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California Supreme Court Decides Spielbauer – Lybarger Rights are Secure

By Gary M. Messing and Jason H Jasmine

On February 9, 2009, the California Supreme Court reaffirmed 40 years of precedent and practice regarding the conduct of internal investigations by public entities. In *Spielbauer v. County of Santa Clara*, the California Supreme Court overturned the Sixth District Court of Appeal and confirmed that an employee can be compelled to provide a statement during an administrative investigation, and that the statement given under such compulsion cannot be used against the employee in any criminal proceeding unless the employee voluntarily surrenders his or her constitutional privilege against such use.

The facts of this case, and the potential ramifications of a victory by Mr. Spielbauer, resulted in the PORAC Legal Defense Fund along with the Attorney General of California, the California State Sheriffs Association and the California Police Chiefs Association (and many others), preparing amicus curiae briefs in favor of the position espoused by the County of Santa Clara. Although the County of Santa Clara had strong support from other associations, PORAC was the only employee-side organization to file an amicus brief on behalf of the County in this matter. On behalf of PORAC, the amicus curiae brief we filed took the counter-intuitive position of supporting the County. PORAC determined that such a position was necessary given the far-reaching impacts a victory for Mr. Spielbauer would have.

As you may recall, the Spielbauer case involved deputy public defender Thomas Spielbauer, who was being investigated by his employer for allegedly making deceptive statements in court, while representing a criminal defendant. Mr. Spielbauer's employer made several attempts to interview him, and during each of those attempts, Mr. Spielbauer refused to answer questions based on the advice of his attorney. In an argument that he carried from these initial interviews all the way to the

California Supreme Court, Mr. Spielbauer contended that his privilege against compelled self-incrimination (under both the federal and state Constitutions) dictated that he could not be compelled, on pain of dismissal, to answer potentially incriminating questions unless he received, in advance, a formal grant of immunity for direct or derivative use of his answers in any criminal case against him.

Ever since the U.S. Supreme Court cases of *Garrity v. State of New Jersey* (1967) 385 U.S. 493 and *Lefkowitz v. Turley* (1973) 414 U.S. 70, employers and employees have understood that a public employer can order its employees to answer questions about the performance of their official duties, even if the answers to those questions would be incriminating. However, California has long held that by compelling answers, under the threat of potential discipline, the statements are deemed coerced such that they cannot be used against the employee in a subsequent criminal proceeding. Perhaps the most famous California case dealing with this issue is *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, which is the origination of the phrase "Lybarger Rights". The California Supreme Court in Lybarger held that while an employee had the constitutional right to remain silent and not incriminate himself, such silence could be deemed insubordination (with consequent administrative discipline) and any statements the employee did offer under compulsion of threat of discipline could not be used in any subsequent criminal proceeding.

The Sixth District Court of Appeal, sought to turn the long history of cases, including Garrity and Lybarger on its head. In its decision in Spielbauer, the Sixth Circuit ruled that a public employee has a constitutional right to remain silent when questioned by his or her employer, and cannot be punished unless he or she refuses to answer questions under an express grant of immunity from a district attorney or U.S. attorney. According to the Court of Appeal, it would have been incorrect to tell an employee that he or she can be punished for not answering an employer's questions that could relate to potential criminal charges. The problem with this position, and the primary reason PORAC supported the County's appeal from the decision, is that under the Court of Appeal's analysis, any statement given by the employee is not truly coerced and therefore would not be excluded in a criminal prosecution without a formal grant of immunity. Of course, obtaining a formal grant of immunity – prior to determine whether a violation of the law had occurred – would be rare. In its decision, the California Supreme Court highlighted the fact that there is not constitutional or statutory provision specifically authorizing any official or public agency to confer a formal grant of immunity, in advance of discovering misconduct, simply because an employee refuses to answer questions during an administrative investigation.

If the Court of Appeal's decision in this case had been affirmed, employees would often be forced to choose between waiving their Constitutional rights or allowing an investigation to proceed without their input. As we have reported previously, many departments around the State had indicated their intent to simply choose not to interview the subjects of their investigations when any potentially criminal conduct presented itself. In most cases, the officers' statements are necessary to clear them at the investigative stage. Thus, under the Sixth District decision, officers who want to clear themselves would risk having their statement used against them criminally. An officer who chose not to give a statement during an investigation would still be faced with punitive action and would then be faced with yet

another decision at the administrative hearing – provide a statement at an administrative hearing (and allowing it to be used criminally) or face almost certain termination or other discipline.

