# SENATE COMMITTEE ON PUBLIC SAFETY

**Senator Nancy Skinner, Chair**
**2017 - 2018 Regular**

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| **Bill No:** | AB 1298 | **Hearing Date:** | July 11, 2017 |
| **Author:** | Santiago | | |
| **Version:** | April 26, 2017 | | |
| **Urgency:** | No | **Fiscal:** | Yes |
| **Consultant:** | GC | | |

**Subject:** ***Public Safety Officers: Procedural Rights***

## HISTORY

Source: Los Angeles County Professional Peace Officers Association; Los Angeles Police Protective League; Riverside Sheriffs' Association

Prior Legislation: SB 388 (Lieu), 2013, vetoed
SB 313 (De Leon), Ch. 779, Stats. of 2013
AB 955 (De Leon), Ch. 494, Stats. of 2009

Support: Association for Los Angeles Deputy Sheriffs; Association of Deputy District Attorneys; Association of Orange County Deputy Sheriffs; California Association of Code Enforcement Officers; California Association of Highway Patrolmen; California College and University Police Chiefs Association; California Correctional Peace Officers Association; California Correctional Supervisors Organization; California Narcotic Officers Association; California Statewide Law Enforcement Association; Fraternal Order of Police; Long Beach Police Officers Association; Los Angeles County Probation Officers Union, AFSCME Local 685; Los Angeles County Professional Peace Officers Association; Peace Officers Research Association of California; Sacramento County Deputy Sheriffs' Association; State Coalition of Probation Organizations

Opposition: Alliance for Boys and Men of Color; American Civil Liberties Union; California Police Chiefs Association; California State Sheriffs' Association; Chief Probation Officers of California; Courage Campaign; A New Way of Life Reentry Project; PACT: People Acting in Community Together; PolicyLink; Western Regional Advocacy Project

Assembly Floor Vote: 62 - 6

## PURPOSE

***The purpose of this bill is to specify "clear and convincing evidence" as the standard of proof required in order to sustain an administrative disciplinary action against a law enforcement officer for making a false statement.***

*Existing law* defines "public safety officer" as all peace officers, except as specified. (Gov. Code, § 3301.)

*Existing law* finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations between public safety employees and their employers. (Gov. Code, § 3301.)

*Existing law* provides that when any public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action, the interrogation shall be conducted under the specified conditions. (Gov. Code, § 3303.)

*Existing law* states that, for purposes of the POBOR, "punitive action" means any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment. (Gov. Code, § 3303.)

*Existing law* specifies that when any public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action, the interrogation shall be conducted under the following conditions:

1) The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise. If the interrogation does occur during off-duty time of the public safety officer being interrogated, the public safety officer shall be compensated for any off-duty time in accordance with regular department procedures, and the public safety officer shall not be released from employment for any work missed; (Gov. Code, § 3303, subd. (a).)

2) The public safety officer under investigation shall be informed prior to the interrogation of the rank, name, and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation. All questions directed to the public safety officer under interrogation shall be asked by and through no more than two interrogators at one time; (Gov. Code, § 3303, subd. (b).)

3) The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation; (Gov. Code, § 3303, subd. (c).)

4) The interrogating session shall be for a reasonable period taking into consideration gravity and complexity of the issue being investigated. The person under interrogation shall be allowed to attend to his or her own personal physical necessities; (Gov. Code, § 3303, subd. (d).)

5) The public safety officer under interrogation shall not be subjected to offensive language or threatened with punitive action, except that an officer refusing to respond to questions or submit to interrogations shall be informed that failure to answer questions directly related to the investigation or interrogation may result in punitive action; (Gov. Code, § 3303, subd. (e).)

6) No statement made during interrogation by a public safety officer under duress, coercion, or threat of punitive action shall be admissible in any subsequent civil proceeding, subject to certain qualifications; (Gov. Code, § 3303, subd. (f).)

7) The complete interrogation of a public safety officer may be recorded; (Gov. Code, § 3303, subd. (g).)

8) If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time; (Gov. Code, § 3303, subd. (g).)

9) If prior to or during the interrogation of a public safety officer it is deemed that he or she may be charged with a criminal offense, he or she shall be immediately informed of his or her constitutional rights; (Gov. Code, § 3303, subd. (h).)

