
THIRD READING

Bill No: SB 1088
Author: Bradford (D)
Amended: 3/16/22
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE: 4-0, 4/26/22
AYES: Bradford, Kamlager, Skinner, Wiener
NO VOTE RECORDED: Ochoa Bogh

SENATE APPROPRIATIONS COMMITTEE: Senate Rule 28.8

SUBJECT: Public employment: law enforcement labor relations

SOURCE: Author

DIGEST: This bill prohibits 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.

ANALYSIS:

Existing law:

- 1) Establishes the Public Safety Officers Procedural Bill of Rights Act (POBOR). (Gov. Code §3300 et. seq.)
- 2) States that for purposes of POBOR, the term "public safety officer" means peace officers listed in specified sections of the Penal Code. (Gov. Code § 3301.)
- 3) Finds and declares that the rights and protections provided to peace officers under POBOR constitute a matter of statewide concern. (Gov. Code § 3301.)
- 4) 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.)

- 5) 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.)
- 6) 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.)
- 7) 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 POBOR, or the exercise of any rights under any existing administrative grievance procedure. (Gov. Code § 3304(a).)
- 8) 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).)
- 9) 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).)
- 10) 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. (Gov. Code §3304.5)
- 11) 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. (Gov. Code §3309.5(a).)
- 12) 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. (Gov. Code §3309.5(c).)
- 13) 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:

- 1) 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.
- 2) Specifies that “without a substantive effect” includes, but is not limited to:
 - a) 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
 - b) Harmless errors, including technical errors, that are not so damaging and prejudicial as to change the outcome of an investigation or a decision.
 - c) 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

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.”

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.

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. 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. 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.” 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. This bill is premised on the notion that harmless procedural violations should not be the basis for overturning officer disciplinary actions.

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.”

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 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. This 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 a more solid legal basis upon which to reverse it.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

SUPPORT: (Verified 5/10/22)

California Public Defenders Association

OPPOSITION: (Verified 5/10/22)

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 Correctional Peace Officers Association
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

Prepared by: Alex Barnett / PUB. S. /
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