



THE LABOR BEAT

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The Labor Beat is prepared for the general information of our clients and friends. The summaries of recent court opinions and other legal developments may be pertinent to you or your association. However, please be aware that The Labor Beat is not necessarily inclusive of all the recent authority of which you should be aware when making your legal decisions. Thus, while every effort has been made to ensure accuracy, you should not act on the information contained herein without seeking more specific legal advice on the application of these developments to any particular situation.

On The Home Front

JASON JASMINE SWORN IN AS SACRAMENTO COUNTY BAR ASSOCIATION SECRETARY-TREASURER

On December 7, 2015, at the Sacramento County Bar Association's Annual Meeting, MAJ attorney Jason Jasmine was sworn in as the Secretary Treasurer, after being elected in November. Jason has a long history of working with the SCBA, having been a member of its Board of Directors and Chair of the Mentorship Task Force for the last three years. Jason has also served as an Arbitrator for the Bar's Mandatory Fee Arbitration Program for approximately six years. Prior to his election to the SCBA Board, Jason also served as the Chair of its Labor & Employment Law Section.

Fighting The Good Fight

PETALUMA POA NEGOTIATES TWO-YEAR DEAL

The Peace Officers Association of Petaluma resolved their negotiations by ratifying a two-year contract with the City. The bargaining team consisted of POA President **Garrett Glavano, Ron Klein, Bob Barnes** and **Mike Page**. **Gary Messing** served as the team's Chief Negotiator.

The meetings occurred over a period of almost eight months with a backdrop of interest arbitration as a possibility by virtue of a Petaluma voter-approved ordinance.

The two-year MOU is effective July 1, 2015 through June 30, 2017. In September 2015, all bargaining unit members received a 4% base wage increase. The bargaining unit consists of police officers, including officers, detectives and sergeants, as well as non-sworn evidence technicians, dispatchers, Parking Enforcement Officers, and the like. In addition, the parties have a reopener commencing in April 2016 for the sole purpose of discussing potential salary adjustments during Fiscal Year 2016-2017. The City agreed to provide a salary survey based on the same methodology utilized in the current round of bargaining.

There were additional increases in economic items, including: an increase of a dental benefit from \$1,500 to \$2,000 per year, effective January 1, 2016; dispatch certification pay at the rate of 1.5% for intermediate certification and an additional 1.5% for those who achieve an advanced certificate, for a total of

3%; and improvements in shift differential, allowing higher vacation accruals for rehires and the like. There were also numerous beneficial non-economic changes.

A key issue requiring cooperation and hard work from both sides of the table was the question of how to deal with increases in medical contributions. Traditionally, the POA has been provided 95% of the Kaiser Bay Area premiums for an individual or for dependent coverage. Going forward, the increases commencing in 2017 will be paid by the employer, with the City increasing its contribution by up to 9% over the 2016 health plan rate. Should the cost of that insurance increase more than 9%, the employees and the City will share the additional amount at 50% for the employee and 50% for the City.

FREMONT CITY EMPLOYEES MAKE SIGNIFICANT GAINS IN NEW MOU

The City of Fremont Employee Association ("CFEA") recently inked a new two-year MOU with the City of Fremont that contains significant financial gains for its members. Most notably, these include salary increases of 3% per year, additional "equity" salary increases of 1.5%-2% per year for numerous classifications, and an additional \$300 per month for use in the "cafeteria" benefits plan. CFEA also obtained a 50% increase in available tuition reimbursement funds, a 100% increase in the per-member annual tuition reimbursement cap, and a new \$150 monthly bilingual pay benefit available to qualifying members. These were the most significant financial gains obtained by any non-safety unit in the City.

The CFEA bargaining team was led by **Jonathan Yank** and CFEA President **Shannan Young**. Kudos to the City of Fremont's bargaining team for helping to set an excellent tone for labor relations between the City of Fremont and this new labor association.

FRESNO CORRECTIONAL SERGEANTS ASSOCIATION APPROVES MOU

The Fresno Correctional Sergeants Association, led by its President, **Tom Mendoza**, and bargaining team members **Jeff Penry** and **Hector Lara**, signed off on a two-and-a-half-year MOU. The team, led by **Gary Messing**, penned the deal that provides for a 1% increase effective in January 2016, a 1.5% in July 2016, and a 2.5% increase in July 2017.

The Correctional Sergeants Association was pleased with the

package that resulted from the negotiations, which added several benefits that have been at issue for the sergeants for many years. The County finally instituted a uniform allowance of \$19.23 and bumped insurance contributions from the County to the Fresno DSA Health Insurance Trust by \$20 per individual, per every two-week pay period.

The parties were able to update language in the contract and also agree on reopeners on health insurance contributions and improvements to the grievance and disciplinary arbitration procedures.

