Stone Busailah, LLP
A Partnership of Professional Law Corporations

1055 East Colorado Blvd., Suite 320, Pasadena, California 91106 Tel (626) 683-5600 Fax (626) 683-5656

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TRAINING BULLETIN

DISCOVERY ORDERS IN OFFICER'S APPEAL HEARING ARE *"NOT APPEALABLE"* BY CITY EMPLOYER

C.A.4th OPINION HELPS TO "LEVEL PLAYING FIELD" FOR COPS

By Michael P. Stone, Esq. and

Muna Busailah, Esq.

In *Riverside County Sheriff's Department v. Stiglitz (Drinkwater, Real Party In Interest),* 60 Cal.4th 624 (2014), the California Supreme Court broke new ground in the law by holding in a *case of first impression*, that hearing officers in administrative appeals can hear and decide *Pitchess* motions brought by an officer-appellant to discover disciplinary records relating to other officers in order to demonstrate that he or she suffered an overly-severe, disparate, discriminatory or retaliatory penalty for the same or similar misconduct.

Every peace officer in this State is granted an important procedural due process right by law in *Government Code §3304(b)* of "POBRA".[1] This right is to have a timely, fair and effective administrative appeal for any of the forms of "punitive action". A viable defense in some cases recognized in the *Drinkwater* case by our Supreme Court, is that of "disparate penalty".[2] The authors of this

[1] "POBRA" refers to the Public Safety Officers Procedural Bill of Rights Act, *Government Code* §§3300-3312

[2] We do not mean to instruct that every penalty for the same conduct must be the same. After all, there are an infinite number of aggravating and mitigating facts that can affect the penalty. We're not concerned here with minor or insignificant differences in penalties; rather, we are focused on penalties meted out that essentially, don't pass the "sniff test". That is, reasonable minds could not abide

article were privileged to argue the *Drinkwater* cases in the Court of Appeal, Fourth Appellate District, and before the Supreme Court, supported by numerous associations appearing as *Amicus Curiae,* including LDF.

Drinkwater, the seminal case in this context, commenced with the discharge of Riverside County Deputy Kristy Drinkwater for alleged "time-card irregularities" that the Department characterized as theft of public funds. We became aware of more than 10 similar "time card irregularity" cases where none of the "guilty" employees were fired. There were no aggravating factors in Drinkwater's case, except she was not liked by her supervisors.

Muna Busailah's motion for discovery of the records of the 10-plus cases was granted, and the County dragged the administrative appeal into superior court and obtained a stay on the appeal which ultimately prevented Drinkwater from proceeding with her appeal for over five (5) years while County lawyers challenged Drinkwater's rights at every turn, and all the way through the Supreme Court proceedings. Apropos is the maxim, "Justice delayed is justice denied."

Finally, the Supreme Court unanimously held that Drinkwater's motion was properly filed, presented and heard; and correctly adjudicated by Hearing Officer Jan Stiglitz, a distinguished appellate lawyer and San Diego law professor.

But as the law stood post-*Drinkwater*, employers could still stall a case for years in the trial and appellate courts with a near-endless stream of appeals and writ petitions once a hearing officer granted even a well-founded *Pitchess* motion for information from other employees' personnel records.[3]

This situation turned the *Drinkwater* victory into something of a hollow grant because *winning the motion* is only the beginning, followed by perhaps years of expensive legal wrangling in the courts, while one's appeal for reinstatement is effectively side-tracked and remains suspended for months and maybe years, while the employer's counsel succeeds in getting judges to *stay* by judicial order, prosecution of the appeal until this issue is decided by a higher court. *Stall* is the name of the game. Meanwhile, our fired deputy or officer is without income, likely not eligible for unemployment insurance benefits because the employer will oppose the application, contending the that officer/deputy was fired for "wilful misconduct", which is a disqualifier under the *Unemployment Insurance Code §1256*. Litigation of this "side issue" in a separate and independent proceeding adds another layer of delay and uncertainty to an intolerable period where the employee has lost all control over his/her income and finances.

