Case No. S206350

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RIVERSIDE COUNTY SHERIFF'S DEPARTMENT, Plaintiff and Respondent vs. JAN STIGLITZ, Defendant. RIVERSIDE SHERIFF'S ASSOCIATION, Intervenor/Appellant. AND RELATED ACTIONS.	)	Case No. S206350 **PETITIONER'S REPLY BRIEF** [Riverside Superior Court No. RIC10004998, after Published Decision of the Fourth District Court of Appeal, Div. Two, No. E052729]

PETITIONER'S REPLY BRIEF

After Published Opinion of the Fourth Appellate District, Division Two, in the appeal from the Superior Court for the County of Riverside Honorable Mac R. Fisher, Judge Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

///

Statutes

Business and Professions Code

Evidence Code

Government Code

Labor Code

Penal Code

Other

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Petitioner, RIVERSIDE COUNTY SHERIFF'S DEPARTMENT (hereafter "The Department") respectively submits its single Reply Brief, jointly responding to the separate Answering Briefs of Real Party in Interest, KRISTY DRINKWATER (hereafter "Drinkwater"), and Intervenor, RIVERSIDE SHERIFF'S ASSOCIATION (hereafter "RSA").

PREFATORY STATEMENT.

Despite more than 80 combined pages of Answering Briefs, it is amazing how Drinkwater and RSA both manage to avoid the very narrow issue framed by this Court:

> "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?"

In the underlying opinion, the Fourth District Court of Appeal identified "*an ambiguity*" in the statutory framework encompassing the *Pitchess* process since there are no less than six roles exclusively mandated to the "court" and only a singular reference to an "administrative body". Yet, neither Drinkwater nor RSA ever once address these multiple statutory

references to "court". Each instead proffers exhaustive, but unpersuasive, arguments why one reference to "administrative body" should somehow prevail over all other statutory provisions to the benefit of their respective interests with little or no regard to the global impact of their positions.

Without repeating the concise, but thorough, arguments set forth in the Department's Opening Brief on the narrow issue presented, the Department will attempt address the collateral issues raised by the Answering Briefs.

ARGUMENT

1. THIS IS NOT A DUE PROCESS ISSUE.

Latching onto the Fourth District's due process argument (Slip Op. 27-28), Drinkwater and RSA suggest that the Department is somehow attempting to deprive deputies of their right to present relevant evidence of disparate penalty. Although it is curious that neither party ever denies that Drinkwater intentionally falsified her timesheets, the Department has consistently agreed that evidence of disparate penalty may be relevant.[1] The issue, however, is not relevancy, but the exclusive statutory process by which any privileged information may be obtained.

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[1] While disparate penalty is mitigation rather than a defense, intentionally false statements will always warrant termination. *Talmo v. Civil Svc. Comm. (1991) 231 Cal.App.3d 210, 230.*

In support of her due process argument, Drinkwater suggests that the preclusion of *Pitchess* motions in DMV hearings established in *Brown v. Valverde (2010) 183 Cal.App.4th 1531* fails to implicate any due process issues, but would somehow implicate them in peace officer disciplinary hearings. This argument immediately fails for a couple of reasons (1) it has already been established that DMV hearings comport to due process [*Peretto v. DMV (1991) 235 Cal.App.3d 449, 460*], and (2) it is rather disingenuous to suggest that the loss of one's driving privilege in a DMV hearing is somehow less important than the range of discipline at issue in an administrative hearing under *Government Code § 3304(b).* Although Drinkwater is facing termination in the instant case, the issue pending before the Court will have global application for officers facing anything from a written reprimand to termination. It simply cannot be said that the appeal of a written reprimand by an officer under POBR should warrant greater due process than an individual appealing the revocation of their driving privilege at a DMV hearing.

Ironically, Drinkwater then cites *Petrus v. DMV (2011) 199 Cal.App.4th 1240* for the proposition that due process is required for a fair and meaningful defense in a DMV hearing. The due process violation in *Petrus*, however, was narrowly limited to the fact that the DMV failed to

fulfill its mandatory duty to provide blood alcohol results to the grieving driver until literally minutes before the scheduled hearing.

There is a critical difference between the obligation of any prosecuting authority to provide evidence to meet its burden of proof and the desire of any defendant to seek statutorily privileged evidence pertaining to third parties. There is no suggestion that the Department has ever failed to provide Drinkwater with all of the evidence upon which the administrative charges are based. *Skelly v. State Personnel Bd (1975) 15 Cal.3d 194.* Once again, the Department is not saying that Drinkwater can't seek information in support of her disparate penalty claim – she simply must, like any other defendant in any other proceeding, comply with the statutory scheme enacted by the Legislature for the discovery of confidential peace officer personnel files.