The sergeants were pleased with the efforts of the County team of **Jerry Flores** and **Gilbert De La Torre**, led by **Carlos Cortes**, and felt that the County made an effort to reach out to the sergeants in this contract (and the immediate prior one) to rectify compaction with the CO classification that has been plaguing the organization for years.

GUILD FOR PROFESSIONAL PHARMACISTS SUCCESSFULLY RESOLVES GRIEVANCES

Messing Adam & Jasmine's attorneys believe that many times the most successful (and cost-effective) resolution can be accomplished via proactive settlement discussions. That is precisely how **Jason Jasmine** assisted the Guild for Professional Pharmacists in resolving several recent grievances and unfair labor practice charges involving the contracting out of bargaining unit work, and the unilateral change from 10-hour to 8-hour shifts in certain facilities. The Guild represents a large number of pharmacists in Kaiser and CVS facilities throughout Northern California (and in other locations).

Although we are not authorized to discuss the specific terms of any of the recent settlements, we can say that all three of them resulted in significant economic payments from the employer, as well as changes in practices that will ensure such changes would not be made unilaterally in the future. In order to accomplish this, the Guild employed a dual strategy of actively engaging the employer in early settlement discussions, while at the same time aggressively "litigating" through the filing and prosecution of grievances and unfair labor practice charges, including the pursuit of information requests¹ tailored to obtain the relevant information and also to make it clear to the employer that the scope of the liability it was facing was significant.

Ultimately, though the Guild stands ready, willing and able to litigate any matter to a final successful resolution if it is necessary to do so, it and its counsel both believe that most of the time the best resolution for all parties is one that has been mutually negotiated.

SUNNYVALE COMMUNICATIONS OFFICERS NEGOTIATE NEW THREE-YEAR MOU

The Sunnyvale Communications Officers recently completed extended negotiations over a new three-year MOU. The agreement was reached during mediation with the State Mediation and Conciliation Service. Under the agreement, the heavily burdened officers (who are 20%+ understaffed) will see increases of 3% retroactive to January 1, 2015, 3.5% effective January 1, 2016, and in January 2017 will return to a salary survey. Officers will also see an additional \$100 per month in contributions towards their health insurance. In return, employees will move to a Paid Time Off (PTO) model (replacing the more familiar vacation and sick leave benefit), although they will retain their right to up to 90 days of Paid Medical Leave for illness and injury absences. The employees will receive a one-time credit of 60 hours of PTO in the conversion. Employees will see a reduction of 1% in employer paid member contributions each year of the contract. **Gregg Adam** assisted the COA in its negotiations.

SUNNYVALE MANAGERS AGREE ON NEW MOU

The Sunnyvale Managers' Association recently concluded negotiations on a new three-year MOU, also following mediation. The terms of the MOU call for increases of 3.5%, 2.5% and 1.5% plus a 1% one-time payment in each of the 3 years. Managers already use a Paid Time Off approach, and senior managers will see a higher accrual rate for PTO hours. Employees will also see a reduction of 1% in employer paid member contributions each year of the contract. A new premium was agreed to for special assignment work, and workers will receive an additional 10-hour floating holiday, a 10-hour increase in administrative leave, and an increase in tuition reimbursement for employees. **Gregg Adam** assisted the SMA in its negotiations.

¹ See *The California Public Records Act: An Invaluable but Overlooked Tool for Labor Relations* in this issue (p. 11).

In The News

UNITED STATES SUPREME COURT REPORT: MESSING ADAM & JASMINE LLP SPEARHEAD NATIONWIDE PUBLIC SAFETY COALITION FIGHTING TO PRESERVE UNIONS' RIGHT TO COLLECT AGENCY FEES FROM NON-MEMBERS

By Gary Messing and Gregg Adam

Background

The 2015-2016 term of the United States Supreme Court has opened in Washington D.C. Among the most closely watched cases on the Court's docket this year will be *Friedrichs v. California Teachers' Association*. This is a challenge by a group of California teachers to laws requiring that they contribute financially to the labor union that represents them, bargains for their increased wages and benefits, files grievances on their behalf, etc.

The teachers behind the lawsuit are non-union employees represented by the California Teachers' Association ("CTA"); so their contributions are commonly known as "fair share" or "agency" fees.

Agency fees have been permitted in the public sector since 1977, when the Supreme Court ruled, in *Abood v. City of Detroit*, that whereas closed shops (meaning employees had to be a member of a union in order to be employed) were not constitutionally-permitted in the public sector, agency fee agreements, which require non-members to pay a fee towards the costs of bargaining and representation, were.

In recent years, the conservative majority on the Supreme Court, especially Justice Samuel Alito, has increasingly signaled its intention to try to overturn *Abood*, declare agency fee agreements constitutionally prohibited, and make right-to-work laws the law of the land. This threat comes notwithstanding the California Legislature's recognition of the critical role agency fee provisions play in achieving harmonious labor relations. So called "right-to-work" states prohibit union security agreements, such as agency fee provisions, enabling "free-riding" as a means to reduce the membership and dilute the power of labor unions. Free riding is when an employee is represented by a union, gets all the same negotiated wages and benefits, has the right to have grievances (including disciplinary appeals if they are contractual) filed on his or her behalf, but does not contribute a dime towards the cost of these benefits. Exclusive bargaining representatives with a high percentage of non-

members could suffer a crippling blow to have to support all of the non-members fairly under the legal duty of fair representation.

