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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LOS ANGELES COUNTY PROFESSIONAL PEACE OFFICERS ASSOCIATION et al., Petitioners and Appellants, v. COUNTY OF LOS ANGELES et al., Respondents.	B281401 (Los Angeles County Super. Ct. No. BS159462)

APPEAL from a judgment of the Superior Court of Los Angeles County. James C. Chalfant, Judge. Affirmed.

Hayes & Ortega, LLP, Dennis J. Hayes and Tracy J. Jones for Petitioners and Appellants.

Liebert Cassidy Whitmore, Geoffrey S. Sheldon and Jennifer K. Palagi for Respondents.

Petitioners David Moser and the Los Angeles County Professional Peace Officers Association (together, Petitioners) challenge a judgment denying their petition for writ of mandate. Petitioners assert the Los Angeles County Sherriff's Department (Department) failed to provide due process and violated the Public Safety Officers Procedural Bill of Rights Act (POBRA) when it suspended Moser after he was charged with a misdemeanor for inflicting cruel punishment or treatment impairing the health of an inmate. The Superior Court determined the Department provided sufficient pre-deprivation process, and the post-deprivation hearing offered to Moser was sufficient under POBRA. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Moser was hired by the Department in 1999, and promoted to sergeant in 2014. Shortly thereafter, he was assigned to the North County Correctional Facility (North County).

On September 5, 2014, a North County inmate refused to fully submit to a cavity search upon his return from a court appearance. Deputies restrained the inmate while waiting for him to defecate suspected contraband. When Moser's shift began, he found the inmate in an isolation cell, naked, handcuffed, and tethered to a ring connected to the wall. Moser was initially concerned about the restraints, but reviewed the Department's policy and determined they were permitted.

According to the inmate, he was shackled naked in the cell for up to 15 hours, during which time he was forced to sit in feces. The inmate also complained that a deputy kneed him in the forehead. The inmate suffered injuries to his head, wrists, and midsection that required medical attention.

The Department conducted an administrative investigation, after which it referred the incident to its Internal Criminal Investigations Bureau (ICIB) to investigate possible criminal conduct. The ICIB conducted an investigation and found evidence corroborating some of the inmate's assertions. The ICIB concluded its investigation around May 4, 2015, and submitted the facts of the case to the Los Angeles County District Attorney's Office.

On September 4, 2015, the District Attorney filed a misdemeanor complaint against Moser, alleging he committed cruel punishment or treatment impairing the health of an inmate in violation of Penal Code section 673.[1] Moser was arrested the next day.

Suspension

On September 9, 2015, the Department sent Moser a letter stating it intended to suspend him without pay for up to 30 days beyond judgment of the pending criminal charge, pursuant to rule 18.01 of the Los Angeles County Civil Service Rules (Rule 18.01).[2] The letter indicated Moser could respond, orally or in

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[1] Penal Code section 673 makes it a misdemeanor to "use in the reformatories, institutions, jails, state hospitals or any other state, county, or city institution any cruel, corporal or unusual punishment or to inflict any treatment or allow any lack of care whatever which would injure or impair the health of the prisoner, inmate, or person confined; and punishment by the use of the strait jacket, gag, thumbscrew, shower bath or the tricing up of a prisoner, inmate or person confined is hereby prohibited."

[2] Rule 18.01 provides: "A. Subject to such appeal right as provided in this Rule, an employee may be suspended by the

writing, to the intended action within 15 business days, during which time he would be placed on paid administrative leave. The letter noted the decision to proceed with the suspension was based solely upon the criminal charge.

On September 24, 2015, Moser's counsel wrote a letter to the Department asserting Moser was innocent, and the mere existence of a misdemeanor charge is insufficient to support a suspension. The letter further asked that the Department not implement the suspension given Moser's "exemplary" employment record.

