LOS ANGELES POLICE PROTECTIVE LEAGUE v. CITY OF LOS ANGELES
Case Number: 18STCP03495
Hearing Date: February 15, 2019

FILED
Superior Court of California
County of Los Angeles

FEB 19 2019

Sherri R. Carter, Executive Officer/Clerk
By ______________, Deputy
Fernando Becerra, Jr.

ORDER DENYING WRIT OF MANDATE and GRANTING LIMITED DURATION STAY

Stay Expires March 1, 2019 at 3 p.m.

On December 31, 2018, on the application of the Los Angeles Police Protective League (Petitioner), this court issued an Alternative Writ of Mandate directing the City of Los Angeles and Police Chief Michael R. Moore (Respondents) from "retroactively enforcing or applying Senate Bill 1421's amendments to Penal Code sections 832.7 and 832.8 in any manner which would result in the disclosure or production of peace officer personnel records and information regarding incidents or reflecting conduct occurring prior to January 1, 2019, or in the alternative, to show cause before this Court . . . why Respondents have not done so."

On January 18, 2019, this court granted leave to intervene in this matter to the ACLU of Southern California and Valerie Rivera as well as to the First Amendment Coalition, Los Angeles Time Communications LLC, California Newspapers Partnership LP, the Center for Investigative Reporting and California New Publishers Association (collectively Intervenors). The court ordered a joint opposition from the Intervenors.

The matter has been fully briefed.

Intervenors' three evidentiary objections to the Declaration of Craig Lally are all sustained.

Petitioner's objection to the request for judicial notice of decision on the Contra Costa County Superior Court is sustained. The request for judicial notice is denied as irrelevant.

Intervenors' request for judicial notice filed February 14, 2019 is denied as untimely. (See Evid. Code § 453, subd. (a).)

ANALYSIS

At issue before the court are recent amendments to Penal Code sections 832.7 and 832.8 through Senate Bill 1421 (SB 1421) (effective January 1, 2019) deeming certain peace officer personnel records no longer confidential and subject to disclosure under the California Public

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Records Act (CPRA) (Gov't Code § 6250 *et seq.*). More specifically, Penal Code section 832.7, subdivision (b) now provides:

> (b)(1) Notwithstanding subdivision (a), subdivision (f) of Section 6254 of the Government Code, or any other law, the following peace officer or custodial officer personnel records and records maintained by any state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act . . . :
>
> (A) A record relating to the report, investigation, or findings of any of the following:
>
> (i) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.
>
> (ii) An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury.
>
> (B)(i) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public.
>
> . . .
>
> (C) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.

Petitioner asserts SB 1421 cannot operate to release peace officer personnel records arising out of incidents or conduct occurring prior to January 1, 2019 because doing so (1) would constitute a retroactive application of the statute not intended by the legislature and (2) impair peace officers' privacy rights previously provided to them by statute.[1]

The parties disagree whether SB 1421 operates retroactively.

"[D]eciding when a statute operates 'retroactively' is not always a simple or mechanical task." (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 268.) Quoting centuries old precedent, the United States Supreme Court explained, "'every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . . .'" (*Landgraf, supra*, 511 U.S. at 269 [citation omitted].)

Generally, the legislature does not intend for laws to operate retroactively. (Pen. Code § 3; Civ. Code § 3.)

Does the Statute Operate Retroactively?

Resolution of the retroactivity issue requires the court to determine legislative intent. The rules of statutory interpretation are well known:

> "In the first step of the interpretive process we look to the words of the statute themselves. . . . The Legislature's chosen language is the most reliable indicator of its intent because "'it is the language of the statute itself that has successfully braved the legislative gauntlet.'" . . . . We give the words of the statute "a plain and commonsense meaning" unless the statute specifically defines the words to give them a special meaning. If the statutory language is clear and unambiguous, our task is at an end, for there is no need for judicial construction. . . . In such a case, there is nothing for the court to interpret or construe. . . ."

(*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082-1083 [citations omitted].)