This time around, after several near-misses, union supporters fear that Justice Alito has patched together a five-justice majority to invalidate agency fee agreements on the premise that they interfere with the First Amendment rights of non-members. In recent years, in *Knox v. SEIU (2011)* and then *Harris v. Quinn (2014)*, in minority or concurring opinions (i.e., opinions supported by less than a majority of the Court), members of the conservative wing of the Court have aggressively laid out their case for why state collective bargaining laws that allow non-union employees to be charged a fee for their labor representation purportedly violate such employees' free speech rights.

The fact that the Court has taken another agency fee case so quickly after *Harris* has union advocates convinced mischief is afoot.

Agency Fee or Fair Share Clauses

An agency fee or fair share provision is a clause (usually appearing in a collective bargaining agreement) that allows a labor union that is the exclusive representative of a particular bargaining unit to charge a fee to non-members attributable to the cost to the union of bargaining for and representing non-members. Because an exclusive representative, such as a POA or DSA, has a duty of fair representation to both union members and non-members with respect to matters governed by the collective bargaining agreement, most collective bargaining laws, including all of California's, permit the union to charge the non-members an amount for this burden. The law is well-developed on what expenditures may or may not be charged: costs associated with collective bargaining and administering the collective bargaining agreement generally may be charged; costs associated with political activity on behalf of the union generally may NOT.

In terms of process, a union will base what it charges a non-member on its expenditures in the prior year. Non-chargeable items (political expenditures primarily) will be separated from collective bargaining related expenditures. So, for example, if 75% of the union's expenditures in 2013 were collective bargaining related, then, in 2014, a non-member would be given the opportunity to opt-out of paying the full rates paid by a member and instead only pay 75% of the member rate (i.e.,

the 2013 percentage). If the non-member does not exercise her opt-out rights, she will be charged the same fee as a full member. Members who have a bona fide religious objection to contributing to labor unions can elect instead to pay their agency fee amount to a designated charity.

Under existing California law, a union has it within its own power to prevent any represented employee from “free-riding”—i.e., enjoying the fruit of the union’s efforts (e.g., better wages and working conditions) without paying some amount for it in return.

The Public Safety Coalition

The member associations comprising the Public Safety Coalition played a significant role in helping to assemble a nearly half-million-member strong coalition of public safety employees who filed an amicus curiae—or friend of the court—brief in the United States Supreme Court supporting the right of the California Teachers’ Association to collect fair share fees from non-members. Our coalition was comprised of the Peace Officers Research Association of California (PORAC), PORAC Legal Defense Fund, National Association of Police Organizations, CAL FIRE Local 2881, the California Correctional Peace Officers’ Association, the New York State Association of Police Benevolent Associations, the Detectives’ Endowment Association of the New York City Police Department, California Statewide Law Enforcement Association, the Davis Professional Firefighters Association, Local 3494, the Fresno Deputy Sheriff’s Association, the San Francisco Police Officers’ Association, the Deputy Sheriffs’ Association of Santa Clara County and the Engineers and Architects’ Association.

The brief was crafted by Gary Messing and Gregg Adam of Messing Adam & Jasmine LLP together with the Stanford Law School Supreme Court Litigation Clinic and Stanford Law School Professor and esteemed Supreme Court practitioner Pamela S. Karlan. This team worked in close coordination with the AFL-CIO and the National Education Association to style a brief that emphasized the unique role agency fees play in public safety unions. The full brief – which may be viewed at: <http://majlabor.com/wp-content/uploads/2015/04/Friedrichs-Coalition-Amicus-Curiae-Brief-111215-No.-14-915-00015641xD-C64A.pdf> – stressed how public safety unions play a vital role in ensuring that the employees they represent can protect the public. This ranges from improving employee safety and training, to fostering solidarity among safety workers, to improving recruitment and retention of high-quality public

safety employees. And it explained how much importance the California Legislature has attached to agency fees in all of its labor relations statutes, how California has structured its collective bargaining model around robust unions representing public safety employees, and how the elimination of agency fees would threaten public safety by undermining the role of public safety unions. The brief stresses the need for solidarity between employees working in paramilitary-type organization who depend upon one another for their safety and lives. The brief (uniquely amongst all the briefs filed) illustrates how, where someone is working next to a free rider and carrying that person’s freight, the potential for undermining solidarity exists and threatens to fracture working relations within the public safety entity.

