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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

TERRY JOHNS, Plaintiff and Respondent, v. CITY OF LOS ANGELES et al., Defendants and Appellants.	B248191 (Los Angeles County Super. Ct. No. BS134502)

APPEAL from a judgment of the Superior Court of Los Angeles County, Luis A. Lavin, Judge. Affirmed.

Michael N. Feuer, Los Angeles City Attorney, Carlos De La Guerra, Managing Assistant City Attorney, Wayne H. Song and Bruce Monroe, Deputy City Attorneys, for Defendants and Appellants.

Silver, Hadden, Silver, Wexler & Levine, Susan Silver and Jacob A. Kalinski for Plaintiff and Respondent.

Appellants, the City of Los Angeles and Los Angeles Police Department (LAPD) Chief Charles Beck, appeal from a judgment entered upon the trial court's order granting respondent LAPD Officer Terry John's petition for writ of administrative mandamus directing appellants to vacate a conditional reprimand issued to respondent. The trial court concluded appellants violated the Public Safety Officers Procedural Bill of Rights Act (hereinafter POBRA) Government Code[1] section 3303 when the LAPD subjected respondent to an undercover "sting audit" without affording him the protections and rights provided under section 3303. Before this court, appellants argue the trial court erred in concluding that POBRA applied to the "sting audit" conducted on respondent based on the court's conclusion he was subjected to interrogation during the audit. In addition, appellants argue the trial court erred in concluding respondent was wrongfully denied discovery of a written statement and investigation notes prepared by the undercover officers who conducted the audit. As we shall explain, only appellant's argument with respect to the application of POBRA has merit. Given the totality of the circumstances surrounding the investigation we conclude respondent was not subjected to interrogation by the LAPD during the "sting audit," and thus, he was not entitled to the rights and protections provided in section 3303. Nonetheless, respondent has demonstrated that the LAPD failed to provide him with the discovery required under the provision of the Memorandum of Understanding (MOU) governing his administrative appeal. Accordingly, we affirm the order granting the petition for a writ of mandate.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The "Sting Audit"*

Based on complaints that respondent, "may have been discourteous to citizens and refused to complete crime reports," the LAPD internal affairs division decided to

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[1] All references to statute are to the Government Code unless otherwise indicated.

conducted a "sting audit" on respondent in November 2009.[2] To substantiate or refute the concerns and previous complaints, a sting audit mimicking a citizen encounter was arranged and conducted by an undercover officer (hereinafter "UC 35") who posed as a citizen seeking to make a police report.

On November 19, 2009, respondent was assigned to the LAPD Southwest Police Station as Kit Room Officer. Kit Room Officers are responsible for checking equipment in and out, conducting audits, checking logs, and assigning cars to officers going out in the field. On various occasions, respondent was also assigned to work the front desk. The front desk duties include: answering the phone, assisting citizens, and taking police reports from citizens who come into the station. At some point during his shift on November 19, 2009, respondent was asked to assist another officer at the front desk. Between 8:00 p.m. and 8:20 p.m., while respondent was at the front desk, UC 35 entered the Southwest Police Station lobby. UC 35 had been shown a photograph of respondent

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[2] In 2001 the LAPD entered into a Consent Decree with the United States Department of Justice pursuant to an order of the federal district court to address issues related to claims of police misconduct and the manner in which the LAPD conducted its internal policing operations and management. The Decree was signed in response to a complaint alleged by the United States against the City of Los Angeles, the Los Angeles Board of Police Commissioners, and the LAPD for "violating 42 U.S.C. § 14141 by engaging in a pattern of practice of unconstitutional or otherwise unlawful conduct that has been made possible by the failure of the City defendants to adopt and implement proper management practices and procedures." (See generally *United States v. City of Los Angeles* (2002) 288 F.3d 391.) Accordingly, the Consent Decree required appellants "to develop and initiate a plan for organizing and executing regular, targeted, and random integrity audit checks, or 'sting' operations . . . to identify and investigate officers engaging in at-risk behavior, including: . . . violations of LAPD's Manual Section 4/264.50 (or its successor). These operations shall also seek to identify officers who discourage the filing of a complaint or fail to report misconduct or complaints." The Consent Decree stated its purpose as: "The United States and the City of Los Angeles . . . share a mutual interest in promoting effective and respectful policing" and "The parties enter into this Agreement to provide for the expeditious implementation of remedial measures, to promote the use of the best available practices and procedures for police management . . . ."

