The Biggest Pitfalls under POBR and FBOR

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Experience
Jay Trinnaman is a partner in the Cerritos office. He specializes in the representation of both public and private sector employers in all aspects of labor relations and employment law matters, including disciplinary and grievance arbitrations, unfair labor practice charges before the Public Employment Relations Board ("PERB"), defense of EEOC/DFEH charges, negotiations in collective bargaining, writ of mandate matters, and advice and counsel.

Prior to joining AALRR, Mr. Trinnaman had over five years of experience representing employees in the field of law enforcement and public safety, including serving as in-house counsel for a labor organization, the California Organization of Police and Sheriffs. With his experience representing both management and unions, Mr. Trinnaman brings a unique perspective when working with employers to resolve their labor disputes.

In addition to representing California employers, Mr. Trinnaman is licensed to practice law in the State of Nevada, where he has successfully represented clients in their business litigation disputes.

Education
Tulane University Law School, New Orleans, LA (Juris Doctor)
Vanderbilt University, Nashville, TN (Bachelor of Arts)

Memberships
Orange County Labor and Employment Relations Association
California Public Employers Labor Relations Association

Community Involvement
California Police Chiefs Association
California State Sheriffs’ Association
Alfonso Estrada works with public and private sector clients on various matters, including employee discipline and claims alleging discrimination, harassment, retaliation, First Amendment violations, and breach of privacy. When those issues escalate into litigation, Mr. Estrada handles all stages of the litigation process through trial if necessary.

Mr. Estrada also conducts administrative investigations pertaining to employee misconduct and harassment, among other areas of inquiry. He has conducted internal investigations for the City of Beverly Hills Police and Fire Departments, City of Anaheim, City of Alhambra Police Department, City of Colton, City of Loma Linda Fire Department, and City of Fresno Fire Department.

Mr. Estrada began his legal career as a Deputy District Attorney for the Los Angeles County District Attorney’s Office, where he gained significant trial experience engaging in all aspects of trial, from voir dire through sentencing. Prior to joining AALRR, Mr. Estrada worked extensively with law enforcement unions, representing their members in administrative matters ranging from administrative investigations to discharge hearings, while gaining significant expertise with the Public Safety Officers Procedural Bill of Rights Act. Due to Mr. Estrada’s unique legal background, he has spent much of his legal career working with law enforcement as a criminal prosecutor; while representing law enforcement unions; and currently representing law enforcement agencies and executives throughout California.

Mr. Estrada speaks fluent Spanish.

Education
Mr. Estrada received his law degree from UCLA School of Law, where he was an Articles Editor for three years for the Chicano/a - Latino/a Law Review and a member of the Moot Court Honors Program. He also served as a Judicial Extern for the Honorable R. Gary Klausner, United States District Court for the Central District Court of California. Mr. Estrada received his bachelor’s degree in legal studies, with an emphasis in race and law, from the University of California at Berkeley.

Community Involvement
Mexican American Bar Association
MABA Free Legal Clinic, MABA Judicial Endorsement Committee Member
California Police Chiefs Association
California State Sheriffs’ Association
The Five Biggest Pitfalls under POBR and FBOR

Today's Agenda

• Background of POBR and FBOR
  * Biggest Pitfalls
    1. When Interrogation Rights are Triggered
    2. Right to Information during the Disciplinary Process
    3. Right to a Representative
    4. Key Distinctions between POBR and FBOR
    5. Right to Access Files

What is the POBR?

Public Safety Officers Procedural Bill of Rights Act

• Government Code §§ 3300 et seq.
• Enacted in 1977
• “... effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers…”
  - Gov't Code § 3301
What is the FBOR?

**Firefighters Procedural Bill of Rights Act**

- Government Code §§ 3250 et seq.
- Effective January 1, 2008
- Enacted to provide same basic protections afforded to other first responders in State of California
- Look to 35+ years of POBR case law for interpretation

What Areas Are Covered By POBR & FBOR?