The Coalition was in good company: amongst the other groups filing amicus briefs in support of the California Teachers’ Association were the US Government; Constitutional Law Scholars, more than 20 States, multiple Employer School Districts, the National Women’s Law Center, the IAFF, Corporate and Labor Law Professor groups, Current and Former Republican Members of State Legislatures and Congress and AFL-CIO.

Why this matters to you

At a base level, this matters because the idea of some employees getting the benefit of better wages, benefits, and working conditions, but relying on you to foot the bill for achieving them is morally objectionable. This “free-riding” is particularly problematic in the tightly-knit public safety workplace. Public safety unions have traditionally enjoyed extremely high levels of voluntary membership, usually upwards of 95%; however, where the option is paying 75% of the cost as a non-member versus paying 100% of the cost as a member, the economic incentive to leave is narrower as compared to—if Friedrichs prohibits agency fees—100% versus 0%. As our brief asserts, “This risks setting in motion a union ‘death spiral’: as membership drops, the union will have to increase dues to cover its expenses, which will create further incentives for additional workers to quit the union.”

But going beyond that, lest anyone doubt that this is a critical issue for labor unions, including POAs and DSAs, the Economic Pay Institute—contemplating a post-Friedrichs world where fair share fee provisions are declared unconstitutional, has concluded in a recent study that eliminating fair share fees and making public employment “right-to-work” would increase what it calls the “pay penalty” for working in state and local

government. In other words, if agency fees are invalidated, the economic data strongly suggests peace officer pay will decrease significantly over time.

The Economic Pay Institute's study made five key findings:

1. State and local government employees earn less than similar private-sector workers, even though their education level (the most important predictor of earnings) is higher; however, they receive better health benefits and pensions.
2. Public-sector unions raise wages of public employees compared with similar non-union public employees somewhere to the order of 5%-8%, which helps to narrow the private-public wage gap in those unionized sectors.
3. However, public-employee unions in full collective-bargaining states that permit union security (i.e., agency shop clauses) raise total compensation to competitive market standards set by the private sector. In other words, only public employees in states with full collective bargaining make as much as their private-sector peers.
4. If the Supreme Court renders agency shop clauses unenforceable for public employees, it will shrink union membership because more people will try to gain services without paying for them (the "free-rider" problem).
5. If the court renders agency-shop clauses unenforceable for public employees, it will ultimately reduce public-employee compensation by up to 9%.

These are daunting long-term prospects.

While an adverse decision will likely have less of an immediate impact on public safety unions, due to the high-level of voluntary membership they maintain, the blow to other unions will be significant and will inevitably reduce the overall effectiveness of all unions nationwide. It can only be hoped that the presence of the Public Safety Coalition, amongst the many voices supporting agency-shops, causes the conservative majority on the Supreme Court some pause before turning public sector labor relations upside down.

Oral argument was heard Monday, January 11, 2016 by the United States Supreme Court in the first case on the Court's 2016 calendar. The transcript from the hearing and initial reports from those who attended suggest that the conservative majority on the Supreme Court will rule in favor of Friedrichs

and set in motion a series of sweeping attacks on organized labor in the public sector. We expect to see a decision by summer.

Postscript: Of most interest to public sector labor unions after Justice Antonin Scalia's recent death is its impact on *Friedrichs*. Please see our Labor Beat Blog from February 17, 2016 at <http://www.laborbeatblog.com/?p=531>.

AROUND THE STATE

CALIFORNIA SUPREME COURT CHIPS AWAY AT FIREFIGHTERS' RIGHTS

By Jason Jasmine

In a somewhat surprising decision handed down by the California Supreme Court in August of last year, it unanimously held that the Firefighters Procedural Bill of Rights Act (Gov. Code section 3250 et seq.) does not necessarily give a firefighter the right to review and respond to negative comments in a supervisor's daily log memorializing that supervisor's thoughts and observations concerning an employee, when that log is used as a memory aid in preparing performance plans and reviews. [*Poole v. Orange County Fire Authority* (August 24, 2015) WL 4998965]. A copy of the opinion is available at <http://www.courts.ca.gov/opinions/documents/S215300.PDF>.

In overturning the Court of Appeal, the key issue upon which the Court based its holding was that the log at issue in this case was not shared with, or available to, anyone other than the supervisor who wrote the log, thus it does not constitute a file "used for personnel purposes by his or her employer" for purposes of the Act. Although this was a somewhat narrow holding, we are concerned about how it will be applied going forward. Will there be secret "logs" kept by all those who supervise firefighters? Will those secret logs – though not shared or used by others – be used by the supervisor to "refresh" his or her memory and subsequently create a document that is used for review and/or discipline many months after the incident at issue – when, by that point, the firefighter's memory may have faded? The Court recognized such potential prejudice to the firefighters, but sidestepped it by noting that the section at issue (Gov. Code section 3255) simply requires the opportunity to review and respond to an adverse comment entered into a personnel file or a file used for personnel purposes. Here, the Court concluded that a supervisor's log used only to refresh that supervisor's memory and not seen by or

available to others, was not a personnel file or a file used for personnel purposes, thus the firefighter did not have the right to review and respond to it.