and was equipped with an "overhear" device – which allowed other officers to hear the audit.[3]

When UC 35 entered the station lobby he approached the front desk. He told respondent that his bicycle had just been stolen and asked if he could make a police report. Although no one else was in the station lobby, respondent instructed UC 35 to sign in and have a seat. Several minutes later three civilians entered the station lobby and approached the front desk. One of the civilians appeared disheveled and had dried blood on his arm; it appeared as if he had been in some type of altercation. When the civilian asked respondent how long it would take to make a police report, respondent informed the group that a police report would take two to three hours to complete and it would be better if they made the report at another station. The civilians then left the station without making a report, and according to UC 35, they looked disappointed. In UC 35's view although respondent was not disrespectful to the citizens, it did not appear that respondent was doing any other duties at the time that would have prevented him from taking the police report.

UC 35 then asked respondent how long it would take to make his report. Respondent told him it would take told 20 to 30 minutes. When asked why respondent could not take the report, respondent stated that he was not the desk officer. UC 35 then left the station and called his handling officer to update him on the situation. UC 35 was instructed to re-enter the station to allow respondent another opportunity to take a police report. After re-entering the lobby and waiting for approximately five minutes, UC 35 approached the front desk and informed respondent he had to leave because he had someone waiting for him and that he needed to have the report taken at that time. Respondent then asked UC 35 if he knew the make, model and serial number of the bicycle. UC 35 told him that he only knew the "make" of the bicycle. Respondent informed UC 35 that it would be difficult to make a report given that he did not know the

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[3] UC 43 listened to the interaction between UC 35 and respondent on the overhear device and took notes of the conversation.

bike's serial number. UC 35 informed respondent he still wanted to make a report. At that point another officer came to the front desk and respondent asked the other officer to take the police report. The other officer took the report, which took between 3 and 20 minutes to complete.

2. *Charges and Conditional Official Reprimand*

The day following the audit, UC 35 completed a written statement regarding the investigation. Several months later UC 35 was interviewed by the case's investigating officer (hereinafter IO 41). UC 35 used his statement to refresh his memory during the interview. Thereafter, IO 41 submitted his report. After completion of the internal affairs investigation, the LAPD charged that respondent neglected "to complete a crime report for an undercover officer [UC 35] posing as a victim of crime."

Respondent's commanding officers recommended the charge be sustained and that he receive a "conditional official reprimand." On August 18, 2010 the Chief of Police charged respondent with negligent misconduct for failing to take a crime report: "while on duty, [you] were negligent of your duty when you failed to take a crime report." Respondent was issued a conditional official reprimand stating: "should a similar allegation arise and be sustained against you at anytime during the remainder of your employment with the Department from the conclusion of this investigation, you will receive no less than a 10-day suspension."

3. *Administrative Appeal*

On September 7, 2010, respondent filed an administrative appeal of the reprimand.

Prior to the administrative hearing, respondent sought to obtain through discovery a copy of the written statement UC 35 had prepared the day after the sting operation and a copy of the notes that UC 43 took while listening to the interaction between UC 35 and respondent. The hearing officer denied respondent's request for the notes and statement, finding the documents to be confidential.[4]

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[4] Prior to the hearing, respondent also requested that the LAPD make available for interview UC 24 (an undercover officer who had received a briefing of the operation),

On June 30, 2011, the hearing officer concluded that respondent was guilty of misconduct. The hearing officer rejected respondent's defenses that (1) respondent was not assigned to the front desk at the time of the incident; and (2) that he delegated the duty to take the report to the other officer to help develop that officer's report-writing skills. The hearing officer also rejected respondent's arguments that he was denied due process rights because he did not have the opportunity to interview and effectively cross-examine witnesses during the hearing; (2) he was not afforded the protections and rights required by POBRA; and (3) he was improperly refused access to discovery of documents under Article 9.5(A) of the MOU between the LAPD and LAPD Officer's union. On August 3, 2011, the Chief of Police upheld respondent's conditional official reprimand.