Drinkwater's reliance on *Fletcher v. Superior Court (2002) 100 Cal.App.4th 386,* to support her due process argument is also misplaced. The issue in *Fletcher* had nothing to do with due process issues in an administrative setting, but instead narrowly addressed the constitutional right of a criminal defendant under *Brady v. Maryland (1963) 373 U.S. 83, 87* [codified in California under *Penal Code § 1054.1*] to an officer's entire

employment history in response to a *Pitchess* motion properly filed with and determined by a court.

In a nutshell, this is simply not a due process issue and has nothing to do with whether peace officers can seek access to statutorily privileged information which may or may not be relevant to their administrative appeal. The narrow issue framed by this Court is the forum for the discovery to such privileged information already established by statute.

2. THE ISSUE IS NOT LIMITED TO DRINKWATER'S TERMINATION CASE.

While Drinkwater is facing the ultimate penalty of termination, she and RSA fail to address the broad scope of disciplinary hearings undertaken with the Peace Officers Bill of Rights (POBR) pursuant to *3304(b)*. As set forth in *Government Code § 3303*, the range of discipline triggering the right to an administrative appeal includes everything from written reprimands to dismissal.

Drinkwater also suggests that her desire for evidence of disparate penalty could be satisfied by the Department simply providing her with records of similar cases with the identities of those officers redacted. (Answering Brief, p. 30). However, in the next breath, Drinkwater outlines the detailed information she would require in order to determine whether

the other cases were on point with her own. For a number of reasons, Drinkwater's narrow view of this issue fails:

- In an agency the size of the Riverside County Sheriff's Department (over 2,500 sworn deputies), there may be a sufficient number of cases of similar conduct to minimize the likelihood that a previously disciplined deputy would be identified in a redacted format. However, given that the vast majority of the more than 500 law enforcement agencies in the state of California employ less than 50 officers, it is highly unlikely that more than a very few would have been disciplined for similar misconduct to the subject officer during the previous five (5) year retention period (*Penal Code § 832.5*). As such, it would be rather easy to deduce the identity of the uninvolved officer from even a redacted format. Yet, this is the very privacy interest this Court declared *Evidence Code § 1045* was enacted to protect. *City of Santa Cruz v. Municipal Court (1989) 49 Cal.3d 74, 83.*
- Although disparate penalty is the reason Drinkwater seeks access to the confidential personnel files of uninvolved officers in the instant case, the issue in the next administrative

appeal may be the credibility of a witness officer which obviously could not be limited to redacted files. Or, an officer pursuing a disability claim might wish to seek the very sensitive and privileged medical files of officers who filed similar claims. Permitting *Pitchess* motions to be heard in administrative hearings could even extend to seeking payroll and confidential tax records (W-2's) of uninvolved officers in a payroll grievance. This broad expansion of the scope of discovery of privileged peace officer personnel files contemplated by the *Pitchess* process is precisely why the Legislature has mandated that these sensitive issues may only be determined by the court.

- Ironically, both Drinkwater and RSA acknowledge that RSA has been the exclusive bargaining unit representing deputies in administrative appeals for over twenty (20) years and is therefore already privy to the identities of all previously disciplined deputies and the final penalty imposed. While this presents an interesting conflict of interest for RSA to seek to expose prior discipline of deputies it previously represented, this is precisely the type of "other records" contemplated by

Evidence Code § 1045(c) as an alternative to disclosure under the *Pitchess* process. Of course, knowing the identities of similarly disciplined deputies would also facilitate simply asking those deputies to appear voluntarily in support of any defense without the need for *Pitchess.* However, as RSA aptly points out (Brief, p. 19), "*for a myriad of reasons, a deputy may not wish to be involved or to support a fellow deputy.*" Once again, this is exactly why *Evidence Code § 1045(d)* requires the court to "protect the officer or agency from unnecessary annoyance, embarrassment or oppression."

- Despite the best efforts of Drinkwater and RSA to distinguish the limitation of *Pitchess* motions to only involved officers imposed by *Evidence Code § 1047*, their efforts must fail. Frankly, the Department agrees that *Alt v. Superior Court (1999) 74 Cal.App.4th 950,* expands section *1047* beyond those officers who were merely involved in the "arrest or contact" with the individual seeking officer records. Such a narrow expansion makes sense in the circumstances of *Alt* in which the officer who was the subject of the *Pitchess* motion was the actual complainant against the officer seeking access

to the complaining officer's files. However, under the broad expansion sought by Drinkwater and RSA, section *1047* would be rendered meaningless by permitting *Pitchess* motions on files of officers whose only connection to the seeking officer was the fact that the subject officer was coincidentally disciplined for similar misconduct sometime in the previous five years.

