OIG | OFFICE of the INSPECTOR GENERAL

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The Department Violated Its Own Policy When It Failed to Include a No-Rehire Clause in a Settlement of a Strong Dismissal Case Against a Sergeant Accused of Soliciting a Minor for Sex

The Office of the Inspector General (OIG) is responsible for, among other things, monitoring the California Department of Corrections and Rehabilitation's (the department) staff complaint process, internal investigations, and employee disciplinary process. Pursuant to California Penal Code sections 6126 and 6133, the OIG reports annually on the staff complaint process and semiannually on its monitoring of internal investigations and the employee disciplinary process. However, in some cases, where there are compelling reasons, the OIG may issue a separate public report regarding a case; we call these *Sentinel Cases*. The OIG may issue a Sentinel Case when it has determined the department's handling of a case was unusually poor and involved serious errors, even after the department had a chance to repair the damage.

This Sentinel Case, No. 21-02, involves a sergeant who allegedly[1] communicated with an undercover detective posing as a 16-year-old female with the intent to commit sex acts with a minor. The hiring authority dismissed the sergeant but later allowed him to resign in lieu of the dismissal. As part of the settlement, the hiring authority and department attorney agreed to remove the disciplinary action from the sergeant's personnel file, and intentionally violated departmental policy when they failed to include a mandated clause prohibiting the sergeant from applying for or accepting employment with the department in the future. As a result, the sergeant is free to apply for and accept employment with any State agency, including the department.

1. The department determined there was a preponderance of evidence the sergeant engaged in the alleged conduct and dismissed the sergeant before the conclusion of the sergeant's criminal proceedings. At the time of the settlement, those criminal proceedings were still pending. The prosecutor in the criminal case is required to prove the charges in court beyond a reasonable doubt, and the sergeant is entitled to a presumption of innocence until proven guilty in those proceedings.

The Department Determined That the Sergeant Attempted to Solicit Sex From a Minor

The department dismissed the sergeant for misconduct that occurred between August and October of 2020. In August of 2020, the sergeant had a profile on a friendship and dating application. According to outside law enforcement, the application is used for sharing pornographic material and arranging meetings for sexual acts, and it is commonly used by minors. The 39-year-old sergeant used the application to solicit sex from an undercover detective posing as a 16-year-old female.

The sergeant requested to chat with a user whose profile indicated she was 18 years old. When he began communicating with her through the application, the undercover detective told him she was 16 years old. Nevertheless, the sergeant continued to send messages to the detective and the communications continued for two months. During this time, the sergeant sent sexually explicit and lewd messages describing sexual acts he wanted to engage in with a person he believed to be a minor.

In October 2020, the sergeant arranged to have sex with the person he believed to be 16 years old. On the day of the proposed meeting, he conducted an internet search for hotels in the area and, while on his way to meet a minor, purchased condoms. When the sergeant arrived at the agreed upon location, outside law enforcement arrested him and a detective found a box of condoms in his pocket. Later, when a detective asked the sergeant if he knew why he was arrested, the sergeant nodded and said, "Yeah. A really stupid mistake."

The department conducted its own investigation and the sergeant admitted in the investigative

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interview that he sent messages to a person who said she was a minor. His defense was he believed it was a fake account. The hiring authority reviewed the investigation and sustained allegations that the sergeant solicited sex from a minor and lied during the Office of Internal Affairs investigation. The hiring authority served a detailed 60-page dismissal on the sergeant, and the sergeant appealed the dismissal to the State Personnel Board (the Board).

