Case No. S206350

IN THE
SUPREME COURT OF CALIFORNIA

RIVERSIDE COUNTY SHERIFF'S DEPARTMENT,
Plaintiff and Respondent,

v.

JAN STIGLITZ,
Defendant.

RIVERSIDE SHERIFFS' ASSOCIATION,
Intervenor/Appellant.

AND RELATED ACTIONS.

After a Decision by the Court of Appeal
Fourth Appellate District, Division Two
Case No. E052729
On Appeal from the Superior Court of the County of Riverside,
The Honorable Mac R. Fisher, Judge Presiding.
Case No. RIC10004998

ANSWERING BRIEF ON THE MERITS OF INTERVENOR/APPELLANT RIVERSIDE SHERIFFS' ASSOCIATION

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I. NATURE OF THE ACTION

The Riverside Sheriffs' Association ("RSA") is an employee organization recognized by the County of Riverside ("County") as the exclusive representative of County employees in the Law Enforcement Unit ("LEU") for purposes of collective bargaining pursuant to the Meyers-Milias-Brown Act ("MMBA"). (AA 1317) The LEU is comprised of County employees including but not limited to the classification of Correctional Deputy. (AA 1317) RSA and the County have shared a collective bargaining relationship for many years wherein they negotiate and enter into memoranda of understanding regarding the terms and conditions of employment for County employees in the LEU. (AA 1317)

The LEU Memorandum of Understanding ("MOU") between RSA and the County was in full force and effect from April 1, 2008, through January 31, 2011. (AA 1317) RSA members in the LEU ratified the MOU and the Board of Supervisors adopted it by resolution. (AA 1317) Therefore, the MOU is a binding and enforceable contract. (*Glendale City Employees' Association, Inc., et al. v. City of Glendale, et al.* (1975) 15 Cal.3d 328, 337.)

Following her termination as a Correctional Deputy with the County, Kristy Drinkwater ("Drinkwater") sought a disciplinary administrative appeal of her termination. (AA 0006) Because Drinkwater is a Correctional Deputy, the administrative appeal hearing was conducted pursuant to Article XII of the MOU and Government Code § 3304(b) of the Public Safety Officers Procedural Bill of Rights Act ("POBR"), Government Code §§ 3300-3313. (AA 0145, 1344)

Article XII of the MOU sets forth at length the disciplinary appeal process which includes the selection of a mutually agreed upon hearing officer from an arbitrator strike list. (AA 1346) Article XII gives the parties the following rights: to call and examine witnesses; to introduce exhibits; to

cross-examine opposing witnesses; to impeach any witness; and to rebut any derogatory evidence. (AA 1346-1347) The Employee Relations Division Manager is required to produce any relevant County record. (AA 1346) In addition, Article XII provides that the hearing officer shall submit written findings of fact, conclusions of law, and the decision to the parties. (AA 1346) The decision of the hearing officer is final, subject to the rights of the parties to seek judicial review under Code of Civil Procedure § 1094.5. (AA 1346)

During the administrative appeal hearing of her termination, Drinkwater submitted a motion to hearing officer Jan Stiglitz ("Stiglitz") for discovery of redacted law enforcement records pursuant to Evidence Code § 1043 ("§ 1043 motion" or "*Pitchess* motion") to establish her defense of disparate treatment.[1] (AA 0085.6) In particular, Drinkwater sought redacted records from disciplinary proceedings against sworn personnel employed by the Riverside County Sheriff's Department ("Department") who were believed to have been investigated or disciplined for similar allegations of irregularities in submitting time cards. (AA 0085.7) The redacted records were sought to show that the penalty imposed on Drinkwater (termination) was disproportionately harsh in comparison with the discipline that the Department had ordinarily and historically imposed on others for the same alleged misconduct. (AA 0085.7)

The Department opposed the motion on the merits. (AA 0085.20) However, at no time during the administrative appeal hearing did the

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[1] Following the decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 the Legislature enacted Penal Code § 832.7 which provides that "Peace officer or custodial officer personnel records and records maintained by any state or local agency ... or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." (Pen. Code, § 832.7, subd. (a).)

Department challenge Stiglitz's authority to rule on the motion. (AA 1724) On March 15, 2010, Stiglitz granted the motion with a finding of good cause and ordered an in-camera review of the records. (AA 0111-0115)

On or about March 19, 2010, the Department initiated the Superior Court action through the filing of a petition for an administrative writ pursuant to Code of Civil Procedure § 1094.5 ("Petition"), which sought to compel Stiglitz to vacate his decision that good cause existed to grant the 1043 motion. (AA 0001) The petition did not challenge the authority of hearing officer Stiglitz to rule on the motion. (AA 0001-0020) The petition named Stiglitz as the Respondent and Drinkwater as the Real Party in Interest but RSA was not named as a party to the lawsuit. (AA 0001-0020)

Drinkwater filed an opposition to the Petition which argued among other things that: (1) the redacted records sought to be produced in private was not a "disclosure," and therefore, did not trigger the protections afforded Evidence Code § 1043; (2) the MOU authorized hearing officer Stiglitz to rule on the motion; and (3) assuming *arguendo* that Evidence Code § 1043 was applicable, Drinkwater had met the criteria of Evidence Code § 1043 for disclosure of the redacted records. (AA 0118-0143)

Prior to the time that the Court ruled on the Petition, the Department, for the first time, raised an argument challenging hearing officer Stiglitz's authority to rule on a 1043 motion pursuant to *Brown v. Valverde* (2010) 183 Cal.App.4th 1531. (TR 1-2) The parties engaged in supplemental briefing, and Drinkwater argued among other things that there was statutory authority for Stiglitz to rule on the motion. (AA 0153-0193)

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The Court granted the Petition. The court entered an order on June 22, 2010 which provided that Stiglitz did not have the authority under any statute or under the MOU, to rule on an Evidence Code § 1043 motion. (AA 0194) In support of its ruling, the Court relied upon *Brown* as controlling authority. (AA 0194)

II. PROCEDURAL HISTORY

Upon learning that the named parties had litigated the meaning of the MOU without providing RSA, a party to that MOU, with notice and an opportunity to protect its interest, RSA brought a motion for a new trial, a motion to set aside and vacate the Court's order entered on June 22, 2010; and a motion for leave to intervene. (AA 0197-0737) All of the motions were granted. (AA 1130, 1279, 1280)

RSA then filed an opposition to the Petition which argued among other things that: (1) *Brown* was inapplicable as it concerns a Department of Motor Vehicles ("DMV") administrative per se hearing; (2) a motion made under Evidence Code § 1043 ("1043 motion") is available in a hearing held pursuant to Gov. Code § 3304(b); (3) per the LEU MOU, the parties contractually agreed to provide the hearing officer with authority to rule on an Evidence Code § 1043 motion through the express language of the MOU as well as the parties' past practice; and (4) the Department failed to exhaust administrative remedies by not challenging the hearing officer's authority to rule on the motion during the administrative appeal. (AA 1297-1315)

