

FIREFIGHTERS' PROCEDURAL BILL OF RIGHTS ACT

The California Legislature has conferred on firefighters many of the same protections already enjoyed by law enforcement personnel for over thirty years, enacting the Firefighters' Procedural Bill of Rights Act (Government Code Sections 3250-3262), effective January 1, 2008. With few exceptions, the new Act mirrors the provisions of the Public Safety Officers' Procedural Bill of Rights Act (Government Code Section 3300-3313) from which we have the benefits of three decades of judicial interpretation. In the pages that follow, we will address the most common questions firefighters have had regarding the Act. However, we caution readers that this area of law is in constant flux, and conclusions regarding a specific matter should only be made in consultation with experienced legal counsel.

I. To whom does the Act apply?

The Act applies to “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.” However, “firefighter” does not include any employee who has yet to complete the probationary period required by his employer as a condition of employment. Also, inmates of state and local institutions performing firefighting or related duties do not qualify as firefighters under the Act. (Section 3251(a))

II. For purposes of internal affairs investigations, when does the Act apply?

When a firefighter is subjected to interrogation “that could lead to punitive action”, the interrogation must be conducted in accordance with the provisions of Section 3253, which defines “punitive action” as “any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.”

Section 3253 requires that the interrogation be conducted at a reasonable hour and for a reasonable time. In interpreting parallel provisions of the Public Safety Officers’ Procedural Bill of Rights Act (“Officers’ Act”), courts have implied an element of reasonableness in the provisions of the statute. (*Upland Police Officers’ Association v. City of Upland* (2003) 111 Cal.App.4th 1294)

III. What must management tell the firefighter prior to the interrogation?

Section 3303(b) requires that the firefighter under investigation “shall be informed, prior to the interrogation, of the rank, name, and command of the firefighter in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation”. Questions asked of the firefighter shall be asked “by and through no more than

two interrogators at one time.” (Section 3253(b)) On its face, this subsection does not prohibit more than two representatives of management in the interrogation room, and merely limits the questioning to be funneled through two interrogators.

Furthermore, subsection (c) notes that the firefighter under investigation “shall be informed of the nature of the investigation prior to any interrogation.” While case law has not defined what comprises “the nature of the investigation”, an application of the “reasonableness” standard of the *Upland* case would suggest that management must provide to the firefighter sufficient information to apprise him of the incident(s) being investigated, so at minimum the firefighter will have a meaningful opportunity to confer with his chosen representative prior to the interview. Merely identifying the scope of the interview as “misconduct” or “conduct unbecoming” would appear to be grossly insufficient, inasmuch as such generalities provide no notice whatsoever to the firefighter or his representative of the specific nature of the inquiry.

IV. Is an interrogating officer required to read to the subject firefighter all of his rights under the Act prior to the interview?

Although departments may either orally or in writing provide extensive notification to firefighters as to their rights under the Act at some point prior to any questioning, such is not specifically required by the Act itself.

V. Can the statement of a firefighter coerced by the department be used against the firefighter in a civil proceeding?

Section 3253(f) prevents the use of a coerced administrative statement in any judicial proceeding except (1) in disciplinary and other civil service matters brought against the firefighter by his agency; or (2) in administrative or civil actions brought by the firefighter arising

out of a disciplinary action.

If the civil action is in federal court, none of these statutory rules apply.

VI. Is a firefighter entitled to pre-interrogation discovery?

Section 3253(g) states in part that the firefighter “shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those portions that are otherwise required by law to be confidential.” Interpreting similar language in the Officer’s Act, the California Supreme Court in *Pasadena Police Officers’ Association v. City of Pasadena* (1990) 51 Cal.App.3d 564 held that the materials noted above need only be supplied post-interrogation, seemingly after the issuance of a notice of proposed discipline. Apart from the notifications contained in Section 3253(b) and (c) regarding the identity of the interrogators and the nature of the investigation, the only pre-interrogation discovery required by the Act consists of access to the tape recordings of a first interrogation prior to a second interview. (Section 3253(g))

Conversely, management is not prohibited from providing any kind of pre-interrogation discovery. Certainly, it can be argued by a representative that, at minimum, a firefighter should have the opportunity to review any documents or reports he personally prepared to refresh his recollection.