10) 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 public safety officer, that officer, at his or her request, shall have the right to be represented by a representative of his or her choice who may be present at all times during the interrogation; and (Gov. Code, § 3303, subd. (i).)

11) The representative shall not be required to disclose, nor be subject to any punitive action for refusing to disclose, any information received from the officer under investigation for noncriminal matters. (Gov. Code, § 3303, subd. (i).)

*Existing law* states that this section shall not apply to any interrogation of a public safety officer 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 public safety officer, nor shall this section apply to an investigation concerned solely and directly with alleged criminal activities. (Gov. Code, § 3303, subd. (i).)

*Existing law* specifies that no public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of the rights under the Public Safety Officers Procedural Bill of Rights, or the exercise of any rights under any existing administrative grievance procedure. (Gov. Code, § 3304.)

*Existing law* states that administrative appeal by a public safety officer under the POBOR shall be conducted in conformance with rules and procedures adopted by the local public agency. (Gov. Code, § 3304.5.)

*Existing law* states that a punitive action, or denial of promotion on grounds other than merit, shall not be made by any public agency against any public safety officer solely because that officer's name has been placed on a *Brady* list, or that the officer's name may otherwise be subject to disclosure pursuant to *Brady v. Maryland* (1963), 373 U.S. 83. (Pen. Code, § 3303.5, subd. (a).)

*Existing law* specifies that evidence that a public safety officer's name has been placed on a Brady list, or may otherwise be subject to disclosure pursuant to *Brady v. Maryland* (1963), 373 U.S. 83, shall not be introduced for any purpose in any administrative appeal of a punitive action, except as specified. (Pen. Code, § 3303.5, subd. (c).)

*Existing law* states that, except as provided, no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public

agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct. (Gov. Code, § 3304, subd. (d).)

*Existing law* states that if, after investigation and any predisciplinary response or procedure, the public agency decides to impose discipline, the public agency shall notify the public safety officer in writing of its decision to impose discipline, including the date that the discipline will be imposed, within 30 days of its decision, except if the public safety officer is unavailable for discipline. (Gov. Code, § 3304, subd. (f).)

*This bill* provides that when a law enforcement officer is under investigation for an allegation of making a false statement, an administrative finding of a false statement by that officer shall require proof based on clear and convincing evidence.

*This bill* states that the standard of clear and convincing evidence shall apply only to allegations of false statements and shall not apply to, or affect any other allegation or charge against the public safety officer.

## COMMENTS

### 1. Need for This Bill

According to the author:

> In the 1963 case Brady v. Maryland the U.S. Supreme Court placed upon prosecutors an affirmative obligation to disclose to the defense all exculpatory information; otherwise it amounts to a due process violation. An officer proven to have lied during a disciplinary investigation, or in any other context, will be placed on a “Brady list”, which is then provided to prosecutors. If an officer on the list is scheduled to testify in a case, a prosecutor will be notified by the agency so that appropriate disclosure can be made.
>
> POBOR prohibits an agency from taking any adverse action simply because an officer has been placed on a Brady list (Government Code, § 3305.5 (a).) However, this doesn’t foreclose an agency from disciplining the officer for the underlying conduct which led to the officer being placed on the list.
>
> Due to the gravity of being placed on the Brady list, clear statewide policy is needed to establish a standard of proof and evidence requirements to ensure that there is an evidentiary basis for finding that an officer has made a “false or misleading statement.”
>
> California needs to establish clear and consistent parameters for peace officers and law enforcement agencies to follow to ensure that only officers who intend to deceive will be found guilty of making a false or misleading statement. Since this serious allegation carries the weight to possibly end the career or at least damage the credibility of the accused officer, AB 1298 takes a step to standardize the burden of proof required. This measure requires a finding of clear and convincing evidence on an administrative allegation of “making a false statement” against a peace officer.