On November 12, 2015, the Department informed Moser he was suspended pursuant to Rule 18.01, as of November 5, 2015. The letter noted that Moser did not respond to the September 9, 2015 notice.[3] It further stated Moser could request a hearing

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appointing power for up to and including 30 days, pending investigation, filing of charges and hearing on discharge or reduction, or as a disciplinary measure. Where the charge upon which a suspension is the subject of criminal complaint or indictment filed against such employee, the period of suspension may exceed 30 calendar days and continue until, but not after, the expiration of 30 calendar days after the judgment of conviction or the acquittal of the offense charged in the complaint or indictment has become final. The reason(s) for such suspension shall be forthwith furnished in writing to the employee and a copy sent to the director of personnel."

[3] At oral argument before the trial court, the respondents' counsel represented that this statement referred to the fact that Moser had not *orally* responded to the letter of intent. There is no evidence in the record to support counsel's assertion. Petitioners, however, did not directly raise this as an issue before the trial court or on appeal.

before the Los Angeles County Civil Service Commission (CSC) to challenge the suspension.

Sometime thereafter, Moser requested a hearing before the CSC,[4] which was granted on January 13, 2016. The CSC defined five issues for the hearing: (1) Is there a sufficient nexus between the criminal charges and Moser's duties sufficient to warrant a suspension? (2) Did the Department have a valid interest to suspend Moser? (3) Is there merit to any affirmative defenses raised by Moser? (4) Was the suspension appropriate? and, if not, (5) What is the appropriate remedy?

On January 21, 2016, the CSC provided the parties a list of possible hearing officers, which they could reject no later than February 4, 2016. On February 4, 2016, Moser sent the CSC a letter rejecting one of the officers.

On June 17, 2016, the Department requested that the CSC set a hearing date. On July 7, 2016, Petitioners requested that the appeal remain in abeyance until the completion of Moser's criminal case.

Petition for Writ of Mandate

On December 4, 2015, Petitioners filed a petition for writ of mandate in Superior Court, pursuant to Code of Civil Procedure, section 1085. In the first amended petition, Petitioners asserted the Department failed to provide Moser adequate due process.[5]

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[4] It is not clear from the record when Moser requested the hearing.

[5] The petition named as respondents the County of Los Angeles, the Board of Supervisors for the County of Los Angeles, Lisa M. Garrett, and the Los Angeles County Civil Service Commission. On appeal, the respondents are the County of Los Angeles and the Board of Supervisors for the County of Los

According to Petitioners, whenever an officer is suspended under Rule 18.01 based on a misdemeanor charge not involving moral turpitude, due process requires that the Department provide a pre-suspension hearing related to the conduct underlying the charge. Petitioners also alleged the Department violated POBRA by failing to offer Moser an adequate administrative appeal of his suspension.

In opposition, Respondents argued Moser had no right to any pre-suspension process, but, in any event, it provided sufficient process by offering him a *Skelly*[6] hearing. Respondents further contended Moser could argue the merits of the criminal charge and his innocence at the CSC hearing, but it was his choice that the hearing remain in abeyance while the criminal charge is pending.[7] Respondents further asserted the CSC hearing comported with POBRA given the Rule 18.01 suspension was not disciplinary in nature; rather, it was imposed because Moser could not perform his essential duties in light of the pending criminal charge.

The trial court denied the petition. The court rejected the Department's argument that a pre-deprivation hearing was not required. Nonetheless, the court found the Department provided sufficient due process by offering Moser a *Skelly* hearing prior to suspending him without pay.[8] The court also determined the

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Angeles (together, Respondents).

[6] *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 (*Skelly*).

[7] Respondents presented evidence that the CSC does not have a policy of holding hearings in abeyance pending criminal charges, unless requested by the employee.