VII. What rights does a firefighter have during the interrogation?

The firefighter under investigation has the right not to be subjected to offensive language, or threatened with punitive action, except that a firefighter “refusing to respond to questions or submit to interrogation shall be informed that failure to answer questions directly related to the investigation or interrogation may result in punitive action.” (3253(e)) Also, the firefighter is

entitled to tape record the interview, as are management's representatives, and to have his own representative present during any questioning. (3253(g) and 3253(i))

VIII. Is management required to read a firefighter his *Miranda* rights?

Section 3253(h) requires that those rights be read if it is deemed that the firefighter may be charged with a criminal offense. Most agencies will likely routinely give *Miranda* warnings even if no criminal charges are contemplated as an exercise of caution, as is currently the practice of police agencies.

The Act contains a provision not otherwise found in the POBR regarding questioning that might relate to criminal culpability:

“The employer shall provide to, and obtain from, an employee a formal grant of immunity from criminal prosecution, in writing, before the employee may be compelled to respond to incriminating questions in an interrogation. Subject to that grant of immunity, a firefighter refusing to respond to questions or submit to interrogations shall be informed that the failure to answer questions directly related to the investigation or interrogation may result in punitive action.” (Section 3253(e)(1))

Prior to 2007, it had been well accepted in California, pursuant to the decision in *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, that an administrative agency had the authority to order an employee to respond to questions, with the advisal and promise that the statements made by the employee could not be used against him in any criminal proceeding. However, in early 2007, the California Court of Appeal, Sixth District, held that in the absence of

a grant of immunity by an entity with authority to grant immunity, a county could not terminate an employee for insubordination if the employee refused to respond to administrative questions. (*Spielbauer v. County of Santa Clara* (2007) 146 Cal.App.4th 914) Since police departments have no authority to grant immunity, the *Spielbauer* case called into question the propriety of the conduct of administrative investigations by public entities throughout California. The California Supreme Court has since vacated the Court of Appeal's opinion and accepted the case for review. Accordingly, we will likely know more about what constitutes a "formal grant of immunity" for purposes of the Firefighters' Act once the Court renders its decision. In the meantime, police agencies are conducting interviews in accordance with the *Lybarger* standard.

IX. Are there circumstances under which the Act is not applicable in an administrative setting?

First, the Act expressly provided that its rights and protections "only apply to a firefighter during events and circumstances involving the performance of his or her official duties." (Section 3262) Also, according to 3253(i), Section 3253 "shall not apply to any interrogation of a firefighter 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 firefighter." However, the determination of what constitutes "the normal course of duty..." etc. is subject to judicial interpretation based on the specific facts of each case. In *City of Los Angeles v. Superior Court (Labio)* (1997) 57 Cal.App.4th 1506, it was held that when supervisors heard of potential misconduct by a police officer, and conducted a brief inquiry into the circumstances regarding the alleged misconduct, such was sufficient to place the officer under investigation, and thereby required the supervisors to provide the notifications contained in

3303(b) and (c), parallel provisions of 3253(b) and (c), respectively. As an exercise of caution, a firefighter should assert his rights whenever being questioned about potential misconduct.

X. How much time does management have to pursue disciplinary action against a firefighter?

With some qualifications, Section 3254(d) requires that no punitive action nor denial of promotion on grounds other than merit shall be undertaken against any firefighter for any “act, omission, or other allegation of misconduct”, if the investigation of the allegation is not completed within one year of the discovery of the allegation by a person otherwise authorized to initiate an investigation. This provision applies only to an “act, omission or other allegation of misconduct” that is discovered on or after January 1, 2008 and is subject to numerous circumstances under which the statute may be “tolled” (extended). Generally speaking, the one year rule will be applicable to cases in which there is no collateral civil, criminal or workers’ compensation litigation.

