

ATTACHMENT X



CALIFORNIA DEPARTMENT OF HUMAN RESOURCES

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Governor Edmund G. Brown Jr.
Secretary, Government Operations Agency Marybel Batjer
Director Richard Gillihan

December 23, 2016

via email Ellenlaw@aol.com and US Mail

Ellen Mendelson
Law Office of Ellen Mendelson
533 Bella Vista Way, 1st Floor
San Francisco, CA 94127-2303

Dear Ms. Mendelson,

As you know, this office represents the Executive Director of the Commission on Peace Officers Standards and Training (POST) and we write to you in that capacity. This is to respond to your November 14, 2016 correspondence. This office does not represent the Commission itself and we do not respond on behalf of the Commission body or Commissioners.

In your letter, you assert Mr. Ortiz has "already been certified with peace officer status or alternatively he possesses experience [Guam and National Guard] that should substitute for the requirement of retaking the Regular Basic Course (RBC)." It is your position that by not issuing a certificate to Mr. Ortiz, POST has effectively cancelled a "certificate previously issued" in violation of Penal Code section 13506. You also assert that POST's position violates the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) 28 U.S.C.A. §§ 4301 et seq. Finally, you have requested that Mr. Ortiz be granted an exemption from the Executive Director pursuant to California Code of Regulations, title 11, section 1008(b)(3)(A)(4).

POST's Records Reflect Mr. Ortiz Does Not Have A Professional Certificate

From the outset, clarification regarding the certification Mr. Ortiz holds is warranted, as it appears there is confusion over what constitutes peace officer "certification." While Mr. Ortiz appears to have received a certificate of completion (from Alameda County Sheriff's Office) for the training necessary to satisfy the requirements to exercise peace officer authority as a member of the National Guard, this certificate is not the same nor is it equivalent to a professional certificate such as POST's Basic Certificate.

Penal Code section 830.4 allows the Governor of California, by virtue of his office and position as commander in chief of the state militia, to designate National Guard Members as "peace officers" and grant them all the powers of peace officers when they are called or ordered into active state service

pursuant to sections 143 or 146 of the Military and Veterans Code. It is suggested that Mr. Ortiz was called to service in the California National Guard under one of these sections.¹ Under your theory, Mr. Ortiz's mobilization in the California National Guard effectively granted him peace officer status equivalent to that which is bestowed by a professional, POST certificate. Moreover, you suggest that POST has effectively cancelled his "certificate" per Penal Code section 13506. Your reliance on Mr. Ortiz's certificate of completion as a professional certificate is misplaced.

POST does not dispute that Penal Code section 830.4 grants Peace Officer *powers* to mobilize National Guard units. However, that grant of power is distinct from the POST entry level training requirements to be employed as a peace officer with a California law enforcement agency. California Code of Regulations, title 11, section 1011, identifies the certificates issued by POST and the requirements for their obtainment. Subdivision (a)(1)(B) identifies six professional certificate levels, the first of which is the "Basic Certificate". Obtaining a Basic Certificate effectively requires the completion of three steps: (1) completion of the Basic Academy (or "Regular Basic Course" (RBC)); (2) employment with a POST-qualified agency; and (3) completion of a one-year probation with the qualified agency.²

The six certificates set forth above are distinctly different than the certificates an individual may receive for course completion. (Cal. Code Regs. tit 11, § 1011, subd. (e)(1).) Obtaining a certificate of course completion requires only the completion of a POST-certified course. (*ibid.*)

Mr. Ortiz asserts he completed the RBC, as a National Guard member, despite the fact that his National Guard service only required completion of an introductory firearms course pursuant to Penal Code section 832, subdivision (a). (85 Ops. Cal. Atty. Gen. 203, (2002) [National Guard members are designated as peace officers under certain circumstances (Pen. Code § 830.4, subd. (a)), but to exercise peace officer powers, they must comply with the introductory training requirements of §832, subd.(b)(1).].) While completion of the RBC course would be sufficient to allow Mr. Ortiz to function as a peace officer during specific circumstances where National Guard members are called to exercise such authority (Cal. Pen. Code, § 830.4), the completion of the RBC does not vest Ortiz with a professional certificate as would be required for a full-time peace officer, as he has not completed all the requirements for a POST Basic Certificate pursuant to Regulation 1011, subd. (a)(4).

In short, a certificate of course completion is not the equivalent to a professional Basic Certificate issued by POST pursuant to regulation. (Cal. Code Regs., tit. 11, § 1011, subd. (a)(1)(B)(1).) POST has no record that Mr. Ortiz met the employment and probationary requirements for a professional certification pursuant to Regulation 1011. That Mr. Ortiz has a pending job offer is insufficient to qualify as employment pursuant to the requirements for a Basic Certificate.

¹ We did not receive copies of any of Mr. Ortiz's orders to service. We received the hyperlinks to various news releases you provided whereby Governor Brown declared states of emergency and mobilized the California National Guard pursuant to Military and Veterans Code section 146 between 2008 and 2015.

² Cal. Code Regs., tit. 11, § 1011, subd. (a)(4)(A) [requiring an applicant be employed as a full-time peace officer by a POST-participating department at the time of application for any certificate.]

