

# CLIENT NEWS BRIEF

## Police Officer's Pre-Promotion Conduct Could Be Basis to Rescind Promotion

On June 14, 2019 the California Court of Appeal for the Second Appellate District issued its opinion in *Conger v. County of Los Angeles*, finding that denying a police officer's promotion because of his conduct prior to the promotion, was not a violation of his rights and was instead a legitimate merit-based decision.

In November 2015, the Los Angeles County Sheriff's Department promoted Sergeant Thomas L. Conger to the rank of lieutenant, a position subject to a six-month probationary period. In mid-April 2016, before the six-month probationary period expired, Conger was informed that he was being investigated for a use of force incident that occurred before Conger's probationary promotion. As a result, the probationary period was extended. In May 2016, while still on probation, Conger was released from the probationary position of lieutenant due to his failure to adhere to Department policies regarding use of force. The evaluation period was listed as November 1, 2015, to May 20, 2016, but the incident described in the evaluation was the May 21, 2015 use of force incident that had occurred almost six months before the promotion.

Conger filed a petition for a writ of mandate in the trial court, arguing that the promotion rescission was based on alleged misconduct that happened before he was promoted, and constituted a "denial of promotion on grounds other than merit" pursuant to the Public Safety Officers Procedural Bill of Rights (POBR) Act (Government Code section 3300, et seq.), and therefore he was entitled to an administrative appeal hearing.

The trial court denied Conger's petition, concluding that Conger could be denied a promotion based on merit factors arising prior to the probationary period because section 3304(b)'s relevant period was not limited to the duration of the probation itself. The trial court found that the decision to rescind the promotion based on Conger's failure to report a use of force was merit-based.

Conger appealed and the California Second District Court of Appeal affirmed the trial court's decision. The court observed that an employer may deny a promotion without triggering the right to appeal under POBR so long as the denial is based on merit. The court noted that while a demotion is one of the listed punitive actions under section 3303 that triggers the administrative appeal right, regardless of whether it was based on merit or nonmerit grounds, this promotion was not yet permanent and thus its denial did not qualify as a demotion. The court found that the critical factor was that the adverse action took place during the probationary period while the employer was still assessing whether the officer deserved the higher position. The court concluded that Conger's release from his probationary position before he achieved permanent status constituted a "denial of promotion" for POBR purposes, and not a "demotion." While this decision establishes that an agency may consider a police officer's pre-promotion conduct during the probationary period, and that a subsequent denial of a promotion based on such conduct may be found to be merit-based, it is still a fact-specific analysis and does not

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Number 35

mean that every situation will result in an officer being ineligible for the administrative appeal.

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