The Department Should Not Have Settled a Strong Dismissal Case Against a Sergeant Accused of Soliciting a Minor for Sex

At the prehearing settlement conference, the department entered into a settlement with the sergeant, allowing him to resign in lieu of dismissal. The OIG disagreed with the settlement because the evidence of misconduct was strong and the settlement would allow the sergeant to apply for a State job without seeking permission from the Board.[2]

Arguments in favor of dismissal were strong. The department attorney acknowledged the department had no substantial evidence problems. The sergeant was unrepresented. The sergeant failed to file a prehearing settlement conference statement and, as a result, the Board could have excluded evidence offered by the sergeant at the hearing.[3] If the case proceeded to hearing and the Board sustained the allegations, the dismissal would likely have been upheld, and the sergeant would not have been able to apply for a State job without permission from the Board. However, because the department allowed the sergeant to resign, he will not have to seek permission from the Board to take an examination or apply for a State job in the future. The OIG believes this sergeant, who was found to have attempted to solicit sex from a 16-year-old, should be prohibited from working not only as a peace officer, but also as a civil servant.

The Department Violated Its Policy When It Settled the Case Without a No-Rehire Clause

Departmental policy, found in Chapter 3, Article 22, and implemented as a part of the *Madrid* reforms, dictates that when the department enters into a settlement agreement with an employee who agrees to resign, the settlement agreement shall include a clause stating the employee agrees never to apply for or accept employment with the department in the future.[4] The required clause also indicates the department can dismiss the employee again if it inadvertently offers the dismissed employee a position, and the employee must waive any right to appeal that dismissal. This type of clause, commonly referred to as a "no-rehire" clause, is an effective tool for ensuring the department does not inadvertently rehire dismissed employees in the future. It also provides the department with a mechanism for dismissing an employee it inadvertently hires if the employee was previously dismissed and allowed to resign. The department did not include the no-rehire clause in the settlement agreement with the sergeant and, therefore, violated its policy.

The department's decision to not include the no-rehire clause is based upon its interpretation of a recently enacted law. *California Code of Civil Procedure,* section 1002.5, which took effect on January 1, 2020, forbids the use of no-rehire clauses in an agreement to settle an employment dispute between an employer and an "aggrieved person" who has filed a claim against the employer. Section 1002.5 defines an aggrieved person as "a person who, in good faith, has filed a claim

2. In cases where the Board sustains a dismissal action, the dismissed employee is no longer permitted to take any State civil service examination or be certified from an eligible list to any position in the State civil service absent the approval of the Executive Officer pursuant to *California Code of Regulations* (CCR), section 211.2. In order to obtain approval, the dismissed employee must file a petition with the Board with notice to the dismissing agency that includes substantiation of corrected behavior. The executive officer of the Board makes the determination whether to grant permission to the petitioner to apply for a State job.

3. CCR, Title 2, section 57.1.

4. Department Operations Manual, Chapter 3, Article 22, Section 33030.26.2, "Essential Settlement Language."

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against the person's employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process."[5] The department interprets this language to mean that an "aggrieved person" includes an employee who is terminated for misconduct, but appeals the dismissal with the Board. The OIG disagrees with the department's analysis.

The purpose of section 1002.5 is not to protect the perpetrators of wrongdoing, but the *victims*. In support of the bill enacting section 1002.5, the author stated:

> AB 749 will bring greater fairness and clarity to existing law by voiding any settlement provision arising from an employment dispute if the provision restricts the ability of an "aggrieved" employee to work for the employer. The bill defines an "aggrieved" employee as one who has filed a claim against the employer, whether the employee filed the claim in court, with an administrative agency, in an alternative dispute resolution forum, or through an internal grievance procedure. **In short, it will only protect employees who are victims of alleged discrimination, harassment, or other labor law violations. It will not protect the perpetrators of wrongful acts that give rise to an employment dispute.** An employer always retains the right to discharge an employee or refuse to rehire an employee if there are valid grounds for doing so.[6] (Emphasis added.)

Taking this necessary context into consideration, the sergeant is not an "aggrieved person." The sergeant filed an appeal of his dismissal for cause, not a claim against the department. He made no allegations that he was the victim of discrimination, harassment, or other labor law violations. Therefore, we do not believe the sergeant qualifies as an "aggrieved person" within the intent of this law.

