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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

RIVERSIDE COUNTY SHERIFF'S DEPARTMENT, Plaintiff and Respondent, v. JAN STIGLITZ, Defendant; RIVERSIDE SHERIFF'S ASSOCIATION, Intervenor and Appellant.	E052729 (Super.Ct.No. RIC10004998) OPINION
RIVERSIDE COUNTY SHERIFF'S DEPARTMENT, Plaintiff and Respondent, v. JAN STIGLITZ, Defendant; KRISTY DRINKWATER, Real Party in Interest and Appellant.	E052807 (Super.Ct.No. RIC10004998)

APPEAL from the Superior Court of Riverside County. Mac R. Fisher, Judge. Reversed.

Hayes & Cunningham, Dennis J. Hayes and Adam E. Chaikin for Intervenor and Appellant Riverside Sheriff's Association.

Stone Busailah, Michael P. Stone, Muna Busailah and Travis M. Poteat for Real Party in Interest and Appellant Kristy Drinkwater.

Lackie, Dammeier & McGill and Michael A. Morguess for Peace Officers' Research Association of California Legal Defense Fund as Amicus Curiae on behalf of Intervenor and Appellant Riverside Sheriff's Association and Real Party in Interest and Appellant Kristy Drinkwater.

Silver, Hadden, Silver, Wexler & Levine, Richard A. Levine and Michael Simidjian for Los Angeles Police Protective League as Amicus Curiae on behalf of Intervenor and Appellant Riverside Sheriff's Association and Real Party in Interest and Appellant Kristy Drinkwater.

Ferguson, Praet & Sherman, Jon F. Hamilton, Kimberly A. Wah and Bruce Praet for Plaintiff and Respondent.

Kathleen Bales-Lange, County Counsel (Tulare), and Crystal E. Sullivan, Deputy County Counsel, for California State Association of Counties and California League of Cities as Amici Curiae on behalf of Plaintiff and Respondent.

Jones & Mayer, Martin J. Mayer, Gregory P. Palmer and Krista MacNevin Jee for California State Sheriffs' Association as Amicus Curiae on behalf of Plaintiff and Respondent.

INTRODUCTION

Following the decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*), the Legislature enacted Penal Code section 832.7. (See *Brown v. Valverde* (2010) 183 Cal.App.4th 1531, 1538.) That statute provides that, subject to some exceptions not pertinent here, "Peace officer or custodial officer personnel records and records maintained by any state or local agency . . . or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code."[1] (Pen. Code, § 832.7, subd. (a).)

This case presents the question whether the hearing officer in an administrative appeal of the dismissal of a correctional officer who was a nonprobationary employee of the Riverside County Sheriff's Department (Department) has the authority to grant a *Pitchess* motion. We conclude that the hearing officer in this case has the authority to do so, and we reverse the judgment.

PROCEDURAL AND FACTUAL BACKGROUND

[1] We will discuss the statutory *Pitchess* discovery scheme in detail below.

Kristy Drinkwater was terminated from her position as a correctional deputy employed by the Department, for falsifying her time records in order to obtain compensation to which she was not entitled. She appealed her termination pursuant to the terms of the memorandum of understanding (MOU) then in effect between the County of Riverside (County) and the Riverside Sheriffs' Association (RSA), the employee organization which represents employees in the law enforcement unit for purposes of collective bargaining. The law enforcement unit consists of County employees in several classifications, including correctional deputies.

The MOU in effect at the time of Drinkwater's termination provided for a procedure by which correctional deputies could appeal the termination of their employment, as provided for in Government Code section 3304, subdivision (b).[2] The appeal procedure provides for a hearing before a mutually agreeable hearing officer selected from a list of hearing officers and the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses, to impeach witnesses, and to rebut derogatory evidence. The MOU provides that it is the "duty of any County Officer or employee to attend a hearing and testify upon the written request of either party, or the

[2] Government Code sections 3300 through 3313 constitute the Public Safety Officers' Procedural Bill of Rights, or POBR. Government Code section 3303, subdivision (b) provides that no adverse employment action may be taken against a public safety officer without giving the officer the opportunity for a hearing. POBR does not apply to correctional officers, who are not public safety officers. (Pen. Code, § 831.5.) However, the MOU, which is a binding contract between the RSA and the County (see *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 337), provides the same protections for correctional deputies.

Hearing Officer, provided reasonable notice is given [to] the department employing the officer or employee. The Employee Relations Division Manager, or designee, shall arrange for the production of any relevant County record. The Hearing Officer is authorized to issue subpoenas." The hearing officer may "sustain, modify, or rescind an appealed disciplinary action," and his or her decision is final, subject to the right of the parties to seek judicial review pursuant to Code of Civil Procedure section 1094.5.[3] The hearing is a "private proceeding among the County, the employee and the employee organization." The attendance of any other person is at the hearing officer's discretion.

Drinkwater asserted that the penalty of termination was disproportionate to her misconduct because other Department employees who had falsified time records had received lesser punishment. She submitted a motion to hearing officer Jan Stiglitz for discovery of disciplinary records of other Department personnel who had been investigated or disciplined for similar misconduct. Stiglitz found that Drinkwater had stated a "'plausible scenario'" showing good cause for the production of the records, but denied the motion without prejudice because Drinkwater had not identified the employees whose records she sought. Stiglitz held that although Drinkwater was entitled

[3] Code of Civil Procedure section 1094.5 provides that administrative mandamus is available to permit a court to review a "final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer." (Code Civ. Proc., § 1094.5, subd. (a).)

to discovery of the records on a proper showing, the Department was not required to search its records to provide her with the information requested.

In a subsequent renewed motion, Drinkwater identified the employees by name and stated the nature of the misconduct she understood they had committed and the resulting penalties, or absence thereof. However, she sought production only of records which had been redacted to conceal the identities of the employees involved.

The Department opposed the motion on its merits. It acknowledged that Stiglitz had jurisdiction to rule on the motion. On March 15, 2010, Stiglitz found good cause and ordered the Department to produce the requested records for his in camera review. On March 19, 2010, the Department filed its petition for a writ of administrative mandate, seeking to compel Stiglitz to vacate his decision that good cause existed. The petition did not challenge Stiglitz's authority to rule on the motion.

