
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: AB 443 **Hearing Date:** July 11, 2023
Author: Jackson
Version: February 6, 2023
Urgency: No **Fiscal:** Yes
Consultant: AB

Subject: *Peace officers: determination of bias*

HISTORY

Source: Author

Prior Legislation: AB 2547 (Nazarian, 2022), held in Senate Appropriations
AB 655 (Kalra, Ch. 854, Stats. of 2022)
SB 2 (Bradford, Ch. 409, Stats. of 2021)
AB 846 (Burke, Ch. 322, Stats. of 2020)
AB 243 (Kamlager, 2019), held in Senate Appropriations

Support: California Faculty Association; California Public Defender Association; Los Angeles County District Attorney's Office; National Association of Social Workers, California Chapter, National College Players Association

Opposition: Peace Officers Research Association of California (PORAC)

Assembly Floor Vote: 60 - 0

PURPOSE

The purpose of this bill is to require the Commission on Peace Officer Standards and Training (POST) to establish a definition of "biased conduct" and to develop guidance for use by law enforcement agencies in screening the social media accounts of applicants for bias.

Existing law establishes the Commission on Peace Officer Standards and Training (POST) to set minimum standards for the recruitment and training of peace officers, develop training courses and curriculum, and establish a professional certificate program that awards different levels of certification based on training, education, experience, and other relevant prerequisites and states the powers of POST, including among others, to develop and implement programs to increase the effectiveness of law enforcement, to secure the cooperation of state-level peace officers, agencies, and bodies having jurisdiction over systems of public higher education in continuing the development of college-level training and education programs. (Pen. Code, §§ 830-832.10; 13500 et. seq.)

Existing law authorizes POST, for the purpose of raising the level of competence of local law enforcement officers, to adopt rules establishing minimum standards related to physical, mental

and moral fitness and training that shall govern the recruitment of any peace officers in California. (Pen. Code, § 13510, subd. (a).)

Existing law requires POST to develop and deliver training courses for peace officers on a wide array of topics, including, the use of tear gas, SWAT operations, elder abuse, persons with disabilities, behavioral health, technology crimes, sexual assault, first aid, missing persons, gang and drug enforcement, use of force and human trafficking, among others. (Pen. Code §§13514 – 13519.15.)

Existing law requires POST to post on its internet website all current standards, policies, practices, operating procedures and education and training materials, as specified. (Pen. Code, § 13650.)

Existing law requires each class of public officers or employees declared by law to be peace officers shall meet minimum standards, including that they be free from any physical, emotional, or mental condition, including bias against race or ethnicity, gender, nationality, religion, disability, or sexual orientation, that might adversely affect the exercise of the powers of a peace officer. (Gov. Code, § 1031, subd. (f).)

Existing law requires POST, by January 1, 2022, to study, review and update their regulations and associated screening materials related to the evaluation of emotional and mental condition to include the identification of explicit and implicit bias toward race or ethnicity, gender, nationality, religion, disability, or sexual orientation. . (Gov. Code, § 1031.3.)

Existing law requires all peace officers to complete an introductory course of training prescribed by POST, demonstrated by passage of an appropriate examination developed by POST. (Pen. Code, § 832, subd. (a).)

Existing law mandates the course of basic training for peace officers include adequate instruction on racial, identity, and cultural diversity in order to foster mutual respect and cooperation between law enforcement and members of all racial, identity, and cultural groups. In developing the training, POST shall consult with appropriate groups and individuals having an interest and expertise in the field of racial, identity, and cultural awareness and diversity. (Pen. Code, § 13519.4 (b).)

Existing law provides that a peace officer shall not engage in racial or identity profiling, and defines “racial or identity profiling” as the consideration of, or reliance on, to any degree, actual or perceived race, color, ethnicity, national origin, age, religion, gender identity or expression, sexual orientation, or mental or physical disability in deciding which persons to subject to a stop or in deciding upon the scope or substance of law enforcement activities following a stop, except that an officer may consider or rely on characteristics listed in a specific suspect description. The activities include, but are not limited to, traffic or pedestrian stops, or actions during a stop, such as asking questions, frisks, consensual and nonconsensual searches of a person or any property, seizing any property, removing vehicle occupants during a traffic stop, issuing a citation, and making an arrest. (Pen. Code, § 13519.4, subds. (e), (f).)

Existing law provides that once the initial basic peace officer training is completed, specified peace officers who adhere to the standards approved by the Commission on Peace Officer Standards and Training (POST) shall be required to complete a refresher course on racial and

identity profiling, including implicit bias, every five years thereafter, or on a more frequent basis if deemed necessary, in order to keep current with changing racial, identity, and cultural trends. (Pen. Code, § 13519.4, subd. (i).)