The Department Failed to Apply an Exception for When an Employer Documents a Good Faith Determination That the Aggrieved Person Engaged in Criminal Conduct

Even if the sergeant were considered an "aggrieved person" under section 1002.5, the statute does not forbid the use of no-rehire clauses when an employer makes a determination that the aggrieved person committed criminal conduct before the person files the claim. Section 1002.5 states in pertinent part:

> (b) Nothing in subdivision (a) does any of the following:
>
> (1) Preclude the employer and aggrieved person from making an agreement to do either of the following:
>
> …
>
> (B) Prohibit or otherwise restrict the settling aggrieved person from obtaining future employment with the settling employer, if the employer has made and documented a good faith determination, before the aggrieved person filed the claim that the aggrieved person engaged in sexual harassment, sexual assault, **or any criminal conduct.** (Emphasis added.)

In this case, the department conducted an investigative and disciplinary findings conference, during which it found and documented that the sergeant attempted to solicit sex from a minor. The department documented the penal code sections the sergeant violated and the allegations of criminal conduct in the formal disciplinary action it served on the sergeant. It was only after the department made and documented its good faith determinations that the sergeant filed an appeal

5. *California Code of Civil Procedure*, section 1002.5(c)(1).

6. Chris Micheli, Will California Open the Floodgates to Employment Litigation? (2019) 51 U. Pac. L. Rev. 285, 294; footnote 48 [Senate Judiciary Committee, Committee Analysis of AB 749 at 8 (Jul. 9. 2019)].

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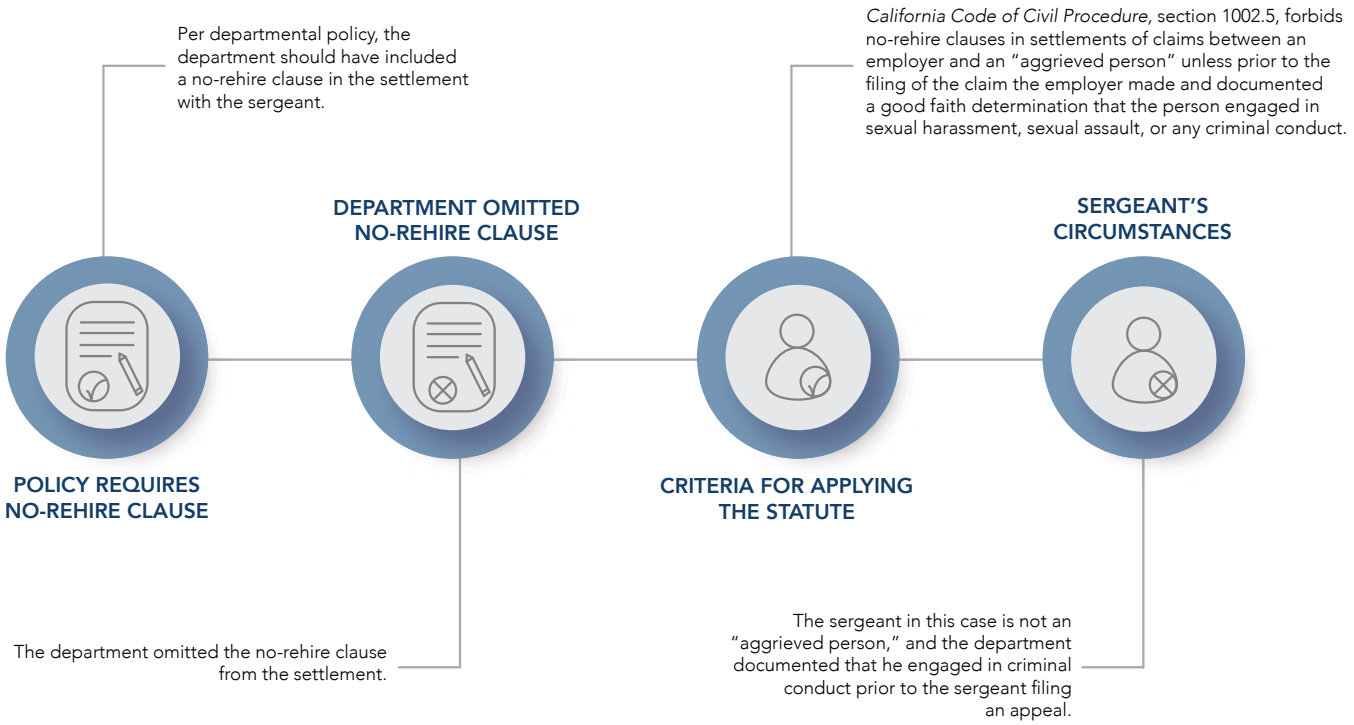
The Department's Misinterpretation of Law in Its Settlement With the Sergeant



