federal jury in a separate action, awarded him and two other officers, including one of those being investigated for using excessive force in this case, \$3.55 million in damages for being denied

coveted promotions and special assignments, in retaliation for their complaints and discrimination.

Stay safe!

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**Michael P. Stone** is the firm's founding partner and principal shareholder. He has practiced exclusively in police law and litigation for 37 years, following 13 years as a police officer, supervisor and police attorney. He is an "A-V Preeminent" rated trial lawyer, by the National Martindale-Hubbell Law Directory, which is the highest lawyer rating attainable in the Directory, reflecting the confidential opinions of lawyers and judges collected by the Law Directory.