Whether redaction or some other alternative might work for Drinkwater, such suggestions do not address the jurisdiction in which they might be formulated or why they couldn't be fashioned in the statutorily mandated forum of the courts. The issue framed by this Court is not limited to Kristy Drinkwater or even RSA, but will instead have a statewide impact on all administrative hearings under POBR in agencies of all sizes and in cases ranging from written reprimands to termination.

3. ADMINISTRATIVE HEARING OFFICERS ARE NOT AUTHORIZED TO DETERMINE PRIVILEGE ISSUES.

As more fully addressed in the Department's Opening Brief, there are several critical reasons why the Legislature expressly limited the determination of sensitive privilege issues to the courts at no less than six places within the *Pitchess* statutory scheme.

Contrary to the claim of RSA, *Government Code § 3304(b)* contains no provisions for discovery or the scope of evidence to be presented in any administrative appeal – it simply provides for an administrative appeal. In fact, despite four amendments to *3304* since the 1978 enactment of the *Pitchess* statutes, the Legislature has never seen fit to authorize or even address the propriety of *Pitchess* motion in administrative appeals provided under *3304(b)*.

Instead, the Legislature added *Government Code § 3304.5* in 1998 [ch. 263 § 1 (SB1662)] to require that peace officer administrative appeals under POBR shall be conducted in conformance with local agency rules and procedures. Ironically, the MOU governing the administrative appeal process between the Department, RSA, and Drinkwater expressly provides:

> "The rules of privilege shall be effective to the same extent that they are not or hereafter may be recognized in civil actions."
>
> *MOU, Article XII, § 9(D) at Joint App. 0159*

In other words, the privilege attached to peace officer personnel files pursuant to *Penal Code § 832.5* shall be determined in the same manner as in any civil action – i.e. by the court as set forth in *Evidence Code § 1045(b)-(e)*. Coincidentally, this operative MOU provision is remarkably similar to *Government Code § 11507.6* which also exempts the discovery of

information privileged by law in administrative hearings for state agencies. (i.e. the same conclusion reached in *Brown, supra.* - *Pitchess* motions fall exclusively within the jurisdiction of the courts).

In her effort to counter the Department's logical suggestion that the inclusion of "administrative body" in *Evidence Code § 1043* was intended to address various administrative judges (i.e. courts), Drinkwater makes an impassioned plea that precluding non-judicial administrative hearing officers from adjudicating *Pitchess* motions would somehow create an inequity between peace officers employed by the state and all other local officers because the administrative appeals for state officers take place at the State Personnel Board (SPB). (Answering Brief, p. 33-34). Unfortunately, Drinkwater's argument is based on the faulty premise that administrative law judges preside over SPB hearings while non-judicial hearing officers preside over the administrative appeals of local officers. In fact, *Government Code § 18671* provides that any person authorized by the board (i.e. not judges) may preside over SPB hearings.

As such, the Department's argument at page 13 of the Opening Brief remains valid as a simple way to reconcile the "*apparent ambiguity*" between the single reference to "administrative body" in section *1043* and the six statutory roles exclusive reserved to the courts in sections *915* and

1045. There are in fact several judges/courts sitting as "administrative bodies" which would have logically been contemplated by the Legislature so as to warrant this singular reference in 1043 – State Bar Judges are established under *Business and Professions Code § 6079.1;* Administrative Law Judges are established under *Government Code § 11502* and WCAB Judges are established under *Labor Code § 5312, et seq.*

Drinkwater also attempts to suggest that the inclusion of hearing officers and arbitrators in *Evidence Code § 901* and the authority of the "presiding officer" to rule on claims of privilege under *Evidence Code § 905* somehow implies the ability of administrative hearing officers to hear *Pitchess* motions. Once again, however, a more complete review of the governing statutes reveals the fallacy of Drinkwater's position. *Evidence Code § 900* expressly limits the foregoing definitions within the chapter "unless the provision or content otherwise requires" (i.e. *Evidence Code § 1045* in fact "otherwise requires" that *Pitchess* motions fall within the exclusive jurisdiction of the courts). Similarly, *Evidence Code § 915(b)* expressly limits consideration of privileges commencing with section *1040* to the exclusive role of the courts and to the exclusion of any other presiding officer.

While RSA correctly notes that administrative hearing officers are mutually selected by the parties, they are selected within the limited parameters of the MOU (to weigh evidence and determine the merits of the allegations and penalty) and are nowhere authorized to determine privilege issues in the statutory context of *Pitchess*. Because the Department has already provided the Court with other compelling reasons why administrative hearing officers cannot be entrusted with *Pitchess* motions (Opening Brief, p. 14-17), they will not be repeated here.

