

Investigative Tips For Conducting Peace Officer Investigations

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You have just been called to conduct a workplace investigation involving a public safety officer. Your mind flashes to “POBR” and “*Lybarger*.” You are on it! You know there are special provisions for all peace officers in the State of California, whether they are employed by the State or by local governments. But tell me again...just what protections are afforded public safety officers? What procedures must take place to avoid any violations? When does *Lybarger* come into play again?

This article provides an overview of the protections afforded public safety officers and the procedures you must follow as an investigator to ensure compliance with the law and the usefulness of any information gained during an investigative interview or interrogation.

POBR...At First Glance

The Public Safety Officers Procedural Bill of Rights Act (POBR) is set forth in California Government Code section 3303. One of its main sections provides that rights attach whenever an officer is “under investigation and subjected to interrogation” on a matter “that could lead to punitive action.”¹ This is true whether the interrogation is undertaken by the officer’s commanding officer or by any other member of the employing public safety department (yes, that’s you).

POBR contains many requirements. Here are the most notable of POBR’s “investigation” procedures:

- The interrogation shall be **conducted at a reasonable hour**, preferably at a time when the public safety officer is on duty or during the normal waking hours for the officer.
- If the interrogation does occur during off-duty time of the officer, the officer shall be **compensated for any off-duty time** in accordance with regular department procedures.
- The public safety officer under investigation shall be **informed prior to the interrogation** of the rank, name, and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation.
- All questions shall be asked by and through **no more than two interrogators** at one time.
- The public safety officer under investigation shall be **informed of the nature of the investigation** prior to the interrogation.
- The interrogating **session shall be for a reasonable period** taking into consideration gravity and complexity of the issue.
- The public safety officer shall be allowed to attend to his or her own **personal physical necessities**.
- The public safety officer shall not be subjected to **offensive language or threatened** with punitive action.
- However, a public safety officer refusing to respond to questions or submit to interrogations shall be informed that **failure to answer questions** directly related to the investigation or interrogation **may result in punitive action**.
- **No promise of reward** shall be made as an inducement to answering any question.
- **No statement** made during interrogation by a public safety officer **under duress, coercion, or threat** of punitive action shall be **admissible in any subsequent civil proceeding**.
- The complete interrogation of a public safety officer **may be recorded**. If a tape recording is made of the interrogation, the officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time.

¹ The Act defines “punitive action” as any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.

- 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.
- No notes or reports that are deemed to be confidential may be entered in the public safety officer's **personnel file**.
- The public safety officer shall have the **right to bring his or her own recording device** and record any and all aspects of the interrogation.
- If prior to or during the interrogation of a public safety officer it is deemed that he or she may be charged with a **criminal offense**, he or she shall be **immediately informed of his or her constitutional rights (Miranda warning)**.
- Upon the filing of a formal written statement of charges, or whenever an interrogation focuses on matters that are likely to result in punitive action against any officer, that public safety 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.
- The **representative shall not be a person subject to the same investigation**.
- The **representative shall not be required to disclose**, nor be subject to any punitive action for refusing to disclose, any **information received from the public safety officer** under investigation for non-criminal matters.

As one might imagine, each of these procedures can raise issues that should be considered well in advance of the actual interview. Your investigation strategy and interrogation questions should be formed with the POBR protections in mind. At a minimum, the following questions should to be answered before you embark on interviewing a public safety employee.

How much detail must the officer be given beforehand to meet the “informed of the nature of the investigation” requirement? Although POBR does not specifically tell us, it should be more than a generic interrogation notice, but less than providing each and every specific factual allegation against the peace officer. A notice providing the general nature of the allegations, with adequate content to understand the charges, might look like this:

It has been alleged that you have engaged in conduct that violates the department’s sexual harassment policies. The alleged conduct includes inappropriate comments, touching, emails, computer usage, and photographs over the course of six months.

The particulars of these allegations must then be fully explored during the investigative interview.

How far in advance must the public safety officer be informed of the nature of the investigation? Again, POBR does not directly state the specifics of the “notice” requirement. Courts have used a “rule of reasonableness,” recognizing that peace officers should receive the notice far enough in advance so as to be able to prepare an adequate response.

How long can an interview be delayed based upon unavailability of the public safety officer’s representative? Courts have held that it is the public safety officer’s responsibility to secure the attendance of a chosen representative who is physically able to represent the officer at the reasonably scheduled interrogation. In other words, the interview does not have to be unreasonably delayed because of the representative’s unavailability.

What role does the representative play during the interview? Unlike investigations involving the private employee, the public safety officer’s representative does not have to be silent. Instead, courts have held that a public safety officer’s representative may speak, object, clarify questions, and even elicit favorable facts during the interrogation.

Thus, the representative can take an assertive role to assist in ascertaining the facts of an incident in the pursuit of protecting the public safety officer. The California Supreme Court identified the purpose of the

public safety officer's representation during an investigatory interview in *Civil Service Ass'n v. City and County of San Francisco*, 22 Cal.3d 552, 567 (1978):

“A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. . . . (citing *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975).”

A note of caution – this does not equate to adversarial confrontation during the interview.

Are there any time constraints under POBR? Although we all operate under a sense of urgency when conducting investigations, POBR sets an outside time limit for the conduct of the investigation and interrogation. POBR requires that completion of the investigation and notification to the public safety officer of punitive action must occur within one year of the employer's discovery of the alleged misconduct (but be aware of some tolling provisions in some circumstances).

And Then There Is *Lybarger*...

In February 2009, the California Supreme Court in *Spielbauer v. County of Santa Clara*, 45 Cal.4th 704 (2009), reversed a controversial appellate court decision that held that a deputy public defender, who had been given a *Lybarger* warning, could not be discharged for refusing to answer his employer's incriminating questions without a formal grant of immunity. We now know that a public employer is within its rights to compel a public employee, by threat of job discipline, to answer questions about job performance or misconduct, as long as the employee is not required, on pain of dismissal, to *waive* the Fifth Amendment constitutional protection against any criminal use of those answers.

So what does this look like in a workplace investigation? If a public safety officer under interrogation refuses to answer a question and “takes the Fifth,” the investigator must inform the officer of the protections offered to him or her. This instruction, called the “*Lybarger* Warning,” should contain four parts:

1. An order to give a statement;
2. A warning that discipline could result from failure to give a statement;
3. A promise that the statement and the fruits of the statement will not be used in a subsequent criminal prosecution against the employee; and
4. A reminder that they cannot be required to waive Fifth Amendment rights.

For example, a *Lybarger* instruction might say:

You have been asked to provide information as part of the Police Department [insert employer's name] investigation. Failure to fully cooperate in this investigation may subject you to disciplinary action. Please be advised that in order to protect your Fifth Amendment right against self-incrimination in a criminal proceeding, any information you provide as part of this investigation cannot be used against you in any subsequent criminal proceeding. You cannot be required to waive your right to privilege against self-incrimination under threat of job discipline.

Any investigator commencing an investigation involving a public safety officer should carefully read and understand California Government Code sections 3300-3311 before doing any work.

Authors' note: Did you know that firefighter's have their own separate Firefighter's Procedural Bill of Rights? Stay tuned for CAOWT's next issue....

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