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April 28, 2014

Clerk of the California Supreme Court
350 McAllister St.
San Francisco, CA 94102-7303

Re: Court Ordered Letter Brief of Petitioner, Riverside County Sheriff's Department
Riverside County Sheriff's Dept. v. Jan Stiglitz, Case No. S206350

The Court has directed the parties to file supplemental letter briefs to address the following questions:

> *Assuming that a motion for discovery of officer personnel records may be filed in an administrative proceeding (Evid. Code § 1043, subd. (a), and a hearing officer has authority to determine that the motion states good cause for discovery (Evid. Code § 1043, subd. (b)(3)), is there any existing statutory mechanism that would allow the matter to be transferred to the superior court for an in camera review of the records by a judicial officer (Evid. Code § 1045, subd. (b))? If no existing statutory mechanism applies, do we have the authority to create such a transfer mechanism?*

The short answer to both of these questions is "probably not". While the Department had previously addressed the prospect of allowing non-judicial hearing officers to make the threshold determination of good cause under *Evid. Code § 1043(b)(3)* [Reply Brief, p. 15-16], the Court has correctly identified the glaring absence of any mechanism which would then transfer such matters to the superior court for the undeniably exclusive role of conducting the *in camera* inspection of the confidential peace officer personnel files at issue.

1. <u>There Is No Statutory Mechanism to Transfer Matters To The Superior Court For *In Camera* Review.</u>

As more fully set forth in the Department's Opening Brief (p. 5-7), the First District Court of Appeal properly observed in *Brown v. Valverde, (2010) 183 Cal.App.4th 1531, 1549*, that the statutory scheme governing DMV hearings did not contemplate or allow for administrative hearing officers to entertain any aspect of *Pitchess* motions. In the instant context of peace officer disciplinary appeals, the governing statutory scheme (*Govt. Code § 3304(b)*)

similarly lacks any statutory provision which even contemplates, much less expressly authorizes, the presiding hearing officer to entertain even a determination of good cause for discovery of confidential peace officer personnel files belonging to officers who likely have little or no involvement or interest in the petitioning officer's case beyond having once been disciplined for presumably similar misconduct. As such, it remains rather clear that the statutory scheme governing all phases of *Pitchess* discovery was legislatively limited exclusively to judicial officers (perhaps including administrative law judges).

However, since the Court has asked the parties to assume that a hearing officer has the authority to entertain a *Pitchess* motion make the initial determination of good cause for discovery (*Evid. Code § 1043(b)(3)*), the Department diligently searched for a statutory mechanism which might facilitate transfer of the matter to the superior court for the statutorily mandated *in camera* review of the actual records by the required judicial officer. Although the Department had at first thought that the pre-litigation discovery provisions of *Code of Civil Procedure § 2035.010* might provide a mechanism for transferring a matter to the superior court without the need for an underlying action, subd. (b) expressly precludes the use of that statutory process for the purpose of ascertaining the possible existence of a defense. (i.e. the precise reason Respondent, RSA, has advanced as the need for *Pitchess* discovery in disciplinary hearings.)

Frankly, the omission of any mechanism for transferring good cause determinations from non-judicial hearing officers to the superior court within the statutory scheme encompassing the well-established *Pitchess* process is strong evidence that the Legislature never intended for any aspect of such discovery matters to be entertained in any forum other than the clearly outlined exclusive jurisdiction of the courts. On the contrary, had the Legislature intended for non-judicial hearing officers to make good cause determinations and then transfer the files to the superior court for its mandated exclusive role of *in camera* review, it would have legislated the transfer mechanism into the statutory scheme. However, it didn't and the absence of such a statutory mechanism must presume the Legislature's intent not to create one. *People v. Drake (1977) 19 Cal.3d 749, 755.*

2. The Inherent Powers of the Court Do Not Include the Authority to Legislate Non-existent Jurisdiction.

Since the Legislature elected to not create or even contemplate any statutory mechanism to transfer good cause determinations from non-judicial hearing officers to the superior courts, this Court has long made it clear that "the judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function." *Marine Forests Society v. California Coastal Com.*, (2005) 36 Cal. 4th 1, 25.