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the penalty in question, when considering defense evidence of the penalties in similar cases. I have had good success with this defense over the years.

[3] *See: Pitchess v. Superior Court* (1974) 11 Cal.53

Family and marital discord usually follow with the added stress and strain – a perfect storm, tearing away at the seams of family stability.

We needed a case to come up to a Court of Appeal, where an employer would invoke the same procedures as happened in *Drinkwater* to attempt to delay the case for years, while the employer "exhausted its remedies" before complying with a hearing officer's order to produce so-called *"Pitchess* records" and materials. It all *sounds* correct; but the *effect* on our officers is devastating to a young police family.[4]

That case has come along. It is *City of Carlsbad v. Scholtz (Real Party In Interest, Seapker)*, July 8, 2016, C.A.4th No. D070253, where Michael Williamson of our firm represented a fired Carlsbad officer in an appeal for reinstatement. Williamson developed evidence of disparate penalty, sufficient to place an ethical duty on him as defense counsel to pursue this possibly meritorious defense. In a motion, Williamson sought to access via the *in camera* procedures under *§915 Evidence Code,* official records relating to *discipline* or *no discipline* of identified officers for similar alleged misconduct. Hearing Officer Scholtz ("Scholtz") granted the motion.

A sergeant testified in the Department's case. On cross-examination Scholtz directed the sergeant to respond to a question about whether an officer had been reprimanded for an incident in which he and the appellant were both involved and for which the appellant received a written reprimand in November 2012. The City based its decision to discharge the appellant in part on this reprimand. The City objected to the questioning. Scholtz overruled the City's objection and ordered the sergeant to answer. A lieutenant attending the hearing countermanded Scholtz and directed the sergeant not to answer the question. The sergeant declined to answer the question. Williamson moved to exclude all testimony and evidence related to the reprimand. Scholtz granted the motion, struck all testimony and evidence related to the reprimand from the record, and prohibited the City from presenting any further testimony and evidence related to the reprimand.

The City filed a petition with the Superior Court seeking a writ of mandate to reverse these evidentiary rulings of the hearing officer. The Superior Court denied the writ petition "on the merits", but without prejudice, primarily on the ground the City had an adequate legal remedy via a petition for writ of administrative mandate at the conclusion of the administrative appeal. The Superior Court considered the matter to be an evidentiary issue and questioned whether the City was entitled to bring a petition for writ of mandate every time the hearing officer made an unfavorable

[4] "*I worry more about what the administration of the LAPD will do to my husband than what the gangsters on the street in 77th might do to harm him*". Spoken by a police-client's spouse to me years ago, as we rode in an elevator up to his disciplinary hearing.

evidentiary ruling. The City appealed the judgment of the Superior Court and filed a motion requesting the Court of Appeal to stay the hearing officer from conducting proceedings until the appeal was decided. Williamson opposed the motion, asserting, among other points, the judgment is not appealable because it was interlocutory, i.e., there remain issues between the parties to be adjudicated, specifically the administrative appeal. Williamson argued that proceeding with the City's appeal would needlessly delay matters (which had been delayed by the City enough already).

The Court of Appeal agreed, stating the judgment is not final because the administrative appeal remains pending and its adjudication is essential to a final determination of the parties' rights (i.e., whether the City properly discharged the appellant). Accordingly, the Court of Appeal dismissed the City's appeal.

This case illustrates how employers will seek to gain advantage by delay, financially strangling discharged appellants, who might be persuaded to forego their appeals for a lump sum cash out payment to "go away". *Drinkwater* established important due process rights for aggrieved officers. This case closes the circle by prohibiting employers from engaging in seemingly endless appeals and frivolous motions and writs, interposed solely for delay, knowing that at some point, even the most resolved appellant can be weakened by unconscionable delays, to "throw it in" for a paltry lump sum of cash.

The Court of Appeal on its own motion ordered this opinion certified for publication to clarify what had become uncertainty, post-*Drinkwater*.

Stay Safe!

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.

Muna Busailah is the firm's managing partner. She has represented peace officers in police law and litigation cases, in administrative, state and federal venues since 1993.