

**THE**

**OF CALIFORNIA LAW ENFORCEMENT**

# **TOPICS OF INTEREST**

**THE BOOMERANG EMPLOYEE - WHAT TO DO  
WHEN A FIRED EMPLOYEE COMES BACK**

**A PROVEN STAFFING METHODOLOGY**

**BUILDING TRAINING FROM LESSONS  
LEARNED — A CHECKLIST TO  
SUCCESSFUL TRAINING**

**REESTABLISHING THE LIEUTENANT'S  
ROLE AND AUTHORITY**

**Volume 37 No. 1, 2003**



# THE BOOMERANG EMPLOYEE: WHAT DO YOU DO WHEN A FIRED EMPLOYEE COMES BACK?

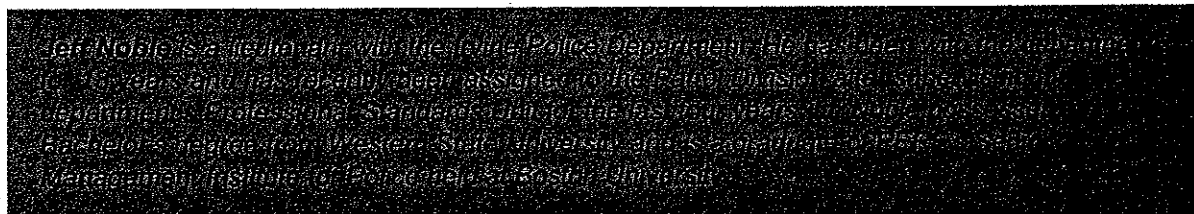
**P**olice agencies are subservient to the law: subject and beholden to the legal process when it comes to criminal matters and just as subject and beholden to when it comes to the employment law context. In both arenas, police agencies sometimes "lose." On occasion, persons that we arrest are set free as a result of the process. In the same vein, the process in employment law provides steps for the employee to address what they believe to be excessive punishment or wrongful termination by their employer. At some point the process comes to a binding and final conclusion. In a wrongful termination case, there are generally only two possible outcomes: either the termination is upheld, or the employee is ordered back to work. When an administrative decision to terminate a public safety employee is overturned and the employee is ordered to be returned to duty, a host of problems surface. These problems range from the emotional to the distinctly practical. Importantly, many of the

problems are exacerbated by the reality of how long these cases tend to run. The administrative process always takes time, often more than a year from date of termination to date of ordered return to work. Frequently, these cases last for two or more years and result in an employee being returned to active duty after this extended absence. This raises a series of questions:

1) What was the employee doing for the period of time that they were separated from the department? Certainly the key question is whether the employee engaged in inappropriate behavior while not part of the department?

2) Did the employee engage in any conduct that would cause the department to terminate or discipline the employee if they had been working during that time period?

3) Did the employee engage in any conduct that if revealed during a background check of a new employee, would prevent that individual from being hired?



4) Can the employee now meet the basic requirements of a police officer?

5) Are they physically and mentally fit?

6) Can management conduct a background, medical, psychological, and polygraph on the re-entry employee in the same manner that they would on any new employee?

7) And more importantly, is the legal issue of whether management may conduct background checks to cover the period of time that the employee was not with the Department, the most overriding concern of the employee's re-entry process?

The challenge of returning a long-term absent employee to the organization is to balance the legitimate concerns of the agency over the return to their

ranks of an individual who has not been subject to their rules, regulations, and standards of conduct for an extended period of time against the concerns of the employee who has been vindicated of wrongdoing for which they were originally separated from their agencies. The employee comes back with a sense of "rightness." "I should never have been terminated, therefore, you should treat me as though I have been an employee all along." Meanwhile, the employing agency feels that this is an individual that they have had no control over during the time they were dismissed.

How were they supporting themselves? What have they been doing?

Just like the process that the employer and employee participated in that resulted in the employee being ordered to return to work, there needs to be a process for the employee's actual return. This article is an attempt to define those issues and offer suggestions for confronting this very real situation.

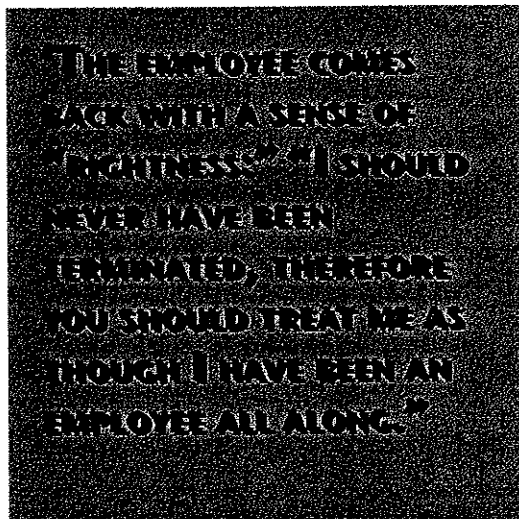
### **Legal Framework**

Employers want to know what their employee has been doing during their leave.