[8] At oral argument, the trial court noted that if the

post-suspension CSC hearing was adequate, noting the scope of the hearing would include whether a suspension was appropriate under the specific circumstances. In addition, the court found the hearing could have been held within 90 days of the suspension, which it concluded was sufficiently prompt.[9]

The court further determined the scope of the CSC hearing was sufficiently broad to satisfy POBRA. The court noted that because the suspension was imposed based on the criminal charge itself, and not the underlying conduct, POBRA does not require a hearing on the merits of the criminal charge.

The court entered judgment denying the petition, and

Department declined to consider Moser's response to the September 9, 2015 letter of intent, there might be a "*Skelly* violation." Nonetheless, the court indicated the issue of whether the Department actually provided a sufficient *Skelly* hearing was not before it. Rather, the trial court believed the only issue was whether the process offered by the Department, in the abstract, complied with due process.

The court also rejected Petitioners' assertion that due process required a pre-deprivation hearing on the merits of the underlying criminal charge. The court noted there would be a serious risk of erroneous result at such a hearing given Moser would likely refuse to testify and the Department would not be privy to all the information underlying the criminal charge.

[9] The court noted that, given Moser's request to hold the hearing in abeyance, the Department had no control over the timing of the CSC hearing. It also noted that Moser "has considerable input into the timing of his misdemeanor case, and [therefore] has substantial control over the timing of his post-suspension hearing."

Petitioners timely appealed.[10]

STANDARD OF REVIEW

When reviewing a decision denying a petition for writ of mandate brought pursuant to Code of Civil Procedure section 1085,[11] we accept the trial court's factual findings if supported by substantial evidence. (*Mednik v. State Dept. of Health Care Services* (2009) 175 Cal.App.4th 631, 639.) Whether a petitioner received due process is a pure legal question subject to de novo review. (*Ibid.*; *Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95, 107–108 (*Bostean*).)

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[10] While this appeal was pending, Petitioners filed a motion to augment the record with evidence showing the delay in Moser's criminal case was beyond his control. The evidence, however, was not before the trial court, and is therefore not the proper subject of a motion to augment. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 ["Augmentation does not function to supplement the record with materials not before the trial court."].) In any event, the proffered evidence is irrelevant to the issues before us. (See *Foothill Properties v. Lyon/Copley Corona Associates* (1996) 46 Cal.App.4th 1542, 1558, fn. 17 [denying motion to augment record where evidence was irrelevant].) Accordingly, we deny the motion.

[11] "Section 1085 of the Code of Civil Procedure authorizes a trial court to issue a writ of mandate to compel an act which the law specifically requires. A petitioner seeking a writ of mandate under this section is required to show the existence of two elements: a clear, present and usually ministerial duty upon the part of the respondent, and a clear, present and beneficial right belonging to the petitioner in the performance of that duty." (*Bergeron v. Department of Health Services* (1999) 71 Cal.App.4th 17, 21–22.)

DISCUSSION

I. The Department Was Not Required to Provide Moser a Hearing Prior to the Suspension

Petitioners contend the Department violated due process by failing to provide Moser a sufficient hearing prior to suspending him. We find no merit to this argument.

A. Legal Principles

"Both the federal and state Constitutions compel the government to afford persons due process before depriving them of any property interest. (U.S. Const., 14th Amend. ['nor shall any state deprive any person of life, liberty, or property, without due process of law']; Cal. Const., art. I, § 7, subd. (a) ['A person may not be deprived of life, liberty, or property without due process of law . . . .'].)" (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 212 (*Today's Fresh Start*).) "The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.' " (*Mathews v. Eldridge* (1976) 424 U.S. 319, 348 (*Mathews*).) However, the "precise dictates of due process are flexible and vary according to context." (*Today's Fresh Start, supra*, 57 Cal.4th at p. 212.)

In *Mathews*, the United States Supreme Court identified three factors courts should balance to determine what process is required under specific circumstances: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's

interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[12] (*Mathews, supra*, 424 U.S. at p. 335; see *Bostean, supra*, 63 Cal.App.4th at p. 113.)