1. Interrogation Rights
2. Punitive Action
3. Administrative Appeals
4. Personnel Files
5. Privacy Rights
6. Enforcement

Pitfall #1

When are Interrogation Rights Triggered?
Interrogation Rights - POBR

Government Code § 3303

“When any public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action, the interrogation shall be conducted under the following conditions. For 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.”

Interrogation Rights - FBOR

Government Code § 3253

“When any firefighter is under investigation and subjected to interrogation by his or her commanding officer, or any other member designated by the employing department or licensing or certifying agency, that could lead to punitive action, the interrogation shall be conducted under the following conditions:”

Interrogation Notice

• Notice required
  – Name, rank and command of person in charge
  – Name of interrogating officers
    • No more than two
  – All other persons to be present at the interrogation
    – “Nature of the investigation”
When May an Interrogation be Conducted?

- Reasonable time
- Generally on duty or normal waking hours
  - Compensation requirement for off-duty interrogation

Conditions of the Interrogation

- All questions asked by no more than two (2) interrogators
- Reasonable length
- Reasonable breaks
- No offensive language
- No threat of punitive action
- Except for failure to answer questions
- No promise of reward

Documentation of the Interrogation

- All parties may tape record the interrogation
- Access to Department’s recordings
  - Prior to subsequent interrogation
  - Prior to “further proceedings”
Right to Representation at Interrogation

- **Subject** of investigation is entitled to representation of choice during an interrogation
  - Analysis: could statements lead to **punitive action**?
  - No obligation to affirmatively offer a representative

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Key Exception under POBR

**Government Code § 3303(i):**

- “This section shall not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer, nor shall this section apply to an investigation concerned solely and directly with alleged criminal activities.”

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Key Exception under FBOR

**Government Code § 3253(i):**

- “This section shall not be construed to apply to counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other firefighter.”
Analysis of When Rights are Triggered

Is it an “interrogation”?

OR

Is it counseling, instruction, or information verbal admonishment or other routine or or unplanned contact?

Case Studies

• Interrogation or Permissible Contact?
  • POBR cases
  • Applicable to FBOR

Case Study No. 1

• Steinert v. City of Covina
Case Study No. 2

• Hinrichs v. County of Orange

Case Study No. 3

• City of Los Angeles v. Superior Court (Labio)
  (1997) 57 Cal.App.4th 1506

Case Study No. 4

• Paterson v. City of Los Angeles
Pitfall #2
The Right to Information during the Disciplinary Process

Employee Demands for Information

• Typically get discovery requests at each step of Discipline Process for Public Safety Personnel
  Discipline Process =
  – Administrative Investigation Interview
  – Pre-Skelly Hearing
  – Post-Skelly Hearing
The Five Biggest Pitfalls under POBR and FBOR:

Right to Information Pre-Administrative Interview

- POBR (Government Code section 3303(g)) often cited by union counsel for right to pre-interrogation discovery
  - Provides in pertinent part:
    - "The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential."
  - FBOR corollary = Gov. Code section 3253(g)

- FBOR/POBR do not require investigator’s reports to be turned over to subject in advance of administrative interview/interrogation
- No right to pre-administrative interview discovery
  - Pasadena POA v. City of Pasadena (1990 CA SC) 51 Cal.3d 564
    - "Thus, when allegations of officer misconduct are raised, it is essential that the department conduct a prompt, thorough, and fair investigation. Nothing can more swiftly destroy the community’s confidence in its police force than its perception that concerns raised about an officer’s honesty or integrity will go unheeded or will lead only to a superficial investigation."
    - “… granting discovery before interrogation could frustrate the effectiveness of any investigation, whether criminal or administrative."