Fortunately, the California Supreme Court decision affirmed the status quo, holding that while employees can be ordered to respond to questions during an administrative investigation, and can be punished for refusal to answer those questions, the use of those statements (or the fruits thereof) in any criminal proceeding is forbidden, without any need to obtain a formal grant of immunity. Mr. Spielbauer was not ordered to choose between his constitutional rights and his job. Rather, he was told that he was ordered to answer questions, and that no criminal use could be made of his answers. In the context of an administrative investigation, the employer was not required to seek, obtain, and confer a formal grant of immunity before requiring Mr. Spielbauer to respond to its questions.

As we argued in our amicus curiae brief on behalf of PORAC, this decision by the California Supreme Court was not only important to protect the rights of individual officers who are the subject of investigations, but was also important to protect the credibility of police and sheriff's departments throughout California. One of the principal purposes of Lybarger and its progeny, was to maintain the public's confidence in the trustworthiness and integrity of its law enforcement officers. The compelled statement, protected here by the California Supreme Court, helps to ensure that investigations are seen by the public as being as complete and thorough as possible. A system that would allow, and in many cases practically require, peace officers to refuse to give statements, would severely damage the public's trust in the system.

Although Mr. Spielbauer has indicated his intent to appeal to the United States Supreme Court, we believe it is unlikely that the U.S. Supreme Court would be interested in the case, given the fact that the California Supreme Court did such a thorough job of relying on both U.S. and California Supreme Court precedent in support of its decision.

DOJ Special Agent Prevails In POBR Suit Superior Court Finds Agent's Supervisor Conducted Unlawful Interrogation

By Kasey Christopher Clark
CSLEA Chief Counsel
and General Manager

CSLEA and the CSLEA Legal Defense Fund are pleased to report that on February 25, 2009, Sacramento Superior Court Judge Loren E. McMaster issued a ruling in favor of Department of Justice Special Agent Alfredo Cardwood, finding that DOJ violated the Public Safety Officers Procedural Bill of Rights Act (POBR).

The following is a brief description of the history of the case which gave rise to the Court's ruling: On March 17, 2006, Cardwood, while employed by DOJ as a Special Agent Supervisor, attended an off-duty party with other members of a task force he supervised. During the course of the evening Cardwood became intoxicated and was involved in two separate physical altercations with a task force member by the name of John Smothers. After leaving the party, Cardwood continued to seek out, but was unable to locate Smothers, to settle their dispute. (It is important to note that Cardwood has since apologized to Smothers and they remain friends to this day).

On March 18, 2006, Cardwood's supervisor, Special Agent in Charge Val Jimenez was contacted by Merced County Undersheriff Bill Blake who related he had received reports of Cardwood's conduct at the party the evening prior. Jimenez also spoke with Frank Pietro, formerly of the Atwater Police Department, who also expressed serious concerns regarding Cardwood's conduct.

Jimenez then spoke with one of the other members of the task force who had hosted the party who detailed Cardwood's conduct. Jimenez next contacted another DOJ Special Agent in Charge James Parker to get advice on how to handle the situation. The two specifically discussed the POBR implications of contacting Cardwood and Parker advised Jimenez not to question Cardwood.

Nonetheless, despite knowledge that Cardwood had engaged in potentially criminal conduct, and despite Parker's admonition, Jimenez called Cardwood and questioned him about the prior evening's activities. Jimenez did not advise Cardwood that his responses could subject him to disciplinary action which would have triggered Cardwood's right to request that a representative be present during questioning and a right to tape record the interview.

On May 31, 2006, when Cardwood was formally interviewed by DOJ, I asserted that the phone call placed by Jimenez constituted an interrogation within the meaning of POBR and that Cardwood had not been afforded rights that he was entitled to under the statute. I also demanded that DOJ provide a copy of any notes or memoranda prepared by Jimenez which related to the phone call.

In January of 2007, DOJ issued a Notice of Adverse Action proposing to dismiss Cardwood from employment with DOJ for the conduct at the task force party as well as for alleged dishonesty in the phone call with Jimenez. At the pre-deprivation Skelly hearing, Agent Cardwood and I were able to convince the Skelly officer there was no dishonesty and the proposed penalty was excessive. The Skelly officer reduced the penalty to demotion and eliminated the charge of dishonesty.

DOJ then issued an amended Notice of Adverse Action effective January 26, 2007, which removed the charge of dishonesty but replaced the word "dishonest" with "evasive" throughout the notice and alleged such evasiveness constituted neglect of duty, insubordination or other failure of good behavior. An appeal of the amended notice of adverse action was filed with the State Personnel Board and remains pending.

Given the importance of the enforcement of rights granted to peace officers, Cardwood requested the CSLEA Legal Defense Fund authorize coverage under the LDF Plan's affirmative relief or cases of high importance provisions. The LDF Trustees authorized coverage and authorized LDF Panel Attorneys **Gary Messing** and **Jason Jasmine** of the Sacramento office of Carroll, Burdick & McDonough to file suit against DOJ for violation of Cardwood's POBR rights.

