LEGAL DEFENSE TRUST

MICHAEL P. STONE, GENERAL COUNSEL

River Crest Drive, Suite A, Riverside, CA 92507
Phone (951) 653-0130 Fax (951) 656-0854

TRAINING BULLETIN

VOL XII ISSUE No. 2 February 2016

POBRA ALLOWS "REASONABLE" NOTICE OF THE NATURE OF THE INVESTIGATION PRIOR TO ANY INTERROGATION

***Ellins v. City of Sierra Madre,* filed January 28, 2016**
Court of Appeal, Second Appellate District, B2661968

By: Robert Rabe, Esq.

The Public Safety Officers' Procedural Bill of Rights Act (POBRA) "provides procedural guarantees to public safety officers under investigation" by their employers. (*City of Los Angeles v. Superior Court* (1997) 57 Cal.App.4th 1506, 1512.) Government Code §3303 sets forth an officer's rights when he/ she is "subjected to interrogation by his/her commanding officer or any other member of the employing public safety department that *could lead to* punitive action." (§3303.) These rights do not attach to questioning "in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor." The rights provided under *Government Code* § 3300 et seq, include the right to have any interrogation conducted at a "reasonable hour," for a "reasonable period," and in a nonoffensive manner; the right to know who will be conducting the interrogation and who will be present; the right to have a "representative of [the officer's] choice" present; and the right to record the interrogation or obtain any recording made by the interrogator. In *Ellins*, the Court of Appeal interpreted the right in § 3303, subdivision (c): "The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation."

The Court of Appeal had to answer the question: How *much* "prior to" any interrogation must the officer be given that information? The Court concluded that a public safety officer must be informed of the "nature of the investigation" **reasonably prior** to any interrogation. Notice is "reasonably prior to" an interrogation if it grants the officer sufficient time to meaningfully consult with any "representative" he or she elects to have present during the interview. The Court also noted the employing department may postpone disclosure until the scheduled time of the interview—and briefly postpone the commencement of the interview to allow time for consultation—if it has reason to believe that earlier disclosure would

jeopardize the safety of any interested parties or the integrity of evidence under the officer's control.

The officer, John Ellins (Ellins) made 12 inquiries of the CLETS database. The subject of the inquiries was Ellins' ex-girlfriend and members of her family. Ellins had no official reason to make those inquiries. The Department opened an investigation into Ellins' use of the CLETS database after receiving a letter from the ex-girlfriend, who reported that Ellins told her he had tracked her down in New York with information from the database.

The Department formally notified Ellins that "[a]n administrative investigation is currently being conducted regarding an alleged abuse of your peace officer powers and duties." The notice provided no further details on the nature of that alleged abuse. Ellins retained an attorney as his representative.

Just minutes before the interview was to begin, the investigator notified Ellins—orally and in writing—that he was alleged "in May 2010 [to have] inappropriately accessed the [CLETS database] and made numerous inquiries regarding [his] former girlfriend . . . and her relatives." The investigator then gave Ellins and his representative an hour to discuss the charges in private before commencing the interview; this was the amount of time Ellins' representative had requested. However, after 25 minutes, Ellins told the investigator he refused to participate in the interview on the advice of his representative. Ellins' commanding officer appeared and directly ordered Ellins to sit for the interview; Ellins still refused. The Department terminated Ellins. Ellins appealed his termination to a hearing officer, who affirmed the penalty of dismissal.

Ellins petitioned the Los Angeles County Superior Court for a writ of mandate to overturn his dismissal. In addition to arguing the insufficiency of the evidence and raising constitutional challenges, Ellins challenged the timing of the Department's notice of the nature of the investigation under section 3303, subdivision (c). The trial court upheld the termination and Ellins appealed.

The Court of Appeal held that the Department provided Ellins with notice of the nature of the investigation "reasonably prior to" his interrogation. The letter the Department received from Ellins' former girlfriend indicating Ellins' efforts to track her down without her consent provided good cause to postpone disclosure of the nature of the investigation until the commencement of the interrogation to avoid any possibility of retaliation against her. Moreover, once the investigator disclosed the nature of the investigation, he granted Ellins and his representative the time they had requested to confer. The Court of Appeal concluded the time Ellins had was sufficient to allow for meaningful consultation as to the allegation being made against him, i.e., did he have any official reason to be running searches in the CLETS database on his ex-girlfriend and her family? In light of this conclusion, the court affirmed the judgment of the trial court and Ellins' termination.

Ellins was terminated for accessing CLETS and his insubordination - because he did not sit for his interview after being ordered to do so. When an officer is informed of the nature of the investigation **just prior to** an interrogation, he or she should demand and take all the time necessary to consult with a representative prior to starting the interview. What should not occur, as happened here, is for an officer to refuse to be interviewed due to late notice.

Stay Safe!

Robert Rabe is an associate attorney in the firm. He has been a member of the California Bar for almost 40 years, specializing in criminal law, appellate practice and police administrative matters.