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May 2, 2014

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

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

First and foremost, Petitioner, Riverside County Sheriff's Department (hereafter "Department") was a bit surprised and would object to the recent Letter Brief submitted by *Amicus*, Los Angeles Police Protective League (hereafter "League") since this Court's order of April 16, 2014, was expressly directed only to "the parties". While it is fortunate that the League actually provides very little support for their position, it would be unreasonable and unrealistic for the Department to attempt to address the invited arguments of Respondent ("RSA") and every uninvited *Amici* in the minimal time allotted by the Court to respond. Nonetheless, the Department files this Responsive Letter Brief as follows:

Question No. 1 - There remains No Statutory Authority to Transfer Matters to the Superior Court For *In Camera* Review.

Fortunately, the parties (including RSA) agree that there is no statutory authority which would facilitate the transfer of findings by a non-judicial hearing officer in an administrative proceeding to the superior court for the mandated *in camera* review of confidential peace officer personnel files under *Evid. Code § 1045, subd. (b).*

While *Amicus* League suggests that *Code of Civil Procedure § 1281.8* provides statutory authority for such a transfer, this suggestion is misplaced for the simple reason that many, if not most, disciplinary appeal hearings for peace officers are not formal "arbitrations". On the contrary, most such disciplinary appeals (including the instant case) are evidentiary hearings governed by local rules and memorandums of understanding (MOU) which do not fall within the procedural rules of arbitrations set forth in *Code of Civil Procedure § 1280, et seq.*

The only other "statutory" argument presented by *Amicus* League is an attempt to stretch the provisions of the Peace Officers Bill of Rights (POBR) set forth in *Government Code §§ 3304(b)* and *3304.5* into a "due process" argument. Ironically, the requirement of *3304.5* for agencies to conform to their own local rules and procedures summarily defeats this argument. In the instant case, the operative MOU (like many local rules) mandates that the rules of privilege shall remain in effect (*Joint App. 0159*). As more fully addressed in the Department's Reply Brief and, just as the court determined in *Brown v. Valverde (2010) 183 Cal.App.4th 1531, 1549*, nothing in the local rules authorizes or even contemplates statutory authority for non-judicial officers to hear *Pitchess* motions. Thus, while the "due process" argument has been exhaustively addressed in the formal briefs, there is no statutory authority for non-judicial officers to determine privilege issues and certainly no statutory authority to transfer these matters from administrative hearings to the superior court.

Question No. 2 - This Court Does Not Have the Inherent Authority to Create a Process to Transfer Such Matters to the Superior Court.

In support of their argument that the Court has the inherent power to create its own non-statutory process to transfer *Pitchess* hearings from non-judicial officers to the superior court, RSA cites to a string of cases to seemingly support this proposition. Unfortunately, a review of these string citations reveals that virtually every one of these cases involved matters which were already before the superior court and the courts were thereafter permitted to fashion their own remedies to facilitate discovery matters already before the court. Not one of the cases cited by RSA involves the judicial creation of a mechanism to transfer discovery from a non-judicial forum to the superior court. Similarly, RSA's citation to *Code of Civil Procedure § 187* necessarily presumes "jurisdiction (already) . . . conferred on a court or judicial officer".

Ironically, RSA cites to this Court's decision in *Pitchess v. Superior Court (1974) 11 Cal.3d 531, 535-537* for the "inherent power of the court" to order discovery without legislation. Two major problems with such reference: (1) the (criminal) parties in *Pitchess* were already before the superior court (i.e. no need to create a mechanism to transfer some non-judicial matter to the court), and (2) in response to the *Pitchess* decision, the Legislature created the statutory scheme which now exclusively governs discovery of privileged peace officer personnel files. Yet, intimately aware that it was creating the statutory scheme which would henceforth control the discovery of such sensitive files, the Legislature must be presumed to have known that it was not creating (and did not intend to create) a mechanism for such discovery to commence in non-judicial administrative hearings and then somehow magically end up before superior court judges who were now statutorily mandated to exclusively consider such matters. On the contrary, the Legislature made it very clear no less than six times that all *Pitchess* discovery matters were to be exclusively heard by courts.

While *Amicus* League further suggests that this Court has historically allowed for the augmentation of administrative hearings, not one case even remotely provides for the creation of a mechanism to transfer non-judicial discovery matters in administrative appeals to the superior court. The bottom line is that the only authority to create a mechanism to introduce *Pitchess* discovery into non-judicial administrative appeals lies exclusively with the Legislature.

Moreover, even if this Court somehow concludes that it has the inherent power to create a mechanism which is currently conspicuously absent from the existing statutory scheme exclusively governing *Pitchess* discovery, the resulting logistical nightmare cannot be ignored:

- If a non-judicial hearing officer somehow made the threshold determination of good cause (under a yet-to-be-fashioned test for good cause in administrative settings), the receiving superior court judge would not have the benefit of knowing the underlying facts or purpose for discovery in order to determine the relevance of the files he/she was inspecting *in camera.*

- The timing of such heretofore non-existent *Pitchess* motions in administrative appeals would be difficult and inconsistent, at best. These administrative appeals are generally scheduled months in advance due to various factors such as availability of the selected hearing officer, schedules of counsel, witnesses and the parties. If the non-judicial hearing officer was first required to determine good cause for *Pitchess* discovery in the superior court, it would be virtually impossible to accurately schedule an actual date for the administrative appeal without first knowing the superior court's calendar and ability to render a finding.

- Under the current statutory scheme governing *Pitchess* discovery, the officer whose records are being sought must be provided with notice and opportunity to defend his or her own privacy. *Evidence Code § 1043(a).* Given that these officers will rarely, if ever, have anything to do with the pending disciplinary appeal (e.g. they were likely disciplined sometime in the past for similar misconduct), any judicially created mechanism would need to account for the rights of these uninvolved officers to participate at both the non-judicial threshold determination and any resulting *in camera* review in the court.

As set forth in the Department's briefs throughout this case, it would never be as simple as merely creating a mechanism to transfer good cause determinations of non-judicial hearing officers to the superior court. Any ruling along such lines would also need to address all of these resulting collateral issues and inevitably result in a flood of appeals to interpret a process never before introduced into these administrative appeals. Whether the *Pitchess* process should ever take place in administrative appeals before non-judicial hearing officers is a question to be presented to the Legislature where a carefully fashioned process can be considered and

implemented, if appropriate. In the meantime, it is respectfully requested that this Court apply the existing statutory scheme exclusively to the courts and any judicial administrative hearing bodies the Legislature may have originally contemplated.

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.

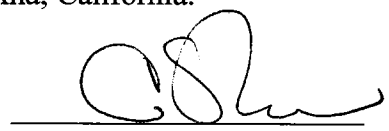
On May 2, 2014, served the **SUPPLEMENTAL LETTER BRIEF** on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

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 May 2, 2014, at Santa Ana, California.



Cathy Sherman

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