

MANAGER'S GUIDE TO THE CALIFORNIA FIREFIGHTERS BILL OF RIGHTS ACT



BY MARTIN J. MAYER AND KEVIN JOHNSON

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AND
KEVIN JOHNSON**

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FIREFIGHTERS PROCEDURAL BILL OF RIGHTS ACT

SECTION 3250 This chapter shall be known, and may be cited, as the Firefighters Procedural Bill of Rights Act.

As a statutory declaration:

The Legislature finds and declares that firefighters are often called upon to render aid in hostile emergency situations rife with conflict and confrontation. In providing lifesaving services to the public, firefighters are subject to numerous job safety procedures and protocols, which sometimes are compromised or altered, in a highly charged atmosphere of critical incident stressors. Firefighters who trust their instincts in these volatile emergency situations are deserving of due process rights and protections should those circumstances arise. Mutual aid and automatic aid agreements entered into between fire agencies throughout the state require firefighters to respond to emergencies across political boundaries, therefore, the rights and protections provided to firefighters under this act constitute a

matter of statewide concern. The effective protection of property and the safety of the public depends upon the maintenance of reasonable and consistent procedural protections applicable to all employers with respect to the disciplinary process. It is necessary that this act be applicable to all firefighters, as defined in subdivision (a) of Section 3251 of the Government Code, wherever situated within the State of California, in order to ensure that stable employment relations are continued throughout the state, and to further ensure that effective services are provided to all people of the state.

SECTION 3251 FIREFIGHTER DEFINED

For purposes of this chapter, the term firefighter means any firefighter employed by a public agency, including, but not limited to, any firefighter who is a paramedic or emergency medical technician, irrespective of rank.

WHO IS NOT COVERED

The term firefighter does not include an inmate of a state or local correctional agency that performs firefighting or related duties.

Persons who are covered by Section 3300 of the Public Safety Officers Procedural Bill of Rights Act, which includes State Fire

Marshal, Voluntary Fire Wardens, members of an arson-investigating unit and Firefighter/Security Guards of the Military Department.

This act does not apply to any employee who has not successfully completed the probationary period established by his or her employer as a condition of employment.

POLITICAL ACTIVITY

SECTION 3252

“(a) Except as otherwise provided in Chapter 9.5 (commencing with Section 3201), or whenever on duty or in uniform, no firefighter shall be prohibited from engaging, or be coerced or required to engage, in political activity.

(b) A firefighter shall not be prohibited from seeking election to, or serving as a member of, the governing board of a school district, or any local agency where the firefighter is not employed, including, but not limited to, any city, county, city and county, or special district, or political subdivision thereof.”

SCENARIO 1:

The Fire Chief has directed his firefighters to pass out postcards denouncing a sitting Judge. When asked by the ACLU to stop distribution by on-duty personnel, the Chief responds that the activity is non-political and that the firefighters are merely providing a public service.

WHAT YOU NEED TO KNOW:

In *California Common Cause v. Duffy*, (1987) 200 Cal. App. 3d 730, the Sheriff of San Diego County, John Duffy, appeared at a news conference to encourage Chief Justice Rose Bird to resign and failing that to encourage the public to vote against her retention. To further promote this cause, Sheriff Duffy directed his officers to distribute postcards which contained strongly-worded anti-Bird messages. The American Civil Liberties Union (ACLU) requested Sheriff Duffy stop distribution of the postcards because it involved illegal expenditures of public monies and the use of department personnel.

Sheriff Duffy responded that the distribution of the postcards did not involve any prohibited political activity by on-duty personnel. He further argued that the activity was nonpolitical and nonpartisan because Chief Justice Bird was not yet a candidate: “The Chief Justice position is not one which is filled at an election, her position was not one for which a party may nominate a candidate, and that his officers were just providing an informational service for the public's benefit.”

In distinguishing between “campaign” and “informational” activities, the court stated:

The use of public funds to purchase such items as bumper stickers, posters, advertising floats, or

television and radio spots unquestionably constitutes improper campaign activity, as does the dissemination, at public expense, of campaign literature prepared by private proponents or opponents. On the other hand, a public agency pursues a proper informational role when it simply gives a fair presentation of the facts in response to a citizen's request for information. A fair presentation of the facts will necessarily include all consequences, good and bad.

The court concluded that in this particular case, the postcard distribution scheme was clearly partisan political activity and not informational.

THE BOTTOM LINE:

When off-duty and out of uniform, firefighters are free to engage in political activity. Normally issues arise when an employee, identified as a firefighter, is wearing a uniform similar in appearance to his or her department uniform.