4. *Petition for Writ of Mandate*

On August 25, 2011, respondent filed a petition for writ of mandate under Code of Civil Procedure section 1094.5, asserting that the LAPD violated section 3300 in various respects; that the evidence presented at the administrative hearing did not support the decision to discipline respondent; and that the penalty was excessive. Respondent also filed a claim pursuant section 3309.5 (arising from the alleged failure, under section 3303, subd. (g), to provide respondent with documentation regarding the investigation). Respondent sought to have the decision to sustain the conditional reprimand set aside.[5]

UC 35 and IO 41. The hearing officer indicated that the LAPD should try and make those individuals available prior to the hearing. Respondent subsequently requested a continuance of the administrative hearing claiming that he had completed the interviews of UC 35 and IO 41 only two business days before the hearing and that he had not had enough time to prepare a defense. The hearing officer denied the request. In addition, the hearing officer denied respondent's request to call UC 43 and UC 45 (the supervising officer) during the administrative appeal hearing.

[5] The superior court has initial jurisdiction over any proceedings brought by a public safety officer against a public safety department for alleged violations of the POBRA. (§ 3309.5, subd. (c).) If the court finds that a public safety department has violated the POBRA, it "shall render appropriate injunctive or other extraordinary relief

The trial court granted respondent's writ petition under Code of Civil Procedure section 1094.5. This timely appeal followed.

DISCUSSION

I. Standard of Review

The decision of the administrative hearing officer to uphold the conditional reprimand issued by the LAPD may be challenged in superior court by means of a petition for a writ of mandate. (See Code Civ. Proc., § 1094.5.) In reviewing the administrative decision, the trial court "(1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated." (*People v. Alvarez* (1996) 14 Cal.4th 155, 182.) An administrative mandamus provides for judicial review of an agency decision resulting from a proceeding in which "(1) by law a hearing is required to be given, (2) evidence is required to be taken, and (3) the determination of the facts is the responsibility of the administrative agency." (See Code Civ. Proc., § 1094.5, subd. (a); *Gong v. City of Fremont* (1967) 250 Cal.App.2d 568, 572.) The superior court shall exercise its independent judgment on the evidence. Where a superior court is required to make such an independent judgment upon the record of an administrative proceeding, the scope of review on appeal is limited. An appellate court must sustain the superior court's findings if substantial evidence supports them. (*Pasadena Unified School District v. Commission on Professional Competence* (1977) 20 Cal.3d 309, 312; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143, fn. 10; *Steinert v. City of Covina* (2006) 146 Cal.App.4th 458, 462, 465.)

The questions presented here, however, turn not on disputed factual issues resolved by the trial court, but instead on the trial court's interpretation of section 3303. Thus, we review this matter under independent review (de novo) standard of appellate review. (See *Paterson v. City of Los Angeles* (2009) 174 Cal.App.4th 1393, 1400; *Shafer*

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to remedy the violation . . . including . . . prohibiting the public safety department from taking any punitive action against the public safety officer." (§ 3309.5, subd. (d)(1).)

v. County of Los Angeles Sheriff's Dept. (2003) 106 Cal.App.4th 1388, 1396.) In determining "the scope of coverage under the Act, we independently determine the proper interpretation of the statute and are not bound by the lower court's interpretation." (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562; *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1807).

Appellants argue that the trial court erred in granting the petition for writ of mandate. They claim that the trial court erred in concluding (1) that POBRA, specifically section 3303, applied to the "sting audit" conducted in this case; and (2) that respondent was entitled to discovery of documents (UC 35 statement and UC 43's notes) under section 3303, subdivision (g). We address these claims in turn.