In the context of a retroactivity analysis, Petitioner correctly notes statutes do not operate retroactively "unless expressly so declared" by the legislature. (Pen. Code § 3; Civ. Code § 3.) "[I]n the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is clear from extrinsic sources that the Legislature . . . must have intended a retroactive application." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209.) "'The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact.'" (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 475 [quoting *Landgraf v. USI Film Products, supra,* 511 U.S. at 270].)

Here, as argued by Petitioner, SB 1421 has not been "expressly [] declared" to apply retroactively because nothing in the text of SB 1421 expressly dictates whether it should be applied retroactively. (Pen. Code § 3; Civ. Code § 3.) Extrinsic sources attached as exhibits to the Petition also do not speak to an express legislative intent on retroactive application. Therefore, Petitioner urges, SB 1421 does not operate retroactively, and peace officer records *created* prior to the effective date of SB 1421 (January 1, 2019) are not subject to release pursuant to a CPRA request.

The question of retroactive application, however, is of no consequence where, as here, on its face, SB 1421 does not so operate. SB 1421 merely prescribes a law enforcement agency's prospective duty as of January 1, 2019 to make certain categories of peace officer personnel records available to a requestor through the CPRA. The statute dictates as of January 1, 2019, a law enforcement agency has a disclosure duty as to certain records requested after January 1, 2019. It does not impose an obligation or a burden on a law enforcement agency to revisit

responses it may have made to CPRA requests prior to January 1, 2019. Thus, the statute does not "create[] a new obligation, impose[] a new duty, or attach[] a new disability, in respect to transactions or considerations already past . . . ." (*Landgraf v. USI Film Products, supra,* 511 U.S. at 269.)

Further, other language in the statute supports this view. The unambiguous language demonstrates SB 1421's operation has nothing to do with the date on which a personnel record was created – it applies to all records. The statute speaks to a law enforcement agency's obligation to disclose certain personnel records "maintained" by it when requested under the CPRA after January 1, 2019. (Gov't Code § 6254 *et seq.*)

The word "maintained" is a past tense verb meaning "kept possession and care of" while "'any' means without limit and no matter what kind." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.) Thus, as argued by Respondents and Intervenors, "any" and "all" records "maintained" by a law enforcement agency would necessarily include records created prior to the statute's effective date so long as they are "maintained" by the law enforcement agency and requested on or after January 1, 2019.

Given the prospective nature of the duty created by the statute, the court finds SB 1421 does not operate retroactively.[2]

Petitioner's Claim the Retroactive Effect of SB 1421 is Impermissible

Petitioner focuses extensively on its claim releasing personnel records created before January 1, 2019 has an impermissible retroactive effect. Petitioner contends "SB 1421's amendments to remove the confidentiality of conduct occurring prior to its effective date would constitute a retroactive application of its provisions."[3] (Application for Alternative Writ 5:19-6:2.) Petitioner further argues "disclosing records reflecting incidents or conduct occurring prior to January 1, 2019 would constitute a retroactive application of SB 1421's amendments because it would violate the right of privacy of that information *already acquired* under existing law." (Application for Alternative Writ 6:19-20.)

With respect to retroactive effect, Petitioner's specific claims as to impermissible retroactivity are twofold. First, Petitioner contends the statute "substantially changes the legal effect of past events." (*Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 550.) Second, Petitioner argues the legislation eliminates (i.e. impacts) its members' privacy rights in personnel records predating the effective date of the statute.

Substantial Change in the Legal Effect:

"A statute has retroactive effect if it substantially changes the legal effect of past events. [Citations omitted.] 'A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment [citation] or upsets expectations based on prior law. Rather, the court must ask whether the new provision

attaches new legal consequences to events completed before its enactment.'" (*Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach, supra,* 86 Cal.App.4th at 550 [quoting *Landgraf v. USI Film Products, supra,* 511 U.S. at 269-270] [emphasis omitted].)

Petitioner argues its members relied on the confidential nature their personnel records to reach dispositions in disciplinary matters brought by Respondents. Petitioner suggests, in many disciplinary cases, those peace officers would have handled disciplinary matters much differently had they known the confidentiality of their personnel records might someday be eliminated.[4] Petitioner urges, "This undisputed evidence [regarding responding to discipline] thus establishes that the application of SB 1421 to pre-existing personnel files would have a substantial retroactive impact, as it would attach a new legal consequence to pre-enactment events." (Reply to City 11:22-24.)