Even if this Court was to somehow try to fashion its own transfer mechanism under its umbrella of judicial interpretation, the parameters of such a process would require such strict guidelines that the benefits of such a solution would be far outweighed by the collateral issues it would create. For example:

- While the current *Pitchess* process originating entirely within the courts requires an underlying action with all of the accompanying procedural rules, there are no corresponding procedural safeguards in administrative appeals before non-judicial hearing officers. In other words, this Court would need to establish very clear guidelines as to when an officer could even initiate a good cause motion in an administrative appeal process. Could the officer file such a motion during the investigative phase of an internal investigation and before administrative charges were even filed? Probably not. [See: *Pasadena POA v. Pasadena (1990) 51 Cal.3d 564*]

- Once a non-judicial hearing officer theoretically issued a finding of good cause during an administrative appeal, scheduling of the *in camera* review in the superior court would present its own series of challenges. Would the administrative hearing presumably be postponed while awaiting a hearing date from the court? Would such referrals from hearing officers somehow take priority in the superior court or would they be at the mercy of the schedules of already over burdened judges?

- While the determination of good cause for the discovery of personnel files for officers involved in the underlying action has been carefully defined by the courts in criminal and even civil proceedings [e.g. *People v. Memro (1985) 38 Cal.3d 658*], allowing non-judicial hearing officers to make such a determination under *Evid. Code § 1043(b)(3)* for officers who are not even involved in the pending appeal would put these hearing officers in the unenviable and uncontrolled position of rendering unprecedented and likely inconsistent rulings. Needless to say, the appellate courts would eventually be required to establish a completely new set of good cause guidelines never before contemplated by the Legislature or the courts.

- Regrettably, this Court is painfully aware of the already overcrowded dockets of the superior courts and further subjecting them to a flood of unregulated *Pitchess* motions from non-judicial hearing officers would unduly burden the courts with actions never contemplated by the Legislature.

- As noted in the Department's Opening Brief (p. 8), the fact that the Legislature added *Evid. Code § 1047* to the *Pitchess* statutory scheme summarily to preclude discovery of personnel files for uninvolved officers defeats the need to create a mechanism to transfer such administrative matters to the superior court. By definition, the only confidential peace officer personnel files RSA is seeking are those of officers who were never involved in the appealing officer's case. These are the very officers who the Legislature sought to protect from unnecessary annoyance, embarrassment or oppression. *Evid. Code § 1045(d).*

Rather coincidentally, the current statutory scheme encompassing the *Pitchess* process was legislated in response to this Court's landmark decision in *Pitchess v. Superior Court (1974) 11 Cal.3d 531.* If RSA and other labor organizations wish the *Pitchess* process to extend to non-judicial hearing officers in administrative appeals, the remedy lies with the Legislature and not this Court. While the Department sincerely hopes to have answered this Court's supplemental question, it is also respectfully urged that the Court recognize that the current *Pitchess* process was simply never intended to extend to any phase of an administrative appeal presided over by a non-judicial hearing officer.

Respectfully submitted,

FERGUSON, PRAET & SHERMAN
A Professional Corporation

By: 

Bruce D. Praet, Attorneys for
Respondent, Riverside Sheriff's Dept.

BDP/cs

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I, Cathy Sherman, employed in the aforesaid County, State of California; I am over the age of 18 years and not a party to the within action. My business address is 1631 East 18th Street, Santa Ana, California 92705-7101.

On April 28, 2014, served the **SUPPLEMENTAL LETTER BRIEF** on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

SEE ATTACHED SERVICE LIST

XXX (By Mail) I placed such envelope with postage thereon fully paid to be placed in the United States mail at Santa Ana, California.

XXX (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 28, 2014, at Santa Ana, California.

Cathy Sherman

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