Brown v. Valverde, *supra*, 183 Cal.App.4th 1531 was decided shortly before the superior court was to rule on the petition. The Department brought the ruling to the trial court's attention and argued, for the first time, that only a judicial officer can rule on a *Pitchess* motion. Following supplemental briefing and further argument, the trial court found, based on *Brown v. Valverde*, that "there is no statutory authorization nor is there authorization pursuant to the [MOU] between [the Department] and [RSA] that would permit [a hearing officer] in a disciplinary hearing to consider *Pitchess* discovery motions." Accordingly, it granted the petition.

RSA, which had not been notified of the writ proceedings, brought motions for a new trial, to set aside and vacate the court's order, and for leave to intervene. The motions were granted, and RSA filed its opposition to the petition. The court again granted the writ and ordered Stiglitz to deny the motion.

RSA and Drinkwater each filed a timely notice of appeal. The two appeals were consolidated.

LEGAL ANALYSIS

1.

THE TRIAL COURT HAD JURISDICTION TO GRANT ADMINISTRATIVE MANDAMUS

A. The Finality Rule Does Not Bar Administrative Mandamus.

Code of Civil Procedure section 1094.5 provides that administrative mandamus is available to permit a court to review a "*final* administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer." (Code Civ. Proc., § 1094.5, subd. (a), italics added; see *Temescal Water Co. v. Dept. Public Works* (1955) 44 Cal.2d 90, 101; *Keeler v. Superior Court* (1956) 46 Cal.2d 596, 599.) Here, we requested supplemental briefing to address the question whether the order granting the first phase of the *Pitchess* motion is a final order within the meaning of Code of Civil Procedure section 1094.5. We

conclude that although the order is not final, the trial court nevertheless had jurisdiction to review it under the "irreparable harm" exception to the finality rule.

The courts have long recognized that Code of Civil Procedure section 1094.5 permits review only of a final decision on the merits of the entire controversy and does not permit piecemeal review of interim orders and rulings. (*Kumar v. National Medical Enterprises, Inc.* (1990) 218 Cal.App.3d 1050, 1055.) This is a part of the requirement that administrative remedies must be exhausted before the parties may resort to the courts, and is "analogous to the one final judgment rule in judicial proceedings." (*Alta Loma School Dist. v. San Bernardino County Com. On School Dist. Reorganization* (1981) 124 Cal.App.3d 542, 554-555 [Fourth Dist., Div. Two] (*Alta Loma*).) There are a few exceptions to the finality rule: where the administrative body lacks jurisdiction; where it would be futile to pursue the administrative process to its conclusion; or where irreparable harm would result if judicial intervention is withheld until a final administrative decision is rendered. (*Id.* at p. 555.)

A discovery order is not a final decision on the merits of the controversy. Accordingly, administrative mandamus does not lie at this juncture, unless one of the exceptions applies.

In its supplemental brief, the Department did not directly assert that any of the exceptions identified in *Alta Loma* applies. Rather, it contends that the order is not final for purposes of administrative mandamus because there was no other remedy available to

prevent disclosure of confidential personnel records to Stiglitz for purposes of his in camera review.

The Department relies on *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321. In that case, the California Supreme Court held that in California, in the absence of any remedy at law, traditional mandamus had been expanded "not only to compel the performance of a ministerial act, but also in a proper case for the purpose of reviewing the final acts and decisions of statewide administrative agencies which do not exercise judicial power." (*Id.* at p. 330.) However, contrary to the Department's contention, the court held that what is now called administrative mandamus is available only to review *final* acts and decisions of administrative agencies. (*Ibid.*) It did not hold that mandamus is available to review interim orders rendered in an administrative proceeding. Moreover, when the Legislature enacted Code of Civil Procedure section 1094.5, subdivision (a) in 1945, four years after the decision in *Bodinson*, it specified that administrative mandamus is available solely to review final orders and decisions in an adjudicative administrative proceeding. (Stats. 1945, ch. 868, § 1.) Consequently, even if *Bodinson* had held that review of interim orders was available through administrative mandate, it would have been overruled by the enactment of Code of Civil Procedure section 1094.5, subdivision (a), which provides for review of final administrative rulings only. Accordingly, the lack of any other remedy is not an exception to the rule that only final administrative rulings are subject to court review by administrative mandamus.

As part of its argument that administrative mandamus is available to review the order on the *Pitchess* motion because it has no other remedy, the Department contends that judicial intervention was necessary to prevent irreparable harm. It contends that because Stiglitz lacks jurisdiction to rule on a *Pitchess* motion, he also has no authority to review the confidential personnel files he ordered the Department to produce. It states that if it were required to wait to challenge the order for production of confidential personnel records until the controversy was finally resolved, "there would be nothing to protect since the very information sought [to be] protected . . . would be divulged," at least to Stiglitz.

One of the fundamental purposes underlying the statutory *Pitchess* motion procedure is to protect the affected officer's right of privacy in his or her personnel records. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83-84 [statutory scheme includes "forceful directive" to consider privacy interests of the officers whose records are sought].) Loss of privacy can be found to constitute irreparable harm. (*Clear Lake Riviera Community Assn. v. Cramer* (2010) 182 Cal.App.4th 459, 473.) Moreover, writ review is generally appropriate "when the petitioner seeks relief from a discovery order which may undermine a privilege or a right of privacy, because appellate remedies are not adequate to remedy the erroneous disclosure of information," including confidential information sought in a *Pitchess* motion. (*California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1018-1019.) Consequently, we agree that if a hearing officer in an administrative proceeding lacks the authority to rule on a *Pitchess*

motion at all, then producing confidential personnel files for the hearing officer's review would constitute irreparable harm to the employees whose privacy would be violated. Accordingly, because the hearing officer's authority to rule on a *Pitchess* motion is the issue before us, the irreparable harm exception to the finality rule permits the Department to seek judicial intervention at this juncture.

B. Exhaustion of Administrative Remedies

Drinkwater and RSA assert that because the Department failed to raise the question of Stiglitz's authority to rule on the *Pitchess* motion before filing its petition for administrative mandamus, it did not exhaust its administrative remedies. Consequently, they contend, the trial court lacked jurisdiction to rule on the writ petition.