**2. Public Safety Officers Bill of Rights (POBOR)**

POBOR provides peace officers with procedural protections relating to investigation and interrogations of peace officers, self-incrimination, privacy, polygraph exams, searches, personnel files, and administrative appeals. When the Legislature enacted POBOR in 1976 it found and declared "that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern." While the purpose of POBOR is to maintain stable employer-employee relations and thereby assure effective law enforcement, it also seeks to balance the competing interests of fair treatment to officers with the need for swift internal investigations to maintain public confidence in law enforcement agencies. (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564.)

**3. Administrative Hearings**

When a law enforcement officer is investigated by their agency for disciplinary matters, the officer has a right to confront the allegations at an administrative hearing. An administrative hearing is a trial-like proceeding before an administrative agency or administrative law judge. As in a trial, evidence is proffered and testimony is given. Unlike a trial, an administrative hearing is often shorter in duration and more informal in nature. POBOR governs many aspects of how the disciplinary investigation, the administrative hearing, and any resulting actions are handled.

Evidentiary rules in administrative hearings are more relaxed than in judicial proceedings. Courts have recognized telephonic testimony at administrative hearings as a legitimate way for witnesses to provide testimony when they cannot be physically present.

> " . . . administrative hearings are not necessarily infirm because of telephonic testimony. *Slattery v. Unemployment Ins. Appeals Bd*. (1976) 60 Cal. App. 3d 245 is instructive. There the court criticized the California Unemployment Insurance Appeals Board for failing to notify one of the parties about the opportunity of having a telephone conference hearing. The court described such hearings as "a pragmatic solution, made possible by modern technology, which attempts to reconcile the problem of geographically separated adversaries with the core elements of a fair adversary hearing: the opportunity to cross-examine adverse witnesses and to rebut or explain unfavorable evidence." *C & C Partners v. Dep't of Indus. Relations* (199) 70 Cal. App. 4th 603.

This bill would prohibit witness testimony at a police disciplinary hearing by telephone or any other electronic means.

**4. Standard of Proof in Civil Hearings**

The preponderance-of-the-evidence standard is the default for most civil lawsuits and administrative hearings. In civil cases a plaintiff is typically suing a defendant for lost money because of acts like breaking a contract or causing a car accident (the money loss might be due to vehicle damage and medical bills, for example). Preponderance of the evidence is met if the trier of fact (judge, jury, or hearing officer) believes the evidence shows the defendant is more likely than not—more than 50% likely to be—responsible.

The clear-and-convincing-evidence standard goes by descriptions such as "clear, cogent,

unequivocal, satisfactory, convincing" evidence. Generally, this standard is reserved for civil lawsuits where something more than money is at stake, such as civil liberties. Examples include:

- restraining orders;
- dependency cases (loss of parental rights);
- probate of wills; and
- conservatorships. (*Conservatorship of Wendland*, 26 Cal. 4th 519 (2001); *Santosky v. Kramer*, 455 U.S. 745 (1982).)

"Clear and convincing" means the evidence is highly and substantially more likely to be true than untrue; the trier of fact must have an abiding conviction that the truth of the factual contention is highly probable. (*Colorado v. New Mexico*, 467 U.S. 310 (1984).

This bill would raise the standard of proof in police administrative disciplinary proceedings to "clear and convincing" when the officer is accused of making a false statement.

**5. Brady Lists and Disclosure in Criminal Cases**

Unlike civil court cases, there is generally no discovery permitted in criminal cases in California, except where required by a specific statute or required by the United States Constitution. (Penal Code, § 1054, subd. (e).) The landmark case in the area of criminal disclosures is *Brady v. Maryland* (1963), 373 U.S. 83. In that case and its progeny, the United States Supreme Court held that due process requires the disclosure to the defendant of evidence favorable to an accused that is material either to guilt or punishment. (*Id*. at 87.) This requirement for disclosure does not distinguish between impeachment evidence that reflects on the credibility of the witness, and direct exculpatory evidence. (*U.S v. Bagley* (1985), 473 U.S. 667, 676.)

The Brady disclosure requirement obligates the prosecutor to turn evidence of misconduct by a police officer who may be called as a witness in a case, if that misconduct could discredit or impeach the officer's testimony. "Impeachment evidence is exculpatory evidence within the meaning of Brady. Brady/Giglio information includes 'material . . . that bears on the credibility of a significant witness in the case.'" (*United States* v. *Blanco* (9th Cir. 2004), 392 F.3d 382, 387-388 (citations omitted).)