Existing law provides that a peace officer may have their certification suspended or revoked if they have engaged in serious misconduct, which includes demonstrating bias on the basis of race, religion, or other specified categories. (Pen. Code, § 13510.8.)

Existing law requires POST to adopt by regulation a definition of “serious misconduct” that shall serve as the criteria to be considered for ineligibility for, or revocation of, certification, and requires that definition to include demonstrating bias on the basis of race, national origin, religion, gender identity or expression, housing status, sexual orientation, mental or physical disability, or other protected status in violation of law or department policy or inconsistent with a peace officer’s obligation to carry out their duties in a fair and unbiased manner. (Pen. Code, § 13510.8, subd. (b)(5).)

Existing law provides that peace officer personnel records are confidential except records related to use-of-force cases involving death or great bodily injury, sustained findings of sexual assault, and sustained findings of discrimination, among other things. (Pen. Code, § 832.7.)

Existing law requires law enforcement agencies to report to POST any complaints, charges, or allegations that could lead to decertification. (Pen. Code, § 13510.9.)

Existing law provides that a law enforcement officer exhibiting bias or animus towards a defendant because of their race, ethnicity, or national origin may be grounds to declare a mistrial, dismiss charges, or vacate a sentence, as specified. (Pen. Code, § 745, subd. (e).)

Existing law defines “bias motivation” for purposes of adopting law enforcement hate crimes policy as a preexisting negative attitude toward actual or perceived characteristics such as disability, gender, race, religion, and other enumerated traits. (Pen. Code, § 422.87.)

This bill requires POST to establish a definition of “biased conduct” that, at a minimum, includes all of the following:

- Biased conduct includes conduct resulting from implicit and explicit biases.
- Conduct is biased if a reasonable person would conclude so using the facts at hand.
- An officer need not admit biased or prejudiced intent for conduct to reasonably appear biased.
- Biased conduct may occur in an encounter with the public, first responders, employees of criminal justice agencies, as specified, or online, such as conduct on social media.

This bill provides that law enforcement agencies shall use the commission’s definition of biased conduct, consistent with existing law, in any investigation into a bias-related complaint or an incident that involves possible indications of officer bias, and determine if racial profiling occurred.

This bill requires POST to develop guidance for local law enforcement departments on performing effective Internet and social media screenings of officer applicants, which, at a minimum, must include strategies for identifying applicant social media profiles and for

searching for, and identifying, content indicative of potential biases, such as affiliation with hate groups.

This bill delays its effective date to January 1, 2026.

COMMENTS

1. Need for This Bill

According to the Author:

California's work to elevate the conduct of our law enforcement professionals and protect our citizens is not over. That is why this bill requires all of California's POST certified peace officers to follow the same definition of "biased conduct". It is essential that in the most progressive and diverse state ensures that peace officers are held to the same standard of conducting themselves free of bias without out room for interpretation.

Every person in California should have confidence that any contact with a peace officer is based on the need for service or intervention. But most importantly, they should be sure that their contact with any officer is free from fear that bias might dictate the level of professionalism and service they receive. In April of 2022, the State Auditor released a report asking for the Legislature to adopt this simple change, but it should not have taken a state audit to arrive at this conclusion. AB 443 is another step to ensuring that Californians receive the level of service and justice they deserve.

2. POST and Existing Requirements Related to This Bill

POST was established by the Legislature in 1959 to develop minimum recruitment and training standards for California peace officers. As of 1989, all peace officers in California are required to complete an introductory course of training prescribed by POST, and demonstrate completion of that course by passing an examination. According to the POST Web site, the Regular Basic Course Training includes 43 separate topics, ranging from juvenile law and procedure to search and seizure, taught over the course of a minimum of 664 hours of training.¹ Over the course of the training, individuals are trained not only in policing skills such as crowd control, evidence collection and patrol techniques, they are also given instruction in criminal law, requiring specific knowledge of various Penal Code and constitutional provisions.

Existing law contains several provisions intended to minimize and respond to bias among peace officers. AB 846 (Burke, Ch. 322, Stats. of 2020), which was inadvertently repealed,² established a requirement that peace officers be free from any bias against race or ethnicity, gender, nationality, religion, disability, or sexual orientation that might adversely affect the exercise of the powers of a peace officer. Further, POST currently provides mandatory training for peace officers on implicit bias, which must "stress understanding and respect for racial, identity, and cultural differences, and development of effective, noncombative methods of carrying out law

¹ <http://post.ca.gov/regular-basic-course-training-specifications.aspx>

² See fn. 1 above.

enforcement duties in a diverse racial, identity, and cultural environment.”³ Additionally, existing law, established by SB 2 (Bradford, Ch. 409, Stats. of 2021), provides a process whereby peace officers who have engaged in serious misconduct can be decertified, where “serious misconduct” includes “demonstrating bias on the basis of race, national origin, gender identity or expression, housing status, sexual orientation, mental or physical disability, or other protected status in violation of law or department policy or inconsistent with a peace officer’s obligation to carry out their duties in a fair and unbiased manner.”⁴ Finally, AB 655 (Kalra, Ch. 854, Stats. of 2022), which was signed just last year, imposed a requirement that law enforcement agencies investigate current and prospective peace officers regarding membership in hate groups, participation in hate group activity, or advocacy of public expressions of hate, and provided that certain findings would disqualify a person from employment as a peace officer.