On November 10, 2010, the hearing on the Petition for a writ took place. (TR 47) The Court's tentative ruling was to grant the writ. (TR 50:21) The Court reasoned that pursuant to *Brown*, Stiglitz was barred from ruling on an Evidence Code § 1043 motion. (TR 50:18-20). On December 13, 2010, the Court signed the order ("Order") granting the petition pursuant to *Brown* and ordered Stiglitz to deny the motion. (AA 2175)

On January 14, 2011, RSA filed its notice of appeal. (AA 2179) Thereafter, on January 21, 2011, Drinkwater filed her notice of appeal. (AA 2196) The two appeals were consolidated. (AA 2224)

In a published decision, the Court of Appeal held that *Pitchess* discovery is available in a Government Code § 3304(b) hearing as a matter of due process where it is relevant to the officer's defense and the hearing officer has the authority to rule on that motion. *Riverside County Sheriffs' Dept. v. Stiglitz*, 209 Cal. App. 4th 883, 907-908 (2012).[2]

After an exhaustive analysis of the *Ptichess* discovery statutes (Evidence Code §§ 1043 and 1045 and Penal Code §§ 832.7 and 832.8), the court of appeal concluded that *Brown* does not hold that *Pitchess* discovery is unavailable in all administrative proceedings as a matter of law. *Riverside County Sheriffs' Dept. v. Stiglitz, supra,* 209 Cal. App. 4th at 899-902.

Instead, the court interpreted *Brown* to hold that although *Pitchess* discovery is available in some administrative proceedings, it is not available in DMV administrative per se hearings based statutory limitations on the evidence to be considered and the limited issue to be resolved. *Id.* The court compared and contrasted the statutory limitations of DMV administrative per se hearings with the mandates of Government Code § 3304(b) and the provisions of the MOU which provide for discovery in disciplinary hearings. *Riverside County Sheriffs' Dept. v. Stiglitz, supra*, 209 Cal. App. 4th at 902.

After finding *Brown* completely distinguishable from the present case, the court of appeal focused on the ambiguity in the statutory scheme that is the heart of this dispute to date:

> "Although Evidence Code section 1043, subdivision (a) provides that a *Pitchess* motion is to be filed in "the appropriate

[2] Although depublished by virtue of the court granting of the petition for review, reference is made to the official reporter solely for the convenience of the court.

court or administrative body," Evidence Code section 1045, which provides the procedure for deciding a *Pitchess* motion, refers only to how a *court* shall proceed upon the filing of a *Pitchess* motion.

Riverside County Sheriffs' Dept. v. Stiglitz, supra, 209 Cal. App. 4th at 903.

In the final analysis, the court of appeal held that it simply cannot read the phrase "or administrative body" out of Evidence Code § 1043, because (1) there is no justification for interpreting Evidence Code § 1043 in such a way as to render the phrase "or administrative body" meaningless; (2) the statutory scheme does not provide a procedure for party seeking *Pitchess* discovery in an administrative proceeding to invoke the jurisdiction of a court to rule on the motion; (3) an interpretation of Evidence Code §§ 1043 and 1045, which excludes administrative bodies as venues for *Pitchess* motions, conflicts with the due process rights afforded to peace officers in disciplinary hearings by Government Code § 3304 (b); and (4) the history of the *Pitchess* legislation does not demonstrate that the Legislature intend to disallow *Pitchess* motions in administrative proceedings. The court also held that administrative mandamus is available to obtain judicial review of a hearing officer's ruling on a *Pitchess* motion before the personnel records are produced. *Riverside County Sheriffs' Dept. v. Stiglitz, supra,* 209 Cal. App. 4th at 902-907.

Because the court of appeal determined that *Pitchess* discovery is available in a Government Code § 3304(b) hearing as a matter of due process where it is relevant to the officer's defense, the court did not resolve the issue of whether the MOU either expressly or as a matter of past practices provides for *Pitchess* discovery. *Id.* at 908. However, the court noted that the MOU does provide for a full evidentiary hearing, including the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses, to impeach witnesses, and to rebut derogatory evidence. It also mandates the production of any relevant County record requested by either

party and empowers the hearing officer to issue subpoenas; and therefore, it must be inferred that where officer personnel records are relevant to the issues raised, this provision in the MOU affords discovery of the relevant records. *Id.*

III. ISSUE PRESENTED

This Court granted the petition for review filed by the Department but limited review to the following issue:

> "Does the hearing officer in an administrative appeal of the dismissal of a correctional officer employed by a county sheriff's department have the authority to grant a motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531?"

IV. SUMMARY OF ARGUMENT

The holding in *Brown v. Valverde* (2010) 183 Cal.App.4th 153 ("*Brown*"), does not stand for the proposition that only sworn judicial officers may rule on an Evidence Code § 1043 motion. The language used by *Brown* clearly expressed the court's intent to narrowly apply its holding. The *Brown* court took great pains to state that its holding only applies to a DMV administrative per se hearing. An "administrative per se hearing" required by the Vehicle Code is significantly different from an "administrative appeal" required by the POBR and the Fourteenth Amendment. Brown does not hold that *Pitchess* discovery is unavailable in all administrative proceedings as a matter of law.

An administrative hearing officer may rule on a *Pitchess* motion in a hearing under Government Code § 3304(b), which requires that the officer be afforded due process, a full evidentiary hearing, and the ability to present a meaningful defense. Since disparate treatment of similarly situated employees may be an abuse of discretion and provide a basis for rescinding or modifying discipline, where that defense is raised, due process mandates that

the officer be given the opportunity to demonstrate the relevance of the personnel records of other officers. Due process requires *Pitchess* discovery in a hearing mandated by government code § 3304(b). The limited and conditional right to keep peace officer records confidential does not trump the statutory and constitutional right to due process. Contrary to the Department's argument, consent is not a reliable means to obtain relevant evidence to support either a valid defense or a factor in the determination of whether or not to grant discovery.

There is no justification for interpreting Evidence Code § 1043 in such a way as to render the phrase "or administrative body" meaningless. The rules of statutory construction do not allow for the court to excise statutory language by judicial fiat. The legislative purpose of the statutory scheme was not to deny due process in a Government Code § 3304(b) hearing.

Since the hearing officers are labor arbitrators mutually selected by the parties, the parties can ensure that hearing officers have the expertise to rule on an Evidence Code § 1043 motion. There has never been any confusion, concerns, problems or disputes over the statutory scheme allowing hearing officers to hear Evidence Code § 1043 motions. Government Code § 3304(b) hearing officers routinely gain possession of the confidential records of the peace officers over whose appeals they preside. It is illogical to argue that hearing officers can be trusted to have within their possession records of the peace officer appealing discipline, but not the records of those who are not. The reference in Penal Code § 832.7, subdivision (a) to a "civil proceeding" includes an administrative proceeding which adjudicates the propriety of disciplinary action. The evidentiary hearing before a mutually selected arbitrator who serves as hearing officer is an administrative body within the meaning of Evidence Code § 1043.

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The Department's reliance on Evidence Code § 1047 is inappropriate as the conduct at issue did not involve an arrest, custody or booking. *Alt v. Superior Court* (1999) 74 Cal. App. 4th 950.

As an added protection, there does exist a procedure for a party opposing discovery in an administrative proceeding to invoke the jurisdiction of a court to rule on the motion, as the Department did in this case when it initially filed its petition in the Superior Court.