II. The Trial Court Erred in Concluding That Section 3303 Applied to the Specific Integrity Audit Targeting Respondent

POBRA 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 [certain] conditions" or with certain procedural safeguards. (§ 3303.) These procedural safeguards include, among other things, the right to be informed of the nature of the investigation before being subjected to interrogation (§ 3303, subd. (c)), the right to be represented at the interrogation by a representative of the officer's choice (§ 3303, subd. (i)), and the right to bring a recording device and record the interrogation (§ 3303, subd. (g);[6] *Van Winkle v. County of Ventura* (2007) 158 Cal.App.4th 492, 497.)

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[6] Section 3303 provides, in pertinent part: "(a) 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 . . . .

"(b) 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.

"(c) The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation.

"(d) 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.

"(e) 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. No promise of reward shall be made as an inducement to answering any question. . . .

"(f) 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. . . .

"[¶¶]

"(g) The complete interrogation of a public safety officer may be recorded. 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. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential. No notes or reports that are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation.

"[¶]

"(i) 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

Our Supreme Court has described the POBRA as "a labor relations statute that provides procedural protections for police officers during administrative and disciplinary actions initiated by their employers." (*Van Winkle v. County of Ventura, supra,* 158 Cal.App.4th at p. 497; *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 572-574.) The court has further described the protections of the POBRA as applying "when a peace officer is interrogated in the course of an administrative investigation that might subject the officer to punitive action . . . ." (*Pasadena Police Officers Assn. v. City of Pasadena, supra,* 51 Cal. 3d at p. 574.) "Punitive action" is statutorily defined as "any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment." (§ 3303.)

Not all investigations and interrogations of public safety officers are subject to the POBRA, however. Two exceptions are expressly described in section 3303, subdivision (i). First, the POBRA does 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, ..." (§ 3303, subd. (i).) Second, the POBRA does not apply to "an investigation concerned solely and directly with alleged criminal activities." (*Ibid.; Van Winkle v. County of Ventura, supra,* 158 Cal.App.4th at p. 497.)

In granting the petition for writ of mandate in this matter, the trial court concluded that respondent was under "investigation" and subject to "interrogation" pursuant to section 3303 when UC 35 asked respondent to take his police report. The court relied on the LAPD's Manual definition of an "integrity audit" to hold that respondent was "under investigation" as contemplated under section 3303. With respect to the term "interrogation," the court ruled in pertinent part that: "Although the cases interpreting

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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. The representative shall not be a person subject to the same investigation. 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." (§ 3303.)

Government Code section 3303 do not specifically define what constitutes an interrogation, the United States Supreme Court has defined an interrogation in the criminal context as 'not only . . . express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.' [Citation.]" The trial court concluded that respondent was "subjected to interrogation," because the sting audit targeting only respondent "created a situation that could lead to punitive action against him," and because UC 35's questions to respondent were asked to "catch" respondent in "an act of misconduct." As a result, according to the trial court, the LAPD was required to provide respondent with notice, and the other rights and protections contained in section 3303 in conducting the investigation and interrogation. The court concluded that LAPD failed to comply with section 3003 in conducting the sting audit, and therefore, the LAPD could not sustain the punishment imposed upon respondent.

In our view the "sting audit" qualifies as an "investigation" under section 3303 because it is a targeted examination of the conduct of an individual police officer. As the trial court correctly observed the LAPD's Manual characterizes integrity audits such as the one conducted in this case as "*investigations* that are designed to evaluate a Department employee's conduct in potential areas of at-risk behavior." (Italics added; all underlining deleted.)

Thus, the dispositive question here is whether the interaction between UC 35 and respondent in November 2009 amounted to "interrogation" under section 3303.

Preliminary we reject the trial court's primary rationale for concluding that the communication between UC 35 and respondent was an interrogation, namely that respondent was subject to interrogation because the sting audit targeting appellant could lead to punitive action against him. The court's reasoning is circular; a communication does not transmute into an "interrogation" simply because the appellant may at some later point be punished based on what the investigation ultimately reveals. Instead, if a communication is an interrogation and the target is under investigation that could lead to

punitive action against the target, then the target is entitled to the panoply of rights and protections contained in section 3303.