In *Skelly, supra*, 15 Cal.3d 194, the California Supreme Court explained that, prior to taking punitive action against a permanent civil service employee, "due process does not require the state to provide the employee with a full trial-type evidentiary hearing . . . ." (*Id*. at p. 215.) However, the court determined due process does require that the employee receive, at a minimum, "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." (*Ibid*.) These procedures, which are often referred to as a *Skelly* hearing, serve to " 'minimize the risk of error in the initial removal decision' " (*id*. at p. 215), and "are merely anticipatory of the full rights which are accorded to the employee after discharge." (*Kirkpatrick v. Civil Service Com*. (1978) 77 Cal.App.3d 940, 945, italics omitted.)

Ten years after *Skelly*, the United States Supreme Court similarly concluded that prior to termination, a "tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an

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[12] The California Supreme Court has indicated that a fourth factor may also be considered: " '[T]he dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official.' " (*People v. Allen* (2008) 44 Cal.4th 843, 862–863; see *Today's Fresh Start, supra*, 57 Cal.4th at p. 213.)

opportunity to present his side of the story." (*Cleveland Board of Education v. Loudermill* (1985) 470 U.S. 532, 546.) The high court explained that the " 'hearing,' though necessary, need not be elaborate . . . . [and] '[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.' " (*Id.* at p. 545.)

In *Gilbert v. Homar* (1997) 520 U.S. 924 (*Gilbert*), the United States Supreme Court clarified that a pre-deprivation hearing of the sort envisioned in *Loudermill* and *Skelly* is not constitutionally required in all instances where a public employer takes punitive action against a tenured employee. In *Gilbert*, a university suspended without pay a police officer shortly after state police arrested and charged him with possession of marijuana, possession with intent to deliver, and criminal conspiracy to violate the controlled substance law, which is a felony.[13] (*Gilbert,* at pp. 926–927.) The officer asserted the university violated due process in waiting several weeks after the suspension to provide him a hearing. (*Id.* at p. 927.) According to the officer, due process required that he be provided a hearing prior to any suspension without pay. (*Id.* at p. 928.)

The high court noted that because due process is flexible, it must balance the *Mathews* factors to determine whether a pre-suspension hearing was required. (*Gilbert, supra*, 520 U.S. at pp.

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[13] The university suspended the officer pursuant to section 7.173 of the Pennsylvania Administrative Code, which, provided, "As soon as practicable after an employe has been formally charged with criminal conduct related to his employment with the Commonwealth or which constitutes a felony, the employe shall be suspended without pay. If the charge results in conviction in a court of law, the employe shall be terminated."

930–932.) The court determined the officer had an interest in the "uninterrupted receipt of his paycheck," but his interest was lessened by the fact that he was temporarily suspended, rather than terminated. The court noted that "[s]o long as the suspended employee receives a sufficiently prompt postsuspension hearing, the lost income is relatively insubstantial (compared with termination) . . . ." (*Gilbert, supra*, 520 U.S. at p. 932.) On the other hand, the court found the university has "a significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as police officers." (*Ibid*.) Moreover, because the officer was no longer useful once the felony charge had been filed, the university was not required to bear the added expense of hiring a replacement while still paying him. (*Ibid*.)

The court then turned to the risk of erroneous deprivation and likely value of additional procedures, which it noted was the most important factor. (*Gilbert, supra*, 520 U.S. at p. 933.) The court determined the arrest and filing of charges—which required an independent third party's determination that there is probable cause to believe the officer committed a serious crime—essentially served the same purpose as a pre-deprivation hearing, which is to determine whether there are "reasonable grounds to support the suspension without pay." (*Id*. at pp. 933–934.) As such, the arrest and charge were sufficient to ensure the "employer's decision to suspend the employee is not 'baseless or unwarranted,' [Citation] . . . ." (*Id*. at p. 934.) The court further noted "the imposition of felony charges 'itself is an objective fact that will in most cases raise serious public concern.' [Citation.]" (*Ibid*.) After balancing these factors, the Supreme Court

concluded the university was not required to provide the officer any process prior to the suspension.

