
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: SB 1088 **Hearing Date:** April 26, 2022
Author: Bradford
Version: March 16, 2022
Urgency: No **Fiscal:** Yes
Consultant: AB

Subject: *Public employment: law enforcement labor relations*

HISTORY

Source: Author

Prior Legislation: AB 1298 (Santiago, 2017), not heard in Senate Public Safety
SB 388 (Lieu, 2013), vetoed
SB 313 (De Leon), Ch. 779, Stats. of 2013
AB 955 (De Leon), Ch. 494, Stats. of 2009

Support: California Public Defenders Association

Opposition: Arcadia Police Officer Association; Association for Los Angeles Deputy Sheriffs; Burbank Police Officers' Association; California Association of Highway Patrolmen; California Coalition of School Safety Professionals; California Statewide Law Enforcement Association; Claremont Police Officers Association; Corona Police Officers Association; Culver City Police Officers' Association; Deputy Sheriffs Association of San Diego County; Fullerton Police Officers' Association; Inglewood Police Officers Association; Los Angeles Police Protective League; Los Angeles School Police Officers Association; Newport Beach Police Association; Peace Officers Research Association of California; Placer County Deputy Sheriffs' Association; Pomona Police Officers Association; Riverside Police Officers Association; Riverside Sheriffs' Association; Santa Ana Police Officers Political Action Committee; Upland Police Officers Association

PURPOSE

The purpose of this bill is to prohibit the reversal or modification of public safety officer discipline decisions based on a procedural violation of the Public Safety Officers Procedural Bill of Rights (POBOR) when the violation has been deemed by an administrative hearing officer or arbitrator to be "without substantive effect," as defined.

Existing law establishes the Public Safety Officers Procedural Bill of Rights Act (POBOR). (Govt. Code §3300 et. seq.)

Existing law states that for purposes of the (POBOR), the term "public safety officer" means peace officers listed in specified sections of the Penal Code. (Gov. Code, § 3301.)

Existing law finds and declares that the rights and protections provided to peace officers under POBOR constitute a matter of statewide concern. (Gov. Code, § 3301.)

Existing law finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations between public safety employees and their employers. (Gov. Code, § 3301.)

Existing law states that in order to assure that stable relations are continued throughout the state, and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined, wherever situated within the State of California. (Gov. Code, § 3301.)

Existing law prescribes the conditions under which an interrogation shall be conducted when a public safety officer is under investigation and subjected to interrogation that could lead to punitive action, and defines "punitive action" as any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment. (Gov. Code, § 3303.)

Existing law specifies that no public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of the rights under the Public Safety Officers Procedural Bill of Rights, or the exercise of any rights under any existing administrative grievance procedure. (Gov. Code, § 3304(a).)

Existing law provides that no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period that may be required by his or her employing agency without providing the public safety officer with an opportunity for administrative appeal. (Gov. Code §3304(b).)

Existing law provides that no police chief may be removed by a public agency, or appointing authority, without providing the chief of police with a written notice and the reasons therefor and an opportunity for administrative appeal. Gov. Code §3304(c.).

Existing law provides that an administrative appeal instituted by a public safety officer shall be conducted in conformance with rules and procedures adopted by the local public agency. (Govt. Code §3304.5)

Existing law states that it is unlawful for any public safety department to deny or refuse to any public safety officer the rights and protections guaranteed to him or her under POBOR. (Govt. Code §3309.5(a).)

Existing law provides that the superior court shall have initial jurisdiction over any proceeding brought by any public safety officer against any public safety department for alleged violations of POBOR. (Govt. Code §3309.5(c).)

Existing law provides that, in any case where the superior court finds that a public safety department has violated POBOR, the court shall render appropriate injunctive or other extraordinary relief to remedy the violation and prevent future violations of a like or similar nature. (Govt. Code §3309.5(d)(1).)

This bill provides that a procedural violation of POBOR that an administrative hearing officer, board, or arbitrator, acting pursuant to their appropriate authority, deems to be without a substantive effect shall not be the basis for reversing or modifying discipline of a public safety officer.

