

SB 2: It's Going to Be a Long Road

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I wish I had better news. Anyone who told you that SB 2 wasn't going to be a big deal or that your association doesn't need Plan VI coverage was very wrong.

I recently had the occasion to participate in the beginning process of the first wave of decertification hearings. These observations are my own.

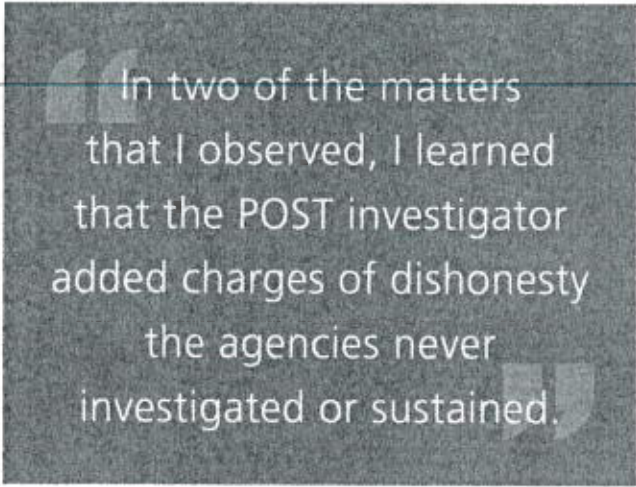
The first step is the (re)interview. Although the officer would have likely already participated in an internal affairs interview, a POST investigator may reinterview them. POBR doesn't apply, and *Miranda* and *Lybarger* warnings are not given. It is, essentially, a voluntary statement. But if you are requested to and don't participate, decertification still moves forward, so participation isn't exactly optional. POST may also request written documents or statements.

The POST investigation will determine if the conduct is "serious misconduct" according to their definitions. The investigator makes findings that are then reviewed to determine if they move forward with suspension or decertification. In two of the matters that I observed, I learned that the POST investigator added charges of dishonesty the agencies never investigated or sustained.

From there, the officer receives notice. They may immediately temporarily suspend your certificate pending the process. At this point, the hiring agency will have to decide whether to place the officer in a non-sworn position or put them on leave. Whether they put them on paid or unpaid leave remains to be seen. I have participated in drafting side letters with chiefs of police to determine outcomes related to this possibility and encourage you to meet with your chief about options. Your agency may have already disposed of a matter with discipline less than termination, but now here you are.

The first "appearance" is before the Board. I was able to appear via Zoom. Ahead of this

appearance, the matter is publicly agendized. The POST investigator and/or POST attorney ("the Division") then makes a presentation (often with PowerPoint slides), giving the ugly highlights that support their findings and advocating that they have met their burden of "clear and convincing evidence" to move the matter to the next step. The officer and/or their representative may then speak during the public comment period to make arguments against the investigator's belief the burden has been met. It felt like a *Skelly* hearing, as no witness testimony or additional evidence was permitted. The only



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question was whether the burden was met or not. Factors in mitigation are irrelevant to the question of whether the conduct was "serious misconduct" by that burden of proof at this stage.

Any member of the public who wants to can write in a public comment or make a public comment in person or via phone call at the time the matter is called. **They can say whatever they want in public comment.** I witnessed an observer taking to the mic to decry police brutality during a matter that was not even before the Board for excessive force.

Each of the four cases on the calendar that day went to a vote during a closed session, and each case ended up moving forward to the next step. This process took all day, depending on the order in which the case was called, so someone paying hourly for an attorney would be paying, potentially, for hours of wait time.

The next step for us will be before the Commission. Following the Division's presentation to the Board, the Board will issue a written decision explaining its reasons if the Board recommends revocation or suspension, and the Division will provide the officer with written notification of the date and time that the Commission will meet to review that recommendation.

At this next step, the Division will present to the Commission its findings, as presented to the Board, **including any information added to the record during the Board hearing**, along with the Board's recommendation. The officer and their representative can again be heard during the public comment portion. If the Commission decides to adopt a recommendation, it will require a two-thirds vote of the commissioners present. If the Commission reaches a different conclusion than the Board's recommendation, the Commission will issue a written decision explaining its rationale.

If the Commission determines action against the officer's certification is warranted, the case will be set for an evidentiary hearing before an administrative law judge. Those of us present at the Board hearing were informed before the individual hearings were called that POST had just provided "training" of some sort to the judges that would be hearing these cases. The findings of the administrative law judge are advisory back to the Commission, which will make the final decision regarding the officer's certification.

Each step of the process is very public. Immediately after the Board hearing, I began receiving phone calls from reporters wanting comments on my client's case.

I have participated in some wild arbitrations, and this process feels like it has the potential to be beyond that. Exonerated IAs, civil settlements, social media post content, discipline from multiple years prior despite a successful lateral to another department ... it appeared nothing was off the table for the presentation, or for questioning

by the Board members. The process gave me great pause about participating in the public comments leading up to the evidentiary hearing, as each step will be transcribed and become public record. From a defense attorney's perspective, it is not a controlled environment.

My greatest takeaways from this first experience at the Board hearing were as follows (and could of course change as my experience becomes more common)

- 1 Hope for the best, but count on going to evidentiary hearing. While a two thirds vote will be required to move past the Commission, I witnessed very skillful attorneys whom I know well move right through to the next stop despite presentations I found very persuasive in opposition.
2. Don't get too comfortable. Anything is fair game. Your personnel file is not private. Something from years ago that you thought was resolved can rear its head.
- 3 If your association doesn't have Plan VI, get it. I have personally experienced

having to discuss with two officers the cost of moving forward out of pocket because they were not covered by Plan VI. Considering the preparation needed for the sheer number of steps in the process, it seems an officer would need to have a dedicated savings account for this proceeding. I daresay many will give up in lieu of spending the money even if they had viable arguments in their defense just based on cost alone.

4. Encourage your association to have a serious discussion with your department head about potential outcomes if a member's certification is suddenly temporarily suspended by POST but they aren't currently facing termination. Don't wait until that happens to figure out what's next.

About the Author

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LDF Trustee Meetings

May 24

Los Angeles

July 12

PORAC HQ, Sacramento

August 23

PORAC HQ, Sacramento

October 4

PORAC HQ, Sacramento

November 20

Palm Desert
(with PORAC Conference)



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