B. Analysis

The parties agree that Moser's suspension constituted a governmental deprivation of his property interest entitling him to due process. (See *Bostean, supra*, 63 Cal.App.4th at p. 110.) They disagree, however, as to what process Moser was owed in connection with this deprivation.

Petitioners' primary contention is that due process required a hearing to consider the merits of the criminal charge before the Department could suspend Moser under Rule 18.01. Respondents, in turn, contend Moser was not entitled to any pre-deprivation hearing, let alone a hearing regarding the merits of the underlying charge. After balancing the relevant *Mathews* factors,[14] we agree with Respondents that, under the specific circumstances of this case, the Department was not required to provide Moser a hearing before the suspension. As such, there was no due process violation.

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[14] In *Skelly*, the California Supreme Court articulated five factors relevant to whether a pre-deprivation hearing is necessary, which it derived from numerous United States Supreme Court decisions: "whether predeprivation safeguards minimize the risk of error in the initial taking decision, whether the surrounding circumstances necessitate quick action, whether the postdeprivation hearing is sufficiently prompt, whether the interim loss incurred by the person affected is substantial, and whether such person will be entitled to adequate compensation in the event the deprivation of his property interest proves to have been wrongful." (*Skelly*, *supra*, 15 Cal.3d at p. 209.) We think these factors are sufficiently encompassed within the three *Mathews* factors.

1. Private Interest

Respondents do not dispute that Moser has a significant interest in receiving a paycheck from the Department. (See *Gilbert, supra*, 520 U.S. at p. 932; *Bostean, supra*, 63 Cal.App.4th at p. 113.) However, like the officer in *Gilbert*, Moser's interest is lessened by the fact that he was temporarily suspended, rather than terminated. Moser also admits he received unemployment benefits during a portion of his suspension.[15] Moreover, like the officer in *Gilbert*, Moser's interest is further lessened by the relatively prompt availability of a post-deprivation hearing and the fact that he will be entitled to back pay if successful at that hearing.[16]

Petitioners insist Moser's interest is significantly greater than the officer's interest in *Gilbert* because the CSC hearing is neither adequate nor prompt. Petitioners, for example, maintain the CSC hearing will not provide a meaningful opportunity to challenge the suspension because it will concern only whether a criminal charge has been filed against Moser. The undisputed

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[15] Moser received unemployment benefits until June 2016, but the amount of benefits is not clear.

[16] Petitioners assert back pay will not be sufficient given Moser has incurred significant damages for which he will not be compensated, including damages from having to sell his house. The record is not clear when Moser suffered these damages, and it is possible he could have avoided them by promptly challenging the suspension at the CSC hearing, rather than requesting the hearing be held in abeyance.

evidence, however, indicates the scope of the hearing is significantly broader than Petitioners suggest. The CSC certified multiple issues for the hearing, including whether there was a nexus between the charge and Moser's duties, whether the suspension was an appropriate remedy, whether the Department had an interest in the suspension, and any affirmative defenses.[17] We cannot say that such a hearing is inadequate, per se, such that it would mandate a pre-deprivation hearing.[18]

We also disagree with Moser's suggestion that the CSC hearing is not sufficiently prompt. The evidence indicates Moser could have received a hearing within approximately three months of his suspension,[19] during which time he was collecting unemployment benefits. We recognize that this is a significant amount of time to go without a full paycheck, and give it due weight in our consideration of the relevant interests. We do not, however, think it so substantial that it alone mandates a pre-

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[17] The parties disagree as to whether the CSC will consider Moser's innocence as an affirmative defense. Neither party, however, presented evidence on this point, and we do not know specifically what the CSC will consider as an affirmative defense given the hearing has yet to occur.