The court disagrees "a new *legal* consequence to pre-enactment events" would result under SB 1421. Certainly, SB 1421 "upsets expectations based on prior law." (*Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach, supra,* 86 Cal.App.4th at 550 [quoting *Landgraf v. USI Film Products, supra,* 511 U.S. at 269-270].) That said, SB 1421 does not attach any new legal consequence to any discipline imposed on a peace officer. The statute does not subject the peace officer to further or different discipline; there is no legal consequence to disclosing the personnel record. That the information may be disclosed to the public is not a "new legal consequence to events completed before [SB 1421's] enactment." (*Ibid.*)

As noted by the United States Supreme Court, "Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; a new law banning gambling harms the person who had begun to construct a casino before the law's enactment or spent his life learning to count cards. [Citation.] ('If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever'). Moreover, a statute 'is not made retroactive merely because it draws upon antecedent facts for its operation.'" (*Landgraf v. USI Film Products, supra,* 511 U.S. at 269 n. 24 [citation omitted].)

Accordingly, the court finds SB 1421 does not substantially change the legal effect of past events such that it has an impermissible retroactive effect — even to the extent it may "unsettle expectations and impose burdens on past conduct" by removing the confidential designation to records where there was some past expectation of privacy.[5]

Elimination of Privacy Rights:

Petitioner contends permitting disclosure of personnel records created prior to January 1, 2019 impermissibly eliminates its members' right to privacy in those records.

Petitioner's members' privacy rights in certain personnel records were created by statute. As noted by Petitioner, "Existing law identifies peace officer personnel records, and information

obtained from those records, as confidential and exempt from disclosure absent compliance with the statutory *Pitchess* process." (Application for Alternative Writ 3:13-15.) In addition, the CPRA provided Petitioner's members with additional statutory privacy protections.[6]

Nothing prevents the legislature from modifying the statutory rights it previously provided to Petitioner's members. (*See, e.g., People v. Superior Court (Smith)* (2018) 6 Cal.5th 457, 466; *People v. McClinton* (2018) 29 Cal.App.5th 738, 753.) Nothing prevents the legislature from changing the law. Petitioner has not identified any authority preventing the legislature from modifying the statutory privacy rights it previously created in peace officers' personnel records.

Finally, for the first time in its reply papers, Petitioner asserts "the privacy rights previously provided to officers should be considered vested, and therefore subject to impairment in only limited circumstances." (Reply to City 13:20-21.) Petitioner cites no authority supporting its claim the privacy rights are vested rights.

As a preliminary matter, it is "presumed" rights created by statute are not "vested rights" and a party arguing otherwise must overcome this presumption. (*Walsh v. Board of Administration* (1992) 4 Cal.App.4th 682, 697 ["[I]t is presumed that a statutory scheme is not intended to create private contractual or vested rights and a person who asserts the creation of a contract with the state has the burden of overcoming that presumption."]) Petitioner has not overcome this presumption. Petitioner has not provided any authority supporting its reply argument that Petitioner's members' statutory privacy rights are "vested rights."

Moreover, rights created by statute are not generally vested. (*Plotkin v. Sajahtera, Inc.* (2003) 106 Cal.App.4th 953, 962 ["More than 70 years ago our California Supreme Court distinguished between statutes retroactively affecting common law rights and those affecting rights based on statute: Common law rights were classified as "vested"; rights created by statute were not."].)[7]

Even assuming the rights were vested, "'the state, exercising its police power, may impair such rights when considered reasonably necessary to protect the health, safety, morals and general welfare of the people.'" (*Id.* at 963 [citation omitted].) Whether the impairment of a vested right violations notions of due process "requires weighing several factors . . . ." (*Ibid.*) This record is insufficient and inadequate to conduct such an examination.

Petitioner has not established SB 1421's elimination of the confidentiality designation of personnel records created before January 1, 2019 results in an impermissible retroactive effect on peace officer's privacy rights.

