

presents

2024 Public Sector Conference

The Changed Landscape After Police Reform Legislation: Perspectives from Labor,
Management and POST

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Conference Reference Materials

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The Changed Landscape After Police Reform Legislation: Perspectives from Labor, Management and POST

Presented By: Toby Darden, Geoff Sheldon, Mike Rains
Moderator: Yuval Miller

Senate Bill 2 (“SB 2”)

SB 2 – Overview

- Mandates that peace officers must be certified (aka licensed) to work as a peace officer in the State – proof of eligibility or professional certificate
- Law enforcement agencies cannot hire officers unless they have current, valid certification
- POST may revoke or suspend certification as a result of disqualifying convictions
- POST may revoke or suspend certification as a result of serious misconduct, as defined
- Agencies are required to notify POST of complaints, charges or allegations of serious misconduct and certain other events, such as settlements or civil judgments in cases involving serious misconduct
- Three-year lookback period for serious misconduct complaints
- Only certain “lookback” cases are actionable

SB 2 – Overview (Con't)

- POST will investigate the allegations; if reasonable grounds for suspension or revocation exist, will notify the officer of their appeal rights and forward the case to the board for review and recommendation as to the appropriate action.
- If the board finds clear and convincing evidence for revocation, sends case to Commission. May recommend suspension instead if warranted.
- Commission reviews board recommendations to ensure the evidence supports the board's recommendation; if so, sends case back to division to institute revocation proceedings before an Administrative Law Judge.
- Information reported must be accessible to the officer, the employing agency, and any other agency doing a background investigation in connection with an employment application by the officer.
- Agency must finish misconduct investigations even if the officer resigns.

POST Regulations – Title 11, California Code of Regulations

- **1201** – Definitions Related to Peace Officer Certification
- **1202** – Peace Officer Certificates
- **1203** – Peace Officer Disqualification
- **1204** – Cancellation of Peace Officer Appointment
- **1205** – Serious Misconduct
- **1206** – Peace Officer Standards Accountability Division Investigations
- **1207** – Reporting Serious Misconduct
- **1208** – Temporary Suspension
- **1209** – Notification of Completed Investigation, Officer Rights to Request Review, and Hearing Procedures
- **1210** – Voluntary Surrender
- **1211** – Peace Officer Standards Accountability Advisory Board
- **1212** – Commission Hearing on Peace Officer Certification
- **1213** – Suspension of Peace Officer Certification
- **1214** – Annual Reporting Requirements
- **1215** – Address of Record

Dishonesty

Abuse of Power

Physical Abuse

Sexual Assault

Demonstrating Bias

Acts that Violate the Law that are Sufficiently Egregious
or Repeated

Participation in a Law Enforcement Gang

Failure to Cooperate with an Investigation into Potential
Police Misconduct

Failure to Intercede

Serious Misconduct

Defining “Serious Misconduct”

PC 13510.8 and 11 CCR 1205

1. Dishonesty relating to the reporting, investigation, or prosecution of a crime, or relating to the reporting of, or investigation of misconduct by, a peace officer or custodial officer, including, but not limited to: false statements, intentionally filing false reports, tampering with, falsifying, destroying, or concealing evidence, perjury, and tampering with data recorded by a body-worn camera or other recording device for purposes of concealing misconduct.

11 CCR 1205 Added

1. For purposes of this subsection, in considering whether a suspension or revocation of certification is proper, the Commission will consider the extent to which the dishonesty related to a material or significant fact in the context of the statement or omission alleged to be dishonest, and will also consider whether the dishonesty appears to have been done willfully or intentionally, with the intent to deceive.