[18] We consider the sufficiency of the CSC hearing only in the context of determining whether a pre-deprivation hearing was required. Whether Moser is actually provided a CSC hearing that comports with due process is a separate question that we cannot decide on the record before us given the hearing has not yet occurred. (See *Gilbert, supra*, 520 U.S. at pp. 935–936.)

[19] We acknowledge it likely would have taken additional time to complete the hearing and issue a final decision.

deprivation hearing. (See *Federal Deposit Ins. Corp. v. Mallen* (1988) 486 U.S. 230, 236 [no per se due process violation where no pre-deprivation hearing and the post-deprivation hearing and decision would take 90 days].)

Petitioners insist we should consider the fact that it has been more than two years since the suspension, yet Moser still has not had a CSC hearing. Petitioners, however, overlook that this delay was primarily caused by Moser's insistence that the hearing be held in abeyance.[20] Although Moser may have good reason for that request, the fact remains that it is his choice not to proceed with the hearing. Due process does not require a pre-deprivation hearing simply because an employee chooses not to promptly participate in the post-deprivation proceedings offered to him.

2. Public Interest

The Department had a significant interest in immediately suspending Moser. Indeed, we think the interest in suspending Moser was at least as great as, if not greater than, the university's interest in *Gilbert*. Like the officer in *Gilbert*, Moser occupies a "position[] of great public trust and high public visibility . . . ." (*Gilbert, supra*, 520 U.S. at p. 932.) Unlike the officer in *Gilbert*, Moser's charged crime—inflicting cruel

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[20] The precise reason Moser requested the hearing be held in abeyance is not clear. Petitioners maintain Moser would have meaningfully participated in a pre-suspension hearing to consider the merits of the criminal charge, even if it took place while the criminal charge was pending. Petitioners do not explain why Moser could not similarly participate in a CSC hearing while the criminal charge is pending, especially given their insistence that the scope of the CSC hearing is limited.

punishment on an inmate—allegedly occurred while he was acting in his official capacity and constituted an abuse of the powers delegated to him by the Department. In such situations, it is not only prudent, but imperative, that the Department take swift action to maintain public trust and instill confidence that it is committed to ensuring its deputies exercise their authority in a lawful manner.[21]

Petitioners argue the Department's interest was not as significant as the university's interest in *Gilbert* given Moser was charged with a misdemeanor rather than a felony. According to Petitioners, unlike felony charges, misdemeanor charges "do not call into question an officer's ability to do his job."[22] Petitioners also point out that a misdemeanor conviction, as opposed to a

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[21] In their reply brief, Petitioners briefly suggest the Department could have served these interests by reassigning Moser to a position where he would not have contact with inmates, or by suspending him with pay. However, given the nature of the charge, the Department could have reasonably concluded Moser was no longer useful in any capacity once the charge was filed, and "the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him." (*Gilbert, supra*, 520 U.S. at p. 932.)

[22] The trial court similarly distinguished *Gilbert* on the basis that, even if the underlying misdemeanor charge is true, Moser would not be placed on the Department's "*Brady* list," and could therefore have some continuing use to the Department while the charge is pending. The court's finding that Moser would not be placed on a *Brady* list, however, was not based on any evidence or authority, but rather an unsupported assertion in Petitioners' briefing. In any event, it is not self-evident that Moser would be useful to the Department simply because he remains off the *Brady* list.

felony conviction, is not alone sufficient to support disciplinary action.

Under the unique circumstances of this case, we do not find the misdemeanor/felony distinction particularly meaningful. Although it may not be true of all misdemeanor charges, there is no question that a charge of inflicting cruel punishment on an inmate calls into question an officer's ability to do his or her job. Moreover, while a misdemeanor conviction may not, in and of itself, provide sufficient cause for discipline, Petitioners concede that the conduct underlying such a conviction may provide cause for discipline. We have little doubt that an officer would be subject to discipline for inflicting cruel punishment on an inmate. (See L.A. County Civ. Service Rules, rule 18.031 [providing that an employee may be disciplined for, among other things, failure to exercise sound judgment and any behavior which is unbecoming a county employee].)