WHAT ACTION YOU ELECT TO TAKE IN REGARD TO SECTION 3252 SHOULD BE PREDICATED UPON SEEKING APPROPRIATE LEGAL ADVICE.

RIGHT TO REPRESENTATION

SECTION 3253(i)

“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 firefighter, that firefighter, 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 firefighter under investigation for noncriminal matters. This section shall not be construed to apply to counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other firefighter.”

SCENARIO 1:

As a supervisor, you have just arrived on the scene of an accident involving one of your firefighters. You approach the involved firefighter and ask, “What happened?” The firefighter tells you that he has the right to a representative under FBOR and is not going to answer your questions.

WHAT YOU NEED TO KNOW:

Section 3253(i) states, “Upon the filing of a formal written statement of charges, or whenever an interrogation focuses on matters that are likely to result in punitive ... that firefighter 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. More important, the section also states, “This section shall not be construed to apply to counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other firefighter.”

In *Darvish v. City of Inglewood* (a non-published case)¹, Darvish was involved with three other Inglewood Police Officers and two Los Angeles County Sheriff's Deputies in the arrest of Donovan Jackson at a Thrifty Gas Station. The arrest was videotaped by a bystander and broadcast on local television news, creating a media firestorm. When the Sergeant arrived at the scene, Darvish was questioned in accordance with the police department's use-of-force protocol. The Sergeant questioned Darvish to "obtain information regarding the circumstances surrounding the use of force and to document those on the department's Use of Force report."

¹ California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b).

Darvish contends that the Sergeant's planned encounter with him at the scene of the incident, the Sergeant's subsequent interview of him and the other officers, combined with the instructions to write a Miscellaneous Report of the incident were tantamount to an interrogation that would trigger the procedures and protections of Section 3303(c) and (h). Darvish contends that the Sergeant did not inform him of the nature of the investigation prior to this "interrogation" nor advise him of his constitutional rights.

Section 3303(c) provides that, "The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation."

Section 3303(h) provides that, "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."

Section 3303(i) provides that, "This section shall not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer." The court in *City*

of Los Angles v. Superior Court, (1997) 57 Cal. App. 4th 1506, stated, “This section was included to avoid claims that almost any communication is elevated to an investigation.”

In *Darvish*, the Sergeant was conducting a routine investigation between a supervisor and a subordinate. The Sergeant did not have a complaint about police misconduct, instead was responding to a report of use of force, a routine matter. The Sergeant’s duty was to investigate to ensure that the force used was not excessive and was within policy. There was no indication that the force used was excessive or out of policy. The Sergeant had no information which would lead her to conclude that any officer in particular had engaged in any misconduct that would lead to sanctions.

Therefore, the court went on to say, “Because the facts establish that the Sergeant was investigating an event, not an individual facing misconduct allegations, the on-the-scene investigation is within the ‘routine’ exception of Section 3303 (i).”

In *Steinert v. City of Covina*, (2006) 146 Cal App 4th, 458, Officer Steinert’s name arose as part of a routine informal audit performed by the California Department of Justice, which monitors use of its criminal records databases. The Covina Police Department learned from the Department of Justice that Officer Steinert had performed a records search on an individual

and had designated the search “TRNG,” signifying training. Justice Department and Covina policies precluded the use of actual records for training purposes. The Covina Police Department examined their records for the day that Officer Steinert had run the search and found that Officer Steinert had taken a vandalism report at approximately the same time that the record search was conducted. Officer Steinert’s supervisor believed the criminal history search was appropriate and the only problem was the “user error” of designating the search as for training rather than entering the crime report number associated with the vandalism report.

Later that same morning, the supervisor called Officer Steinert into the office. Officer Steinert remembered taking the vandalism report and told the supervisor that the victim had in fact, mentioned a person as a possible suspect (named ran by Officer Steinert) when making the report. The supervisor instructed Steinert to make sure to include names as “mentioned persons” in the crime report, and to use a case number rather than “TRNG” when conducting record searches on individuals. At the end of instructing Officer Steinert, the supervisor asked if Officer Steinert disclosed any of the confidential information to the victim. Officer Steinert replied no.

A supervisor with the Covina Police Department is required to perform audits of two crime reports per week. This audit

involves contacting the person whom reported the crime to inquire whether the department and officer responded courteously and appropriately. Because Officer Steinert's supervisor had already reviewed the vandalism report, he decided to use that report as one of the two audited reports for the week. When the supervisor contacted the victim, she reported that Officer Steinert had disclosed confidential information about the possible suspect when she made her crime report. With this information, the supervisor launched an internal affairs investigation of Officer Steinert that ultimately led to dismissal from the department.