If the court does find that the post-*Pitchess* statutory scheme under Evidence Code § 1043 does not apply (but see below), the court should hold that a peace officer in a Government Code § 3304(b) hearing is able to obtain relevant evidence in the form of records of fellow officers by subpoena and without the requirement to bring a noticed motion before the hearing officer or anyone else; or in the alternative, the court should remand to the trial court the issue of whether the MOU either expressly or as a matter of past practices provides for *Pitchess* discovery, which is an issue that the court did not resolve. *Riverside County Sheriffs' Dept. v. Stiglitz, supra*, 209 Cal. App. 4th at 908.

V. ARGUMENT

A. BROWN DOES NOT HOLD THAT *PITCHESS* DISCOVERY IS UNAVAILABLE IN ALL ADMINISTRATIVE PROCEEDINGS

1. THE COURT IN BROWN LIMITED ITS HOLDING TO ONLY DMV ADMINISTRATIVE PER SE HEARINGS.

Brown is legally and factually distinguishable. In *Brown*, within the context of a DMV administrative per se hearing, a driver facing license suspension following arrest for driving under the influence sought the arresting officer's personnel records regarding the arresting officer's absence from work on the day of the administrative per se hearing in order to attack

the arresting officer's credibility. (*Brown* at 1554.) The trial court issued a writ of mandate directing the administrative hearing officer to hear the *Pitchess* motion.

On appeal, the court identified the narrow issue before it as whether in a DMV administrative per se hearing a driver facing a license suspension following arrest for driving under the influence could seek discovery of confidential peace officer records pursuant to *Pitchess*. (*Brown* at 1535.) In the first paragraph of the opinion, *Brown* states:

> "This appeal presents a single issue of law, an issue of first impression: in a Department of Motor Vehicles (DMV) administrative per se hearing, can a driver facing license suspension following arrest for driving under the influence seek discovery of confidential peace officer personnel records pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 [113 Cal.Rptr. 897, 522 P.2d 305] (*Pitchess*) and its statutory codifications?

(*Brown* at 1535, emphasis added.)

The court took great pains to state that its holding only applies to a DMV administrative per se hearing. *(Brown* at 1536, citing to *MacDonald v. Gutierrez* (2004) 32 Cal.4th 150, 155–156 .)

Brown did not hold that an administrative hearing officer presiding over an administrative disciplinary appeal mandated by Government Code § 3304(b) was statutorily barred from ruling on an Evidence Code § 1043 motion. Rather, *Brown* focused on the statutory scheme surrounding the Vehicular Code. *Brown* intentionally limited its holding to a *Pitchess* motion within the context of a DMV administrative per se hearing. (*Id.* at 1535.)

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2. THE *BROWN* COURT HELD *PITCHESS* DISCOVERY IS CONTRARY TO THE STATUTORY PURPOSE OF AN ADMINISTRATIVE PER SE HEARING AND THAT DMV HEARING OFFICERS LACK THE REQUISITE EXPERTISE.

The reasoning behind a DMV administrative per se hearing is unique to the circumstances bringing it into play. The expedited hearing is necessary under those circumstances in order to protect the public by quickly obtaining a suspension of a driver's license shortly after arrest for driving under the influence. A *Pitchess* motion in that instance would undoubtedly lengthen the process and conflict with the purpose of the Vehicular Code. The Court set forth the limited inquiry of a DMV Administrative Per Se Hearing:

> Under the administrative per se law, the DMV must immediately suspend the driver's license of a person who is driving with .08 percent or more, by weight, of alcohol in his or her blood. [Citation.] The procedure is called 'administrative per se' because it does not impose criminal penalties, but simply suspends a person's driver's license as an administrative matter upon a showing the person was arrested for driving with a certain blood-alcohol concentration, without additional evidence of impairment. [Citation.] The express legislative purposes of the administrative suspension procedure are: (1) to provide safety to persons using the highways by quickly suspending the driving privilege of persons who drive with excessive blood-alcohol levels; (2) to guard against erroneous deprivation by providing a prompt administrative review of the suspension; and (3) to place no restriction on the ability of a prosecutor to pursue related criminal actions. [Citations.]

> The administrative per se laws were deemed necessary due to the time lag that often occurs between an arrest and a conviction for driving while intoxicated or with a prohibited blood-alcohol concentration. During this interim period, arrestees who would eventually be convicted of an intoxication-related driving offense were permitted to continue driving and, possibly, endangering the public. Moreover, without administrative per se laws, persons with extremely high blood-alcohol concentration levels at the time of the arrest could escape license suspension or revocation by plea bargaining to lesser crimes or entering pretrial diversion. Thus, by providing for an administrative license suspension prior to the criminal proceeding, the law affords the public added protection.

(Brown at 1536, citing to *MacDonald v. Gutierrez* (2004) 32 Cal.4th 150, 155–156 .)

Based upon the purpose of the DMV administrative per se hearing, the Court concluded that "a fundamental purpose of the DMV administrative per se hearing is to provide a 'swift and certain' … procedure to 'quickly' suspend the license of a person suspected of drunk driving… Permitting *Pitchess* discovery in such a hearing would be the anti-thesis." (*Brown* at 1556.)

Within its analysis, the Court relied heavily on the purpose of the DMV administrative per se law and the lack of expertise of the hearing officer. Regarding the lack of expertise of the hearing officer, the Court stated that:

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The administrative per se hearing is presided over by either the director of the DMV, a hearing Board, or in the usual case - and as here - a hearing officer. (Veh. Code section 14104.2, subd. (a)... Hearing officers are typically DMV employees who need not have any legal training whatever." (*Brown* at 1537.)

B. *PITCHESS* DISCOVERY IS NECESSARY FOR A HEARING MANDATED BY GOVERNMENT CODE § 3304(b)

1. DUE PROCESS REQUIRES PITCHESS DISCOVERY IN A HEARING MANDATED BY GOVERNMENT CODE § 3304(B)

The court of appeal in the instant case found that an administrative hearing officer may rule on an Evidence Code §1043 motion in a hearing under Government Code § 3304(b) which requires that the officer be afforded due process, a full evidentiary hearing, and the ability to present a meaningful defense. Since disparate treatment of similarly situated employees may be an abuse of discretion and provide a basis for rescinding or modifying discipline, where that defense is raised, due process mandates that the officer be given the opportunity to demonstrate the relevance of the personnel records of other officers. *Riverside County Sheriffs' Dept. v. Stiglitz, supra*, 209 Cal.App.4th at 907-908.

Per Government Code § 3304(b), Drinkwater is entitled to a full POBR disciplinary administrative appeal, which includes the right to raise all of her defenses, such as disparate penalty for like offenses, and the right to obtain the necessary documents to support those defenses. (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 175; *Giuffre v. Sparks* (1999) 76 Cal.App.4th 1322, 1329, *review denied* (2000, Cal) 2000 Cal LEXIS 2030.) The Department claims that Drinkwater simply cannot obtain the necessary documents to prove up a disparate penalty defense. If the Department's

position were true, Drinkwater would receive only a partial administrative appeal because she would be unable to prove up her disparate penalty defense. This cannot be the result envisioned by the Legislature when it enacted Government Code § 3304(b) which required public agencies to provide a full administrative appeal to public safety officers to assure stable labor relations and secure effective law enforcement services. (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 683.) The records sought to establish a defense of disparate penalty are absolutely necessary for Drinkwater to exercise her right to a complete POBR disciplinary administrative appeal.