The first paragraph of section 3303 does not define the term interrogation or characterize what kind of an interaction would qualify as an "interrogation" under the statute. Subdivision (i) of section 3303, likewise does not expressly define the term interrogation. Rather subdivision (i) describes types of interactions excluded from section 3303: "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." (§ 3303, subd. (i); see *City of Los Angeles v. Superior Court* (*Labio*) (1997) 57 Cal.App.4th 1506, 1514 ["[S]ection 3303, subdivision (i) is intended to cover innocent preliminary or casual questions and remarks between a supervisor and officer. . . . The subdivision excludes routine communication within the normal course of administering the department."].) Section 3303, subdivision (i) embodies the Legislature's intent to limit the application of section 3303, "to avoid claims that almost any communication is elevated to an 'investigation.'" (*City of Los Angeles v. Superior Court* (*Labio*), *supra,* 57 Cal.App.4th at p. 1514.)

The focus of section 3303, subdivision (i) on the context of the communication, rather than only the words used, therefore counsels that whether an interaction qualifies as an interrogation requires the consideration of the totality of circumstances of the interaction, including the context and nature of the inquiry, the questions posed, and the intent and actions of the questioner.

Looking at the circumstances of the communication in this case, in particular the questions posed to respondent, we conclude that the interaction between UC 35 and appellant was not an interrogation under section 3303. In our view, the questions posed by UC 35 to appellant do not demonstrate that the communication was an interrogation. The questions—"Can I make a police report?", "How long will it take to make a report?" and the inquiry as to why appellant could not complete the report, are fairly innocuous

and non-suggestive. Under the definition of "interrogation" articulated by the United States Supreme Court in *Rhode Island v. Innis* (1980) 446 U.S. 291, 292 – express questioning and any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect – the questions and police conduct in this case do not qualify as an interrogation. UC 35's questions, his actions or the manner in which the questions were asked, do not qualify as words or actions that UC 35 should have known were reasonably likely to elicit an incriminating response from appellant.

Furthermore, the nature and context of the exchange between respondent and UC35 supports our conclusion that respondent was not interrogated for the purposes of section 3303. At least one court has determined that POBRA does not apply to undercover sting operations designed to catch officers engaged in misconduct and criminal activities. (See *Van Winkle v. County of Ventura, supra,* 158 Cal.App.4th at p. 501.) The communication occurred during the LAPD's undercover operation undertaken to determine whether appellant was performing his duties, specifically, his duty to complete citizen's police reports. When UC 35 entered the station to make a police report it was not known how appellant would react; UC 35 did not know whether or not appellant would refuse to take the police report. At that point, appellant had yet to commit any specific act or dereliction of duty that could sustain a charge of misconduct or result in discipline against him. The LAPD was not seeking to confirm a specific or particular allegation of misconduct. Because he had yet to commit misconduct in connection with his interaction with UC35, it cannot be said that the LAPD was attempting to "catch" appellant in a lie about a specific allegation of conduct.

The circumstances in this case are also distinct from the case law cited by respondent and relied upon by the trial court—*Labio* and *Paterson v. City of Los Angeles* (2009) 174 Cal.App.4th 1393.

In *Labio,* Officer Labio was on duty as a Los Angeles airport police officer on a night in January 1996, when a fatal traffic accident occurred on Imperial Highway. Shortly after the accident, the watch commander and another officer stopped at a nearby

donut shop, where the owner told them that he had seen a male Filipino officer drive past the accident scene in a marked police vehicle and, without stopping, proceed to another nearby donut shop. The watch commander checked the deployment log and discovered that Labio was the only Filipino officer on duty that night. Upon further investigation, the watch commander learned that Labio did not have permission to use a police vehicle that night, and an employee of the donut shop where Labio had allegedly stopped confirmed that a male Filipino had been there around the time of the accident. The watch commander called Labio to his office and questioned him concerning his whereabouts that night, his use of a police vehicle, and the route he had taken. (*City of Los Angeles v. Superior Court* (*Labio*), *supra*, 57 Cal.App.4th at pp. 1509-1510.)