Right to Information Pre-Skelly

- Right to Pre-Skelly information is limited
- Union counsel often issue letters with extensive information demands
- Two cases on point:
  - Skelly v. State Personnel Board (CA SC 1975) 15 Cal.3d 194
Right to Information Pre-Skelly

- What sorts of discovery are PD/FD personnel entitled to before a Skelly Meeting/Hearing?
  - Per Skelly case, this includes, “notice of the proposed action, the reasons therefor, a copy of the charges and the materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.”
  - Gilbert court, “We reject Appellant’s contention that the word ‘materials’ as used in Skelly means each and every document identified in the Chief’s case was required to be produced prior to his pretermination hearing in order to satisfy due process.”

Right to Information Post-Skelly Pre-Administrative Hearing

- Discovery construed more broadly
- Typically outlined in MOU, City/County Personnel Rules and Regulations, or Civil Service Rules
- If there is a discovery dispute, will be decided by hearing officer, arbitrator, civil service commission

Pitfall #3

The Right to a Representative
Difficulty Scheduling Administrative Interviews?

POBR/FBOR Right to A Representative

POB Roy. Code section 3303(i) –

“Upon the filing of formal written statement of charges, or whenever an interrogation focuses on matters that are likely to result in punitive action against any public safety officer, that officer, at his or her request, shall have the right to be represented by a representative of his or her choice who may be present at all times during the interrogation.”

= FBOR = Gov. Code section 3253(i)

PD/FD Right to a Representative is Limited

PD/FD Employee must affirmatively invoke right to representation

Similar to Miranda rights, invocation of right to counsel


Union Counsel – Lackie & Dammmeier

Given notice of initial interview on 2/20/01 for 2/22/01 @ 9:00 a.m.

Agreed to continue to 2/27/01 @ 3:00 p.m.

Received call from union counsel at 1:00 p.m. on 2/27/01 that would not be able to attend. Interrogation proceeded as scheduled.

Union petitioned for and received permanent injunction
Right to Representative Limited

- Court of Appeal overturns trial court’s decision finding:
  - “More specifically, we fully support the officer’s right to be represented by a person of his or her choice during an interrogation. We only hold that such a right is not unlimited. The officer must choose a representative who is reasonably available to represent the officer, and who is physically able to represent the officer at the reasonably scheduled interrogation. But it is the officer’s responsibility to secure the attendance of his or her chosen representative at the interrogation.”
  - “We are confident that the Legislature did not intend to allow the officer to so easily escape all interrogations. As noted above, our Supreme Court has emphasized the need for prompt investigations of allegations of officer misconduct.”
  - Upland, supra, 111 Cal.App.4th 1294, 1305-1306

Employee Demanding More Information in Investigation Notice

- Relevant Statutes:
  - POBR Gov. Code section 3303(c) -
    - The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation
  - FBOR = Gov. Code 3253(c)
The Five Biggest Pitfalls under POBR and FBOR:

Sufficiency of Interrogation Notice

*Ellins v. City of Sierra Madre* (2016) 244 Cal.App.4th 445
- Officer used CLETS database to search ex-girlfriend and members of her family
- 9/2010 Notice of IA stated only “[a]n administrative investigation is currently being conducted regarding an alleged abuse of your peace officer powers and duties.”
- At Interview on 10/13/10, given notice 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.”
- Given 1 hour to consult with representative, refused to participate, eventually terminated in February 2011

Sufficiency of Interrogation Notice

- On its facts, *Ellins* court found that the 1 hour advance notice received by the officer was sufficient notice to comply with Gov. Code section 3303(c)
  - Notice must be given “reasonably prior” to interrogation
  - Court noted legitimate considerations by department:
    - “...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.”