The court of appeals held that personnel records of other officers may be relevant in a § 3304(b) hearing where, for example, the defense is that the punishment imposed is excessive in comparison with the punishment imposed on other personnel in similar circumstances. *Riverside County Sheriffs' Dept. v. Stiglitz, supra*, 209 Cal.App.4th at 901. The Department states that it does not disagree with the relevance of a disparate treatment defense in any administrative appeal. (Opn. Brf. p. 7)

2. THE LIMITED AND CONDITIONAL RIGHT TO PRIVACY DOES NOT TRUMP THE STATUTORY AND CONSTITUTIONAL RIGHT TO DUE PROCESS.

The Department argues that the need to protect peace officer records is greater than the statutory and constitutional right to due process in a Government Code § 3304(b) hearing. However, the privilege created by Evidence Code § 1043 is a conditional privilege and the statutory scheme makes it clear that the right to privacy in the records is limited. *Michael v. Gates* (1995) 38 Cal.App.4th 737, 745. Penal Code § 832.7 allows disclosure of the records in a variety of investigations and Evidence Code § 1043 establishes procedures by which peace officer personnel records may be

obtained for purposes of litigation. *Id.* Due to this statutory scheme that allows disclosure upon a showing of relevance, peace officers have no reasonable expectation of privacy in their personnel records. *Id.* Similarly, a peace officer has no private remedy or private cause of action for violation of disclosure procedures because of the limited or conditional nature of the privilege in the records sought. *Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419.

In contrasting and comparing this limited, conditional privilege with the statutory mandate of Government Code § 3304(b), that requires public agencies to provide a full administrative appeal to public safety officers and the constitutional mandates for due process, the balancing of interests clearly favors allowing production of peace officer records in a Government Code § 3304(b) hearing.

While admitting that an Evidence Code § 1043 motion may reveal evidence of disparate treatment through unlike penalties for like offenses, the Department argues that neither the hearing officer nor the court has the authority to compel the disclosure of such exculpatory evidence. The Department argues that the hearing officer has no authority because the statutory scheme for *Pitchess* motions makes more references to the "court" than to an "administrative body." (Opn. Brf., p.11-14) The Department then argues that the court has no authority because there is no procedural vehicle by which to submit the matter to court. (Opn. Brf., p.17.) In summary, the Department argues that its interpretation of the *Pitchess* discovery process supersedes the fact that the evidence sought is relevant, the defense raised is valid, and that due process is mandated by the POBR and by the Fourteenth Amendment to the United States Constitution. *Id.*

In this case, the Department argues that it is acceptable to exclude evidence that might result in the reinstatement of a peace officer who

commits an offense for which others received a lesser penalty because it is more important to safeguard the confidentiality of the employees who received the lesser penalty.

However, the undeniable fact that Evidence Code § 1043 specifically allows a motion be made to an "administrative body" and the admitted fact that relevant evidence exists in the form of peace officer records that could support a valid defense of disparate treatment; coupled with the statutory and constitutional requirements of due process, leads to the inevitable conclusion that the statutory scheme must be interpreted in a manner that allows for a hearing officer to hear and grant such motions.

In reality, the Department simply seeks to prevent access to this critical evidence, not through a desire to champion the privacy rights of its employees, but in an attempt to thwart this admittedly viable defense.

Statutes that shield peace officers from the disclosure of information to third parties cannot be used as a sword by their employer to terminate them without just cause by denying them relevant information to support a valid defense.

The due process rights of the terminated employee outweighs the limited confidentiality afforded by Evidence Code § 1043 to the employees who are still employed. Allowing such an injustice to stand would thwart the purpose of a disciplinary administrative appeal mandated by Government Code section 3304(b), which is to maintain stable labor relations and ensure effective law enforcement services. As stated in *White v. County of Sacramento* (1982) 31 Cal.3d 676, 683:

> Section 3301 declares that the act's "rights and protections" are afforded peace officers in order to assure the "maintenance of stable employer-employee relations," and thus to secure "effective law enforcement . . . services" for "all people of the

> state." It is evident that the more widely available the opportunity to appeal a decision resulting in disadvantage, harm, loss or hardship, the more "'meaningful [the] hedge against erroneous action'." (*Skelly v. State Personnel Bd., supra*, 15 Cal.3d 194, 210.)
>
> Erroneous action can only foster disharmony, adversely affect discipline and morale in the workplace, and, thus, ultimately impair employer-employee relations and the effectiveness of law enforcement services.

White v. County of Sacramento, supra at 683.

Allowing an Evidence Code § 1043 motion within the context of a disciplinary administrative appeal mandated by Government Code § 3304(b) is consistent with the purpose of the POBR because it allows the public safety officer to obtain the evidence necessary to establish a disparate penalty defense if it exists. The officer is then able to introduce all the evidence in her favor to guard against erroneous disciplinary action, thereby maintaining stable labor relations and ensuring effective law enforcement services. Contrary to a DMV administrative per se hearing, an Evidence Code § 1043 motion in a disciplinary administrative appeal helps to ensure public safety through effective law enforcement services.

Similarly, the Fourteenth Amendment to the United States Constitution guarantees Drinkwater and all LEU members procedural due process because they may only be terminated for good cause and thereby have a contractually-created property interest in their continued employment. (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 207; *Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 169-170; *Vernon Fire Fighters Assn. v. City of Vernon* (1986) 178 Cal.App.3d 710, 722.) The disciplinary administrative appeal process, which is contractually agreed upon and carried out through

Article XII of the MOU, serves the purpose of ensuring that Drinkwater, and those similarly situated, are not deprived of their property without due process. The disciplinary administrative appeal process, which is contractually agreed upon and carried out through Article XII of the MOU, serves the purpose of ensuring that Drinkwater is not deprived of her property without due process.

Brown states that the statutory provisions governing discovery in DMV administrative per se hearings are the Vehicle Code and the Administrative Procedures Act ("APA") codified at Government Code sections 11500 *et. seq.* (*Brown* at 1549.) Neither the Vehicle Code nor the APA have any bearing on discovery in a disciplinary administrative appeal required by the Fourteenth Amendment to the United States Constitution and Government Code sections 3304(b) and 3304.5. In fact, *Brown* concedes that *Pitchess* motions may be appropriate in some administrative proceedings, such as an administrative hearing held to evaluate a citizen complaint filed against a peace officer. (*Brown* at 1549, 1555.)

By enacting the *Pitchess* statutory scheme for discovery motions, the Legislature balanced a litigant's need for disclosure of relevant information with the law enforcement officer's legitimate expectation of privacy in his or her personnel records. *San Diego v. City of San Diego Civ. Serv. Comm'n* (2002) 104 Cal.App.4th 275, 281. Any interpretation of these code sections must achieve the goal of the Legislature to have a balance of these interests.