3. Recent State Audit

In April 2022, the California State Auditor released a report entitled, “Law Enforcement Departments Have Not Adequately Guarded against Biased Conduct,” which presented the findings of an audit of five law enforcement departments throughout the state.⁵ As part of the audit, the State Auditor reviewed a selection of five internal investigations at each department, reviewed the public social media accounts of approximately 450 officers, and examined agency responses to incidents and allegations of biased conduct. The report defined bias in general as a lack of objectivity that can take the form of preconceived judgments, opinions, or attitudes about a person or group based on actual or perceived identity characteristics. Using this general definition of bias, the State Auditor identified numerous occasions of explicit or implicit bias and agencies’ corresponding disciplinary actions. The audit resulted in the following findings:

- “We identified some officers at each of the five law enforcement departments we reviewed [...] who had engaged in biased conduct.”
- “Of the about 450 officers who had public social media accounts, 17 officers had posted biased statements or content. The posts we identified either promoted negative stereotypes or contained deliberately hateful and derogatory speech directed at groups of people.”
- “We also reviewed selected internal investigations and public social media accounts to determine whether any officers were members of hate groups. [...] Although we did not identify evidence that any officers were members of hate groups, six officers posted content suggesting that they support groups with problematic principles or activities.”
- “We found that each of the local departments had not appropriately addressed indications of bias when they occurred,” and that local departments’ investigations of biased conduct

³ Penal Code §13519.4

⁴ Penal Code §13510.8(b).

⁵ “Law Enforcement Departments Have Not Adequately Guarded Against Biased Conduct.” *California State Auditor*. Published April 2022. <http://auditor.ca.gov/pdfs/reports/2021-105.pdf>; the agencies examined were the California Department of Corrections and Rehabilitation, the Los Angeles County Sheriff’s Department, the San Bernardino Police Department, the San Jose Police Department, and the Stockton Police Department.

“relied heavily on the officers’ denials that bias influenced their actions, without considering whether an officer’s conduct created the reasonable appearance of bias.”

The audit concluded that, as a result of the deficiencies in the departments’ investigative practices, “they are at higher risk for failing to identify instances when their officers engage in biased conduct and failing to take action to prevent those officers from engaging in biased conduct in the future.” Further, the report suggested that “greater statewide oversight could increase law enforcement departments’ adoption of best practices for addressing bias,” and made several recommendations for legislative action, including:

- Require that POST, in the course of its regular audits of local law enforcement departments’ hiring processes, determine whether the departments conduct oral interviews that incorporate assessments of officer applicants’ ability to interact with a diverse community and interviews of secondary references.
- Require that POST develop guidance for local law enforcement departments on performing effective Internet and social media screening of applicants and specify in state law that departments may request that applicants identify their public social media accounts.
- Require that officers receive training on various topics related to community engagement, cultural awareness and biased conduct.
- Create a definition of biased conduct that departments must use when investigating any bias-related complaint or any incident that involves possible indications of officer bias.
- Require law enforcement departments that analyze officer conduct based on this definition to reach one of the existing formal determinations in state law about whether an allegation is true, and to document a rationale for reaching the determination.

4. Effect of This Bill

This bill seeks to implement two of the recommendations offered by the State Auditor, items (2) and (4) above. Specifically, the bill requires POST to establish a definition of “biased conduct,” and specifies several required components of that definition:

- Biased conduct includes conduct resulting from implicit and explicit biases.
- Conduct is biased if a reasonable person would conclude so using the facts at hand.
- An officer need not admit biased or prejudiced intent for conduct to reasonably appear biased.
- Biased conduct may occur in an encounter with the public, first responders, employees of criminal justice agencies, or online, such as conduct on social media.