Best Practice re Interview Notices

- **DO** Provide:
  - Policy/rule/regulations possibly violated in notice through alleged misconduct
  - Dates of alleged misconduct
  - Ok to reveal more information immediately preceding interview
  - Names of interviewers, POBR/FBOR Statement of Rights found in Gov. Code section 3303.
- **DON’T** Provide:
  - Information that would jeopardize safety of interested parties
  - Information that would jeopardize the integrity of evidence under the subject’s control
  - Identifying information of citizen complainant
The Five Biggest Pitfalls under POBR and FBOR:

Pitfall #4

Key Distinctions between POBR and FBOR

1. Investigation of Misconduct with Criminal Implications
2. Scope of Appeal
3. Extent of Coverage

No. 1 - Investigation of Misconduct with Criminal Implications under POBR

- Lybarger admonishment:
  - Appears officer may be charged criminally based on misconduct
  - Officer refuses to answer questions on grounds that the answers could be self-incriminating
  - Statements can only be used for administrative purposes, not for criminal prosecution
  - Failure to answer questions following Lybarger admonishment can be grounds for insubordination

No. 1 - Investigation of Misconduct with Criminal Implications under FBOR

- Formal grant of immunity:
  - "The employer shall provide to, and obtain from, an employee a formal grant of immunity from criminal prosecution, in writing, before the employee may be compelled to respond to incriminating questions in an interrogation. Subject to that grant of immunity, a firefighter refusing to respond to questions or submit to interrogations shall be informed that the failure to answer questions directly related to the investigation or interrogation may result in punitive action."
  - Govt. Code section 3253(e)(1)

- Practical implications
No. 2 - Scope of Appeal
POBR vs. FBOR

• Right to administrative appeal of “punitive action”
  - Government Code sections 3304(b) and 3254(b)

  "Punitive action" is defined as:
  – dismissal
  – demotion
  – suspension
  – reduction in salary
  – written reprimand
  – transfer for purposes of punishment

  - Government Code sections 3303 and 3251(c)

• Appeal of punitive action under POBR:
  “An administrative appeal instituted by a public safety officer under this chapter shall be conducted in conformance with rules and procedures adopted by the local public agency.”
  - Government Code section 3304.5

• Appeal of punitive action under FBOR:
  • Appeal must be in accordance with Administrative Procedures Act
    or
  • MOU provides for binding arbitration of disciplinary appeals
    - Government Code section 3254.5
No. 3 - Extent of Coverage
POBR vs. FBOR

- Limitations on FBOR Coverage:
  "The rights and protections described in this chapter shall only apply to a firefighter during events and circumstances involving the performance of his or her official duties."
  - Government Code section 3262
- Contrast with POBR

Pitfall #5

The Right to Access Files

Union CounselDemanding Inspection of Supervisor’s Files?
The Five Biggest Pitfalls under POBR and FBOR: 9/19/2016

Inspection of Supervisor’s Files

  “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.”

- POBR Gov. Code section 3306.5(a) (FBOR Gov. Code section 3256.5(a))
  “Each employer shall, at reasonable times and at reasonable intervals, upon the request of a public safety officer, during usual business hours, with no loss of compensation to the officer, permit that officer to inspect personnel files that are used or have been used determine that officer’s qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.”

Access to Supervisor’s Files limited

- Poole v. Orange County Fire Authority (CA SC 2015) 61 Cal.4th 1378
  - Does FBOR give employees the right to review and respond to Supervisor’s daily log entries?
  - Log entries = notes memorializing a supervisor’s thoughts and observations re an employee which they use in their performance plans and evaluations
  - Employee’s requesting to review personnel file sometimes ask to review “other file(s)” or a “station file”
  - Here, the CA Supreme Court reversed the Appeal Court that ruled to allow review of Supervisor’s File
  - Factors considered:
    - Only single supervisor had access to daily log, did not permit others to review it
    - Supervisor shared any comments put into PE or PIP with Officer in compliance with section 3255
    - Supervisor did not have the authority to initiate adverse disciplinary action (e.g. demotion or discharge) against employee

- Holding:
  “A supervisor’s log that is used solely to help its creator remember past events does not fall within the scope of that definition. Even if a supervisor uses his or her notes to help draft performance evaluations and other documents that ultimately are placed in a personnel file, the notes themselves are not a file preserved by the employer for use in making decisions about the firefighter’s employment status.”

- Employees generally not entitled to review content of supervisor’s files/logs