Officer Steinert challenged the dismissal by asking the court to suppress statements to the supervisor on the ground that the conversation in which it was elicited was an interrogation that could and did lead to punitive action and that therefore, Officer Steinert should have been afforded the protections of POBR.

The court stated the entire case hinged on the nature of the conversation between Officer Steinert and the supervisor in which Officer Steinert lied about releasing criminal history information to the victim:

Was it an interrogation that could lead to punitive action-in which case Officer Steinert should have been afforded the POBR procedural protections-

or was it a routine interrogation in the normal course of duty, counseling, or informal verbal admonishment, such that no violation of Officer Steinert's rights occurred?

At the time Officer Steinert was questioned, the supervisor knew of no facts that would have caused him to believe that the search itself was improper. The supervisor stated he asked the question regarding disclosure of confidential information to the victim "In the interest of being thorough, my responsibility as a supervisor." The court went on to say:

Had the supervisor not elected to audit that report and therefore not learned that Officer Steinert had improperly disclosed confidential information, the matter would have been resolved. The supervisor's discovery that Officer Steinert had disseminated confidential information despite denying this had occurred, not the search designation issue, caused the internal affairs investigation.

The supervisor testified, "The focus of the investigation or allegation was lying to me. It had nothing to do with the conversation that we had about accessing the information. In my mind, that was a done deal. We had already dealt with that

issue.”

The court ruled that applying the law to the facts as found by the trial court:

The interaction was an interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor, and that by the terms of Section 3303(i), the Act did not apply.

THE BOTTOM LINE:

When conducting an investigation of a routine event, not a complaint of misconduct, the “other routine or unplanned contact” exception to Section 3253(i) will normally apply and the firefighter involved is not entitled to Section 3253 protections.

SCENARIO 2:

As the line supervisor, you receive a complaint from a citizen regarding one of your firefighters.

You conduct a preliminary investigation and determine who the firefighter is and that the firefighter had violated several department

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ABOUT THE AUTHORS

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Martin J. Mayer is a name partner in the firm of Jones & Mayer (J&M) and serves as legal counsel to the Sheriffs and Chiefs of Police in approximately 70 law enforcement agencies throughout California. He serves as General Counsel to the California State Sheriffs Association (CSSA), the California Police Chiefs Association (CPCA) and the California Peace Officers Association (CPOA), and has done so for approximately 25 years. Mr. Mayer is also responsible to oversee the attorneys in the firm of J&M who serve as City Prosecutor in the 16 cities where the firm provides that legal service.

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Mr. Mayer is a graduate of the 6th FBI National Law Institute at Quantico, Virginia (designed for police legal advisors) and was the first attorney in private practice to be invited to participate in the program. He also served for nine years as a POST reserve with the Downey Police Department.

Mr. Mayer writes and lectures extensively, in California and nationally, on legal issues which impact on law enforcement including, but not limited to, the use of force, pursuits, discipline and due process, public records, personnel files, and the Public Safety Officers Procedural Bill of Rights Act. He presents on behalf of numerous statewide law enforcement associations and the California Commission on Peace Officers Standards and Training (POST). He has served on many POST committees as a subject matter expert and has participated in several POST Telecourses, which are used for training peace officers throughout the state. Mr. Mayer is also the 2005 recipient of the “Governor’s Lifetime Achievement Award for Excellence in Peace Officer Training.”

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Speaking Engagements

- *California Commission on Peace Officer's Standards & Training (POST)* 1980-present
 - Executive Development Program
 - Police Mid-management Course
 - County Chiefs and Sheriff's Associations Annual Training Retreats

- *California Peace Officer's Association (CPOA)* 1979-present
 - Role of the Chief of Police
 - Discipline and Due Process
 - Legal Update (2 day session)
 - American's With Disabilities Act (ADA)
- *American's for Effective Law Enforcement (AELE)* 1989-present
 - Civil Liability Issues Affecting Law Enforcement
 - Discipline and Law Enforcement
- *Labor Relations Information System (LRIS)* 1995-present
 - Labor Relations and Disciplinary Procedures
- *International Association of Chief's of Police (IACP)* 1997-present
 - Police Psychologist Committee – "Impact of Psychologists on Law Enforcement"
 - Legal Officer's Section – "Union Impact on Internal Affairs Investigations"
- *California State Sheriff's Association (CSSA)* 1990-present
 - Legal Update at Annual Conference
- *California State University at Long Beach, Department of Criminal Justice* 1992-present
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- *California Association of Law Enforcement Background Investigators* 1997-present
 - Legal Update Impacting Upon Background Investigations
- *League of California Cities Annual Conference* 1998-present
 - Chief of Police Department – Legal Update City Attorney Department –Civilian Review Boards

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