As a general rule, a court has no jurisdiction to intervene in an administrative matter until the parties have exhausted their administrative remedies by obtaining a final order from the administrative body. Exhaustion requires "'a full presentation to the administrative agency upon all issues of the case and at all prescribed stages of the administrative proceedings.' [Citation.] '"The exhaustion doctrine is principally grounded on concerns favoring administrative autonomy (i.e., courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary)."' [Citation.]" (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 609.) Exhaustion is required even if the issue is a pure question of law, as it is in this case. (*NBS Imaging Systems, Inc. v.*

State Bd. of Control (1997) 60 Cal.App.4th 328, 337; *Robinson v. Department of Fair Employment & Housing* (1987) 192 Cal.App.3d 1414, 1417.)

As discussed above, the finality rule is an aspect of the exhaustion requirement. (*Alta Loma*, *supra*, 124 Cal.App.3d at pp. 554-555.) The same exceptions apply, including irreparable harm: A party is not required to exhaust its administrative remedies if doing so would result in irreparable injury. (*City of San Jose v. Operating Engineers Local Union No. 3, supra*, 49 Cal.4th at p. 609.) This exception to the exhaustion rule has been applied "rarely and only in the clearest of cases. [Citation.]" (*City and County of San Francisco v. International Union of Operating Engineers, Local 39* (2007) 151 Cal.App.4th 938, 948.) However, for the reasons stated above in connection with the finality requirement, the exception applies in this case.[4]

2.

THE HEARING OFFICER HAD THE AUTHORITY TO RULE ON THE *PITCHESS* MOTION

[4] The Department contends that the exhaustion requirement was excused because Stiglitz lacked jurisdiction to address the *Pitchess* motion. In this context, jurisdiction does not refer to lack of authority to rule on a *particular issue* which arises in a dispute or proceeding over which the administrative body does have subject matter jurisdiction, which is the issue in this case. (See *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 286-291.) Rather, the lack of jurisdiction exception to both the finality rule and the exhaustion requirement applies only when the administrative body lacks the fundamental authority to resolve the underlying dispute between the parties. (*Alta Loma*, *supra*, 124 Cal.App.3d at pp. 555-556 [finality rule]; *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1081-1082 [exhaustion of administrative remedies may be excused when a party claims that the agency lacks authority, statutory or otherwise, to resolve the underlying dispute].)

A. Introduction

In its original ruling on the writ petition, the trial court held that a *Pitchess* discovery motion "may be heard only by sworn judicial officers unless there is some express authority which would permit someone other than a sworn judicial officer to consider *Pitchess* discovery motions as indicated in *Brown v. Valverde* (2010) 183 Cal.App.4th 1531." The court further held that there is no statutory authorization which would permit a hearing officer in a disciplinary hearing to consider *Pitchess* motions and no authority in the parties' MOU which would permit a hearing officer to hear a *Pitchess* motion. In its final ruling, after having vacated the first ruling to permit RSA to intervene, the court ruled, "In *Brown v. Valverde* (2010) 183 Cal.App.4th 1531, consistent with the ruling [*sic*], the Department's petition for writ of mandate is granted. The respondent [hearing officer] is directed to reverse his earlier issued order granting [Drinkwater's] discovery motion and is further directed to deny the motion."

The phrasing of the trial court's final ruling is somewhat unclear. However, we understand it to mean that the trial court concluded, based upon *Brown v. Valverde*, *supra*, 183 Cal.App.4th 1531 (hereafter *Brown*), that there is no statutory provision which permits a hearing officer in an administrative arbitration to hear and decide a *Pitchess* motion. This is a question of statutory interpretation which we review independently. (*McMahon v. City of Los Angeles* (2009) 172 Cal.App.4th 1324, 1331.)

On appeal, the parties and amici approach the issues in different ways, but boiled down to essentials, the issues in dispute are (1) whether *Pitchess* discovery is available in

an administrative proceeding, including a disciplinary hearing pursuant to Government Code section 3304, subdivision (b); (2) whether the *Pitchess* statutes require a court, rather than a hearing officer in an administrative hearing, to decide a *Pitchess* motion; (3) whether parties may provide for *Pitchess* discovery contractually, even if the statutory scheme otherwise does not provide for it in a particular context; and (4) whether the MOU in this case grants a hearing officer that authority.[5]

B. The Pitchess Discovery Statutes

In *Pitchess, supra*, 11 Cal.3d 531, "defendant Caesar Echeveria was, along with others, charged with battery against four deputy sheriffs. Echeveria moved for discovery of the deputies' personnel files, seeking records showing prior complaints against the deputies, in order to establish at trial that he acted in self-defense to their use of excessive force. The superior court granted Echeveria's motion, and Sheriff Pitchess sought a writ of mandate to quash a subpoena requiring production of the confidential records. The Supreme Court denied the writ, holding that a criminal defendant who is being prosecuted for battery on a peace officer is entitled to discovery of personnel records to show that the officer had a history of using excessive force and that defendant acted in

[5] Drinkwater also assails the trial court's ruling that there was insufficient evidence of a past practice allowing *Pitchess* discovery in disciplinary proceedings under the MOU, thus rendering *Pitchess* discovery a term of the contract. What she cites, however, is the trial court's tentative ruling. Neither the original, superseded order nor the final order granting the writ petition reflects any ruling on the past practices issue. Because we conclude that both the statutory *Pitchess* discovery scheme and the MOU provide the hearing officer in this case the authority to grant *Pitchess* discovery, we need not address any issue pertaining to the parties' past practices.

self-defense." (*Brown, supra*, 183 Cal.App.4th at p. 1538, citing *Pitchess*, at pp. 535-537.)

"Following the *Pitchess* decision, allegations surfaced that law enforcement agencies were destroying records to protect the privacy of officers whose personnel files contained potentially damaging information. [Citation.] At the same time concerns were expressed that defendants were abusing *Pitchess* discovery by conducting fishing expeditions into arresting officers' files. [Citation.] In 1978, the California Legislature addressed these concerns by codifying the 'privileges and procedures' of *Pitchess* motions, with the enactment of Evidence Code sections 1043 and 1045 and Penal Code sections 832.7 and 832.8." (*Brown, supra*, 183 Cal.App.4th at p. 1538, citing *City of Santa Cruz v. Municipal Court, supra*, 49 Cal.3d at p. 81.)