Labio was terminated based on allegations he used a police vehicle without authorization, failed to stop at the scene of an accident, and made an unauthorized detour to a donut shop. (*City of Los Angeles v. Superior Court* (*Labio*), *supra*, 57 Cal.App.4th at p. 1511.) At the time he questioned Labio, the watch commander knew that Labio's failure to stop at the scene of an accident, if determined to be true, could lead to disciplinary action against him. The watch commander also knew that the incident would have to be referred to internal affairs. And, following his interrogation of Labio, the watch commander filed a personnel complaint with internal affairs. (*Id.* at pp. 1510-1511.)

The appellate court in *Labio* agreed with the trial court's conclusion that the watch commander's interrogation "could only be characterized as part of an investigation of Officer Labio for sanctionable conduct" (§ 3303), and not routine or unplanned contact within the normal course of duty. (§ 3303, subd. (i); *City of Los Angeles v. Superior Court* (*Labio*), *supra,* 57 Cal.App.4th at pp. 1513-1514.) In *Labio* the commanding officer sent out a radio call instructing the officer to report to the Watch Commander's office after establishing misconduct, to question him about his whereabouts and use of the city vehicle. Based on the commanding officer's knowledge of the alleged misconduct, his questions to Labio were designed to elicit an incriminating response from Labio. The *Labio* court opined that the officer Labio was subject to an interrogation and

thus, entitled to protections under POBRA. (*Id*. at p. 1510.) Thus, the appellate court affirmed the trial court's ruling that Labio's statements during the interrogation could not be used against him in the City's case-in-chief at the administrative hearing to review Labio's termination. (*Id.* at pp. 1511, 1516-1517.)

Paterson v. City of Los Angeles, supra, 174 Cal.App.4th 1393 presents a similar situation. In *Paterson*, husband and wife police officers sued the City of Los Angeles for violating their POBRA rights in connection with an investigation of the husband's suspected abuse of his sick time. The husband called in sick one day while his wife was on leave after giving birth to a child. A lieutenant suspected that the husband was abusing his sick time and sent a sergeant to the couple's home to conduct a "sick check." Armed with a tape-recorder, the sergeant spoke to the couple's older son, who said his parents were not at home and gave the sergeant his father's cell phone number. The sergeant called the cell number and recorded his conversations with both officers. Both officers falsely stated that they were at home. An investigation ensued, and the officers were temporarily suspended. (*Id.* at pp. 1398-1399.)

The couple sued the City for violating their POBRA rights in connection with the sergeant's investigation. The trial court entered summary judgment in favor of the City, because the couple were later exonerated, reinstated and given back pay for the period of their suspension. The *Paterson* court held that the couple's exoneration did not "nullify" the alleged POBRA violation, and remanded the matter to the trial court with directions to determine whether the "sick check" constituted an interrogation that could lead to punitive action (§ 3303), or an interrogation "in the normal course of duty . . . ." (§ 3303, subd. (i).) The court reasoned that the facts of the case were like those of *Labio* because, like the watch commander in *Labio*, the sergeant suspected wrongdoing before he questioned the couple. Thus the sergeant's questions to the officers were designed to elicit information to contradict the facts known based on the sergeant's visit to their home to investigate whether or not they were in fact sick at home. (*Paterson v. City of Los Angeles, supra,* 174 Cal.App.4th at p. 1403.) Thus, the facts supported an inference that the sergeant's questioning of the couple was an interrogation.

The statements in *Paterson*, unlike the statements made by UC 35, reflect a desire to elicit incriminating responses from the targets of the investigation, not a desire to deduce fact from allegation as UC 35 did during the course of the sting audit. UC 35's conduct upholds POBRA while the sergeant's actions in *Paterson* undermine it.

Here we have no doubt that respondent's rights under POBRA would be triggered if he had been questioned concerning the *prior* complaints about his conduct which led to the sting audit, and that POBRA would also be implicated in interviews or questions posed to respondent by LAPD investigators about his interaction with UC 35 *after* the fact. However, we conclude that the exchange between UC 35 and respondent during the audit does not amount to an interrogation under section 3303.