As a result of this obligation, prosecutors' offices have a duty to seek that information out from other law enforcement agencies.

> Because the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned. A prosecutor's duty under Brady necessarily requires the cooperation of other government agents who might possess Brady material. In *United States v. Zuno-Arce* (9th Cir. 1995), 44 F.3d 1420, we explained why "it is the government's, not just the prosecutor's, conduct which may give rise to a *Brady* violation." Exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does. That would undermine *Brady* by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it, and

> by allowing the prosecutor to tell the investigators not to give him certain materials unless he asked for them. (*United States* v. *Blanco* (9th Cir. 2004), 392 F.3d 382, 387-388.)

The term "Brady list" refers to a list kept by a prosecutor's office, of police officers for whom the prosecutor's office has determined evidence of misconduct exists that would have to be turned over to the defense pursuant to *Brady* v. *Maryland*.

**6. Argument in Support**

According to the Los Angeles County Professional Peace Officers Association:

> An officer proven to have lied during a disciplinary investigation, or in any other context, will be placed on a list, known as the Brady list which is then provided to prosecutors. If an officer of the list is scheduled to testify in a case, a prosecutor will be notified by the agency so that the appropriate disclosure can be made. Once an officer's credibility is undermined by inclusion on the Brady list, his/her testimony will be immediately brought into question and great diminished in value. California has a statute, part of the Public Safety Procedural Bill of Rights, which prohibits an agency from taking any adverse action simply because an officer has been placed on a Brady list (CA Gov. Code §3305.5(a)). However, this doesn't foreclose an agency from disciplining the officer for the underlying conduct which led to the officer being placed on the list and can result in the officer losing his/her job.
>
> California needs to establish clear and consistent parameters for peace officers and law enforcement agencies to follow to ensure that only those who intend to deceive will be found guilty of making a false or misleading statement. Since this serious allegation carries the weight to potentially end the career or at least destroy the credibility of the accused officer, AB 1298 recognizes the magnitude of this charge and takes critical steps to standardize the burden of proof required.
>
> AB 1298 will also prevent a witness from testifying against an officer by phone or other electronic means. Officers have been terminated based on the telephonic testimony of witnesses in their administrative hearings. This deprives the fact finder of observing the witness's demeanor and deprives the officer of a proper cross-examination.
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> Due to the gravity of this administrative charge, clear statewide policy is needed to establish a standard of proof and evidence requirements to ensure that there is an actual evidentiary basis for finding that an officer has made a "false or misleading statement." Defining clear criterion for what constitutes a breach of this policy will provide critical protections for employees from undue punishment while maintaining strong consequences for those who knowingly deceive.

**7. Argument in Opposition**

According to the Courage Campaign:

> False statements by law enforcement are incompatible with public service and can have devastating consequences, including the prosecution, conviction, and imprisonment of innocent people. For these reasons, current law requires prosecutors to inform the defense if an officer involved in a case has a confirmed record of knowingly lying in an official capacity, as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963) and subsequent cases. The serious problem of law enforcement dishonesty and its significant repercussion of undercutting the integrity of the criminal justice system has been widely covered in the press, and notably recognized by the Ninth Circuit Court of Appeal and the Los Angeles County Sheriff's Department.
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> AB 1298 would undermine *Brady* by erecting a substantial barrier to making administrative findings of dishonesty. Under current law, to find an officer guilty of false statements, departments must show that the officer intentionally lied – an already high bar. "To then raise the burden of proof to "clear and convincing evidence" is an unreasonable standard that is out of line with what is granted to other public employees, and far beyond what is provided to any member of the public under investigation by law enforcement.
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> The Obama Administration's Department of Justice has identified trust between law enforcement agencies and the communities they are tasked with protecting and serving as "key to the stability of our communities, the integrity of our criminal justice system, and the safe and effective deliver of policing services." The DOJ recommends that law enforcement agencies build public trust and legitimacy by establishing a culture of transparency and accountability. AB 1298 is antithetical to these recommendations, and would erode the already strained relationships between law enforcement and many communities of color by making it more difficult to investigate and hold officers accountable for lying.

**-- END –**