This decision is almost certain to lead to additional fights over when a file is “shared with or available to” others. Additionally, questions are likely to be raised about if and how this will apply under the nearly identical Public Safety Officers Procedural Bill of Rights Act, and the interplay with *Brady* disclosure obligations.

ATTORNEY GENERAL OPINES THAT DISCLOSING A BRADY LIST IS PERMITTED UNDER PENAL CODE SECTION 832.7

By Jennifer Stoughton

Attorney General Kamala Harris issued an opinion in October agreeing with the California Supreme Court’s decision earlier this year regarding the prosecutions’ access to confidential personnel information in *People v. Superior Court (Johnson)* and further concluding that the release of a *Brady* list to a district attorneys’ office did not violate officers’ rights under Penal Code 832.7 or the Public Safety Officers Bill of Rights (POBRA).

The Opinion, number 12-401, reached the same ultimate conclusion as the California Supreme Court did in *Johnson* – that prosecutors must follow the same procedures as criminal defendants (i.e. a *Pitchess* motion) to gain access to confidential personnel records. Our discussion of the *Johnson* case can be found on page 13 of our last issue of the Labor Beat (October 2015 | Vol. 28 No. 1) available at <http://majlabor.com/wp-content/uploads/2015/09/LaborBeatVol.28No1.pdf>.

The Opinion also went a step further and concluded that the release of names of officers who have sustained findings of misconduct that reflect moral turpitude, untruthfulness, or bias within the proceeding five years (i.e. a *Brady* list) to a district attorneys’ office did not violate Penal Code section 832.7. The proposed policy, submitted by the California Highway Patrol and the Ventura County District Attorneys’ Office, consisted of a secure database or list containing only the names of the officers with sustained findings against them. Officers who were placed on the *Brady* list would be informed and given an opportunity to appeal his/her inclusion. All prosecutors would be able to search the list for officers who had been subpoenaed to testify in upcoming criminal trials. The prosecutor would then have to file a *Pitchess* motion to access the confidential personnel records of any officer witness on the *Brady* list. This procedure, the Attorney General found, gave

the CHP the ability to facilitate compliance with *Brady v. Maryland*, but at the same time provided sufficient protection for the officers by not running afoul of either Penal Code section 832.7 or POBRA.

PERB HAS JURISDICTION OVER UNFAIR LABOR PRACTICE CHARGES FOR ORGANIZATIONS, COMBINING SWORN AND NON-SWORN EMPLOYEES

By Gary M. Messing

PERB recently ruled that PERB has jurisdiction of unfair labor practice charges filed on behalf of organizations representing both peace officers and non-peace officers. The decision is *Santa Clara County Correctional Officers Association v. County of Santa Clara*, PERB Decision No. 2431-M (2015). The case arises out of a challenge based on the fact that the Meyers-Milias-Brown Act in Government Code section 3511 explicitly excludes from PERB’s jurisdiction unfair labor practice charges filed by “persons who are peace officers.” However, PERB noted that the unfair labor practice charge in that case had been filed by an employee organization, and not a peace officer.

It will be interesting to see whether PERB will assert its jurisdiction over unfair labor practice charges filed by organizations that represent only sworn peace officers.

PUBLIC EMPLOYEES MAY BE DISCIPLINED—EVEN TERMINATED—FOR MISCONDUCT COMMITTED WHILE ON UNPAID, RELIEVED-OF-DUTY STATUS

By Jonathan Yank

In *Negron v. Los Angeles County Civil Service Commission* (2015) 240 Cal.App.4th 874, former Los Angeles County Sheriff’s Deputy Thomas Negron challenged the Sheriff’s Department and County Civil Service Commission’s decision to terminate his employment due to misconduct occurring while he was relieved of duty on unpaid stress leave. That misconduct included conviction for driving while under the influence of alcohol, driving with a suspended license, and being belligerent and making false statements to a law enforcement officer.

Negron argued that his relieved-of-duty status took him outside the classified service and, thus, precluded the imposition of discipline for his misconduct. The Court of Appeal disagreed, stating “[t]he fact that a person is on leave from his ‘employment’ makes him no less an employee.” Noting that Negron’s conduct violated numerous department policies and brought discredit to the department, the Court upheld the termination.

COURT OF APPEAL RULES REINSTATEMENT FROM DISABILITY RETIREMENT REQUIRES UNCONDITIONAL REEMPLOYMENT

By Lina Balciunas Cockrell

In the case of *California Dept. of Justice ("DOJ") v. Board of Administration of the California Public Employees Retirement System ("PERS")*, et al., 242 Cal.App.4th 133 (2015), the Court of Appeal affirmed a PERS determination that once a state employee who receives an industrial disability retirement applies for and is granted reinstatement, the employee must be reinstated with the public agency unconditionally.