Defining “Serious Misconduct”

PC 13510.8 and 11 CCR 1205	11 CCR 1205 Added
<p>2. Abuse of power, including, but not limited to, intimidating witnesses, knowingly obtaining a false confession, and knowingly making a false arrest.</p> <p>3. Physical abuse, including, but not limited to, the excessive or unreasonable use of force.</p>	<p>2. For purposes of this subsection, in considering whether a suspension or revocation of certification is proper, the Commission will consider <u>the extent to which the abuse of power was a knowing abuse of the power and authority of a public office.</u></p>

Defining “Serious Misconduct”

PC 13510.8 and 11 CCR 1205	11 CCR 1205 Added
<p>4. Sexual assault, as described in subdivision (b) of Section 832.7.</p> <p>832.7(b)(ii): As used in this subparagraph, "sexual assault" means the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, offer of leniency or other official favor, or under the color of authority. For purposes of this definition, the propositioning for or commission of any sexual act while on duty is considered a sexual assault</p>	<p>4. Sexual assault as described in subdivision (b) of Penal Code Section 832.7, and shall extend to acts committed <u>amongst members of any law enforcement agency.</u></p>

Defining “Serious Misconduct”

PC 13510.8 and 11 CCR 1205	11 CCR 1205 Added
<p>5. Demonstrating bias on the basis of race, national origin, religion, gender identity or expression, housing status, sexual orientation, mental or physical disability, or other protected status in violation of law or department policy or inconsistent with a peace officer's obligation to carry out their duties in a fair and unbiased manner.</p>	<p>5. Demonstrating bias on the basis of <u>actual or perceived</u> race, national origin, religion, gender identity or expression, housing status, sexual orientation, mental or physical disability, or other protected status in violation of law or department policy or inconsistent with a peace officer's obligation to carry out their duties in a fair and unbiased manner.</p>

Defining “Serious Misconduct”

PC 13510.8 and 11 CCR 1205

6. Acts that violate the law and are sufficiently egregious or repeated as to be inconsistent with a peace officer's obligation to uphold the law or respect the rights of members of the public, as determined by the Commission
7. Participation in a “law enforcement gang”
A group of officers who may identify themselves by a name and may be associated with an identifying symbol, including but not limited to matching tattoos, engaging in a pattern of unlawful or unprofessional on-duty conduct

Defining “Serious Misconduct”