"The Penal Code provisions define 'personnel records' (Pen. Code, § 832.8) and provide that such records are 'confidential' and subject to discovery only pursuant to the procedures set forth in the Evidence Code. (Pen. Code, § 832.7.)**[6]** Evidence Code

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6 Penal Code section 832.7 provides:

"(a) Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. This section shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office.

"(b) Notwithstanding subdivision (a), a department or agency shall release to the complaining party a copy of his or her own statements at the time the complaint is filed.

"(c) Notwithstanding subdivision (a), a department or agency that employs peace or custodial officers may disseminate data regarding the number, type, or disposition of

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complaints (sustained, not sustained, exonerated, or unfounded) made against its officers if that information is in a form which does not identify the individuals involved.

"(d) Notwithstanding subdivision (a), a department or agency that employs peace or custodial officers may release factual information concerning a disciplinary investigation if the officer who is the subject of the disciplinary investigation, or the officer's agent or representative, publicly makes a statement he or she knows to be false concerning the investigation or the imposition of disciplinary action. Information may not be disclosed by the peace or custodial officer's employer unless the false statement was published by an established medium of communication, such as television, radio, or a newspaper. Disclosure of factual information by the employing agency pursuant to this subdivision is limited to facts contained in the officer's personnel file concerning the disciplinary investigation or imposition of disciplinary action that specifically refute the false statements made public by the peace or custodial officer or his or her agent or representative.

"(e)(1) The department or agency shall provide written notification to the complaining party of the disposition of the complaint within 30 days of the disposition.

"(2) The notification described in this subdivision shall not be conclusive or binding or admissible as evidence in any separate or subsequent action or proceeding brought before [a hearing officer], court, or judge of this state or the United States.

"(f) Nothing in this section shall affect the discovery or disclosure of information contained in a peace or custodial officer's personnel file pursuant to Section 1043 of the Evidence Code."

Penal Code section 832.8 provides:

"As used in Section 832.7, 'personnel records' means any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following:

"(a) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information.

"(b) Medical history.

"(c) Election of employee benefits.

"(d) Employee advancement, appraisal, or discipline.

"(e) Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.

"(f) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy."

sections 1043 and 1045 set out the procedures for discovery in detail."[7] (*City of Santa Cruz v. Municipal Court, supra,* 49 Cal.3d at p. 81.)

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[7] Evidence Code section 1043 provides:

"(a) In any case in which discovery or disclosure is sought of peace or custodial officer personnel records or records maintained pursuant to Section 832.5 of the Penal Code or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records. The written notice shall be given at the times prescribed by subdivision (b) of Section 1005 of the Code of Civil Procedure. Upon receipt of the notice the governmental agency served shall immediately notify the individual whose records are sought.

"(b) The motion shall include all of the following:

"(1) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace or custodial officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard.

"(2) A description of the type of records or information sought.

"(3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.

"(c) No hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions of this section except upon a showing by the moving party of good cause for noncompliance, or upon a waiver of the hearing by the governmental agency identified as having the records."

Evidence Code section 1046 provides:

"In any case, otherwise authorized by law, in which the party seeking disclosure is alleging excessive force by a peace officer or custodial officer, as defined in Section 831.5 of the Penal Code, in connection with the arrest of that party, or for conduct alleged to have occurred within a jail facility, the motion shall include a copy of the police report setting forth the circumstances under which the party was stopped and arrested, or a copy of the crime report setting forth the circumstances under which the conduct is alleged to have occurred within a jail facility."

Penal Code section 832.7 does not refer to Evidence Code section 1045. However, that statute provides the procedure for ruling on a *Pitchess* motion:

"(a) Nothing in this article shall be construed to affect the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of

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"As statutory schemes go the foregoing is a veritable model of clarity and balance. [Evidence Code s]ection 1043 clearly requires a showing of 'good cause' for discovery in two general categories: (1) the 'materiality' of the information or records sought to the 'subject matter involved in the pending litigation,' and (2) a 'reasonable belief' that the

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those investigations, concerning an event or transaction in which the peace officer or custodial officer, as defined in Section 831.5 of the Penal Code, participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties, provided that information is relevant to the subject matter involved in the pending litigation.

"(b) In determining relevance, the court shall examine the information in chambers in conformity with Section 915, and shall exclude from disclosure:

"(1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought.

"(2) In any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to Section 832.5 of the Penal Code.

"(3) Facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit.

"(c) In determining relevance where the issue in litigation concerns the policies or pattern of conduct of the employing agency, the court shall consider whether the information sought may be obtained from other records maintained by the employing agency in the regular course of agency business which would not necessitate the disclosure of individual personnel records.

"(d) Upon motion seasonably made by the governmental agency which has custody or control of the records to be examined or by the officer whose records are sought, and upon good cause showing the necessity thereof, the court may make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression.

"(e) The court shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested pursuant to Section 1043, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law." (Evid. Code, § 1045.)

governmental agency has the 'type' of information or records sought to be disclosed. ([Evid. Code,] § 1043, subd. (b).)

"The relatively low threshold for discovery embodied in [Evidence Code] section 1043 is offset, in turn, by [Evidence Code] section 1045's protective provisions which: (1) explicitly 'exclude from disclosure' certain enumerated categories of information ([Evid. Code,] § 1045, subd. (b)); (2) establish a procedure for in camera inspection by the court prior to any disclosure ([Evid. Code,] § 1045, subd. (b)); and (3) issue a forceful directive to the courts to consider the privacy interests of the officers whose records are sought and take whatever steps 'justice requires' to protect the officers from 'unnecessary annoyance, embarrassment or oppression.' ([Evid. Code,] § 1045, subds. (c), (d) & (e).)