Respondent, a special agent supervisor ("SAS") with the DOJ, received an industrial disability retirement in December 2008 for a spine condition arising out of several injuries sustained on the job. Approximately 9 months later, respondent applied to PERS for reinstatement. Following an orthopedic evaluation, in February 2010, PERS concluded Respondent was eligible for reinstatement. The DOJ offered to reinstate her on the condition that she complete medical and psychological evaluations and a background investigation. Respondent rejected the DOJ's offer. The DOJ appealed PERS's decision to reinstate Respondent and, following a hearing, the Officer of Administrative Hearing denied the appeal, which decision PERS adopted.

Respondent then filed a constructive medical termination/suspension appeal with the State Personnel Board, alleging that PERS's reinstatement decision entitled her to unconditional re-employment with the DOJ. Following another hearing, the administrative law judge returned a decision in favor of Respondent, which the SPB adopted, ordering the DOJ to reinstate Respondent to an SAS position unconditionally and awarded back pay from the date Respondent appealed to the SPB.

The DOJ filed petitions for a writ of administrative mandamus (judicial review of an agency decision) in Superior Court, challenging the PERS and SPB decisions. Respondent also filed a petition, arguing that back pay should be calculated from the date that PERS granted her request for reinstatement. The trial court denied the DOJ's petitions and granted Respondent's back pay petition. The DOJ appealed.

The DOJ did not dispute that Respondent no longer had the disabling condition that led to her disability retirement; however, the DOJ contended that in order to be eligible for reinstatement, Respondent had to meet minimum standards for a peace officer as set forth in Government Code section 1031

and that PERS should have determined whether Respondent suffered from any other physical, emotional or mental condition that might adversely affect the exercise of her powers as a peace officer.

The Court of Appeal disagreed.

Government Code section 21192 controls PERS's requirements when a recipient of a disability retirement applies for reinstatement. After a medical examination by a physician or surgeon appointed by PERS, the board must determine whether the employee is "still incapacitated" for duty, based on the position held by him or her when he or she retired. The Court of Appeal concluded that the term "still incapacitated" in the statute "suggests the scope of the board's evaluation is limited to determining whether the conditions for which disability retirement was granted continue to exist or not." The Court of Appeal further concluded that the statute did not provide PERS with the authority to identify new physical, mental or emotional conditions that might adversely affect the exercise of an employee's duties. The Court reasoned that newly discovered conditions might not have been sustained on the job or meet the requirements for industrial disability retirement.

The Court of Appeal further rejected the DOJ's contention that, following a PERS determination that Respondent was no longer incapacitated, she had to receive an offer of employment by the DOJ in order to be taken off disability retirement. An offer to reinstate the employee is mandatory.

Finally, the Court of Appeal rejected the DOJ's contention that it was entitled to condition reinstatement on medical and physical evaluations, as well as an updated background investigation. Conditions of reinstatement would be contrary to the mandatory reinstatement provisions of the statutory scheme. The Court noted that although the DOJ was required to reinstate Respondent, it could then pursue an evaluation of her fitness for duty as a result of any other conditions and an updated background investigation "under its usual procedures."

COURT OF APPEAL VOIDS ACKNOWLEDGMENT THAT REQUIRES REIMBURSEMENT OF ACADEMY COSTS

By Lina Balciunas Cockrell

The Fourth District Court of Appeal has ruled in the matter of *In re Acknowledgment Cases*, 239 Cal.App.4th 1498 (2015), that an agreement between the City of Los Angeles and its police officers requiring reimbursement of training costs upon voluntary separation within five years was null and void because it included reimbursement of “department-required” training in addition to the statewide-mandated POST training. In an effort to combat a problem with officers graduating from the academy and, shortly thereafter, leaving the department (“LAPD”) to join other law enforcement agencies, the city enacted a code section requiring reimbursement by the officer if s/he voluntarily left LAPD after serving less than 60 months following graduation from the academy and went to work for another law enforcement agency within a year after separation from LAPD. The code section required the new hired officer with LAPD to sign an agreement to this effect (the “acknowledgment”). The city then sued several officers for breaching the acknowledgment.

Labor Code section 2802 requires an employer to indemnify its employee “for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties.” However, there is no requirement that an employer pay for training that leads to licensure of an employee, even if a license is required for employment. A license is required by a state or locality as a result of public policy. The Court of Appeal therefore concluded that because POST training is required by law (Penal Code 832, 13510 et seq.) and a POST certificate is a statutory prerequisite to exercising the powers of a peace officer in California, a POST certificate is, in effect, a licensure to act as a peace officer. As a result, the Court of Appeal further concluded that POST training is an expense to be borne by the individual officer.

However, LAPD academy training consisted of 644 hours of POST training and 420 hours of “department required” training, the latter of which addressed issues and needs specific to the LAPD. Therefore, Labor Code section 2802 bars the city from requiring police recruits to reimburse it for the cost of the “department required” training, making the acknowledgment null and void.

