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TRAINING BULLETIN



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POBRA VIOLATED WHEN OFFICER NOT PROVIDED FULL REPORT

Davis v. County of Fresno, et al.

Court of Appeal, Fifth Appellate District, Filed May 3, 2018.

By Robert Rabe, Esq. and Muna Busailah, Esq.

James Davis was a supervising juvenile correctional officer for the County of Fresno. He was terminated from his employment based on sustained findings of insubordination, discourteous treatment of a subordinate, wrongfully assuming supervisory duties over his wife, exaggerating hours worked, and other misconduct. The Civil Service Commission denied Davis' appeal of his termination. Davis filed a petition for a writ of administrative mandamus requesting the court to set aside the Commission's decision. The superior court denied the petition.

On appeal, Davis contended the County violated his constitutional due process rights by failing to provide him with a copy of all materials upon which the disciplinary action was based prior to this *Skelly* hearing. Davis also contended the County's failure to produce complete copies of reports and witness interviews conducted during the IA investigation

violated the Public Safety Procedural Bill of Rights Act. (POBRA).

Among the many allegations made against Davis was one relating to an internal complaint filed by a juvenile correctional officer. The officer complained that Davis was retaliating against him for a prior incident. The complaint was investigated and a 20 page memorandum (without attachments), addressing the complaint of retaliation (2012 Memo) was completed.

Davis was served with a Notice of Intent to terminate. The County also provided Davis with a packet of information containing the IA Report and the 2012 Memo, without attachments. Following a *Skelly* hearing, Davis was dismissed from his position with the County, and thereafter filed a timely request for an administrative appeal.

Prior to the administrative hearing, Davis requested that the Department disclose the materials related to the investigation of the

complaints made against him, including the “attachments” to the 2012 Memo. The County refused to provide those documents. After a hearing, the Civil Service Commission issued a notice of decision denying Davis’ administrative appeal and confirmed the Department’s termination.

Davis filed a petition for writ of mandate and a complaint for damages. Davis alleged the County’s failure to produce documents violated the procedural due process rights that apply before a *Skelly* hearing and, in addition, alleged the failure to produce the requested documents violated §3303(g), which states a peace officer is entitled to “any reports and complaints.” The superior court filed an order denying the petition for writ of mandate and issued a statement of decision. The trial court stated Davis’ *Skelly* rights had not been violated because *Skelly* does not require extensive pre-discipline disclosure. The court also concluded the terms “reports” and “complaints” in §3303, suggested a more formal presentation than raw or original source materials and, therefore, POBRA did not require disclosure of the attachments to the 2012 Memo.

In *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 (*Skelly*), the Court held that civil service employees have a property interest in their continued employment that is protected by the due process clause. The court concluded that, “[a]s a minimum, these preremoval safeguards must include ... a copy of the charges and materials upon which the action is based”

In *Gilbert v. City of Sunnyvale* 92005) 130 Cal.App.4th 1264 (*Gilbert*), the Court rejected the contention that the word “materials” as used in *Skelly* means each and every document identified in the internal affairs investigation report was required to be produced prior to the pretermination hearing in order to satisfy due process.

Based on *Gilbert*, the Court in this case concluded that “[t]o satisfy due process, the materials provided to an employee before a *Skelly* hearing must adequately provide an

explanation of the employer’s evidence and notice of the substance of the evidence, which explanation and notice must be sufficient to enable the employee to adequately respond at the *Skelly* hearing. The Court noted that Davis has the burden of demonstrating the superior court erred, and stated Davis had not established that he was unable to adequately respond at the *Skelly* hearing to the allegations being made against him. Consequently, the Court held the County did not violate Davis’ due process rights when it failed to provide him with copies of the attachments to the 2012 Memo prior to his *Skelly* hearing.

The Court then had to decide if the term “report” used in §3303(g) encompasses materials attached to an internal affairs investigation reports. The Court noted, that while the report contained summaries of the witness statements, the complete transcripts of the interviews were attached. By attaching these transcripts, the author was suggesting that they were useful for a full understanding of the matter. The Court commented that having the transcripts attached, helped to assure the integrity of the report because the officer would be able to check the source documents to determine if they are accurately described in the memorandum. The Court concluded that, under the circumstances presented in this case, the attachments were part of a report. Therefore, the County’s failure to produce the attachments violated POBRA.

The parties disputed the appropriate remedy. Davis argued that reinstatement with back-pay was the appropriate remedy, while the County argued that reinstatement would not be appropriate if the employer can show the same result would have occurred in the absence of the statutory violation.

The Court noted that POBRA grants superior courts broad discretion to fashion appropriate equitable remedies to redress violations and to deter future ones. The Court concluded that the trial court will have the relevant information necessary to exercise the

broad discretion granted by POBRA and be able to determine what injunctive or other extraordinary relief, if any, is appropriate to remedy the County's POBRA violation and deter future violations. The matter was returned to the trial court to determine the appropriate remedy.

This is another example of where effective representation at or near the start of the disciplinary process reaped later rewards - in this case, the Court of Appeal. Always consult with a knowledgeable attorney before responding to any report, letter, memo and/or questions concerning an investigation which could possibly lead to punitive action and demand production of all materials upon which the disciplinary action is based.

Stay Safe!

Muna Busailah has been a partner in the firm for 23 years and representing peace officers in police law and litigation cases, in administrative, state and federal venues for 25 years.

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