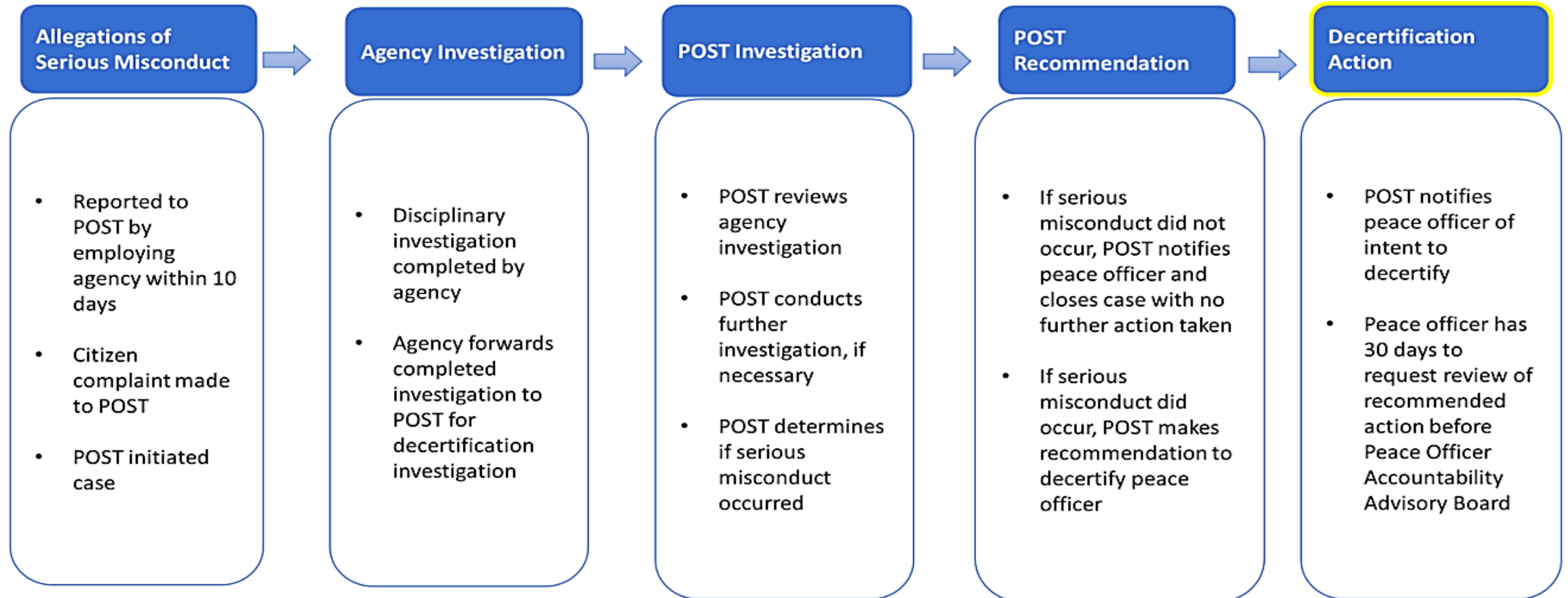
PC 13510.8 and 11 CCR 1205

8. Failure to cooperate with an investigation into potential police misconduct, including an investigation conducted pursuant to this chapter. For purposes of this paragraph, the lawful exercise of rights granted under the United States Constitution, the California Constitution, or any other law shall not be considered a failure to cooperate.
9. Failure to intercede when present and observing another officer using force that is clearly beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances, taking into account the possibility that other officers may have additional information regarding the threat posed by a subject.