4. HISTORY DOES NOT AUTHORIZE ADMINISTRATIVE HEARING OFFICERS TO HEAR *PITCHESS* MOTIONS.

Drinkwater correctly observes that this is the first time this issue has ever reached the appellate level which is presumably why this Court has granted review. While Drinkwater also cites several examples over the past decade wherein the Department did not include the current objection in its routine objections to *Pitchess* motions filed in administrative appeals, it is rather ironic that RSA has historically taken the position that the *Pitchess* process does not apply in such administrative hearings. [See: Joint App. 1665 and 1683] Yet, RSA and Drinkwater now suddenly take the opposite position by arguing that *Pitchess* should apply.

Like any legal issue, the law is constantly changing as the issues are refined and new objections raised. In fact, it was not until the First District Court of Appeal decided *Brown v. Valverde* (2010) 183 Cal.App. 4th 1531, that the Department was provided with a good faith basis to immediately raise the present issue in the context of POBR hearings. Now that that issue has been refined by this Court, the entire state of California looks forward to the learned guidance of this Court in future POBR hearings.

5. NEITHER DRINKWATER NOR RSA EVER ACKNOWLEDGE OR EXPLAIN THE SIX GLARING REFERENCES TO "THE COURT" IN THE *PITCHESS* STATUTORY SCHEME.

As noted above, Drinkwater and RSA have managed to consume a combined total of more than 80 pages filled with sometimes interesting and sometimes rather remote arguments. However, the most conspicuous aspect of both Answering briefs is that neither of them ever mention, much less try to explain, the six statutory provisions of sections *1045* and *915* which expressly limit key roles in the *Pitchess* process exclusive to "the court".

Yet, this is precisely what the Legislature has mandated and simply ignoring these six statutory references will not make them disappear. This Court has framed a very narrow issue and the Department's Opening Brief

has provided concise and persuasive authorities to support the position that the *Pitchess* process simply does not apply in administrative hearings under *Government Code § 3304(b)* just as the *Brown* court properly recognized that such motions cannot be determined by DMV hearing officers.

This is not to say that peace officers may not seek access to the privileged files of other officers. As evidenced in the instant case, the bargaining unit for the appealing officer (here RSA) will usually have institutional knowledge of similarly disciplined officers who may or may not wish to voluntarily reveal their own personnel files (a privacy prerogative each officer should be entitled to exercise).

Absent such knowledge, the Department has previously suggested that an administrative hearing officer could even make a preliminary determination of good cause in each case. If good cause was found, the matter would simply be referred to the court for an *in camera* review of the sensitive privileged information consistent with the existing provisions of *Evidence Code §§ 1045* and *915*. This would insure the Legislative intent:

- Carefully balance the statutorily protected privacy interests of the uninvolved officer(s) with the good cause already set forth in the hearing.

- Avoid unnecessary taint of the administrative hearing officer by not exposing him/her as the fact-finder to irrelevant and sensitive information.
- Provide the subject officer with a protective order enforceable by the court (unenforceable and not even authorized by hearing officers).

Because these dispositive issues have been thoroughly addressed in the Department's Opening Brief (and ignored in both Answering Briefs), the Department will not repeat them here.

6. CONCLUSION.

With the exception of any outstanding *Amicus* briefs, the narrow issue framed by this Court has now been fully briefed by the parties and it is respectfully urged that the Court rule that the *Pitchess* process is limited to the exclusive jurisdiction of the courts or qualified judicial officers sitting in administrative proceedings.

Dated: May 3, 2013

Respectfully submitted,

FERGUSON, PRAET & SHERMAN
A Professional Corporation

By: _____
Bruce D. Praet, Attorneys for
Petitioner, Riverside Sheriff's Dept.

CERTIFICATE OF WORD COUNT COMPLIANCE

1. This brief complies with the type volume limitation of California Rules of Court, Rule 8.204 in that this reply brief contains 3,068 words.

2. This brief complies with the typeface requirements of California Rules of Court, Rule 8.204 and type style requirements as this brief has been prepared in proportionally spaced typeface using Word Perfect X3, Times New Roman 13 point font.

Dated: May 3, 2013

Respectfully submitted,

FERGUSON, PRAET & SHERMAN
A Professional Corporation

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

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.

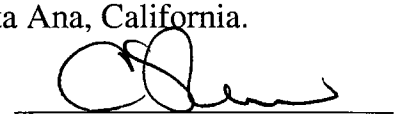
On May 6, 2013, served the **PETITIONER'S REPLY BRIEF** on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

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 6, 2013, at Santa Ana, California.



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