The bill, which delays the implementation of its provisions until January 1, 2026, also requires agencies to use this definition when investigating claims of bias or an incident that involves

possible indications of officer bias, including instances where a peace officer's bias may constitute "serious misconduct" leading to decertification under the framework established by SB 2 (Bradford, 2021). This requirement also mandates that agencies, pursuant to an investigation into a bias-related complaint, to determine if racial profiling occurred. However, the manner in which this provision is drafted gives rise to some ambiguity as to how it is meant to be implemented. Specifically, with regard to SB 2, the bill provides that "law enforcement agencies shall use [POST's] definition of biased conduct, consistent with Penal Code §13510.8(b)(5), in any investigation into a bias-related complaint [...]. Penal Code §13510.8(b)(5) provides that demonstrating bias on the basis of a protected class constitutes "serious misconduct" for the purpose of determining whether a peace officers certification should be suspended or revoked. Does the phrase in this bill "consistent with §13510.8(b)(5) mean that if an officer meets the definition of biased conduct under this bill, they will also meet the definition of "serious misconduct" under SB 2? The Author and Committee may wish to consider amending the bill to clarify whether this is the intent of the provision, and if so, add greater clarity to how such a determination should be made.

Another provision of this bill requires POST to develop guidance for local law enforcement departments on performing effective Internet and social media screenings of officer applicants. The guidance must include, at minimum, strategies for identifying applicant social media profiles and for searching for, and identifying, content indicative of potential biases, such as affiliation with hate groups. This provision will likely be useful in assisting agencies with implementing their new mandates under AB 655 (Kalra, Ch. 854, Stats. of 2022, discussed above).

5. Reasonable Person Standard

This bill requires that the definition of "biased conduct" include, at minimum 4 components, one of which that "conduct is biased if a reasonable person would conclude so using the facts at hand." The "reasonable person" standard is a common form in the American legal system, though is most predominant in civil tort cases involving negligence. The term can be highly subjective and its meaning may change from context to context, or even case to case. In order to ensure that the "reasonable person" standard as applied in this bill achieves the intended objective to accurately define biased conduct, the Author may wish to consider working with stakeholders to amend the bill accordingly and add specificity to that standard.

6. Recent Legislation

AB 2547 (Nazarian, 2022) was almost identical to this bill, except that it included different language regarding the parties with which biased conduct may occur, and did not require agencies to make a determination as to whether racial profiling occurred after a bias-related investigation. The bill passed out of this committee but was held on the suspense file in Senate Appropriations.

7. Committee Amends

The Author intends to take several amendments in committee to address issues raised above and by POST, including:

- Specifying that biased conduct includes conduct, including conduct online, such as social media, engaged in by a peace officer motivated by bias toward that person's actual or

perceived race, color, ethnicity, national origin, age, religion, gender identity or expression, sexual orientation, or mental or physical disability.

- Specifying that conduct is biased if a reasonable person with the same training and experience would conclude, based on the facts, that the officer’s conduct resulted from bias toward a person’s membership in a protected class described in the bullet above.
- Specifying that an officer need not admit biased or prejudiced intent for conduct to be determined to be biased.
- Removing references to Penal Code 13510.8 (SB 2), largely resolving the ambiguity discussed in Comment 4 above. The amendments instead provide:
 - “When investigating any bias-related complaint or incident that involves possible indications of officer bias, a law enforcement agency shall determine whether the conduct being investigated constitutes “biased conduct,” using the definition developed by the Commission [...]”

8. Argument in Support

According to the California Public Defenders Association:

Bias, both implicit and explicit, has undeniably plagued the criminal justice system and resulted in immeasurable injustice to affected individuals. We all are confronted with the ongoing effects of bias in the criminal justice system on a daily if not hourly basis when we see the latest news coverage or research article of some aspect of racial profiling, “biased conduct,” and/or implicitly biased discrimination. The negative effects of bias within the criminal justice arena are so profound that they have, in many ways, had severely negative multi-generational effects on communities and families, not only in how they view and/or distrust the criminal justice system, but also in preventing those affected communities and families from thriving. In fact the damaging effects of bias are so dire that bias has been declared a “public health crisis” by local governments in California.

AB 443 is a necessary step to mitigate the existence of bias in our criminal justice system. Any meaningful interdiction of bias in the criminal justice system must start with law enforcement who are sworn to serve and protect the community. It is crucial that biased individuals are not hired as law enforcement officers. Additionally, there must be a mechanism to investigate, oversee and terminate individuals who engage in biased conduct while serving as law enforcement officers.

AB 443 provides an important tool in the long battle to prevent bias and remediate some of the bias that already exists within the criminal justice arena. By providing a definition of “biased conduct” and requiring agencies to use the operative definition in any investigation or complaint about an allegation of bias or racial profiling, AB 443 provides an initial framework, consistent language for describing the problem and mandates that framework be utilized.

9. Argument in Opposition

According to the Peace Officers Research Association of California (PORAC):

AB 443 would, commencing January 1, 2026, require the Commission on Peace Officer Standards and Training (POST) to establish a definition of “biased conduct,” as specified, and would require law enforcement agencies to use that definition in any investigation into a bias-related complaint or an incident that involves possible indications of officer bias, and to determine if any racial profiling occurred, as defined. The bill would also require POST to develop guidance for local law enforcement departments on performing effective Internet and social media screenings of officer applicants.

-- END --