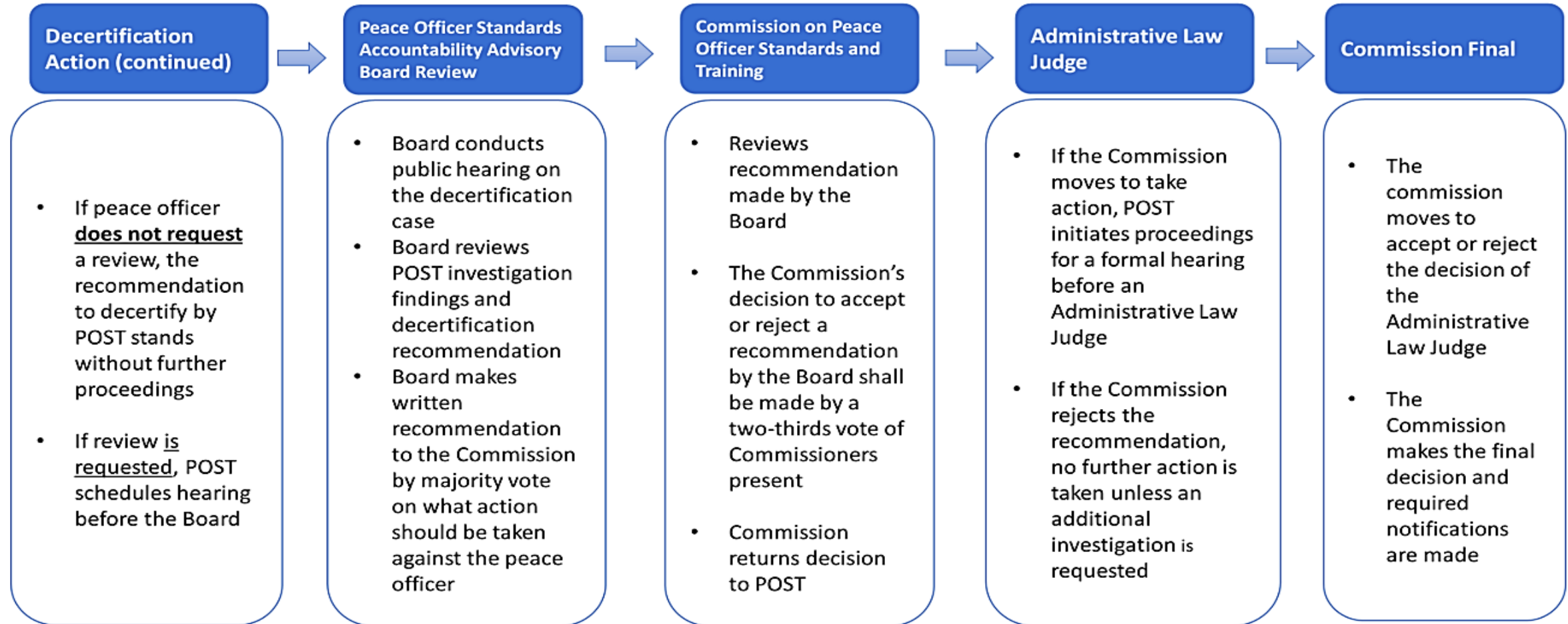
11 CCR 1205 Added

8. Failure to cooperate with an investigation into potential police misconduct, including an investigation conducted pursuant to Chapter 1 of Title 4 of Part 4 of the Penal Code. For purposes of this paragraph, the lawful exercise of rights granted under the United States Constitution, the California Constitution, or any other law shall not be considered a failure to cooperate.

Decertification Process



Decertification Process – Con't



Who is Conducting POST's Investigations?

- POST Law Enforcement Consultants (LEC)
 - All prior law enforcement
 - Most average 20+ years of experience
 - Prior Internal Affairs and/or criminal investigation experience
 - Come from City, County, State, and Federal agencies

Statistics

- **# of Agency Misconduct Reports:** 22,729
- **# of Public Complaints:** 515
- **Total Cases:** 15,624
 - **# of Open Cases:** 10,327 (66% of total cases are currently open)
 - **Open w/POST:** 5,588 (54% of open cases are currently being reviewed by POST)
 - **Open w/Agency:** 4,739 (46% of open cases are currently being reviewed by the agency)
- **# of Closed Cases:** 5,297 (34% of total cases have been closed)
- **Top 3 Allegations/Charges**
 - **1205(a)(3)** - Physical abuse/Excessive or Unreasonable Use of Force (10,091 allegations)
 - **1205(a)(5)** - Demonstrating Bias (6,939 allegations)
 - **1205(a)(2)** - Abuse of Power (3,068 allegations)
 - As of 01/30/2024

**Senate Bill 1421
("SB 1421) and
Senate Bill 16
("SB 16")**

Public Records Act Requests – Overview

- SB 1421 and SB 16 amended Penal Code sections 832.7/832.8 and made certain types of peace officer personnel records accessible with a CPRA request and without a *Pitchess* motion
- The practical effect is that these changes to the law expand the use of peace officer personnel records litigation and allow CPRA requests to be used to access reports and digital evidence as a pre-litigation and litigation tool

PC 832.7 – Public Disclosure

Requires disclosure of records or information from records relating to the report, investigation, or findings of any of the following:

1. An incident involving the discharge of a firearm at a person by a peace officer or custodial officer
2. An incident involving the use of force against a person by a peace officer or custodial officer that resulted in death or in great bodily injury

These records **do not** require a **sustained** finding of misconduct to be subject to disclosure

PC 832.7 – Disclosing Sustained Findings

1. A **sustained** finding involving a complaint that alleges unreasonable or excessive force
2. A **sustained** finding that an officer failed to intervene against another officer using force that is clearly unreasonable or excessive
3. A **sustained** finding made by any law enforcement agency or oversight agency where a peace officer or custodial officer engaged in sexual assault with a member of the public
As used in this subparagraph, “sexual assault” means the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, offer of leniency or other official favor, or under the color of authority. For purposes of this subparagraph, the propositioning for or commission of any sexual act while on duty is considered a sexual assault