After numerous law and motion filings and the completion of discovery, including the depositions of Cardwood, Jimenez and Parker, the parties stipulated to have the trial by the cross filings of summary judgment motions.

In the Court's initial tentative ruling issued on February 12, 2009, the Court denied both parties' motions based on a misunderstanding that the Court was being called upon to weigh disputed evidence, a practice not typically engaged in by the court on

summary judgment motions. At oral argument, the court's jurisdiction to rule was clarified. Messing argued that under both objective and subjective standards, the March 18, 2006 phone call constituted an interrogation within the meaning of POBR. Jasmine summarized the knowledge Jimenez had at the time of the phone call and addressed a point raised by DOJ that a favorable ruling would have no effect on the administrative case pending before the SPB. Jasmine responded, "if that were true, why then won't DOJ stipulate to the violation and the requested relief? It is because the relief may have an impact on the administrative case."

On February 25, 2009, after taking the matter under submission, the Court ruled that "Jimenez's telephone call with Cardwood constituted an interrogation that 'focused on matters that [were] likely to result in punitive action.'" The Court found that DOJ had thus violated Cardwood's POBR rights. The Court ordered the allegations in the amended notice of adverse action which related to the phone call be stricken and that DOJ be prohibited from taking discipline for conduct based on the statements made during the phone call. The SPB case is set for a pre-hearing conference on June 22, 2009.

Although the journey is not over, Special Agent Cardwood would like to express his gratitude to the CSLEA Legal Defense Fund Board of Trustees for authorizing the expenditure of LDF funds to pursue the case and to former ASA-DOJ President James Vitko who participated in making the request for coverage to the trustees. Agent Cardwood would also like to thank Gary Messing and Jason Jasmine for their excellent representation and "for being there every step of the way."

This case is a major success for Agent Cardwood and for all Bargaining Unit 7 peace officers as it sends the message CSLEA and its Legal Defense Fund will utilize all resources within their power to enforce the provisions of POBR. Agencies employing Unit 7 peace officers will think twice before intruding on these rights.

A PERB Administrative Law Judge Issues a Proposed Decision that Retired Annuitants Performing Bargaining Unit Work are Part of Bargaining Unit and Subject to Fair Share Fees

CB&M partner **Gregg Adam** and associate **Jennifer Stoughton** recently prevailed in an Unfair Practice Charge filed on behalf of California Correctional Peace Officers' Association ("CCPOA"). The unfair practice charge alleged two unfair practices committed by California Department of Corrections and Rehabilitation ("CDCR"): 1) unilaterally removing retired annuitants performing State Bargaining Unit 6 ("Unit 6") work from the bargaining unit and 2) failing to withhold fair share fees for retired annuitants working in Unit 6. CCPOA filed the unfair practice charge after learning that CDCR had begun using large numbers of retired annuitants to do Unit 6 work, including routine correctional officer duties. Previously, retired annuitants were only used sporadically for non-routine correctional officer posts such as parole agents. In its Answer to the Complaint issued by PERB, the State Employer contended, for the first time, that retired annuitants have never been part of the bargaining unit and therefore CCPOA did not have standing to assert an unfair practice charge.

After a two-day hearing and extensive post-hearing briefing on the issue, the Administrative Law Judge ruled entirely in CCPOA's favor. The Proposed decision ordered CDCR to: 1) recognize retired annuitants performing bargaining unit work as

members of the bargaining unit exclusively represented by CCPOA; 2) withhold fair share fees from retired annuitants working in Unit 6; and 3) make CCPOA whole for the failure to withhold fair share fees from the paychecks of retired annuitants since November 10, 2006.

The State has appealed the proposed decision to the PERB Board and the parties submitted all briefing on the appeal in December 2008. CB&M has now filed a similar Unfair Practice Charge on behalf of CDF Firefighters ("CDFF"). We will keep you updated with respect to both the final decision on the CCPOA matter, as well as the progress of the CDFF matter.

Senate Bill 1296 eliminates PERB's jurisdiction over interest arbitration

On September 20, 2008, Governor Schwarzenegger signed Senate Bill 1296 ("SB 1296") into law. SB 1296 modified the Meyers-Milias-Brown Act ("MMBA") to specify that the superior courts, and not PERB, have exclusive jurisdiction over actions involving firefighter interest arbitration. The legislation was sponsored by the California Professional Firefighters ("CPF") which was concerned that, unlike law enforcement organizations, firefighter organizations had been unable to proceed to interest arbitration in a timely manner.