This bill specifies that “without a substantive effect” includes, but is not limited to:

- Procedural errors, including the admission or exclusion of evidence, unless the error adversely affects the substantial rights of the public safety officer to an extent that constitutes fundamental unfairness
- Harmless errors, including technical errors, that are not so damaging and prejudicial as to change the outcome of an investigation or a decision.
- With consideration of the totality of the dispute, evidence of misconduct is significant enough to outweigh a claim that an error was substantial enough to justify a change in discipline.

COMMENTS

1. Need for This Bill

According to the author:

SB 1088 will amend the Public Safety Officers Procedural Bill of Rights Act to provide that a violation of the act shall not be the basis for reversing or modifying discipline if a procedural violation is deemed to be without a substantive effect. This harmless error rule, comparable to what is applied in judicial proceedings, would be determined by an administrative hearing officer or board, or by an arbitrator.

SB 1088 applies a common legal standard used in virtually all legal proceedings, both civil and criminal, to POBOR. At present, POBOR does not have statutory language beyond Section 3309.5 governing enforcement of the Act. That provision, which authorizes injunctive and other relief, leaves open the prospect of discipline action being reversed or modified for violations of POBOR that do not have a substantive effect on a determination of wrongdoing. SB 1088 corrects this omission in POBOR by adopting language consistent with what is used in the legal field, generally.

While POBOR should of course be followed as a legal statute, technical violations that do not materially impair the rights of officers often preclude agencies from addressing serious misconduct. Union rights will not be taken away by SB 1088. Even if a showing of prejudice is not made for procedural violations in the case of an individual employee, and, as a result, disciplinary action is sustained, nevertheless an arbitrator, hearing officer, or court may deem it appropriate to award an alternative remedy to either the affected individual or to a union.

2. Public Safety Officers Procedural Bill of Rights Act (POBOR)

POBOR provides peace officers with procedural protections relating to investigation and interrogations of peace officers, self-incrimination, privacy, polygraph exams, searches, personnel files, and administrative appeals. When the Legislature enacted POBOR in 1976 it

found and declared “that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern.” While the purpose of POBOR is to maintain stable employer-employee relations and thereby assure effective law enforcement, it also seeks to balance the competing interests of fair treatment to officers with the need for swift internal investigations to maintain public confidence in law enforcement agencies.¹ The protections provided by POBOR were articulated succinctly by the court in *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795:

[T]he Act: (1) secures to public safety officers the right to engage in political activity, when off duty and out of uniform, and to seek election to or serve as a member of the governing board of a school district; (2) prescribes certain protections which must be afforded officers during interrogations which could lead to punitive action; (3) gives the right to review and respond in writing to adverse comments entered in an officer’s personnel file; (4) provides that officers may not be compelled to submit to polygraph examinations; (5) prohibits searches of officers’ personal storage spaces or lockers except under specified circumstances; (6) gives officers the right to administrative appeal when any punitive action is taken against them, or they are denied promotion on grounds other than merit; and (7) protects officers against retaliation for the exercise of any right conferred by the Act.²

In *County of Riverside v. Superior Court (Madrigal)* (2002) 27 Cal.4th 793, the California Supreme Court summarized the purpose of the Act:

[POBOR] declares “that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers.” Among other things, the Act guarantees public safety officers the right to view any adverse comment placed in their personnel files and to file, within 30 days, a written response, which will be attached to the adverse comment. These provisions reflect the public’s interest in good relations between peace officers and their employers, including protecting peace officers from unfair attacks on their character. Peace officers, in particular, must confront the public in a way that may lead to unfair or wholly fabricated allegations of misconduct from disgruntled citizens. Law enforcement agencies must take these citizen complaints seriously but at the same time ensure fairness to their peace officer employees. The Bill of Rights Act therefore gives officers a chance to respond to allegations of wrongdoing. [*Id.* at 799, citations omitted.]

3. Police Disciplinary Actions: Administrative Hearings and Arbitration

In California, when a law enforcement officer is investigated by their agency for disciplinary matters, the officer has a right to confront the allegations via arbitration or at an administrative hearing. The availability of these venues generally depends on the provisions of a given collective bargaining agreement between a police officers union and a specific agency. In all cases, however, they involve a quasi-judicial proceeding before an administrative agency, panel, officer (such as an administrative law judge) or arbitrator. As in a standard criminal or civil trial, evidence is proffered and testimony is given. However, unlike traditional judicial proceedings, an administrative hearing or arbitration is often shorter and more informal in nature.