"The statutory scheme thus carefully balances two directly conflicting interests: the peace officer's just claim to confidentiality, and the criminal defendant's[8] equally compelling interest in all information pertinent to his defense. The relatively relaxed

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8 *City of Santa Cruz v. Municipal Court*, *supra*, arose in the context of a criminal prosecution. *Pitchess* discovery is not limited to criminal proceedings, however. In *County of Los Angeles v. Superior Court* (1990) 219 Cal.App.3d 1605, the court held that "the Legislature's use of the term 'any criminal or civil proceeding' in Penal Code section 832.7 was intended to apply to any situation, including a personal injury action such as the present case, where a party seeks to discover information contained in a peace officer's personnel file." (*Id.* at p. 1610.) Other courts have agreed that the *Pitchess* statutes are "generally applicable" (*City of Los Angeles v. Superior Court* (2003) 111 Cal.App.4th 883, 893 [disapproved of in part in *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 344-345]) and have held that *Pitchess* discovery is available in civil proceedings where it is relevant and not precluded by another statute (see, e.g., *Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 397, 399-404 [wrongful death suit stemming from police shooting during investigation of a domestic dispute]; *Slayton v. Superior Court* (2006) 146 Cal.App.4th 55, 59-62 [dissolution of marriage]).

standards for a showing of good cause under [Evidence Code] section 1043, subdivision (b)—'materiality' to the subject matter of the pending litigation and a 'reasonable belief' that the agency has the type of information sought—insure the production for inspection of all potentially relevant documents. The in camera review procedure and disclosure guidelines set forth in [Evidence Code] section 1045 guarantee, in turn, a balancing of the officer's privacy interests against the defendant's need for disclosure." (*City of Santa Cruz v. Municipal Court*, *supra*, 49 Cal.3d at pp. 83-84.)

C. Brown Does Not Hold That Pitchess Discovery Is Unavailable in All Administrative Proceedings As a Matter of Law.

As did the trial court, the Department relies on *Brown*, *supra*, 183 Cal.App.4th 1531 as its authority that *Pitchess* motions are not available in any administrative proceeding as a matter of law. This is not what *Brown* holds, however.

In *Brown*, the issue of the availability of *Pitchess* discovery arose in the context of a Department of Motor Vehicle (DMV) "administrative per se" hearing. An administrative per se hearing is one in which a hearing officer, typically a DMV employee, determines whether a driver's license must be suspended following an arrest for driving with a blood alcohol level of 0.08 percent or greater. (*Brown*, *supra*, 183 Cal.App.4th at pp. 1535-1538.) The court expressly addressed only that issue. (*Id.* at p. 1546 ["The issue before us is whether a *Pitchess* motion is available in a DMV administrative per se hearing."]; see also *id*. at pp. 1547-1559 [entire discussion falls under the subheading "*Pitchess* Discovery Is Not Available in DMV Administrative Per

Se Hearings"].) Moreover, although in the course of deciding the narrow issue presented the court rejected Brown's contention that *Pitchess* discovery is available in all administrative proceedings, the court ultimately found itself forced to conclude that the scheme does not *foreclose* the use of *Pitchess* motions in all types of administrative proceedings. Rather, because Evidence Code section 1043 directs that a written *Pitchess* motion shall be filed "with the appropriate court or administrative body," the court held that the Legislature intended *Pitchess* discovery to be available in some types of administrative proceedings. (*Brown*, *supra*, 183 Cal.App.4th at pp. 1549, 1555.) Consequently, the case does not stand for the proposition that *Pitchess* discovery is not available in any type of administrative proceeding. Rather, it holds that although *Pitchess* discovery is available in *some* administrative proceedings, it is not available in a DMV administrative per se hearing.

The reasoning *Brown* employs to hold that *Pitchess* discovery is not available in a DMV administrative per se hearing does not apply to a Government Code section 3304, subdivision (b) hearing (hereafter sometimes referred to as a section 3304(b) hearing). *Brown* points out, first, that the statutes which govern the DMV administrative per se hearings contain no provision for discovery of law enforcement personnel records. (*Brown*, *supra*, 183 Cal.App.4th at pp. 1547-1550.) These statutes do not apply to a section 3304(b) hearing.[9] *Brown* also concluded that *Pitchess* motions may not be

[9] *Brown* holds that Vehicle Code section 14104.7 "identifies the evidence that a DMV hearing officer is to consider," and notes that it does not include peace officer personnel records. (*Brown*, *supra*, 183 Cal.App.4th at p. 1547.) In addition, the court

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brought in an administrative per se hearing because the arresting officer's personnel records are not relevant to the extremely limited issue to be decided in those hearings. (*Brown*, at pp. 1556-1558.) However, personnel records of other officers may be relevant in a section 3304(b) hearing where, for example, the defense is that the punishment imposed is excessive in comparison with the punishment imposed on other personnel in

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holds that Vehicle Code section 14112, subdivision (a) provides that "all matters not covered by division 6, chapter 3, article 3 'shall be governed, as far as applicable, by Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code,' the provisions of the Administrative Procedure Act (APA), governing administrative hearings generally. [Citations.] And Government Code section 11507.6, part of the applicable APA provisions, addresses discovery in administrative hearings, identifying the discovery that a party may obtain from another party and the method by which that discovery may be obtained. . . . [Under Government Code section 11507.6, discovery] does not extend to discoverable matters in the possession of nonparties.' [Citation.]" (*Brown*, *supra*, 183 Cal.App.4th at pp. 1548-1549.) The court went on to note that Government Code section 11507.6 expressly provides that "'[n]othing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential,'" and that Penal Code section 832.7, subdivision (a) specifically designates peace officer personnel records as confidential. And it "'provide[s] the exclusive right to and method of discovery as to any proceeding governed by' the APA provisions. [Citation.]" (*Brown*, at p. 1549.)