LIMITED DURATION STAY

During the hearing, Petitioner requested a stay of 30 days to allow review by the Court of Appeal. The Intervenors objected to any stay.

The court orders the stay issued in this matter on December 31, 2018 restraining Respondents and their agents, employees and representatives from disclosing or producing peace officer personnel records regarding incidents or reflecting conduct occurring prior to January 1, 2019 under the authority of SB 1421 remain in full force and effect until March 1, 2019 at 3 p.m.

CONCLUSION

For the foregoing reasons, Petitioner's request for relief is denied. The stay currently in place will remain in full force and effect until March 1, 2019 at 3 p.m.

IT IS SO ORDERED.

February 19, 2019

Hon. Mitchell Beckloff
Judge of the Superior Court

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[1] In reply, Petitioner expands its argument to claims of "vested rights" and the general privacy right found in Article I, Section 1 of the California Constitution. As noted during the hearing, the claims are undeveloped. Indeed, the Petition does not specifically cite Article 1, Section 1 of the California Constitution as the basis for any relief requested. Petitioner's claim its members' general privacy rights under the California Constitution are compromised does not address the conditional nature of the statutory privilege (see *Hackett v. Superior Court* (1993) 13 Cal.App.4th 96, 100) or how a general right to privacy would protect the four types of records subject to disclosure under SB 1421.

While *Michael v. Gates* (1995) 38 Cal.App.4th 737 may be limited to its "novel factual situation," the case does address a peace officer's claim of a general constitutional right of privacy in his/her employment records: "Similarly, we see no violation of appellant's constitutional right to privacy. An essential element of a cause of action for violation of that right is the plaintiff's reasonable expectation of privacy. [Citation omitted.] The privilege created by Evidence Code section 1043 makes it clear that the right to privacy in the records is limited. Penal Code section 832.7 allows disclosure of the records in a variety of investigations (Pen. Code § 832.7, subd. (a)), and Evidence Code section 1043 establishes procedures by which peace officer personnel records may be obtained for purposes of litigation. Appellant could have no reasonable expectation of privacy." (*Id.* at 745.)

[2] As noted by Intervenors, this interpretation of the statute is consistent with the high courts of other states interpreting similar statutes. (See, e.g., *State of Hawaii Organization of Police Officers v. Society of Professional Journalists* (1996) 83 Hawaii 378, 389-391; *State ex rel. Beacon Journal Pub. Co. v. University of Akron* (1980) 64 Ohio St.2d 392, 395-396.)

[3] To be precise, it is the *record* of the conduct that was confidential prior to January 1, 2019 not the conduct.

[4] While the court sustained the evidentiary objections to this evidence, the court nonetheless addresses Petitioner's reliance claim.

[5] Petitioner claims Respondents ignore California Supreme Court precedent in their retroactivity analysis that broadly states retroactive laws are those that affect rights that existed prior to the adoption of the statute. Neither *Aetna Casualty and Surety Co. v. Industrial Accident Commission* (1947) 30 Cal.2d 388 nor *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467 are particularly helpful to Petitioner. Both cases concerned a change in the law that increased the legal obligations for a party based on past events. In *Aetna*, a law could not be applied to past events in a way that "it enlarged the employee's existing rights and the employer's corresponding obligations." (*Aetna Casualty and Surety Co. v. Industrial Accident Commission, supra,* 30 Cal.2d at 392.) *McClung* is similar. The issue there was whether a change in the law could have been applied to acts predating the change to create individual liability for a manager in an employment context. (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th at 475.) Public disclosure of certain personnel records does not create a new legal consequence.

[6] Petitioner's reliance on *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 756 merely emphasizes the statutory basis of the privacy claim. It is true *BRV* recognizes a public employee's "legally protected interest in their personnel file." (*Ibid.)* *BRV* explains the "privacy protection" is found in the CPRA which is modeled on federal legislation.

[7] To overcome this authority, in its reply papers, Petitioner raises the general right to privacy found in Article I, Section 1 of the California Constitution but the argument is not otherwise developed. See endnote 1 *ante.*