3. CONSENT IS NOT A RELIABLE MEANS TO OBTAIN RELEVANT EVIDENCE TO SUPPORT A VALID DEFENSE NOR A FACTOR IN THE DETERMINATION TO GRANT OR DENY DISCOVERY.

The Department argues that "the deputy attempting to explore a defense of disparate treatment could simply ask the unrelated deput(ies) if they had

any objection to either the release of their files or perhaps even testifying in the pending disciplinary appeal." (Opn. Brf., p. 10.)

Not all employing agencies have an employee association that may or may not know the identities of peace officers whose records would support a defense raised in an administrative hearing. Moreover, the right to discovery has always been based on relevance and not conditioned upon the approval of the party whose records are sought. For a myriad of reasons, a deputy may not wish to be involved or to support a fellow deputy. Due process cannot depend on voluntary disclosure of relevant evidence to support a viable defense.

4. LABOR ARBITRATORS WHO SERVE AS HEARING OFFICERS HAVE THE EXPERTISE TO RULE ON EVIDENCE CODE § 1043 MOTIONS.

The Department claims that like a DMV hearing officer there is "no guarantee that these [3304(b)] hearing officers would have the skills necessary to decide sensitive evidentiary issues such as privilege, good cause and relevance" and that "putting *Pitchess* motions in the hands of anyone less than fully qualified would undermine one of the primary purposes of the *Pitchess* procedures – protecting the confidentiality and privacy of officers." (Opn. Brf. p. 15)

The MOU provides that:

> "The parties shall maintain an Arbitrator Strike List from which hearing officers shall be selected. The inclusion or removal of names from the list shall be by mutual agreement of the parties. The parties shall attempt to mutually agree on an arbitrator. Should the parties be unable to mutually agree upon an arbitrator, then they shall alternately strike names from the Arbitrator Strike List until one name remains." (AA 1346)

Thus, unlike the hearing officer in *Brown*, hearing officer Stiglitz was placed on this list by mutual agreement between RSA and the County based upon his expertise in the area of labor relations. From this list of mutually acceptable arbitrators, the Department and Drinkwater selected Stiglitz to use as a hearing officer.

Since the parties have a mutually agreed upon list of labor arbitrators from which the hearing officer is selected, there actually is a guarantee that all of the hearing officers on the list have the skills necessary to decide sensitive evidentiary issues such as privilege, good cause and relevance; because if they did not, the Department would not have agreed to placing them on the strike list in the first place.[3] Thus, the Department seems to argue it needs protection from its own poor choices. The obvious answer is for the Department to only agree to hearing officers who it believes have the expertise to hear the case and rule on procedural issues, including Evidence Code § 1043 discovery motions.

Without any supporting evidence, the Department severely criticizes the hearing officers who try these appeals as "less than fully qualified", "untrained trier of fact", and lacking "the skills necessary to decide sensitive evidentiary issues." (Opn. Brf. p. 15) Yet, the Department not only agreed to place these hearing officers to the strike list, the Department did so knowing that these hearing officers would hear Evidence Code § 1043 motions. As set forth in Section C.3., below, it is undisputed that the last twenty (20) years, the practice of the parties was to allow these hearing officers to rule on 1043

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[3] A DMV per se administrative hearing is a public hearing, unlike a contractual administrative appeal hearing which is closed to the public. In an administrative appeal hearing conducted pursuant to contract, RSA as the exclusive representative of the LEU under the MMBA has a fiduciary duty to maintain records as confidential. The hearing officer is precluded from disclosing, and the County already has this information. This is different than a public DMV administrative per se hearing.

motions. The Department's criticism of its own hand-selected hearing officers first arose as part of this litigation. Based on its prior actions, the Department has had every confidence in these hearing officers in the past. Thus, the sole purpose of this litigation is to prevent the admission of exculpatory evidence and the uncertainty over the qualifications of the hearing officers to which the parties have mutually agreed only arose after this litigation was initiated.

C. THERE IS NO JUSTIFICATION FOR INTERPRETING EVIDENCE CODE § 1043 IN SUCH A WAY AS TO RENDER THE PHRASE "OR ADMINISTRATIVE BODY" MEANINGLESS

1. THE RULES OF STATUTORY CONSTRUCTION DO NOT ALLOW FOR THE COURT TO EXCISE STATUTORY LANGUAGE BY JUDICIAL FIAT

As in any case involving statutory interpretation, the court's first step is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning. *Garcia v. McCutchen* (1997)16 Cal.4th 469, 476; *People v. Murphy* (2001) 25 Cal.4th 136, 142. In interpreting that language, the court strives to give effect and significance to every word and phrase. *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1285. The well-established canons of statutory construction preclude a construction that renders a part of a statute meaningless or inoperative. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.)

As stated by the court below, "[i]t is a settled axiom of statutory construction that significance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided." *Riverside County Sheriffs' Dept. v. Stiglitz, supra*, 209 Cal. App. 4th at 904, citing *People v. Woodhead* (1987) 43 Cal.3d 1002, 1010.

In this case, the court of appeal's interpretation of Government Code § 3304(b) is consistent with Evidence Code § 1043(a) which provides in relevant part "In any case in which discovery or disclosure is sought of peace or custodial officer personnel records or records maintained pursuant to Section 832.5 of the Penal Code or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records." (Evidence Code § 1043(a); emphasis added.)

If the Legislature had intended for only sworn Judicial Officers to have authority to rule on an Evidence Code § 1043 motion, then the Legislature would not have stated that the motion for discovery of peace officer records could be submitted to either the appropriate Court or administrative body.

The Department argues that there is not a single "statute which authorized or contemplates *Pitchess* motion in the type of disciplinary hearing under Government Code § 3304(b)." (Opn. Brf. P. 7.) This argument is obviously made in error as Evidence Code § 1043(a) specifically makes reference to such motions being made before an "administrative body."

The Department seeks to have this court rewrite Evidence Code § 1043(a) to delete the provision that allows a motion to be filed with an "administrative body" because it is only mentioned once whereas the court's handling of the motion is mentioned six times. There is no rule of statutory construction that authorizes the court to delete language merely because the language is only used once. Having given the ability of a party to make a discovery motion to an administrative body, there is no need to then "permeate" the statutory scheme with repeated, but unnecessary, references to that same administrative body.

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The ambiguity found by the court of appeals would not be present if the Legislature had redundantly stated "the appropriate court or administrative body" when it wrote the procedures to follow upon the filing of such a motion. The only way to harmonize the statutory language in a manner that gives effect and significance to every word and phrase in the statutory scheme, and which does not render meaningless the language in Evidence Code § 1043(b) that a motion may filed with an "administrative body," is to interpret the statutory scheme to mean that the procedures set forth for the "court" to follow upon the filing of a discovery motion are the procedures that the administrative body must follow as well. The Department does not address the fact that it seeks to have the court render meaningless or inoperative the language authorizing a motion to be made to an "administrative body."

The Department cites *People v. Drake* (1977) 19 Cal.3d 749, 755 for the proposition that a single reference to one subject in legislation cannot be considered in isolation, but instead, must be harmonized with the statutory framework as a whole. (Opn. Brf. pp. 12-13) *Drake* involved an earlier version of Penal Code § 1238(a)(6), which authorized an appeal by the People in a criminal case only from " '[a]n order modifying the verdict or finding by reducing the degree of the offense or the punishment imposed.'" (*Drake, supra*, 19 Cal. 3d at p. 754.) The question for the *Drake* court was whether the law provides for an appeal when the trial court modifies the verdict to the lesser included offense.

