Court of Appeal Clarifies Statute of Limitations in Police Discipline Matters, Clearing Way for Disciplinary Proceedings in Racist Texting Case

Originally published in The Authority, CJPIA Newsletter, Issue 80

On June 22, 2017, the California Court of Appeal published a decision in *Rain Daugherty v. City and County of San Francisco*, denying nine officers' claim that the disciplinary notices that were issued against them were untimely and in violation of the Public Safety Officers Procedural Bill of Rights Act (POBRA).[1] The Court of Appeal emphasized that the statute of limitations does not begin to run until the alleged misconduct is discovered by a person authorized to initiate an investigation. It also held that the statute of limitations is tolled during a criminal investigation.

I. Background & Trial Court Order

In 2011, a public defender accused San Francisco Police Department (SFPD) officers of conducting illegal searches, stealing property, and falsifying police reports. This led the United States Attorney's Office (USAO) to initiate a criminal corruption investigation. Select members of the criminal unit of SFPD's Internal Affairs Division (IAD-Crim) assisted the USAO. During the investigation, search warrants of the cellphone records of former SFPD Sergeant Ian Furminger—the central figure in the corruption scheme—led to the discovery in December 2012 of racist, sexist, homophobic, and anti-Semitic text messages between Furminger and nine SFPD officers. All evidence discovered during the course of the investigation was the property of the USAO and protected under a federal nondisclosure agreement as strictly confidential.

Former Sergeant Furminger was convicted of criminal corruption. Three days after the verdict, on December 8, 2014, the text messages between Furminger and the nine officers were released by the USAO to the administrative unit of SFPD's Internal Affairs Division (IAD-Admin). After IAD-Admin completed its investigation of the text messages, the chief of police issued disciplinary proceedings against the nine officers on April 2015.

While disciplinary proceedings were pending, the nine officers filed a petition for writ of mandate—seeking to rescind the disciplinary

RELATED PEOPLE

Private: Kristina Doan Strottman

charges on the grounds that they were untimely.

Under POBRA, an agency cannot take punitive action against a police officer for any alleged misconduct unless the investigation is completed within one year of "the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct," subject to certain statutory exceptions.[2] One such exception provides that the one-year period is tolled while the alleged misconduct is also the "subject" of a pending criminal investigation or prosecution.[3]

The trial court granted the officers' petition, finding that the one-year state of limitations began to accrue in December 2012 when the misconduct was discovered by IAD-Crim. Further, the trial court found that the state of limitations was not tolled because the text messages were not specifically the subject of a criminal investigation. Therefore, the investigation of the nine officer's misconduct was not completed in a timely matter.

II. Court of Appeal Reverses Order Dismissing Disciplinary Proceedings as Untimely

The Court of Appeal reversed the trial court, concluding that the one-year statute of limitation did not begin to run until the text messages were released by the USAO to IAD-Admin, because before then, the alleged misconduct was not and could not be discovered by the "person[s] authorized to initiate an investigation" for the purposes of the Government Code.

The Court of Appeal emphasized that it is SFPD policy and its designation of persons authorized to initiate investigations that is controlling. SFPD was able to show that its IAD-Crim and IAD-Admin were two separate entities and that only IAD-Admin had authority to initiate investigations. Further, the Court of Appeal noted that the USAO's confidentiality restriction prevented disclosure to persons within SFD who were authorized to initiate an investigation, such as IAD-Admin.

Alternatively, the Court of Appeal held that the one-year statute of limitations was tolled until the criminal verdict in the criminal corruption case because the text messages were the "subject" of the criminal investigation within the meaning of section 3304(d)(2)(A). Although the nine officers were not on trial, the text messages were key tools needed to determine the full scope of the conspiracy and corruption scheme. Moreover, because the use and disclosure of the text messages was restricted under the protective order issued in the corruption case, they were "subjects" of the criminal investigation.

The Court of Appeal held that "subjects" of an investigation should be applied broadly, and that the tolling provisions of the Government

Code focus on conduct (i.e. the text messages) rather than individuals (i.e the nine officers) and whether they were implicated in the criminal investigation. Tolling ended when the criminal trial came to an end in December 2014, and the text messages were released. Therefore the April 2014 notices of discipline were timely.

On September 12, 2018, the California Supreme Court declined without comment to grant the nine officers' appeal for review. Therefore, this leaves the Court of Appeal ruling as the final decision in the case.

III. Takeaway from the *Daugherty* Ruling

While POBRA is meant to ensure police officers have a fair and speedy disciplinary process, the one-year statute of limitations may be tolled in circumstances such as related criminal proceedings. This is especially true where there are protective orders preventing decision-makers from receiving information regarding alleged misconduct.

---

[1] Gov. Code, § 3300 et seq

[2] *Id.* § 3304, subd. (d)(1).)

[3] *Id.*, sub. (d)(2)(A).