



# LEGAL DEFENSE TRUST TRAINING BULLETIN

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## **Court of Appeal Rules Investigation Files Can Be Examined By Officer Even If No Discipline Is Imposed**

***By: Hank Hernandez, General Counsel Los Angeles Police Protective League***

*Editor's note: This article was originally published in the LAPPL's "Thin Blue Line" and is republished here with the author's permission. Hank Hernandez was one of the League's Associates General Counsel when RSA-LDT's General Counsel Michael Stone was the League's General Counsel in the 1980's. We acknowledge Hank's generous permission to reprint his article here.*

Recently the Third Appellate District of the California Court of Appeal in *Sacramento Police Officers Association et al. vs. Arturo Venegas Jr. et al.* ruled that the events that trigger an officer's right under the Public Safety Officers Bill of Rights Act (*Government Code* section 3300 et seq.), to read and respond to adverse comments in his/her personnel file, or any other file used for any personnel purposes by the employer, are not limited to formal disciplinary actions, such as a reprimand, admonishment or other specific findings of misconduct. Rather, the court ruled that an officer's rights are triggered by the entry of any **adverse comment** in a personnel file or any other file used for a personnel purpose.

In *Sacramento*, the factual background arose out of an allegation of neglect of duty against Sergeant Michael B. Kime ("Kime") while he was assigned to the Sacramento Police Department's Bomb Squad ("Department"). In late 1995, Kime's take-home vehicle was stolen from his possession. Hours later, it was recovered by the Department. Kime believes that his supervisor made a complaint charging him

with neglect of duty. In any event, an investigation by the Department's internal affairs section was commenced. Pending the investigation, Kime was removed from his position with the bomb squad.

Kime commenced litigation over his removal from the bomb squad. It was resolved when the Department conceded that Kime was entitled to administrative review and agreed to return him to his position with the bomb squad. Ultimately, no adverse action was taken as the result of the internal affairs investigation.

The case before the Court of Appeal began when Kime filed a petition for a writ of mandate pursuant to the Bill of Rights Act (*Gov. Code*, §3309.5), seeking access to, and an opportunity to review and rebut, any document in any file within the Department that contained comments adverse to his interests--specifically, any document relating to an allegation that Kime was neglectful in his duty with respect to the theft of his city-owned car.

In response to the petition, the Department asserted there were no records in Kime's personnel files concerning the stolen car incident, and said: "While Internal Affairs may have records relating to alleged misconduct, such allegations did not result in discipline nor are the Internal Affairs records a personnel record."

A representative of the Department declared that an examination of Kime's personnel file kept in the personnel section, of pertinent watch level files, and of informal disciplinary records kept in the office

of the chief of police revealed no entries or records, adverse or otherwise, with respect to the stolen car incident addressed in Kime's petition. However, the Department conceded that its internal affairs section had an index card that referred to the investigation of the theft of Kime's city-owned car.

The trial court denied the petition for a writ of mandate. The court reasoned that Kime had failed to establish a right to disclosure under the Bill of Rights Act because (1) he had not established that any adverse personnel action was taken against him, and (2) the Department had shown that internal affairs index cards were not used for evaluations, assignments, status changes, or to impose discipline.

The Court of Appeal reversed and remanded the case back to the Superior Court based on the following rationale.

The court recognized that the particular provisions of the Bill of Rights Act that apply to the case were sections 3305 and 3306 of the Government Code.

Section 3305 provides: "No public safety officer shall have any comment adverse to his interest entered in his personnel file, or any other file used for any personnel purposes by his employer, without the public safety officer having first read and signed the instrument containing the adverse comment indicating he is aware of such comment, except that such entry may be made if after reading such instrument the public safety officer refuses to sign it. Should a public safety officer refuse to sign, that fact shall be noted on that document, and signed or initialed by such officer."

Section 3306 provides: "A public safety officer shall have 30 days within which to file a written response to any adverse comment entered in his personnel file. Such written response shall be attached to, and shall accompany, the adverse comment."