PC 832.7 – Disclosing Sustained Findings

4. A **sustained** finding involving dishonesty relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any false statements, filing false reports, destruction, falsifying, or concealing of evidence, or perjury
5. A **sustained** finding that a peace officer or custodial officer engaged in conduct including, but not limited to, verbal statements, writings, online posts, recordings, and gestures, involving prejudice or discrimination against a person on the basis of a protected class
6. A **sustained** finding that a peace officer made an unlawful arrest or conducted an unlawful search

PC 832.7 – “Member of the Public”

- “Member of the public” means any person not employed by the officer's employing agency and includes any participant in a cadet, explorer, or other youth program affiliated with the agency
- NOTE: THIS IS DIFFERENT THAN THE STANDARD UNDER SB 2. (See 11 CCR 1205, which extends sexual assault to acts committed amongst any members of a law enforcement agency)

What is a “Sustained Finding”?

- “Sustained” means a final determination by an investigating agency, commission, board, hearing officer, or arbitrator, as applicable, following an investigation and opportunity for an administrative appeal pursuant to Sections 3304 and 3304.5 of the Government Code, that the actions of the peace officer or custodial officer were found to violate law or department policy (Penal Code Section 832.8(b))
- Also includes records relating to an incident specified in paragraph 1 of this section in which the peace officer or custodial officer resigned before the law enforcement agency or oversight agency concluded its investigation into the alleged incident (Penal Code Section 832.7(b)(3))

SB 16 – Other Significant Aspects of the Bill

- Requires release of qualifying records even where officer resigns before conclusion of investigation
- Allows for delayed disclosure of qualifying records
- Limits ability for agency to invoke attorney client privilege where attorney conducts agency's investigation (factual information and billing records not privileged)
- Modified scope of redactions allowed to records that must be disclosed under CPRA
- Expanded records retention periods (15 years for sustained findings and 5 years for unsustained findings)
- Requires officers to immediately report excessive or unreasonable uses of force
- Removed provision in *Pitchess* motion process that prohibited disclosure of records that were more than 5 years old

How Long Does a Public Agency Have to Respond to PRA?

- Generally, the records must be disclosed as soon as possible and no later than **45 days** from the date of request
- However, there are certain exceptions listed in 832.7(b)(8) for **delaying** the disclosure of 832.7(b)(1) records during criminal or administrative investigations:
 - Can delay for 60 days from the use of force, during an active criminal investigation or until the DA decides whether to file criminal charges
 - Can delay after the 60 days if disclosure would interfere with a criminal proceeding against the officer or another person
 - Each delay requires written notifications containing the specific reasons for the delay, and an estimated date of disclosure

PC 832.7 – Public Records Redactions

- To protect personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace and custodial officers
- To preserve the anonymity of whistleblowers, complainants, victims, and witnesses
- To protect confidential medical, financial, or other information of which disclosure is specifically prohibited by federal law or would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in the records
- Where there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the peace officer, custodial officer, or another person

Impact of SB 2 and SB 1421/SB 16 on Internal Investigations and Agency's Discipline Process

- Agencies must promptly report even mere allegations of “serious misconduct” to POST
- Agencies should treat “serious misconduct” seriously as far as investigation and discipline are concerned
- Agencies should consider explaining the impact of these laws on levels of discipline in
 - disciplinary notices
- Agencies must complete internal investigations even if POBR statute of limitations is violated

**Penal Code § 745 –
The Racial Justice
and Equity Act**

Penal Code §745 – Racial Justice and Equity Act

- Prohibits the State from seeking or obtaining a conviction, or imposing a sentence on the basis of race, ethnicity, or national origin
- A violation is established if the Defendant proves, by a preponderance of the evidence that law enforcement officer “involved in the case” exhibited bias or animus towards the Defendant because of the Defendant’s race, ethnicity or national origin

How It Works

1. A Defendant, following arrest files a Motion under Section 745 saying the Officer who arrested him/her was biased against him/her due to his/her race, ethnicity or national origin.
2. If the Defendant makes a “prima facie showing” of such a violation in the Motion, the Court can hold a hearing, and consider statistical information, expert testimony, and sworn testimony of witnesses and/or the arresting officer. The Court can also appoint an independent expert.
3. The Judge has to make findings at the conclusion of the hearing.