¹ *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564.

² *Binkley*, at fn. 5.

Additionally, evidentiary rules in administrative hearings are more relaxed than in judicial proceedings. POBOR governs many aspects of how the disciplinary investigation, the administrative hearing, and any resulting actions are handled.

Public frustration over the effectiveness of police discipline has grown in recent years as the media has drawn increasing attention to the issue of police misconduct, and particularly the use of deadly force by officers. Perceptions of inadequate police discipline have been fueled by media portrayals of high-profile police shootings where a civilian is killed yet little disciplinary or legal action is taken beyond termination of employment, as in the recent case of Breonna Taylor.³ According to a recent analysis published in the ABA Journal of Labor and Employment Law, “There is a growing sentiment that it is difficult or even impossible to fire a bad cop. Unfortunately, due to the media’s propensity for circulating sensational headlines, they rarely provide complete and accurate accounts of the details of police misconduct arbitration decisions. Most importantly, the media fail to capture what factors arbitrators actually consider when deciding whether to uphold police discipline.”⁴ The analysis examined 92 officer discharges, and of the 43 cases where the discharge was overturned by an arbitrator, nine of these decisions were based on failure to comply with proper procedure. However, in only two of those cases was the procedural error the *sole* basis for overturning the officer’s discharge.⁵ This bill is premised on the notion that harmless procedural violations should not be the basis for overturning officer disciplinary actions.

4. Harmless Error

In the United States legal system, the “harmless error” rule is a common procedural standard used in both criminal and civil cases. Cornell University’s Legal Information Institute provides an apt definition:

An error by a judge in the conduct of a trial that an appellate court finds was not damaging enough to the appealing party's right to a fair trial to justify reversing the judgment. Harmless errors include technical errors that have no bearing on the outcome of the trial, and an error that was corrected (such as mistakenly allowing testimony to be heard, but then ordering it stricken and admonishing the jury to ignore it). In general, the more overwhelming the evidence against the appealing party (appellant), the harder it will be to convince the appellate court that any errors were harmful. In such situations, courts rule that even in the absence of the errors, the appellant could not have won.⁶

Police discipline practitioners consulted by the Committee have indicated that minor procedural errors during the disciplinary process are not uncommon. These can include errors such as the improper admission or exclusion of relatively inconsequential evidence, failure to meet a filing

³ “Few Police Officers Who Cause Deaths Are Charged or Convicted.” *New York Times*. Published 24 September 2020, updated 30 November 2021. <https://www.nytimes.com/2020/09/24/us/police-killings-prosecution-charges.html>

⁴ Adams, Tyler. “Factors in Police Misconduct Arbitration Outcomes: What Does It Take to Fire a Bad Cop?” *ABA Journal of Labor and Employment Law*; Volume 32, Number 1, Fall 2016, pp. 133-156

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⁶ “Harmless Error.” Legal Information Institute (LII) at Cornell Law School. https://www.law.cornell.edu/wex/harmless_error ; for additional harmless error rules, see Rule 103 of the Federal Rules of Evidence, Rule 61 of the Federal Rules of Civil Procedure, and Rule 52(a) of the Federal Rules of Criminal Procedure.

deadline or statute of limitations as prescribed by POBOR, and other procedural missteps unique to specific collective bargaining agreements. This bill seeks to incorporate the harmless error rule into POBOR by precluding the reversal or modification of a disciplinary action based a procedural violation that an arbitrator or administrative hearing officer or board deems to be without substantive effect. The bill defines “without a substantive effect” to include, but not be limited to, the following:

- Procedural errors, including the admission or exclusion of evidence, unless the error adversely affects the substantial rights of the public safety officer to an extent that constitutes fundamental unfairness.
- Harmless errors, including technical errors, that are not so damaging and prejudicial as to change the outcome of an investigation or a decision.
- With consideration of the totality of the dispute, evidence of misconduct is significant enough to outweigh a claim that an error was substantial enough to justify a change in discipline.