The APA applies generally to adjudicatory proceedings of state administrative agencies, such as the DMV. (See 9 Witkin (5th ed. 2008) Cal. Procedure, Admin. Proceedings, § 96, p. 1221; Gov. Code, § 11501, subd. (a) ["This chapter applies to any agency as determined by the statutes relating to that agency."].) The APA does not apply by statute to administrative appeals conducted by a local law enforcement agency pursuant to Government Code section 3304, subdivision (b); on the contrary, Government Code section 3304.5 provides that such an administrative appeal "shall be conducted in conformance with rules and procedures adopted by the local public agency." The MOU between the parties to this case contains provisions for discovery in disciplinary hearings. Those provisions do not require compliance with Government Code section 11507.6, nor, needless to say, with the Vehicle Code.

similar circumstances. While there is "'no requirement that charges similar in nature must result in identical penalties'" with respect to disciplinary treatment of similarly situated public employees (*Talmo v. Civil Service Com.* (1991) 231 Cal.App.3d 210, 230; accord, *Pegues v. Civil Service Com.* (1998) 67 Cal.App.4th 95, 104-106), disparate treatment is nevertheless a recognized defense that may be raised in a disciplinary hearing in an effort to persuade the agency or the hearing officer that less severe discipline is warranted. (See *Talmo v. Civil Service Com.*, *supra*, at pp. 229-231; *Pegues v. Civil Service Com.*, *supra*, at pp. 104-106.) Public agencies must exercise "judicial discretion," i.e., """"'an impartial discretion, guided and controlled in its exercise by fixed legal principles . . . to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.'""" (*Harris v. Alcoholic Bev. Etc. Appeals Bd.* (1965) 62 Cal.2d 589, 594-595.) Hence, a penalty which is greatly in excess of the penalty imposed in similar circumstances may constitute an abuse of the disciplinary body's discretion. For all of these reasons, *Brown* is completely distinguishable from the present case.[10]

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[10] We have not found any case other than *Brown* which addresses the availability of *Pitchess* discovery in administrative proceedings. The California Supreme Court has held that the *confidentiality* provision of Penal Code section 832.7 applies to peace officer personnel records regardless of the context in which they are sought. (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284-1286.) In that case, a newspaper sought to obtain records from a Government Code section 3304(b) hearing via the California Public Records Act. The court held that although Penal Code section 832.7 explicitly provides that peace officer personnel records may not be disclosed in civil or criminal proceedings, except by compliance with Evidence Code sections 1043 and 1046, the purpose of the statute would not be effectuated unless the confidentiality provision is understood to apply in all contexts, not just in criminal or civil proceedings.

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D. An Administrative Hearing Officer May Rule on a Pitchess Motion Where Pitchess Discovery Is Relevant.

After having concluded that because Evidence Code section 1043 provides that a *Pitchess* motion is to be made in "the appropriate court or administrative body," *Pitchess* discovery is available in at least some administrative proceedings, the *Brown* court then held, contradictorily, that because Evidence Code section 1045, which sets out the *Pitchess* procedure in detail, refers solely to the powers and duties of courts, the Legislature actually intended that all *Pitchess* motions are to be decided by courts, i.e., by sworn judicial officers and not by administrative hearing officers. (*Brown, supra,* 183 Cal.App.4th at pp. 1550-1552.) Although *Brown* limited its discussion to the issue before it, i.e., DMV administrative per se hearings, the Department adopts its reasoning to argue that the statutory language demonstrates the Legislature's intention to limit *Pitchess* discovery to court proceedings.

In determining the meaning or application of a statute, a court's task is to determine the intent of the Legislature. We look first to the statutory language, because it is normally the clearest indication of intention. (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737; *Murphy v. Kenneth Cole*

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Accordingly, the court held that peace officer personnel records which are disclosed during administrative proceedings are not subject to discovery by means of the California Public Records Act. (*Copley Press, Inc. v. Superior Court*, *supra*, at pp. 1284-1286.) (The records sought in that case were personnel records of the officer who was the subject of the disciplinary hearing. The case does not involve a *Pitchess* motion seeking records of other officers as a basis for a defense, as in this case.)

Productions, Inc. (2007) 40 Cal.4th 1094, 1103.) Only if the language is ambiguous, or if a literal reading of the statute would lead to an anomalous result, do we resort to extrinsic aids to attempt to ascertain the Legislature's intent. (*Ibid*.)

Here, there is an ambiguity. Although Evidence Code section 1043, subdivision (a) provides that a *Pitchess* motion is to be filed in "the appropriate court or administrative body," Evidence Code section 1045, which provides the procedure for deciding a *Pitchess* motion, refers only to how a *court* shall proceed upon the filing of a *Pitchess* motion. It provides that the court "shall examine the information in chambers in conformity with Section 915 . . . ." (Evid. Code, § 1045, subd. (b).) It also directs "the court" to consider various factors in determining relevance (Evid. Code, § 1045, subd. (c)); instructs that "the court may make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression" (Evid. Code, § 1045, subd. (d)); and authorizes "the court" to "order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law" (Evid. Code, § 1045, subd. (e)). (See fn. 7, *ante*, for full text of Evid. Code, § 1045.) Furthermore, Evidence Code section 915, which is incorporated in Evidence Code section 1045, subdivision (b), distinguishes between the authority of judges and that of other presiding officers in ruling on privileges.**[11]** The *Brown* court

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[11] Evidence Code section 915 provides:

"(a) Subject to subdivision (b), the presiding officer may not require disclosure of information claimed to be privileged under this division or attorney work product under subdivision (a) of Section 2018.030 of the Code of Civil Procedure in order to rule on the claim of privilege; provided, however, that in any hearing conducted pursuant to

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found this to be compelling evidence that the Legislature intended courts to have exclusive jurisdiction over *Pitchess* motions. (*Brown*, *supra*, 183 Cal.App.4th at pp. 1550-1551.) However, *Brown* does not address the following problem: If a *Pitchess* motion can be filed in an administrative proceeding but can be decided only by a sworn judicial officer, how does a party seeking *Pitchess* discovery in an administrative proceeding invoke the jurisdiction of a court to rule on the motion? As the parties concurred at oral argument, the statutory scheme does not provide any mechanism for doing so. This is strong evidence that in spite of the language in Evidence Code section 1045, the Legislature did not intend that *Pitchess* motions may be decided only by courts.

In any event, we cannot simply read the phrase "or administrative body" out of Evidence Code section 1043: "It is a settled axiom of statutory construction that significance should be attributed to every word and phrase of a statute, and a construction

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subdivision (c) of Section 1524 of the Penal Code in which a claim of privilege is made and the court determines that there is no other feasible means to rule on the validity of the claim other than to require disclosure, the court shall proceed in accordance with subdivision (b).