When you suggest to the recently reinstated employee that you are considering requiring a background, medical, psychological and polygraph, you will likely hear a response from the employee's repre-

sentative in colorful terms that they will decline to participate. Not a surprising response considering their feeling that they have just taken you to court and that they are the victors. Although management may disagree with the employee's position, their arguments are rational and may have some merit.

The employee will assert that they are not being hired to be a police officer, but rather they are a tenured employee. In fact, they will claim that the employee technically never left the employment of the agency at all. They



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will point out that the employee successfully completed a background, psychological, medical, and polygraph years ago when they were first hired. They have been ordered back to work and the employer has been ordered to pay them their back wages and benefits just like they were an employee during the time of the appeal process. The employee will argue that the employer does not order such checks of any other employee absent cause and that there is no cause in this case to justify such a process here. The employee's representative may suggest that such a process appears retaliatory and that they may seek a cause of action against the employer if such a process is mandated.

Faced with these arguments, the employer may be tentative in their desire to proceed. Unfortunately, the employer cannot rely on a series of cases to settle this matter. In most states, this is a difficult area of the law with no clear definitive lines to follow. Perhaps the future will bring clearer direction from the courts but for now the employer can only look to provisions like the contained in section 1031 of the California Government Code.

Section 1031 provides the basis of the arguments that are available to the employer for requiring employee background checks prior to the employee's re-entry. Section 1031 defines the minimum standards for police officers. Specifically,

1) Subsection (c) requires that police officers be fingerprinted for the purposes of local, state, and national fingerprint files to determine any criminal record.

2) Subsection (d) requires that police officers be of good moral character, as

determined by a thorough background investigation.

3) Subsection (f) requires that police officers are free from any physical, emotional, or mental condition, which might adversely affect the exercise of the powers of a peace officer.

Section 1031 imposes a duty on the Chief of Police to ensure that their police officers meet basic minimum requirements of a good moral character. Public policy demands such an approach. Absent the ability to declare war, or the Presidential power of deploying the armed forces, police officers are granted the greatest power of any governmental official in our country. Police officers can detain, search and arrest individuals based solely on their belief of probable cause. Police officers can take away an individual's liberty interest of free movement, their freedom of speech and can even enter a private person's home. These powers are immense and must be thoughtfully and judiciously applied. It would be unethical to permit a person of poor moral character to become, or remain a police officer.

The simple fact is that the employee was not an active member of the police department for the period of time between their termination and their reinstatement. This is a key difference: when an employee is out of work for an extended period of time while injured or sick, they remain subject to the rules and regulations of the department. The termination by the agency also ends the requirement that the officer follow the rules of the agency—it is this factor, the absence of a requirement to follow the rules coupled with an extended period

of time off, that concerns police executives. If this period is a few days or a few weeks, there may be an argument for not requiring any re-entry process at all due to the short period of time. If the termination appeal process, however, takes months, and certainly if it takes one to two years, management must make at least some inquiries into the background and actions of the employee during the period of time that they were not actively employed with the department. How this process looks, and more importantly how the re-entry process is handled, will be the difference between an effective plan that is in the best interest of all involved and additional costly litigation.

The key to success in such a process is fairness. The process must be fair to all of the parties involved and it must accomplish all of the goals of both parties. The goal of the employee is to return to work and receive their court ordered back compensation. The goal of the employer is to return a capable, willing employee to the field in a manner that will give the employee the opportunity to be successful and the community an opportunity to benefit from the services of a professional police officer.

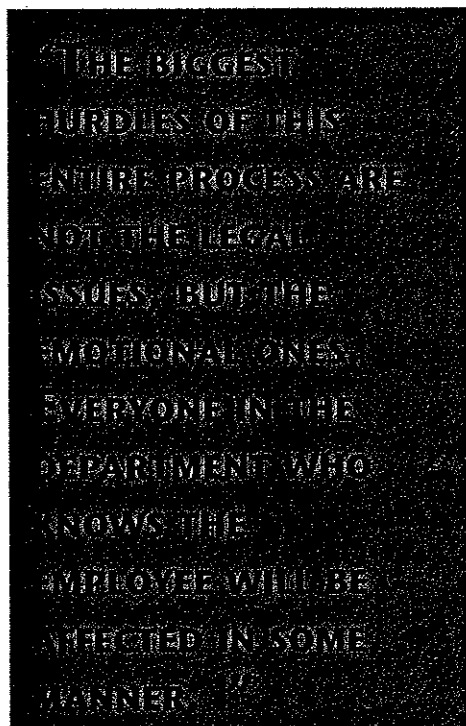
### **Emotional Issues**

The employee will be entering this process with great trepidation: after all, the last time they were at the department, they were fired. The employee will have concerns about how they will be treated by their peers, supervisors and management. The employee will fear that they will be the victim of retaliation by management, or from their peers or supervisors that may have testified against them. They are entering the