In reaching his conclusion we are mindful of the importance of undercover operations and sting audits for the LAPD to meet its obligations under the Consent Decree. We are also aware of the affect upon such operations if targets of sting audits were entitled to the compliment of rights afforded under section 3303. Applying POBRA to sting audits would deprive the LAPD of a valuable tool in conducting investigations involving non-criminal misconduct: "'[T]he sting is an indispensible method for detecting certain types of crime, such as public corruption' by officers. [Citation.] Targets of a sting are not entitled to warnings or the type of advisements that they would receive if they were in custody. [Citations.]" (*Van Winkle v. County of Ventura, supra,* 158 Cal.App.4th at p. 501.) A broad reading of an "interrogation" in the case at bar would mean that all sting audits (not involving criminal conduct) in which questions are posed to the targets would be recast as an interrogation triggering section 3303. Most internal covert investigations – even those that seek to exonerate the target – would not be undertaken. "If suspected officers are entitled to POBRA advisements before initiating a sting operation [as respondent contends], that would be the end of sting operations." (*Id.* at pp. 500-501.) In our view, in implementing section 3303, the Legislature did not intend to hamper a police agency's ability to conduct internal sting operations nor did it intend to limit those investigations to only those that can be conducted through passive observation of the target or the use of non-police personnel.

We cannot endorse an interpretation of the term interrogation that imposes such limitations.

In view of the foregoing, we conclude that the trial court erred in concluding that respondent was "interrogated" under section 3303 and thus entitled to the protections of PROBA.

III. The Trial Court Properly Concluded Respondent's Discovery Rights Were Violated

The trial court relied upon an additional ground to grant respondent's petition, independent of the court's ruling that appellants investigated and interrogated respondent in violation of section 3303. Specifically, the trial court held that respondent was denied a fair administrative hearing because the hearing officer did not require the LAPD before the administrative hearing to produce the written statement of UC 35 prepared the day after the audit and UC 43's notes prepared during the audit. The trial court concluded that the hearing officer erred in deeming those documents confidential especially in view of the fact UC 35 used his written statement to refresh his recollection during the administrative hearing, and that the failure to produce those documents hampered respondent's ability to cross-examine witnesses at the hearing. As we explain, the trial court correctly concluded that the LAPD had not satisfied its discovery obligations in this case.

Generally there is no due process right to prehearing discovery in administrative hearing cases; the "scope of discovery in administrative hearings is governed by statute and the agency's discretion." (*Cimarusti v. Superior Court* (2000) 79 Cal.App.4th 799, 808-809; see also *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 302; *Kennally v. Medical Board* (1994) 27 Cal.App.4th 489, 500; *Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 945; §§ 115-7.5, 11507.6, 11511 [limited discovery rights under the Administrative Procedure Act].) Nor does due process require that an officer be provided "a full trial type evidentiary hearing prior to the initial taking of punitive action." (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215.) Only when "the scope of administrative appeal hearing *is not* prescribed by personnel rules, agency

regulations, memoranda of understanding, or customary agency practices, the adequacy of the appeal procedure must be measured according to constitutional due process principles." (*Binkley v. City of Long Beach*, *supra*, 16 Cal.App.4th at p. 1807, italics added.)

A public officer's discovery rights are described under POBRA and the MOU. Section 3300 "requires only that an opportunity for administrative appeal be provided. It does not specify how the appeal process is to be implemented." (*Browning v. Block* (1985) 175 Cal.App.3d 423, 429.) Section 3303, subdivision (g) states in pertinent part that: "The complete interrogation of a public safety officer may be recorded. 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. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential." (§ 3303, subd. (g).)

The MOU provides procedural measures for administrative appeal hearings as formulated by the local agency.[7] Article 9.5 of the MOU between appellant City and the Los Angeles Protective League (representing public police officers ranked lieutenant and below) prescribes discovery rights due public officers in administrative appeals:

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[7] Under Article 9.5(C) of the MOU, the "Department and the employee have the right to call and cross-examine witnesses, whose testimony shall be given under oath." Outside of these parameters, the MOU does not provide for further discovery rights to augment an officer's ability to confront and cross-examine witnesses. Likewise, there is no right to prehearing witness interviews where an agency's rules do not provide for one. (*Cimarusti v. Superior Court, supra*, 79 Cal.App.4th at pp. 808-809.) Finally, Article 9.4 of the MOU provides that the formal rules of evidence do not apply to administrative appeals involving public officers: "the law is quite clear that the *constitutional* privilege against self-incrimination does not apply to law enforcement administrative investigations where, as here, the statements cannot be used in subsequent criminal proceedings." (*Riverside County Sheriff's Dept. v. Zigman* (2008) 169 Cal.App.4th 763, 770 [holding that "an internal affairs investigation is not a 'proceeding' in which the marital communications privilege [of the Evidence Code] applies."]; italics added.)