"(b) When a court is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) or under Section 1060 (trade secret) or under subdivision (b) of Section 2018.030 of the Code of Civil Procedure (attorney work product) and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and any other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither the judge nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers."

making some words surplusage should be avoided." (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1010.) We see no justification for interpreting Evidence Code section 1043 in such a way as to render the phrase "or administrative body" meaningless.[12]

Moreover, an interpretation of Evidence Code sections 1043 and 1045, which excludes administrative bodies as venues for *Pitchess* motions, conflicts with the due process rights afforded to peace officers in disciplinary hearings by Government Code section 3304(b). In the context of a section 3304(b) hearing, due process requires the opportunity for a full evidentiary hearing. (*Giuffre v. Sparks* (1999) 76 Cal.App.4th 1322, 1329-1331.) Due process also necessarily includes the opportunity to present a

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[12] Drinkwater and RSA contend that Penal Code section 832.7, subdivision (c) permits the disclosure sought in this case because Drinkwater specifically asked for records which were redacted to conceal the names of the officers. Penal Code section 832.7, subdivision (c) provides: "Notwithstanding subdivision (a), a department or agency that employs peace or custodial officers may disseminate data regarding the number, type, or disposition of complaints (sustained, not sustained, exonerated, or unfounded) made against its officers if that information is in a form which does not identify the individuals involved."

The type of data which may be disseminated pursuant to Penal Code section 832.7, subdivision (c) is not the type of information typically sought in a *Pitchess* motion, and it is not the type of information which would be useful in establishing a defense of disparate treatment. Statistical data stripped of any detail as to the circumstances of the other officers' transgressions or their prior discipline history or any other circumstances which may be relevant to the reasons that the department or agency imposed specific sanctions on the other officers will almost never be sufficient to permit the conclusion that the officer who seeks the records was truly similarly situated, because the agency has broad discretion to take almost innumerable factors into account in determining an appropriate sanction for a particular officer. (See *Talmo v. Civil Service Com., supra*, 231 Cal.App.3d at pp. 230-231.) It is certainly not sufficient for Drinkwater's defense to show the number of other officers who were disciplined for falsifying time records and the discipline imposed, with regard for the reasons that a particular sanction was imposed on another officer.

meaningful defense. (*Petrus v. Department of Motor Vehicles* (2011) 194 Cal.App.4th 1240, 1244; see also *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 792-794.) Disparate treatment of similarly situated employees may be an abuse of discretion on the part of a public agency and consequently may provide a basis for rescinding or modifying discipline. (*Pegues v. Civil Service Com.*, *supra*, 67 Cal.App.4th at pp. 104-106; *Talmo v. Civil Service Com.*, *supra*, 231 Cal.App.3d at pp. 229-231; see *Harris v. Alcoholic Bev. Etc. Appeals Bd.*, *supra*, 62 Cal.2d at pp. 594-595.) Accordingly, where that defense is raised in a section 3304(b) hearing, due process mandates that the officer who is subject to discipline must have the opportunity to demonstrate the relevance of the personnel records of other officers. An interpretation of Evidence Code sections 1043 and 1045 which precludes the use of *Pitchess* discovery in section 3304(b) hearings would therefore be unconstitutional. Such an interpretation is to be avoided: "'If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. [Citations.] The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers.' [Citations.]" (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509.)

Next, we disagree with the Department that the history of the *Pitchess* legislation demonstrates that the Legislature did not intend to allow *Pitchess* motions in administrative proceedings. The statutory *Pitchess* scheme was enacted in response to concerns that "police departments across the state were disposing of potentially damaging records to protect the officers' privacy." (*City of Los Angeles v. Superior Court*, *supra*, 111 Cal.App.4th at p. 889.) The "main purpose" behind the legislation was curtailing the practice by some law enforcement agencies of shredding personnel records and curtailing defense discovery abuses which allegedly occurred in the wake of the *Pitchess* decision. (*Ibid.*, citing *San Francisco Police Officers' Assn. v. Superior Court* (1988) 202 Cal.App.3d 183, 189, 190.) However, as we have discussed elsewhere, regardless of the initial impetus for the enactment of the *Pitchess* statutes, the language of the statute unambiguously reflects the Legislature's recognition that *Pitchess* discovery may be relevant in a variety of contexts and that it chose to apply *Pitchess* discovery generally, not solely in criminal proceedings. (See fn. 8, *ante*.) Moreover, our review of the legislative history of the *Pitchess* statutes sheds absolutely no additional light on the Legislature's intentions with regard to the phrase "administrative body."[13] Consequently,

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[13] Penal Code section 832.7 and Evidence Code sections 1043 and 1045 were all enacted as part of the same bill. (Sen. Bill No. 1436 (1977-1978 Reg. Sess.).) (Stats. 1978, ch. 630, §§ 1-6, pp. 2081-2083.) Our review of the history of that legislation reveals that the phrase "in the appropriate court or administrative body" was in the bill as originally introduced. The author of the legislation did not comment on his choice to include the phrase "administrative body," and there is no reference to that phrase in any of the bill analyses or in any of the comments on the bill.

we can only conclude that the Legislature meant what it said, i.e., that a *Pitchess* motion can be made in any appropriate court or administrative proceeding.

The Department also contends that because peace officer personnel records are confidential, they cannot be disclosed in an administrative proceeding. We are not persuaded that protection of the noninvolved officers' privacy interests requires a blanket prohibition on the use of their personnel records in a section 3304(b) hearing, even a nonpublic proceeding as provided for in the MOU in this case.[14] The Legislature devised the *Pitchess* procedure specifically to balance privacy concerns with legitimate discovery needs, and provided that where *Pitchess* materials are relevant, privacy interests must give way to the legitimate interests of parties to litigation. (See *City of Santa Cruz v. Municipal Court, supra*, 49 Cal.3d at pp. 83-84.) And, the statutory scheme includes ample protection for officers' legitimate privacy concerns. Evidence Code section 1045, subdivision (d) provides: "Upon motion seasonably made by the governmental agency which has custody or control of the records to be examined or *by the officer whose*