process with a bad taste in their mouth and they will question even the department's best intentions. The employee may also have a poor attitude, consider himself or herself "bullet proof," and have the false belief that any contact from management will be considered retaliation by the courts.

Management will also have emotional issues. The employer would not have terminated the employee absent

what they believed to be good cause. There will be management level individuals that are emotionally attached to the case for a variety of reasons. Perhaps they testified against the employee, participated in the investigation that resulted in the termination, or merely harbor animosity regarding the return of



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what they believe to be an unfit officer. Management personnel may also fear acts of retaliation, undermining, or legal action from the employee. These fears may be irrational, but the chief should recognize the emotional level of such an event.

If you are a new chief, you have the benefit of not being involved in the original process. You should be aware that everyone in the organization will be looking for you to take sides. You will be approached by management looking for your support in the termination. Other employees will be looking to you to take action against the management and supervisory personnel that participated in the investigation. Your task as a leader is not to take sides in such a dispute, but rather to lead the organization as it deals with the re-entry process and issues that arose as part of the appeal.

The first step in gaining trust is not any position that you may take regarding the underlying termination issues, but the manner that you deal with the re-entry process. Immediately upon being notified of the final outcome, you should convene a meeting of management to inform everyone involved. Word of the outcome will spread quickly through the employee and the employee Association and it is important that you discuss several issues with your staff prior to any interaction that staff members may have with other department members. If this is the final decision and the appeals are over, management must accept the decision. The decision is never to be debated down to supervisors or line officers. The chief

should make it clear from the outset that retaliation will not be tolerated from the employee, employee groups, or management.

The biggest hurdles of this entire process are not the legal issues, but the emotional ones. Everyone in the department who knows the employee will be affected in some manner. Everyone in the department will have an opinion, regardless of whether that opinion is based on any facts. If the emotional issues are not dealt with appropriately, the problem will manifest itself somewhere else at some point in the future. Rest assured that the problems will not simply go away.

The first concern of the returning employee is their back pay and benefits. They have been unemployed for a long period of time, had a job with lower compensation, or merely just want the money. In any event, the back pay will be a significant amount of money. The City's payroll department should be directed to prepare a spreadsheet calculating the back pay, benefits and any other sums ordered by the court, pay period by pay period for the entire time that the employee was separated. You should never allow your payroll department to determine a final figure and present that figure to the employee without an explanation. This type of spreadsheet takes some up front preparation time, but will be invaluable as the process continues.

There should be a single contact person for the employee during this process. The back pay and all issues pertaining to the employee during the re-entry process should be handled

through the identified individual. This is important for two reasons. First, there will be consistency in the message that the employee is receiving and that message should always be that the agency is seeking to make the re-entry process as fair and as quick as possible. Second, the handling individual must report directly to the chief to eliminate the possibility of involvement by anyone that does not have the best interests of the employee or the department at heart.

A re-entry plan should be developed and presented to the employee as soon as possible. The re-entry plan will outline all of the steps of the re-entry, including the background process. There should be no surprises for the employee. The background needs to be limited to the time period that the employee was separated from the department. This is not an opportunity to seek any potential issue that may affect the person's employment, but only those things that would prevent any individual from becoming a police officer.

Like the background, the psychological should only deal with the time period when the employee was separated. The psychologist should limit his inquiry to the determination of whether or not the employee is fit for duty as a police officer. Where pre-employment psychologicals report on the individual's readiness, or best fit for the organization, this psychological should focus only on issues that would prevent the employee's continued employment.

Following the background and psychological, the medical should only cover issues that arose during separation.

The physician's report should be focused on whether or not the employee is physically capable of performing the job requirements of a police officer. Other medical issues should not be pursued unless the employee brings the issue forward.

### **Polygraph**

Although many agencies require a polygraph examination as part of the normal background process, a polygraph should not be given as part of the re-entry process. The Peace Officers' Bill of Rights prevents a polygraph as part of an internal investigation and should there be a determination of potential wrongdoing during the period of absence, there will be an inherent concern that the conduct is an internal investigation, rather than a pre-employment background issue.