XI. Can management lawfully place negative information in a firefighter’s file without the firefighter knowing about it?

Section 3255 restricts management from placing any comment adverse to the firefighter’s interests in a personnel file without the firefighter having first read and signed the instrument containing the adverse comment. Section 3256 gives a firefighter thirty (30) days within which to file a written response to any adverse comment in his file, which response is required to accompany the adverse comment in the file. Furthermore, Section 3256.5 allows firefighters to inspect personnel files that have been used to determine the firefighter’s qualifications “for employment, promotion, additional compensation, or termination or other disciplinary action.”

Firefighters should periodically inspect their files to ensure that management is adhering to its obligations under the Act.

XII. Am I required to take a polygraph examination?

Section 3257 forbids a department from requiring a polygraph, deceptograph, voice stress or any other similar examination from being used in a disciplinary investigation. However, it has been held that the nearly identical language in the Officers' Act did not prohibit management from using polygraphs as part of a promotional examination, since, as one court found, subjecting oneself to a promotional process is a purely voluntary act. *LAPPL v. City of Los Angeles* (1995) 35 Cal.App. 4th 1535.

XIII. May the department inquire of a firefighter's finances?

A firefighter is not required to disclose any item of his property, income, assets, sources of income, debts or personal domestic expenditures, including those of any member of his or her household, "unless that information is otherwise required to be furnished under state law or pursuant to a court order." (Section 3258)

XIV. When can a firefighter's locker be searched?

A firefighter's locker or storage space may be searched (1) in his presence, (2) with his consent; (3) upon advance notification; and (4) with a search warrant, only if the locker or storage space is owned or leased by the employing department or licensing/certifying agency. (Section 3259)

XV. What can a firefighter do if there is a violation of his rights under the Act?

Section 3260 confers "initial jurisdiction" on the Superior Court over any proceeding brought by a firefighter against a department or licensing/certifying agency for alleged violations

of the Act. Under the Officers' Act, it has been held that "initial jurisdiction" allowed, but did not necessarily require, officers to bring an alleged violation directly to Superior Court. In *Alameida v. State Personnel Board* (2004) 120 Cal.App.4th 46, it was held that officers may raise violations of the Officers' Act in administrative, civil service-type proceedings without first proceeding to Superior Court.

A court is allowed to "render appropriate injunctive or other extraordinary relief" to remedy the violation and prevent future violations of the Firefighters' Act, in accordance with Section 3260. If a court finds that a violation was malicious, it may sanction the public safety department up to \$25,000 for each such violation.

XVI. Does the Act apply if the firefighter is merely a "witness" in the investigation?

As the Act applies to firefighters "under investigation and subjected to interrogation...which could lead to punitive action" (Section 3253), a firefighter who is truly only a witness does not appear to fall within that category. However, often management's characterization of a firefighter as a witness is premature and/or erroneous, as based upon insufficient information. Moreover, a firefighter who may not appear to be the primary alleged perpetrator may in fact have administrative liability for aiding or abetting the event, or failing to report or prevent it. Since management may seek to deny the "witness" firefighter the benefits of the Act, it is essential that the firefighter call an Association attorney immediately upon being notified of an interview. A firefighter concerned that he may not be only a witness should respectfully advise management and consult legal counsel.

XVII. When is a firefighter entitled to a representative?

Section 3253(i) states that “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 is entitled to a representative who may be present at all times during an interrogation. Should the representative be a non-attorney employee of the Department, he may not be required to disclose, or be subjected to punitive action for failing to disclose, information received from the firefighter under investigation for non-criminal matters. (Section 3253(i)) Firefighters should discuss critical incidents which have any potential for criminal liability only with an attorney to take advantage of the attorney-client privilege.

Since the firefighter’s right to a representative under the Act falls typically within the interrogation setting, it follows that there is no statutory right to a representative when the employee is not being subjected to interrogation. For example, an employee who is merely being reprimanded, admonished or served with a disciplinary notice would not have an immediate right to have a representative under the Act, as long as management is not asking questions that could lead to punitive action. However, management representatives frequently recognize that the presence of an Association representative during such matters, while not statutorily required, may often assist in calming and expediting the process.