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[14] In *San Diego Police Officers Assn. v. City of San Diego Civil Service Com.* (2002) 104 Cal.App.4th 275, on an appeal from a sustained demurrer, the Court of Appeal held that the employee organizations had stated a cause of action for declaratory relief under Penal Code section 832.7, where the organizations alleged that the public agencies had routinely disclosed information from officer personnel files in section 3304(b) hearings which were open to the public, despite objections by the affected officers. (*San Diego Police Officers Assn. v. City of San Diego Civil Service Com.*, *supra*, at pp. 280-281, 287.) Because the issue was not properly before it, the Court of Appeal declined to decide whether all section 3304(b) hearings must be closed to the public. (*Id.* at pp. 287-288.) It also did not decide whether any means existed in a public hearing to protect officers' legitimate privacy concerns short of prohibiting the use of personnel records all together, such as redacting the records to shield the identity of the officers whose records were being used, as Drinkwater requested in this case.

records are sought, and upon good cause showing the necessity thereof, the court may make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression." (Italics added.) Subdivision (e) of that statute provides: "The court shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested pursuant to Section 1043, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law." If, as we have concluded, *Pitchess* discovery is available in administrative proceedings where it is relevant, these protections necessarily apply in those proceedings as well as in court proceedings. Moreover, as we have previously held, precisely *because* of the privacy interests involved, administrative mandamus is available to provide judicial review of a hearing officer's order for production of officer personnel records before the records are actually produced. Because Evidence Code section 1045, subdivision (d) provides that the affected officer may file a motion seeking an order for protection from unnecessary annoyance, embarrassment or oppression, the officer him- or herself may petition for administrative mandamus, if the employing agency declines to do so. This affords an additional layer of protection for the officers' concerns.

For the same reasons, we also disagree with *Brown*'s conclusion that because administrative hearing officers may not be well qualified to rule on *Pitchess* motions, the Legislature did not intend for *Pitchess* discovery to be available in proceedings not heard by sworn judicial officers. (See *Brown*, *supra*, 183 Cal.App.4th at p. 1558.) Our

conclusion that administrative mandamus is available to obtain judicial review of a hearing officer's ruling on a *Pitchess* motion *before* the personnel records are produced allays any concern that an administrative hearing officer who is not trained in the law may not be qualified to rule on a request for discovery of confidential materials.

E. Pitchess Discovery Is Available in a Section 3304(b) Hearing, If It Is Relevant.

There is no provision in the Public Safety Officers' Procedural Bill of Rights which permits or prohibits *Pitchess* discovery. On the contrary, Government Code section 3304.5 provides that an administrative appeal under section 3304(b) "shall be conducted in conformance with rules and procedures adopted by the local public agency." The only requirement is that the procedures adopted by the agency must comply with due process. (*Giuffre v. Sparks*, *supra*, 76 Cal.App.4th at pp. 1329-1331.) As we have discussed above, due process necessarily includes the opportunity to present a meaningful defense. (*Petrus v. Department of Motor Vehicles*, *supra*, 194 Cal.App.4th at p. 1244; *Dietz v. Meisenheimer & Herron*, *supra*, 177 Cal.App.4th at pp. 792-794.) Accordingly, if *Pitchess* discovery is relevant to an officer's defense in a section 3304(b) hearing, the officer who is subject to discipline must have the opportunity to demonstrate the relevance of the personnel records of other officers and to obtain the records if they are relevant.

F. The MOU Provides for Pitchess Discovery Where It Is Relevant.

Because we have determined that *Pitchess* discovery is available in a section 3304(b) hearing as a matter of due process where it is relevant to the officer's defense,

we need not address the parties' various contentions as to whether the MOU either expressly or as a matter of past practices provides for *Pitchess* discovery. The MOU provides for a full evidentiary hearing, including the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses, to impeach witnesses, and to rebut derogatory evidence. It also provides that "the Employee Relations Division Manager, or designee, shall arrange for the production of any relevant County record requested by either party," and in the same paragraph empowers the hearing officer to issue subpoenas. In order for the MOU to comport with due process requirements in the context of a section 3304(b) hearing, it must be inferred that where officer personnel records are relevant to the issues raised, this provision in the MOU affords discovery of the relevant records.

3.

REMAND FOR A RULING ON THE MERITS IS NOT REQUIRED

The Departments asks that if we find that *Pitchess* discovery is available in the section 3304(b) proceeding, we remand the cause to the trial court for a ruling on its original contention that Drinkwater did not meet her burden of establishing good cause for an in camera review of the personnel records. RSA responds that the trial court has already ruled that the documents Drinkwater requested were relevant.

Although the trial court stated during the hearing on the writ petition that the records Drinkwater sought are relevant, the court did not actually rule on that issue, relying instead entirely on *Brown*, *supra*, 183 Cal.App.4th 1531 as the basis for issuing

the writ. After the trial court granted the writ petition on the basis of *Brown*, the Department did nothing to seek a ruling on its original contention that Drinkwater failed to demonstrate good cause for the in camera review. (We presume that it did not seek such a ruling because the trial court had stated that it believed the materials sought were relevant to Drinkwater's defense.) By failing to seek a ruling on its original theory, the Department effectively abandoned that theory in favor of its contention that Stiglitz lacked jurisdiction to decide the motion at all. Having failed to prevail on appeal on the latter theory, the Department may not now return to the trial court to seek a ruling on its original theory.

4.

JUDICIAL NOTICE

The parties have filed three requests for judicial notice.[15] We reserved ruling on all three requests for consideration with the appeal. None of the documents for which judicial notice has been sought is relevant to our resolution of the appeal. Accordingly, all three requests for judicial notice are denied.

[15] On June 30, 2011, Drinkwater requested judicial notice of Stiglitz's curriculum vitae and standing as an attorney; on August 1, 2011, the Department requested judicial notice of a letter it sent to the trial court attached to its proposed order on the writ petition; on August 22, 2011, RSA requested judicial notice of a prior arbitration award allegedly reflecting the Department's past practice of accepting the authority of hearing officers in section 3304(b) hearings to rule on *Pitchess* motions.

DISPOSITION

The order granting the writ petition is reversed, and the trial court is directed to deny the petition.

CERTIFIED FOR PUBLICATION

MCKINSTER
Acting P. J.

We concur:

RICHLI
J.

KING
J.