Petitioners also suggest the Department's interest was not significant given Moser was following Department policy and the Department did not discipline him in connection with its own internal investigation. Petitioners, however, overlook the possibility that the District Attorney is aware of information not uncovered in the Department's investigation. Further, that Moser was criminally charged with cruel punishment of an inmate is itself an objective fact that raises serious public concern and provided an additional reason for the Department to act. (See *Gilbert, supra*, 520 U.S. at p. 934.)

3. Risk of Erroneous Deprivation and Likely Value of Additional Procedures

Finally, we consider the risk of erroneous deprivation and value of additional procedures, which the Supreme Court has

suggested is the most important factor. (*Gilbert, supra*, 520 U.S. at p. 933.) The purpose of a pre-deprivation hearing is to ensure there are reasonable grounds to support the deprivation. (*Ibid*.) Here, the misdemeanor complaint and arrest effectively provided such grounds. Like in *Gilbert*, the criminal charge and arrest indicated that independent third-parties[23] had determined there are reasonable grounds to believe Moser inflicted cruel punishment on an inmate. (See Rules Prof. Conduct, rule 5-110 [prosecutor has ethical responsibility to institute a charge only if supported by probable cause]; Pen. Code, § 1427 [judge issuing arrest warrant must have reasonable ground to believe defendant committed charged crime]; see also Pen. Code, § 991, subd. (a) [defendant in custody and charged with misdemeanor has right to probable cause determination].) As we discussed, such conduct undoubtedly calls into question Moser's fitness to serve as a peace officer, and the Department has a significant interest in suspending an officer charged with such a crime. Accordingly, the misdemeanor charge and arrest provided reasonable grounds for the suspension, and were sufficient to ensure the Department's deprivation was warranted and not arbitrary. Under these circumstances, a pre-deprivation hearing would have provided little additional value.

After weighing the relevant factors, we conclude the Department was not required to provide Moser any process prior to the suspension. Like in *Gilbert*, the Department had a

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[23] We acknowledge that the Department and District Attorney's Office are both departments of the County of Los Angeles. However, there is no evidence that the District Attorney did not exercise independent judgment in filing the charge against Moser.

significant interest in immediately suspending Moser, the risk of an erroneous suspension was low, and the value of a pre-suspension hearing was insignificant. Although we recognize that the deprivation here is more substantial than in *Gilbert* given the three-month delay in the CSC hearing, we do not think it is so substantial that it warrants a different result. Accordingly, there is no merit to Petitioners' assertion that the Department violated due process by failing to offer him a pre-suspension hearing concerning the merits of the criminal charge.

II. The Department Did Not Violate POBRA

Petitioners briefly assert the CSC hearing, which has yet to occur, violates POBRA. "POBRA is 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* (2007) 158 Cal.App.4th 492, 497.) Under POBRA, "[n]o punitive action . . . shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period . . . without providing the public safety officer with an opportunity for administrative appeal." (Gov. Code, § 3304, subd. (b).)

As we understand their argument, Petitioners contend the CSC hearing does not constitute a sufficient opportunity for administrative appeal, because it will concern only whether Moser was actually charged with a misdemeanor. As discussed above, this assertion is not supported by the evidence. Rather, the evidence shows the scope of the hearing will be significantly broader, and the CSC will consider whether there was a nexus between the charge and Moser's duties, whether the suspension was an appropriate remedy, whether the Department had an

interest in the suspension, and any affirmative defenses. We cannot say that such a hearing would be insufficient as a matter of law. (See *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1806 [limited purpose of POBRA appeal is to establish record of circumstances surrounding discipline and provide opportunity to convince agency to reverse its decision].)

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

BIGELOW, P.J.

We concur:

GRIMES, J.

ROGAN, J.*

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