The *Drake* court concluded that "the failure to provide in section 1238[(a)(6)] for appeals from orders modifying findings to lesser included offenses, while maintaining a distinct provision in section 1181, subdivision 6, for the authority to issue those orders, raises a strong inference that the Legislature did not intend the orders to be appealable by the People." (*Id.* at

755.) Thus, the court concluded there is no statutory authorization for an appeal by the People from an order under section 1181, subdivision 6, which modifies a verdict or finding to that of a lesser included offense.

A subsequent amendment to section 1238(a)(6), added the words "or modifying the offense to a lesser offense." Therefore, the 1978 amendment overruled *Drake*. *People v. Statum* (2002) 28 Cal. 4th 682, 691.

Drake did not discuss nor make any reference to a rule of construction regarding a single reference in legislation, regarding statutory language in "isolation," or make a finding that the court is empowered to rewrite a statute so all parts harmonize, as claimed by the Department. Instead, the court relied on the rule of statutory construction that "[w]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed.'" *People v. Drake* (1977) 19 Cal. 3d 749, 755, citing, *People v. Valentine* (1946) 28 Cal.2d 121, 142. Here, the Department is not urging the court to find Legislative intent where statutory language does not exist, but instead, the Department is urging this court to delete statutory language that does exist in order to find a contrary intent. *Drake* neither stands for nor supports the proposition cited by the Department.

2. THERE HAS NEVER BEEN ANY CONFUSION, CONCERNS, PROBLEMS OR DISPUTES OVER THE STATUTORY SCHEME ALLOWING HEARING OFFICERS TO HEAR EVIDENCE CODE § 1043 MOTIONS.

Significantly, the Department did not place into the record any evidence that the language at issue has caused any confusion, concerns, problems or disputes in the past. At the trial court level in the instant matter, RSA and Drinkwater submitted substantial, undisputed evidence that since 1993

numerous motions had been submitted to hearing officers in disciplinary appeal hearings under Article XII of the MOU seeking peace officer records, all without challenge by the Department to the hearing officer's jurisdiction to rule. In particular, Dennis Hayes (RSA's General Counsel) testified that from the time that he became counsel for RSA in 1993 through the present, numerous Evidence Code § 1043 motions had been brought, all without challenge by the Department to the arbitrator's jurisdiction to rule. (AA 1435.) Likewise, RSA President Pat McNamara testified that from the time that he became President of RSA in 1998 through the present, numerous Evidence Code § 1043 motions had been brought, all without challenge by the Department to the arbitrator's jurisdiction to rule. (AA 1317-1318.) Attorney Michael P. Stone testified that his firm handled the vast majority of Article XII administrative disciplinary appeal hearings from 1996 through the present. (AA 1528.) In connection with the Department's Petition in the instant matter, Mr. Stone instituted a limited audit of his files which revealed that from 2002 through the present, numerous Evidence Code § 1043 motions had been brought, all without challenge by the Department to the arbitrator's jurisdiction to rule. (AA 1528-1529.) In support of this claim, Mr. Stone attached redacted records evidencing Evidence Code § 1043 motions brought without challenge to the arbitrator's authority to rule on eight separate occasions. (AA 1533-1720.) The Department offered no evidence of its own to rebut this abundance of evidence.

The Department uses the hackneyed phraseology of "floodgates" of litigation, "discovery abuses, and "fishing expeditions" when arguing against hearing officers deciding Evidence Code § 1043 discovery motions; but if these concerns had substance, we would have seen some evidence from the parties' long history of allowing hearing officers to hear these motions.

Similarly, there is no evidence that in the history of the parties any of the participants in any Government Code § 3304(b) hearing (Department representative, RSA representative and mutually selected hearing officer) have disclosed any confidential personnel records. RSA represents the interests of its members; and as the exclusive bargaining representative, has a duty to maintain confidential records of its members of which it has many. The mutually agreed upon hearing officers, such as Stiglitz, are attorneys,[4] and therefore, are aware of their obligation to maintain peace officer records confidential that come into their possession by virtue of their employment as hearing officers. Because these proceedings are private hearings not open to the public, the production of such records does not even constitute a disclosure. If any of the problems raised in the Department's brief were real, the Department would have submitted evidence to the trial court in support of this claim. The lack of any such evidence speaks volumes.

In reality, the Department's concern over an Evidence Code § 1043 motion before a hearing officer did not arise from the problem free procedures the parties have followed for the last twenty (20) years, but instead, arose from an opportunistic, albeit skewed, interpretation of the holding in *Brown.* The Department's concern is truly a solution in search of a problem.

3. HEARING OFFICERS ROUTINELY HAVE POSSESSION OF CONFIDENTIAL PEACE OFFICER RECORDS

Hearing Officers have possession of confidential peace officer records with every case over which they preside. As the County admits, the employing agency presents to the hearing officer all of the evidence upon which it relied in making the determination to discipline or discharge a peace officer. In this case, the County presented to the hearing officer Drinkwater's

[4] http://members.calbar.ca.gov/fal/Member/Detail/103815

confidential personnel records to establish that she was terminated with just cause. It is illogical and contradictory to argue that hearing officers can be trusted to have within their possession records of the peace officer appealing discipline but not the records of those not appealing.

4. THE REFERENCE IN PENAL CODE SECTION 832.7, SUBDIVISION (A) TO A "CIVIL PROCEEDING" INCLUDES AN ADMINISTRATIVE PROCEEDING WHICH ADJUDICATES THE PROPRIETY OF DISCIPLINARY ACTION.

The history of the post-*Pitchess* legislation does not demonstrate that the legislature intended to disallow Evidence Code § 1043 motions in administrative proceedings. In 1978, the California Legislature codified the privileges and discovery procedures comprising so-called "*Pitchess* motions" by enacting Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045. *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 50-51. The report by the Senate Committee on the Judiciary indicates that the main purpose of the 1978 legislation (Sen. Bill No. 1436) was to curtail the practice of record shredding and discovery abuses which allegedly occurred in the wake of the California Supreme Court's decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. *San Francisco Police Officers' Ass'n v. Superior Court*, 202 Cal.App.3d 183, 189 (1988).

Penal Code section 832.7, subdivision (a), provides in pertinent part:

> "Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5 [relating to citizen complaints], or information obtained from these records, are confidential and shall not be disclosed in any

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criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code."

Penal Code section 832.7, subdivision (a) [emphasis added].

A civil proceeding includes within its meaning an administrative disciplinary proceeding. *County of Los Angeles v. Civil Service Com.*, 39 Cal.App.4th 620, 631-632 (1995). In that case, the County of Los Angeles argued that an administrative disciplinary proceeding is not a "civil suit" within the meaning of Penal Code section 1016.3, which provides that "There are six kinds of pleas to an indictment or an information, or to a complaint charging a misdemeanor or infraction". (Penal Code § 1016). One such plea, a *nolo contendere* plea, is authorized by Penal Code § 1016.3, which provides, in pertinent part, as follows:

> In cases other than those punishable as felonies, the plea and any admissions required by the court during any inquiry it makes as to the voluntariness of, and factual basis for, the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based.