"Discovery shall consist of copies of *all reports and materials used to substantiate the decision* as to the matter being appealed. Discovery material shall be provided as soon as practicable after selection of a hearing officer, but no later than 14 days prior to the date the hearing commences." (Italics added.)

Contrary to respondent's assertion that a police officer's right to a fair and meaningful administrative hearing for disciplinary actions arises under the Due Process clauses of the Federal and State Constitutions, an officer's right to an administrative hearing arises under section 3300 and the MOU. An officer's due process rights in administrative hearings are not found in constitutions; instead, they are defined by statute. (See *Binkley v. City of Long Beach*, *supra*, 16 Cal.App.4th at p. 1806.) Nor are these statutory rights automatically enhanced by constitutional due process principles. (See *id*. at p. 1808.)

In addition, based on our conclusion elsewhere that the sting audit in this case did not implicate section 3303, respondent was not entitled to the discovery rights provided in section 3303, subdivision (g). Section 3303, subdivision (g) does not afford discovery to a police officer who is not subject to interrogation under section 3303. (*Sacramento Police Officers Association v. Venegas* (2002) 101 Cal.App.4th 916, 923 [holding that section 3303, subdivision (g) did not give an officer the right to discovery where the investigation into his conduct had ended and he was never subject to interrogation under section 3303].) As a result, respondent had no rights to discovery under section 3303, subdivision (g).

Respondent's right to discovery in this case was governed only by the MOU, Article 9.5, which afforded respondent the right to discover reports and materials used to substantiate the decision that was the subject of respondent's administrative appeal. Article 9.5 provides for discovery of materials used by the LAPD decision-maker, here the Chief of Police – to substantiate his decision to discipline respondent – the decision subject to the administrative appeal and review: "Discovery shall consist of copies of *all reports and materials used to substantiate the decision as to the matter being appealed. Discovery material shall be provided as soon as practicable after selection of a hearing*

officer, but no later than 14 days prior to the date the hearing commences." (MOU Art. 9.5, italics added.) [8]

We are not convinced respondent received all of the materials used to "substantiate the decision" against respondent. Although LAPD provided respondent with the investigating officer's report, appellant has not convinced us that the Chief relied exclusively on that report in reaching his decision. In addition, in our view, the documents sought by respondent prior to the administrative hearing and at issue here – UC 35's written statement and UC 43's notes--must have been used by the investigating officer to reach the conclusion in his report that respondent should be disciplined. Given that the Chief relied on the investigator's report, respondent should have been able to discover the notes and written statement. Appellant has failed to demonstrate that these materials were excluded from disclosure required by Article 9.5 of the MOU.

Accordingly, the trial court did not err granting respondent's petition for a writ of mandate on the ground that the LAPD failed to provide him with the discovery required under the MOU.

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[8] The trial court apparently read Article 9.5 to require the disclosure of documents and materials that the *hearing officer* used to support her decision. The court stated: "My view is that, because [UC 35 and UC 43] could not possibly have had independent recollection of what occurred on this particular day, that for all practical purposes, what they stated in the statement form and what was written by [UC 43]…for all practical purposes that was their testimony. [¶] So that was used, in my view, to substantiate the hearing officer's decision." Article 9.5, however, does not provide discovery related to the basis of the hearing officer's decision. On its face, Article 9.5 clearly did not require the LAPD to produce, prior to the administrative hearing, any materials that the hearing officer may rely upon in deciding the administrative appeal.

DISPOSITION

The judgment is affirmed. The parties are to pay their own costs on appeal.

WOODS, Acting P. J.

We concur:

ZELON, J.

SEGAL, J.[*]

[*]Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.