How It Works (cont'd)

4. If the Judge finds, by a preponderance of the evidence, that the arresting officer was biased against the Defendant, it can:
- ✓ Dismiss enhancements
 - ✓ Dismiss special circumstances
 - ✓ Dismiss special allegations
 - ✓ Dismiss one or more charges

Important Issues Concerning 745 P.C. Cases:

- A complaint filed against an officer under 745 P.C. is a reportable claim of “bias” to POST under SB – 2.
- There is no definition of what type of “involvement” an officer must have in a defendant’s arrest to be subject to a 745 P.C. motion:
 - ✓ Transportation Officer?
 - ✓ Part of a Surveillance Team?
 - ✓ Takes a scene photos/measurements?
 - ✓ Interviews the victim?

Important Issues (cont'd)

- How does a defendant make a “*prima facie*” showing of bias?
 - ✓ The investigating/arresting officer is a different race than the defendant?
 - ✓ The arrest resulted from self-initiated activity, rather than a radio broadcast.
 - ✓ The defendant asks the investigating/arresting officer’s employer for data gathered under RIPA concerning the officer?

Important Issues (cont'd)

- This law does not require the lawyer making a 745 P.C. motion, or the D.A. who gets the motion, to notify the Agency which employs the “involved” officer or the officer herself/himself of the motion.
- This law does not allow the “involved” officer who is the subject of a motion, or his/her attorney, to take any role in a hearing, including whether the officer had “involvement” in the case, or whether a hearing should be held.

Other Significant Legislation

AB 655 – Hate Activity

Peace officer background checks must screen for membership in hate groups, hate group activity, or advocacy of public expressions of hate

- Covered activity in past 7 years (after age 18) is disqualifying unless it was part of a bona fide undercover assignment

Agencies must also investigate any complaint of hate activity:

- Sustained finding: Termination is mandatory;
- Records are not confidential

DOJ to issue guidance on investigating these complaints (*AB 655 adds Sections 13680 through 13683 to the Penal Code.*)

AB 443 – Tweaks to SB 2 – Defining “Biased Conduct”

Commencing January 1, 2026:

- Requires POST to establish a definition of “biased conduct”
- Requires POST to develop guidance for law enforcement departments re: performing effective internet and social media screenings of officer applicants
- Requires all law enforcement agencies to use that definition in any investigation into a bias-related complaint or an incident that involves possible indications of officer bias, and to determine if any racial profiling occurred

AB 2188 – Cannabis Use Law

Amends the California Fair Employment and Housing Act (FEHA) to make off-duty marijuana use a protected activity or class, i.e., AB 2188 prohibits discrimination based on off-duty use of cannabis effective January 1, 2024

Allows drug tests that screen for psychoactive THC, but not nonpsychoactive cannabis metabolites

- Intent is to test for actual impairment, not past use

Exempts employees and applicants in positions that require a “federal government background check or security clearance”

Does NOT include exemption for law enforcement personnel – YET?

AB 1264 – Pending Bill to Amend AB 2188

- On February 15, 2024, Senator Shannon Grove introduced SB 1264, which if passed in its present form would exempt applicants and employees from AB 2188
- Positions that would be impacted are those that have functions related to:
 - The apprehension, incarceration, or correction of criminal offenders
 - Civil enforcement matters
 - Dispatch and other public safety communications
 - Evidence gathering and processing
 - Law enforcement records
 - Animal control
 - Community services duties
 - Public administrator or public guardian duties
 - Coroner functions.

Thank You!

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