Penal Code § 1016.3 [emphasis added].

In *County of Los Angeles,* the court equated a civil action to an administrative procedure which adjudicates the propriety of a disciplinary action. *County of Los Angeles v. Civil Service Commission of Los Angeles County*, *supra*, 39 Cal.App.4th at 631-632. On that basis, the court concluded that the *nolo contender* plea may not be used against the defendant as an admission in any administrative procedure which adjudicates the propriety of a disciplinary action. *Id.*

Thus, the term "civil suit" when used in a statute was considered to include an administrative procedure which adjudicates the propriety of a

disciplinary action. Similarly, the reference to a "civil proceeding" in Penal Code section 832.7, subdivision (a), should be construed to include an administrative procedure which adjudicates the propriety of a disciplinary action.

There is nothing in the Legislative history that allows the court to draw the conclusion that the "administrative body" referenced in Section 1043 was not to encompass Government Code § 3304(b) hearings, but there is authority to support the finding that the reference to a "civil proceeding" in Penal Code section 832.7, subdivision (a), includes administrative procedure which adjudicates the propriety of a disciplinary action. *County of Los Angeles v. Civil Service Commission of Los Angeles County*, *supra*, 39 Cal. App. 4th at 631-632.

Since a reference to a civil proceeding has also been construed to include an administrative procedure which adjudicates the propriety of a disciplinary action, there is more than one reference to the application of an Evidence Code § 1043 motion made before an administrative body.

5. THE EVIDENTIARY HEARING BEFORE A MUTUALLY SELECTED ARBITRATOR WHO SERVES AS HEARING OFFICER IS AN ADMINISTRATIVE BODY WITHIN THE MEANING OF THE STATUTE.

Code of Civil Procedure § 1094.5(a) provides that "[w]here the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury." Code of Civil Procedure § 1094.5(a).

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The "inferior tribunal, corporation, board, or officer" referenced in Code of Civil Procedure § 1094.5(a) is generally referred to as the administrative body. "[W]here an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." *Campbell v. Regents of University of California*, 35 Cal.4th 311, 321 (2005), citing, *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 292 (1941). In that case, a discharged employee's lawsuit was dismissed for her failure to exhaust administrative remedies by filing a grievance under existing University grievance or complaint resolution procedures. The court specifically described the action as an administrative remedy sought from an administrative body. In this case, Government Code § 3304(b) mandates an evidentiary hearing. The appeal pursuant to the procedures set for in the MOU satisfies that statutory requirement and exhaustion of that administrative remedy is required. Peace officers have the ability to file a petition for a writ of administrative mandamus wherein the court determines whether the administrative body "has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." (Code Civ. Proc., § 1094.5 (b).)

Considering the number of cases arising under Code Civ. Proc., § 1094.5 that use the term "administrative body," and the fact that many such cases involve a petition for a writ of administrative mandate filed by a peace officer appealing an adverse action, it is reasonable to assume that the Legislature used the term "administrative body" as arising in the broad context of Code Civ. Proc., § 1094.5.

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6. EVIDENCE CODE § 1047 IS INAPPLICABLE AS THE CONDUCT AT ISSUE DID NOT INVOLVE AN ARREST, CUSTODY OR BOOKING.

The Department argues that Evidence Code § 1047 expressly prohibits *Pitchess* discovery of records of officers who were not present or directly involved in the incident giving rise to the request for peace officer records. (Opn. Brf. p.8)

This argument was raised and rejected in *Alt v. Superior Court* (1999) 74 Cal. App. 4th 950. In *Alt*, a police officer sought discovery of the personnel records of a fellow officer after being accused by that officer of insurance fraud. The trial court held that Evidence Code § 1047 barred disclosure of the personnel records as the evidence sought did not relate to arrest or booking. On appeal, the court held that the language of Evidence Code § 1047, read in light of the statutory framework, prohibits discovery only where the request for discovery involves an issue concerning a particular incident involving an arrest, or the conduct between the arrest and booking, and discovery of personnel records of officers not involved in that arrest or conduct is prohibited. The court held that a narrow reading of Evidence Code § 1047 would largely supplant the general discovery standards set forth in sections 1043 and 1045, which do not limit discovery of police personnel records to cases involving altercations between police officers and arrestees. *Id.* 957-958. See also, *Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 399-404 [*Pitchess* discovery is available in civil proceedings where it is relevant and not precluded by another statute and a narrow reading of Evidence Code § 1047 that limits disclosure to only actions involving arrest or booking would lead to "absurd results."] The court should similarly reject the Department's narrow interpretation of Evidence Code § 1047 as being inconsistent with § 1043 and one which seeks an absurd result.

D. A PARTY OPPOSING AN EVIDENCE CODE § 1043 DISCOVERY MOTION IN AN ADMINISTRATIVE PROCEEDING MAY NOT INVOKE THE JURISDICTION OF A COURT TO RULE ON THE MOTION PRE-PRODUCTION

The court held that because of the privacy interests involved, administrative mandamus is available to provide judicial review of a hearing officer's order for production of officer personnel records before the records are actually produced. *Riverside County Sheriffs' Dept. v. Stiglitz, supra*, 209 Cal. App. 4th at 907. In fact, this is the very procedural method by which this matter was placed before the trial court. As set forth above, the Department initiated the Superior Court action through the filing of a petition for an administrative writ pursuant to Code of Civil Procedure § 1094.5, which sought to compel Stiglitz to vacate his decision that good cause existed to grant the Evidence Code § 1043 motion. (AA 0001). The Department's petition challenged the hearing officer's granting of the motion prior to the production of the records.

Although the trial court stated during the hearing on the writ petition that the records Drinkwater sought were relevant, the Department abandoned this theory when it failed to appeal the issue. *Id.* at 908. Thus, the challenge to whether the hearing officer had good cause to grant the *Pitchess* motion was raised, lost and then abandoned by the Department. By the procedural history of this very action, the Department must realize it has the opportunity to file a pre-production challenge to the hearing officer's decision to grant the motion. Dissatisfied with that procedure, the Department now seeks a means by which to block exculpatory evidence even where the court holds there is good cause to allow such evidence.

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E. IF THE COURT FINDS THAT AN EVIDENCE CODE § 1043 MOTION IS INAPPLICABLE TO A GOVERNMENT CODE § 3304(B) HEARING, THEN THE RECORDS SOUGHT SHOULD BE OBTAINABLE THROUGH A SUBPOENA

As set forth above, the Department argues that the entire statutory scheme for an Evidence Code § 1043 motion involving criminal and civil matters was never intended for Government Code § 3304(b) administrative hearings. But the conclusion reached by this argument is not necessarily a conclusion that the records sought are unattainable. The right of a party to obtain peace officer records where relevant is not at issue; it is only the mechanism and means by which production is sought and granted that is at issue.