Source: The Office of the Inspector General.

with the Board. The department was not barred from including the no-rehire clause because, even if the sergeant were an "aggrieved person," the department had already documented the sergeant's criminal conduct prior to his appeal.

Before the prehearing settlement conference, the OIG reminded the department attorney that a no-rehire clause was required by policy if a resignation was approved. In response, the department attorney asserted that the law prohibited the inclusion of a no-rehire clause in this case. However, when asked to provide authority for this position, the department attorney could not identify the specific law that prohibited the use of the no-rehire clause. The during the prehearing settlement conference, the department attorney advised the OIG attorney that the department finalized its decision not to include the no-rehire clause in the settlement and directed the OIG to contact their supervisor.

In a final effort to convince the department that a no-rehire clause was permitted in this case and, in fact, mandated by policy, the OIG discussed the settlement with a high-ranking managerial attorney within the department's Office of Legal Affairs. The OIG explained that because the disciplinary action was based on criminal conduct, the settlement was exempt from section 1002.5. In response, the manager represented that the statute had been amended and the criminal conduct exception had been deleted. We later confirmed that the manager was correct that the statute had been amended; however, the criminal conduct exception had actually been added to the statute, not deleted from it. Therefore, based on an incomplete understanding of the law, the department chose to omit the no-rehire clause from the settlement. Moreover, the department allowed the sergeant to resign in lieu of dismissal and agreed to remove the disciplinary action from

the sergeant's official personnel file. As a result, the sergeant is free to apply for and accept any State job, including a job with the department. We are deeply troubled by the outcome of this case.

We are also concerned with the level of legal analysis demonstrated by the department's attorneys, even at the highest levels. The department attorney assigned to this case demonstrated a lack of knowledge of the law and an inability to substantiate their decision to omit a clause that is required by departmental policy. The manager was unaware that the law provided a criminal conduct exception that permitted the inclusion of a no-rehire clause in this case and allowed the settlement to proceed despite the violation of departmental policy.

This was not the first case in which the department failed to include a no-rehire clause since the new law went into effect on January 1, 2020. The department had repeatedly failed to include the required language in settlements for more than a year and a half.

In mid-August, after settling this case and reconsidering our recommendations, the Employment Advocacy and Prosecution Team instructed its attorneys to seek inclusion of a no-rehire clause when entering into a settlement agreement that allows an employee to resign in lieu of termination. The department has indicated it will take this approach in all resignation cases that qualify under the exception to section 1002.5 where it has determined the employee engaged in sexual harassment, sexual assault, or any criminal conduct. The department also indicated it will take a similar approach in resignation cases that do not qualify under the exception to section 1002.5.

Without exposing the department's litigation strategy, we are concerned that its approach may not adequately protect the department from rehiring employees whose conduct warrants a dismissal from State service, but were allowed to resign in lieu of dismissal. We will continue to monitor and report on the department's approach to the settlement of these types of cases in future discipline monitoring reports.

THE OIG RECOMMENDS THE DEPARTMENT include no-rehire clauses in all settlement agreements that permit an employee to resign in lieu of dismissal, but especially in cases where the department documented criminal misconduct prior to the employee filing the appeal. If the dismissed employee refuses to agree to the no-rehire clause, the department should not enter into the settlement and should proceed to litigate the case on its merits. If the Board rejects a settlement agreement that contains a no-rehire clause, the department should seek judicial review. It is imperative that the department support and defend important policies implemented as part of the *Madrid* reforms to ensure peace officers are disciplined appropriately and policing reform continues to be effectuated. OIG

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