Practically, this change in the law would give arbitrators and administrative review bodies a statutory foothold to conclude that a disciplinary decision should not be overturned on a mere technicality. In addition, if an administrative review body does overrule or modify an agency’s disciplinary decision based on a harmless procedural violation, it would give superior courts reviewing that judgement greater authority to reverse it. Indeed, the California Supreme Court has already applied the harmless error principle to POBOR in reversing lower court rulings. Those rulings found a violation of POBOR when an officer was not advised of a particular right under the Act, and ordered the officer’s reinstatement. In rejecting those rulings, the California Supreme Court concluded in *Williams v. City of Los Angeles* (1988) 47 Cal.3d 195:

Although we acknowledge the importance of the rights conferred by the act and the need to secure compliance with those provisions, we conclude that the trial court abused its discretion in compelling the officer's reinstatement, for in the circumstances of this case, the officer was not prejudiced by the failure to advise him properly and reinstatement is not an appropriate remedy for the wrong.”⁷

This bill clarifies that the court’s application of the harmless error rule in *Williams* is not applicable merely to the facts of that case, but to all police discipline cases in the state that fall under POBOR.

5. Argument in Support

According to the California Public Defenders Association:

“Although California is widely believed to be one of the most progressive states in the country, the Public Safety Officers Procedural Bill of Rights Act (POBRA or POBOR), commonly known as the “police officers bill of rights” (Gov. Code section 3300 et seq.) provides California law enforcement officers facing discipline or criminal accusations with an extensive list of special loopholes and escape hatches that no other public employee or everyday citizen enjoys. These are not technically “rights,” but rather ways in which law enforcement officers who commit misconduct remain insulated from accountability, even when they commit violent acts against the communities they are supposed to protect and serve.

⁷ *Williams v. City of Los Angeles* (1988) 47 Cal.3d 195, 198.

POBRA protections insulate law enforcement members because criminal prosecutions of law enforcement are so rare. Many of the only critical investigations that ever happen into police misconduct allegations are generally the internal ones done by the offending agency or by independent civilian oversight agencies. One of POBRA's many loopholes is California's extremely tight window of one year, during which an investigation into police misconduct allegations must be completed regardless of the seriousness of the allegation. The clock starts ticking the moment an agency discovers an officer's act, omission, or other allegation of misconduct, *or* once a criminal investigation or prosecution of that officer begins. If an offending agency or independent civilian oversight agency fails to complete the investigation into police misconduct ranging from lying under oath to killing an unarmed individual or sexual assault within one year, the officer may not be punished or denied a promotion based on the misconduct. This mandatory one-year deadline provides those who have a stake in hiding police misconduct a convenient way to bury it rather than discipline the officers. SB 1088 is a *smart* and *narrow* legislative fix to close the loopholes related to the one-year time limitation."

6. Argument in Opposition

The Peace Officers Research Association of California (PORAC) writes that:

SB 1088 is unnecessary. The California Supreme Court has already "prohibit[ed] a procedural violation of the act deemed to be without substantive effect, as specified, from being the basis for reversing or modifying discipline of a public safety officer[,]" which is the stated purpose for SB 1088. The California Supreme Court has instructed lower courts that the remedy for POBRA violations must be appropriate under the circumstances and has used "but for" type tests that weigh the POBRA violation against the prejudice to the officer [...] While the remedy for a POBRA violation must be reasonable under the circumstances, the Supreme Court was also mindful of the need to protect POBRA rights [...]

SB 1088 would, among other things, prevent courts from remedying POBRA violations whenever "evidence of misconduct is significant enough to outweigh a claim that an error was substantial enough to justify a change in discipline." The legislation would create a perverse "ends justify the means" incentive for investigators and employing agencies to deprive public safety officers of their POBRA rights in cases where the allegations are perceived as serious enough to do so. This is akin to saying the Fourth Amendment should be disregarded whenever the government believes a suspect committed a serious crime. POBRA violations could be ignored throughout a disciplinary investigation and administrative appeal process, and the courts would be severely restricted in their ability to remedy such statutory violations when reviewing cases by way of administrative mandate. This would effectively deprive public safety officers of the majority of rights and protections afforded by POBRA.