The Legislature adopted the current statutory scheme to insure the production of peace officer records where relevant and probative on a matter at issue in a criminal or civil proceeding, but with additional controls to protect against potential discovery abuses and to preserve records employing agencies demonstrated a propensity to destroy rather than make public. *Brown v. Valverde*, 183 Cal. App. 4th 1531, 1538-1539 (2010). By enacting these code sections, the Legislature balanced a litigant's need for disclosure of relevant information with the law enforcement officer's legitimate expectation of privacy in his or her personnel records. *San Diego v. City of San Diego Civ. Serv. Comm'n* (2002)104 Cal.App.4th 275, 281. Any interpretation of these code sections must achieve the goal of the Legislature to balance these interests.

If, as the Department argues, this post-Pitchess statutory scheme does not apply, then a peace officer in a Government Code § 3304(b) hearing should be free to subpoena records of fellow officers who are believed to

have received lesser discipline for a like offense without the requirement to bring a noticed motion before the hearing officer or anyone else.

This interpretation is also supported by the fact that the production of the records would not constitute a disclosure. Unlike a criminal, civil or administrative per se hearing, the records are produced at a private hearing. In the instant case, in addition to the County, only the arbitrator serving as hearing officer and the representative for the peace officer have custody and control over these documents. Both of these participants are under a duty to keep the records private and confidential. Thus, the law enforcement officer's legitimate expectation of privacy in his or her personnel records is satisfied where, as here, the hearing is private.

This interpretation is also supported by the fact that peace officer records are relevant where they could support a valid defense of disparate treatment. Since the peace officer is entitled to a full-evidentiary hearing with the statutory and constitutional requirements of due process, the court should interpret the statutory scheme in a manner that allows for the production of such evidence.

As set forth above, the MOU mandates the production of any relevant County record requested by either party and empowers the hearing officer to issue subpoenas; and therefore, it must be inferred that where officer personnel records are relevant to the issues raised, this provision in the MOU affords discovery of the relevant records. As the exclusive bargaining agent for all officers whose records are sought, RSA has a right, on behalf of its members, to agree to the production of personnel records and thereby waive any claims of confidentiality or privacy with respect to that limited production. Employee organizations certified as exclusive representatives are

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entitled to all information that is "necessary and relevant" to the discharge of their duty of representation.[5]

Article XII of the MOU provides that "[n]o employee with permanent status shall be disciplined or discharged without good cause." The peace officers who comprise the RSA formed, joined and funded RSA so that it could negotiate and enforce a public sector labor agreement concerning their wages, hours, terms and conditions of employment. As a result, RSA has a statutory duty to enforce a public sector labor agreement on behalf of its members. RSA can enforce the contractual right to have its members discharged only upon a showing of good cause by having access to the relevant records that support the viable defenses raised in the appeal. There is no evidence that Penal Code §§ 832.7 and 832.8 and/or Evidence Code § 1043 were passed by the Legislature to ensure that the exclusive representative of the peace officers could not obtain information necessary to enforce their own collective bargaining agreement.

While the current system of bringing a noticed motion before the hearing officer to obtain peace officer records is preferable, particularly since the procedure has worked flawlessly for as far back as anyone remembers, if the court finds that Evidence Code §1043 motions are inapplicable to a Government Code § 3304(b) hearing, the court should find that normal discovery procedures adopted by the parties should be used for the production of peace officer records in the same manner as other relevant evidence is

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[5] *Stockton Unified School District* (1980) PERB Dec. No. 143, 4 PERC P 11189 , pp. 771-773; *see* also *State of California (Departments of Personnel Administration and Transportation)* (1997) PERB Dec. No. 1227-S, 22 PERC P 29007, pp. 35, 36. In interpreting the MMBA, courts look to the decisions of the California Public Employment Relations Board (PERB) for guidance because of its legislatively designated expertise in interpreting several labor relations acts, including the MMBA. (*Paulsen v. Local No. 856 of International Brotherhood of Teamsters* (2011) 193 Cal. App. 4th 823, 830; *Burke v. Ipsen* (2010) 189 Cal. App. 4th 801, 809.)

obtained. Or in the alternative, the court remand to the trial court the issue of whether the MOU either expressly or as a matter of past practices provides for *Pitchess* discovery; an issue that the court did not resolve. *Riverside County Sheriffs' Dept. v. Stiglitz, supra*, 209 Cal. App. 4th at 908.

VI. CONCLUSION

The starting point in this analysis is that relevant, probative evidence is discoverable and admissible. From there, the issue becomes how to allow that evidence in a manner that also protects the confidentiality of peace officer records to the greatest extent possible. However, that desire to balance those interests has never resulted in the suppression of relevant, exculpatory evidence needed to establish a recognized defense.

There is no indication in the Legislative history or in the statutory language involving Evidence Code §1043 motions that would allow the court to find a Legislative intent to thwart statutory and due process mandates by limiting the ability of a peace officer to obtain relevant evidence to support a viable defense.

An interpretation of Evidence Code § 1043 which excludes administrative bodies as venues for Evidence Code § 1043 motions, conflicts with the due process rights afforded to peace officers in disciplinary hearings by Government Code § 3304 (b).

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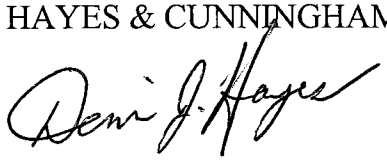
By enacting the *Pitchess* statutory scheme for discovery motions, the Legislature balanced a litigant's need for disclosure of relevant information with the law enforcement officer's legitimate expectation of privacy in his or her personnel records. *San Diego v. City of San Diego Civ. Serv. Comm'n* (2002) 104 Cal. App. 4th 275, 281. Any interpretation of these code sections must achieve the goal of the Legislature to have a balance of these interests.

Dated: March 12, 2013

HAYES & CUNNINGHAM



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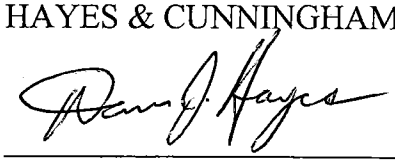
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.520 and Rule 8.204 of the California Rules of Court, I hereby certify that this brief contains 10,545 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: March 12, 2013

HAYES & CUNNINGHAM

By: 

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PROOF OF SERVICE BY MAIL

CASE NAME: *Riverside County Sheriff's Department (Petitioner) v. Jan Stiglitz, et al. (Respondent)*

CALIFORNIA SUPREME COURT CASE NUMBER: S206350
COURT OF APPEAL CASE NUMBER: E052729
RIVERSIDE SUPERIOR COURT CASE NUMBER: RIC10004998

I, Sarah Holko, declare as follows:

1. At the time of service, I was at least 18 years of age and not a party to this legal action. I am a resident or employed in the county where the within-mentioned service occurred.

2. My business address is 5925 Kearny Villa Rd., Ste. 201, San Diego, California 92123.

3. On March 13, 2013, I served the **ANSWERING BRIEF ON THE MERITS OF INTERVENOR/APPELLANT RIVERSIDE SHERIFFS' ASSOCIATION** by United States mail as follows: I enclosed a copy in separate envelopes, with postage fully prepaid, addressed to each individual addressee named below, and I deposited each sealed envelope with the United States Postal Service in San Diego, California, for delivery as follows:

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

Date: March 13, 2013

SARAH HOLKO, Declarant