The city was unable to sever the part of the acknowledgment requiring reimbursement for POST-mandated training because it forfeited this argument by not raising it at trial. Thus,

the acknowledgment was null and void in its entirety and the defendant officers were not liable to the city for reimbursement of any of their training costs.

Across The Country

IT IS FOR AN ARBITRATOR—NOT A COURT—TO DECIDE WHETHER A COLLECTIVE BARGAINING AGREEMENT REQUIRING ARBITRATION OF CONTRACT DISPUTES HAS EXPIRED

By Jonathan Yank

In *International Alliance of Theatrical Stage Employee and Moving Picture Technicians, Artists, and Allied Crafts of the United States (IATSE) v. InSync Show Productions, Inc.* (9th Cir. 2015) 801 F.3d 1033, the Ninth Circuit Court of Appeals was called upon to decide a dispute over whether to compel arbitration of a labor grievance when the employer asserted that the collective bargaining agreement had expired. IATSE disputed that the contract had expired, pointing to a so-called “evergreen” clause providing that the contract “shall continue in full force and effect to and including December 31st, 2007 and from year to year thereafter.” (Emphasis added.) Noting that the dispute hinged on the meaning of the “evergreen” clause and that the parties had agreed to arbitrate all disputes concerning the meaning of the contract, the Court affirmed the lower court’s order compelling arbitration.

UNIONS MUST BE GIVEN ACCESS TO SITE OF FATAL WORKPLACE ACCIDENT

By Jennifer Stoughton

The Seventh Circuit Court of Appeals has ruled that a union has a right to have an investigator access the site of a fatal workplace accident because a union’s right to represent its employees vastly outweighs the employer’s interest in protecting its property rights.

The case, *Caterpillar Inc. v. NLRB*, No. 14-3528 (7th Cir. 2015), arose after a fatal accident at Caterpillar’s weld shop where a worker was crushed to death by a 36-ton “crawler”—similar to the tracks of a bulldozer. The union hired an experienced health and safety specialist to investigate the cause of the accident but the employer refused to allow access accident site. The employer did permit the investigator to view videos of a reenactment of the accident. The Union challenged that decision before the NLRB. The board found for the Union and

ordered that the investigator be permitted access to the accident site.

The Seventh Circuit Court of Appeals agreed with the NLRB. The Court ruled that a “union’s duty to attend to the safety of the employees whom it represents entitles it to insist on performing its own investigation of safety issues, rather than relying entirely on data given it by the company.” Moreover, the employer could not show that allowing the investigator to conduct an on-site investigation would cause actual harm to the company. And, since the employer had not made any determination as to the cause of the accident, or taken any steps to prevent it from happening again, the Court found that the investigator could uncover the yet-unknown cause of the accident, leading to changes that would reduce the chances of a future accident.

US SUPREME COURT AFFIRMS QUALIFIED IMMUNITY IN EXCESSIVE FORCE CASE

By Lina Balciunas Cockrell

In its opinion in the case of *Mullenix v. Luna*, 136 S.Ct. 305 (2015), issued on November 9, 2015, the United States Supreme Court upheld a Fifth Circuit decision granting qualified immunity to an officer who fired at the car of a fleeing arrestee, killing him. The arrestee had led officers on a high-speed chase for 18 minutes, during which time the arrestee twice called the police dispatcher, claiming to have a gun and threatening to shoot at the officers if they did not abandon their pursuit. The dispatcher relayed the threats, as well as a report that the arrestee might be intoxicated to the officers. While two officers maintained their pursuit, others set up tire spikes at three locations. Officer Mullenix came up with the idea of shooting at the car to disable it. Mullenix fired six shots, four of which struck the arrestee’s upper body, killing him.

The estate filed a federal lawsuit under 42 U.S.C. 1983 claiming Mullenix violated the Fourth Amendment by using excessive force. Mullenix claimed qualified immunity barred the suit. Qualified immunity shields government officials from civil liability so long as their conduct “does not violate clearly established statutory or constitutional rights of which a reasonable official would have known.” Though it has never faced this precise set of facts, the Supreme Court affirmed that it has “never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity.”

Though it was designated a “*per curiam*” opinion, which means it is unsigned and usually unanimous, Justice Sonia Sotomayor wrote a scathing dissent against the officer. Justice Sotomayor said Mullenix had no training in shooting to disable a vehicle, had no permission to shoot, and did not wait to see if the spikes stopped the vehicle. “Under the circumstances known to him at the time, Mullenix puts forth no plausible reason to choose shooting at [the arrestee]’s engine block over waiting for the results of the spike strips” and thus should be held to have violated a clearly established right.