Moreover, Penal Code section 13506 is not relevant to the facts here. That section provides that POST "shall not have the authority to adopt or carry out a regulation that authorizes the withdrawal or revocation of a certificate previously issued to a peace officer *pursuant to this chapter.*" (Cal. Pen. Code, § 13506.) The National Guard peace officer designation you point to is issued pursuant to a different chapter of the Penal Code. Section 13506 is similarly inapplicable to the certificate of completion Mr. Ortiz received from Alameda County Sheriff's Office, as POST has taken no action to *revoke* that certificate. Mr. Ortiz continues to possess that certificate of completion; however, it affords him no peace officer powers as would a POST professional certificate.

Exemption From Regualification Under Regulation 1008

You have requested the Executive Director grant an exemption to the requalification requirement pursuant to California Code of Regulations Title 11, section 1008, subdivision(b) (3)(A)(4). You also assert that because Mr. Ortiz served as a police officer in Guam, he should (when his additional military experience is factored in) qualify for an exemption to the six-year limitation for the RBC.³

As set forth in the regulation, to be eligible for the Executive Director to grant an exemption to requalification, an individual must 1) possess a POST Basic Certificate; and 2) be returning to law enforcement after a three-year or longer break in service. (Cal. Code Regs., tit. 11, § 1008, subd. (b)(3)(A).) As discussed above, Mr. Ortiz does not satisfy the first requirement as he does not have a POST Basic Certificate. (*Id.* at § 1011, subd. (a) (B).) In the absence of this certificate, the Executive Director is simply without legal authority to grant an exemption to the requalification requirement and is without legal authority to waive the six-year limitation.

To the extent you are requesting an exemption from the POST Commission under Regulation §1008, subd. (b)(3)(B), as noted in our October 28, 2016 correspondence and restated here, we do not represent or advise the Commission. The proper avenue for appealing this matter and requesting Commission's consideration of an exemption, is to do so before the Commission body itself, such as through your already-pending appeal.

Assertions Regarding USERRA

In response to the assertion that USERRA applies to POST under these circumstances, we respectfully disagree. We also disagree with any assertion that by holding Mr. Ortiz to the same standards as other peace officer candidates violates USERRA.

While an agency with which Mr. Ortiz seeks employment (or actually employs Mr. Ortiz) would be subject to the provisions and protections of USERRA, it is our position that POST does not come within the definition of employer under USERRA. POST has neither offered nor denied any employment to Mr.

³ Under POST regulations, "every peace officer... shall complete the Regular Basic Course before being assigned duties which include the exercise of peace officer powers." (Cal. Code Regs., tit. 11, § 1005.) The RBC expires after six years if the peace officer is not appointed to a full-time peace officer position within that time period. (Cal. Code Regs., tit. 11, § 1008, subd. (b)(2)(B).)

Ortiz nor does it control employment opportunities under the meaning of the Act. (38 U.S.C. § 4303, subd. (4)(A).) Peace officer candidates whose training is certified by POST must still pursue and secure employment with a qualifying agency; certificates issued by POST are not equivalent to an offer of Initial employment. Additionally, nothing in USERRA suggests that its provisions apply to non-employer agencies who merely certify training of individuals as required by law and we are unaware of any legal authority suggesting otherwise.

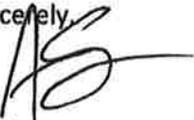
Conclusion

We hope the above-information has provided clarification for you regarding POST regulations and the standards. As discussed above, Mr. Ortiz does not hold a POST Basic Certificate and the Executive Director is without authority to grant an exemption under Regulation 1008 (b)(3)(A). The appropriate avenue to address an exemption would be through a request and appeal with the Commission. We understand that Mr. Ortiz's appeal before the Commission remains calendared on the February 23, 2017⁴ Commission meeting agenda. Should you wish to supplement materials previously provided for the Commission's consideration, you may provide those by mail to the Commission at POST's West Sacramento address at least 20 business days prior to the hearing.⁵

As for your request for review of this matter before a single member of the Commission in advance of the February 23, 2017 meeting, we are unaware of any authority allowing for a separate hearing or proceeding before a single Commission member. POST regulations provide that matters of appeal are to be considered first by the Executive Director and then by the entire Commission. (Cal. Code Regs., tit. 11, § 1058, subd. (a)-(b).) POST does not have the legal authority to subvert that appellate process.

Finally, we understand that POST is preparing a response to your request to appear telephonically at the Commission meeting, which they will send separately from this letter.

Sincerely,



Anthony Serrao
Legal Counsel

cc: Stephanie Scofield, Assistant Executive Director, POST
Dave Cornejo, Assistant Executive Director, POST
Darla Engler, POST

⁴ The previously stated date of February 27, 2017 appears to be incorrect. The Commission's calendar shows the next meeting is scheduled for February 23, 2017, at 9:30 am, in Anaheim, CA.

⁵ For your convenience, additional information regarding appeals may be found at the following link:
<https://www.post.ca.gov/commission-procedure-d-16-appeals-of-denial-of-certificationsuspensiondecertification-of-training-courses.aspx>.