In construing these statutory provisions, the court was guided by the recent decision of the California Supreme Court in *County of Riverside vs. Superior Court (Madrigal)* (2002) 27 Cal.4th 793 (hereafter *County of Riverside*), published after the trial court ruled in this matter. League panel attorney Michael P. Stone (RSA - Legal Defense Trust General Counsel) successfully represented Deputy Madrigal in

the *Riverside* case before the Supreme Court of California.

January  
2003

Quoting with approval the decision in *Aguilar v. Johnson* (1988) 202 Cal.App.3d 241, the Supreme Court concluded that the language in the Bill of Rights Act should be construed broadly to include any document that " " may serve as a basis for affecting the status of [a peace officer's] employment, " " regardless of whether it is kept separate from the officer's general personnel file. Accordingly, the Supreme Court "reject[ed] the assertion that a law enforcement agency's background investigation of a peace officer during probationary employment is somehow not a personnel matter subject to the Bill of Rights Act." "The label placed on the investigation file is irrelevant. The materials in the file unquestionably "may serve as a basis for affecting the status of the employee's employment, " " ; indeed, that is the very purpose of the background investigation." The Supreme Court went on to say its conclusion that the Bill of Rights Act applies was "valid even where the background investigation concerns a matter that occurred prior to the commencement of employment." Moreover, where "the adverse comments arise out of an investigation, the very purpose of which was to assess the employee's qualifications for continued employment . . . the Bill of Rights Act applies, whether or not the comments are prepared and filed prior to termination."

Consistent with the decision in *County of Riverside*, the court in *Sacramento* gave appropriate consideration to the fact that the Legislature utilized broad language in enacting sections 3305 and 3306 and held that the events that will trigger an officer's rights under those statutes are not limited to formal disciplinary actions, such as the issuance of letters of reproof or admonishment or specific findings of misconduct. Rather, an officer's rights are triggered by the entry of any adverse comment in a personnel file or any other file used for a personnel purpose.

The court in *Aguilar* previously addressed the meaning of an adverse comment for the purposes of sections 3305 and 3306 of the Bill of Rights Act. It noted; "Webster defines comment as 'an observation or remark expressing an opinion or attitude. . . 'Adverse' is defined as 'In opposition to one's

interest. DETRIMENTAL, UNFAVORABLE.”

Thus, for example, under the ordinary meaning of the statutory language, a citizen’s complaint of brutality is an adverse comment even though it was “uninvestigated” and the chief of police asserted that it would not be considered when personnel decisions are made.

The *Sacramento* court found the reasoning in *Aguilar* to be persuasive, as did the Supreme Court in *County of Riverside*. The court stated that in its usual and ordinary import, the broad language employed by the Legislature in sections 3305 and 3306 does not limit their reach to comments that have resulted in, or will result in punitive action against an officer. The Legislature appears to have been concerned with the potential unfairness that may result from an adverse comment that is not accompanied by punitive action and, thus, will escape the procedural protections available during administrative review of a punitive action. As the court explained, even though an adverse comment does not directly result in punitive action, it has the potential of creating an adverse impression that could influence future personnel decisions concerning an officer, including decisions that do not constitute discipline or punitive action. The legislative remedy was to ensure that an officer is made aware of adverse comments and is given an opportunity to file a written response, should he or she choose to do so.

Accordingly, the *Sacramento* court rejected the Department’s claim that Kime had no right to review any adverse comment about the stolen police car incident because the information did not result in any adverse personnel action. To the contrary, the court concluded that, regardless of whether the employing agency contemplates or has rejected further action regarding an adverse comment made against a peace officer employee, the officer is entitled to disclosure of the comment if it is entered in an agency file used for a personnel purpose. This conclusion is consistent with the reasoning of *County of Riverside*, which implies that an adverse comment contained in a background investigation file is subject to disclosure even if the officer does not suffer some sort of adverse consequence, as long as it has that potential. The Bill of Rights Act applies to any

comment that may serve as a basis for adversely affecting the status of the peace officer’s employment.

**January  
2003**

The *Sacramento* case is of special significance to all LAPD officers. It reinforces your rights under the Bill of Rights Act. The courts now have another appellate decision that clearly supports the right of officers to discover and respond the adverse comments in files used for personnel matters.

*We at RSA-LDT thank Hank Hernandez for the use of his article and analysis of this important case.*

**STAY SAFE!**

**Michael P. Stone**