FEDERAL COURT DENIES MENLO PARK FIREFIGHTERS’ ASSOCIATION FLSA CLAIMS

By Jennifer Stoughton

The Ninth Circuit Court of Appeals ruled that the FLSA **does not** require an employer to compensate firefighters for time spent traveling to pick up safety gear and that annual leave cash out does not have to be included in the regular rate calculation. In that case, *Balestrieri, et al. v. Menlo Park Fire Protection District*, 800 F.3d 1094 (2015), the Court found that firefighters who travelled between fire stations to pick up or drop off gear did so solely as a result of their own choice. They could have, for example, brought the gear home with them the last time they worked a shift. For that reason, the Court ruled, the firefighters failed to establish that their travelling between fire stations served the District. It was, therefore, not compensable under the FLSA.

The Court also denied the claims related to annual leave payments. The Court reasoned that annual leave cash outs were made in order to reduce the District’s liability for banked leave hours and were not similar to sick leave cash outs or an award for good attendance. Therefore, they did not have to be included in the regular rate used to calculate overtime.

While the decision was disappointing, it is important to note that it was specific to the facts of the case and may not be generally applicable to all employees. We are seeing an uptick in FLSA violations because employers are not including all premium pays in the regular rate calculation and are cashing out comp time at the wrong rate. Messing Adam & Jasmine recently secured a significant victory for one client (including attorneys’ fees) and are in the process of trying to settle several others. Because the FLSA is so complex, in many of these cases neither the employer nor the association were even aware of the violations until we took a close look at pay practices.

Please contact us if you are concerned that your employer's pay practices do not comply with the FLSA.

NLRB AFFIRMS IMPORTANCE OF RIGHT TO REPRESENTATIVE IN MEETING WITH POTENTIAL DISCIPLINARY CONSEQUENCES

By Lina Balciunas Cockrell

In the case of *Bellagio, LLC*, 362 NLRB No. 175 (Aug. 20, 2015), the National Labor Relations Board underscored the importance of Weingarten rights in concluding that an employer cannot take action against an employee for asserting the right to a representative, even when that action does not involve a loss of pay.

A guest at the Bellagio casino in Las Vegas filed a complaint that a bellman tried to coax a tip and was rude when the guest refused. Two casino Front Services Supervisors called the bellman in for a meeting. At the beginning of the meeting, the bellman asked if he could be disciplined and requested a Weingarten representative. The supervisors could not locate a steward. They then asked the bellman to sign a statement regarding his interaction with the casino guest. The bellman refused to do so without a steward and said he would return to work. The supervisors issued the bellman a "suspension pending investigation" form and escorted him off the property.

The next day, the bellman met with management, with a steward in attendance. At the meeting, he completed a statement regarding the incident at issue and was given a verbal warning. He then returned to work. The bellman received no loss of pay as a result of his suspension.

The National Labor Relations Board concluded that the suspension, brief though it was and with no resulting loss of pay, constituted an "adverse employment action." The suspension was a direct result of protected activity — that is, a request for a steward prior to completing a written statement about alleged misconduct. Thus, the bellman's removal from the workplace pending potential disciplinary action had a chilling effect on the exercise of Weingarten rights and constituted an illegal interference with employee rights under Section 8(a)(1) of the National Labor Relations Act.

FOR YOUR INFORMATION

THE CALIFORNIA PUBLIC RECORDS ACT: AN INVALUABLE BUT OVERLOOKED TOOL FOR LABOR RELATIONS

By Jennifer Stoughton

One of the most helpful, and most often-overlooked, tools in labor relations is the California Public Records Act, or "CPRA" for short. The CPRA requires public agencies to turn over public documents within 10 days upon request. Often, the CPRA is the quickest way get access to necessary documents for grievances and/or bargaining. And, because the CPRA has a mandatory attorneys' fee provision for a party that successfully sues and compels an agency to release even one single document, public agencies are much more apt to produce documents requested via the CPRA in a timely manner than through information requests or litigation discovery.

The CPRA defines a public record as anything that is generated or used by a public agency. This includes emails, calendar entries, pay job contracts, policies, budget calculations, and a slew of other types of documentation created and/or used by public agencies. Certain types of information are excluded from disclosure, including confidential personnel information, attorney-client information, deliberative process information, as well as any documentation where the public entity can show that the public's interest in not disclosing the information is greater than the public's interest in having access to the information.

Messing Adam & Jasmine uses the CPRA as a tool to get information quickly and efficiently from employers on a regular basis. Recently, we had a situation where an employer refused to produce information related to an exam. After the employer refused to turn over the information, we made a second, related request for the email retention policy. The employer never responded to the second request and refused to turn over any documents. We sued, and even though the Court ruled that the employer correctly refused to produce documents related to the exam, the Court found that the employer violated the CPRA by failing to produce the email retention policy. As a result, the Court ordered the employer to produce the policy and awarded our client a significant amount of attorneys' fees. This is one example of how the CPRA can be a valuable tool in labor relations.

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Please send any correspondence, requests, comments, to janine@majlabor.com or

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