### **What conduct equals disqualification?**

This brings us to the question of what to do if there is an issue of misconduct had the person been a police officer at the time of the conduct. All of the employee's representative's arguments that the person was employed during the separation period will suddenly be reversed to the position that the employee was not employed during the separation period; they were not under the control of the department and the department's rules and regulations do not apply to the employee during that period.

Serious consideration should be given prior to pursuing an internal affairs investigation on the officer's

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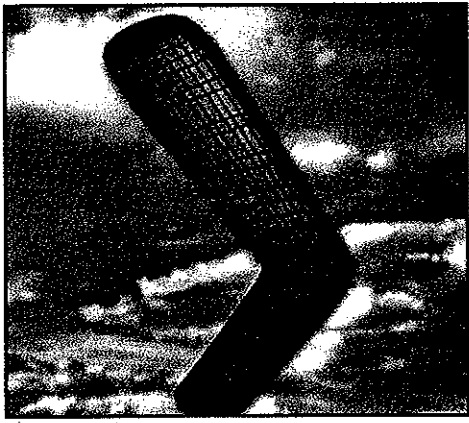
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conduct during the period of separation. The focus should be on those issues that would disqualify one for employment as a police officer and not on issues that may result in some type of discipline, particularly if that discipline would be minor in nature. If you do determine that an internal affairs investigation should be conducted, handle the process in accordance with your routine procedures. You should take special care not to handle this employee differently than any other employee with a similar allegation. Once you recognize that there is an issue, you should proceed with an internal affairs investigation and comply with the Peace Officers' Bill of Rights.



The background needs to be handled as quickly and efficiently as possible. Although the employee has been ordered back to work, they should be placed on some type of paid administrative leave during the initial background process. Obviously, you cannot return the officer to the field until the background has been completed, and, likewise, you would not be well served to assign the officer some type of desk duty unless you have a special need. It is best to have the officer at full duty when the officer physically returns to the department.

Perhaps the best way for the officer to spend the majority of this time is to send the officer to an advanced officer

training course. If the officer was separated for more than one year, it is likely that they have fallen behind in their mandatory continuing education requirements. By sending the officer to outside training, you are complying with the requirements and preparing the officer to be successful upon their return. The officer also needs to receive a range qualification and they may need additional training to accomplish an acceptable score.

The officer may need updated weaponless defense instruction and they should be given copies of all training bulletins and policies issued by the department during their absence.

Because the officer was separated, they will need new

uniforms and equipment. It is appropriate to return the officer's handgun and other equipment, but you should take care not to issue the officer equipment inferior to what the officer had when he left. Again, the utmost care should be taken to demonstrate that the department is acting fairly and not retaliating against the officer in any way.

Upon the officer's return, they will need to be scheduled with a field-training officer. This is not intended as punishment, but is required to ensure that the officer is given every opportunity to succeed. Department procedures, laws of arrest and search and seizure all change. The officer needs to receive updated training in these areas.



The field-training officer needs to be someone that is not emotionally involved on either side of the termination. You should not have the field training officer complete logs on the officer's progress. The role of the field-training officer is just to assist the officer in their transition back into the field environment, not to supervise or critique the officer's abilities. This is a process to make the officer successful, not to attempt to build a package on the officer for future discipline.

Once the officer has been returned to duty, they should receive no special attention. The officer should be treated like any other similarly situated employee. They are not "bullet proof," should they engage in misconduct, but they should not be targeted for investigated solely on their past history either.

### **State Certification**

If the employee's absence from police work is more than three years, there may be state certification issues. California Peace Officers' Standards and Training requires re-certification after three years, but it is our understanding that POST is currently considering the reinstated employee to have never left the employment of the agency and therefore this requirement may not affect the employee. POST or your controlling state agency should be contacted for a specific determination in all cases where the employee has been absent over three years.

### **Conclusion**

Returning a police officer to work after a lengthy period of separation is without question one of the most difficult tasks that a police chief will have to lead his or her organization through. The legal issues can be dealt with on a professional level between the organization and the employee. These issues are not simply theoretical: an informal survey among chiefs of police in California revealed a significant number of employees who had been terminated, who were ordered returned to work through the administrative process but a background check revealed improper—or criminal activity—during their absence from the agency. A strong initial showing that the organization intends to be fair to the employee will assist in resolving potential conflicts and will facilitate the return of the organization to a state of normalcy. The emotional issues on all sides of the event are much more difficult and will take the leadership skills of the chief to maintain the professionalism of their department.

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