

1 **CLANCY LITIGATION GROUP**
Patrick E. Clancy, SBN 60805
2 Dr. Demosthenes Lorandos, SBN 177644
1600 S. Main St., Suite 185
3 Walnut Creek, CA 94596
Tel: (925) 256-4600
4 eFax: (888) 802-5089

5 Attorneys for Defendant

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7 SUPERIOR COURT OF CALIFORNIA, COUNTY OF

8 THE PEOPLE OF THE STATE OF) Case No.
CALIFORNIA,)
9)
Plaintiff,) ADMISSIBILITY OF
10) DEFENDANT'S COMPELLED
vs.) TESTIMONY PURSUANT TO
11) GOVERNMENT CODE SECTIONS
12) 3303 AND 3304
13 Defendant.) Date:
Time:
14) Dept:

15 **INTRODUCTION**

16 *In the instant case the defendant* was prosecuted by the City Attorney in
17 an administrative disciplinary hearing regarding his employment with the
18 *Fire/Police* Department. During that hearing, after *Miranda*
19 admonitions, the defendant was compelled to testify about events that were
20 possibly criminal in nature.

21 The defendant testified against his will without counsel at that hearing
22 and made several statements regarding

23
24 The prosecution may allege that during the administrative hearing the
25 defendant committed specific acts of false testimony regarding
26 . As such the prosecution may
27 attempt to use this evidence to demonstrate that the defendant has a character
28 trait for lying.

1 Refusal to testify at an administrative discipline hearing can be
2 interpreted by the employing agency as insubordination pursuant to Government
3 Code section 3303(a,g) and 3304(a). As such, administrative sanctions can be
4 imposed for refusing to testify.

5 The defendant hereby moves for a protective order preventing any
6 evidence of his compelled testimony at the administrative disciplinary hearing
7 from being admitted into evidence at trial.

8 I.

9 **THE DEFENDANT HAD NO CONSTITUTIONAL OR STATUTORY RIGHT TO REMAIN SILENT FREE OF**
10 **ADMINISTRATIVE SANCTION DURING THE DISCIPLINARY HEARING.**

11 Government Code section 3303 and 3304 are part of the Public
12 Safety Officer's Procedural Bill of Rights Act. Sections 3303(a-
13 g) and 3304(a) establish the administrative procedures by which
14 public safety officers can be investigated and interrogated for
15 disciplinary purposes. Government Code section 3304(a)
16 specifically states:

17 "Nothing in this section shall preclude a head of an agency
18 from ordering a public safety officer to cooperate with other
19 agencies involved in criminal investigations. If the officer
20 fails to comply with such an order, the agency may officially
21 charge him with insubordination." **Government Code section**
22 **3304 (a)**.

23 The case of **Lybarger v. City of Los Angeles** (1985) 221
24 Cal.Rptr. 529; 40 Cal.3d 822, interpreted this section as
25 providing "neither a constitutional nor a statutory right to
26 remain silent free of administrative sanction." *Id.* at 531
27 (emphasis added).

28 The **Lybarger** decision has been upheld in several cases
involving administrative investigations of public safety
officers. (See, e.g. **City of Los Angeles v. Superior Court**
(Labio) (1997) 57 Cal.App.4th 1506 (police officer's non-

1 *Mirandized* questioning by superior officer for sanctionable
2 action rightfully suppressed.) People v. Gwillim (1990) 274
3 Cal.Rptr. 415; 223 Cal.App.3d 1254 (police officer's statement in
4 an internal affairs investigation entitled to use and derivative
5 use immunity under Lybarger.) Williams v. City of Los Angeles
6 (1988) 252 Cal.Rptr. 817; 47 Cal.3d. 195 (failure to advise
7 officer under investigation of his rights per Lybarger and
8 Government Code sections 3303 and 3304 insufficient grounds for
9 reinstatement of employment.))

10 Regarding any constitutional protection afforded the officer
11 being investigated, Lybarger reasoned that:

12 "As a matter of constitutional law, it is well established
13 that a public employee has no absolute right to refuse to
14 answer potentially incriminating questions posed by his
15 employer. Instead, his self incriminating rights are deemed
16 adequately protected by precluding any use of his statements
17 at a subsequent criminal proceeding." Lybarger 221 Cal.Rptr.
18 529 at 531 (emphasis added).

19 The court further determined that no statutory right to
20 remain silent during disciplinary hearings existed determining
21 that Government Code section 3303(e) "expressly provides that an
22 officer who refuses to respond to questions or submit to
23 interrogation is subject to punitive action by his employer." *Id.*
24 at 532.

25 **II.**

26 **CONCLUSION**

27 In the instant case the defendant had a duty to cooperate
28 with the investigation conducted by the _____
regarding his alleged acts of insubordination. Failure to do so
would have resulted in administrative disciplinary action. As a
result, his statements were a product of the administrative

1 disciplinary process and, according to the Lybarger decision,
2 cannot be used against him in any subsequent criminal proceeding.

3 Therefore, the defendant respectfully requests that a
4 protective order issue to the effect that any and all statements
5 or admissions made by him during the disciplinary hearing
6 conducted by the Modesto City Attorney's Office regarding his
7 employment with the Modesto Fire Department be held inadmissible.
8 Further, the defendant respectfully requests that neither the
9 witnesses for the prosecution nor the district attorney make any
10 mention of said disciplinary hearing.

11 Dated: October 16, 1998

Respectfully Submitted,

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Attorney for Defendant

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