

## **Appellate Court Defines POBRA Notice Requirements**

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Peace officer defense attorneys and law enforcement agencies have struggled for years with a provision of the Public Safety Officers Procedural Bill of Rights Act requiring departments to notify officers under investigation “of the nature of the investigation prior to any interrogation.” (Gov. Code § 3303(c).) How far in advance must the notice be given? What constitutes notice? Is the agency entitled to withhold notice? Does the officer have the right to delay the interrogation if notice is not given until the interview?

The Second District Court of Appeal answered these questions recently in *Ellins v. City of Sierra Madre*. Reading a “reasonableness” requirement into Government Code section 3303(c), the court held a public safety officer must be informed of the nature of the investigation “reasonably prior” to any interrogation. “Reasonably prior”, the court said, means giving the officer sufficient time for a meaningful consultation with a representative before the interview. The ruling allows employers to postpone disclosure until the interview only when earlier notice would risk the safety of another party or the destruction of evidence under the officer’s control.

### ***Officer Sought to Delay Investigation***

John Ellins, the appellant in the case, was under investigation for misusing CLETS to locate an ex-girlfriend in New York. His department did not disclose the “nature of the investigation” to him and his attorney until the time scheduled for the administrative interrogation. Ellins asked for an hour’s postponement, then twice refused to proceed with the interview at all because he did not receive adequate notice. He was fired for insubordination as well as the CLETS violations.

The court upheld the termination but used the case to establish its rule of reasonable notice. Whether an officer has been given enough time for a meaningful consultation, the court said, depends on the nature of the allegations, whether the officer needs time to obtain a representative, and whether the allegations are numerous or complex. The court held Ellins had been given adequate time to meet with an attorney, and rejected his claim his POBRA rights had been violated.

### ***Court Focused on Labor Law and Criminal Rights***

The court pegged its decision to four principles derived from labor law, parallel criminal rights, and previous decisions interpreting other provisions of the statute. The court found the statute presumed reasonable advance notice would be given to subject officers. The officer’s right to representation, the court said, would be undermined unless the officer knows the nature of the investigation and can determine whether his or her chosen representative is involved in the incident. “If departments may withhold this information until the last minute, interrogations will

routinely need to be postponed at the last minute whenever that information reveals for the first time that the interrogation is likely to result in punitive action or that the officer's chosen representative is implicated in the investigation."

Reviewing criminal due process rights that parallel POBRA, the court said officers must be able to exercise the right to consult with an attorney before giving a statement. Without adequate notice of the nature of the investigation, the opportunity to talk to a lawyer is meaningless.

"Advanced disclosure of the nature of the investigation," wrote the court, serves the purposes of POBRA by promoting efficient investigations while protecting officers from unfair treatment. Timely disclosure before a scheduled interview should help officers present "justifications, explanations, extenuating circumstances, and other mitigating factors" in internal affairs investigations.

The *Ellins* case will have the greatest effect in those jurisdictions where investigators routinely withhold disclosure of the nature of the investigation until the interview. The decision grants a public safety officer the ability to postpone an interrogation in those circumstances until the officer has had an adequate opportunity to consult with an attorney.