Prior to the enactment of SB 1296, employers consistently forced employee organizations to exhaust PERB's time-consuming unfair practice procedures as a way to avoid interest arbitration. By remedying this disparity, SB 1296 ensures that firefighter organizations can go directly to superior court to compel interest arbitration, undoubtedly saving precious time and money for those organizations looking to invoke interest arbitration.

CSLEA Prevails (Yet Again) in Safety Retirement Battle; DPA Continues to Fight

By Jason H Jasmine

On multiple occasions, we have written about the status of the dispute between the California Statewide Law Enforcement Association ("CSLEA") and the Department of Personnel Administration ("DPA") regarding an agreement to enhance the retirement benefits of more than 3,500 state public safety employees. The agreement was silent as to whether the enhanced benefit would apply prospectively only, or instead would retroactively increase the retirement benefit for all previous years of service. The case wound through the courts for years before the Court of Appeal ordered the matter to arbitration.

On July 23, 2008, the California Statewide Law Enforcement Association ("CSLEA") prevailed in an arbitration worth more than $70 million in retirement benefits. On November 7, 2008, DPA's Petition to Vacate the Arbitration Award was denied, while CSLEA's Petition to Confirm the Arbitration Award was granted. Over the last five years, this matter has been litigated up and down the court system, and through a lengthy arbitration. DPA, however, is not content to simply abide by either the decision of a well-respected labor arbitrator, or the ratification of that decision by the Court. On January 28, 2009, DPA filed an appeal that will require the Third District Court of Appeal to weigh in on DPA's longstanding breach of its contractual obligations.

DPA's actions of delaying the inevitable will ultimately cost the State of California a significant amount more than if it just accepted all of the previous decisions in this case, due both to the interest on the past due amounts, as well as issues concerning funding sources.

We will, of course, keep you posted as this matter progresses.

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Yolo DSA Negotiates Strong Contract

By Ilsa vonLeden, former President, and current Treasurer, of the Yolo County DSA

The Yolo County DSA negotiated a remarkably good contract in the midst of the current financial crisis. This achievement is all the more remarkable as Yolo County is not only one of the most financially stressed counties in the state due to an inequity in the distribution on property tax monies, but this contract was negotiated while Yolo County enacted and planned stringent cost saving measures for other county departments including cutbacks in hours, layoffs and furloughs. We believe our success was due to the teamwork at the bargaining table - the DSA negotiating team working together with the county negotiating team. The chief negotiators for the DSA – **Gary Messing** of CB&M, and Yolo County – Mindi Nunes, were instrumental in achieving our goals. They worked together on and off the record to come to a positive resolution in these difficult times. Also instrumental were the efforts of the DSA's other negotiating team members – **Matt Davis, Jose Gonzalez, John Ney, Tim Martin**, and myself. We provided extensive research into the issues and comparable agencies. We were able to explain the impact of these issues on our members as well as the different needs of peace officers from the standpoint of recruitment and retention. We believe that very important to our success are the relationships we have cultivated with individual members of the county Board of Supervisors over the last several contracts. We have taken a genuine interest in county affairs and learned a lot from the supervisors about how the county is run, while we had the opportunity to discuss why certain issues are important to us.

This three year contract provides a 6.6% increase in salary over two years with the third year bringing compensation within 5% of the average of comparable agencies using a total compensation survey. Deputies will also receive longevity pay in 2.5% increments after each 10, 15, and 20 years of service. The county agreed to provide $25,000 life insurance. Standby pay increased by $1 per hour and shift differential both increased and was adjusted to include the switch several years ago to 12 hour shifts. Health in-lieu pay and bilingual pay both doubled. Vacation pay increased by 16 hours after 20 years of service. Educational and POST incentives are now stacked to a total of 10%. The definition of Training Officer was clarified. As trainees at our agency do not enter the patrol FTO program until partway through their probationary period - due to completing a training program and working first in Court Services, the probationary period was altered to ensure that a trainee who has completed the patrol FTO program will work alone for a minimum of 60 shifts before completing the probationary period. Also, unless the county provides a retiree medical trust on it's own by the end of this year (which is unlikely at this point) the county agreed to allow the DSA to join a retiree medical trust of it's own choosing with the county forwarding contributions to the trust.

Perhaps equally remarkable is the absence of take-aways. Both the county and the Sheriff's Department initially stood firm on proposed

changes which would have been very negative for our members. Due to pressures from court staff over procedures for officer appearances in prelims and trials, the Sheriff's Department incurs high overtime costs from our court cancellation policy, which is similar to that used by other agencies. Through a candid and open exchange of ideas aided by comparable agency research, we were able to pinpoint the problem and to convince the county and the Sheriff's Department representative that the deputies should not shoulder the burden created by other entities beyond our control, and we were ultimately able to retain our current court cancellation policy. Also, current procedures for major discipline result in appeals routinely going to arbitration – which is expensive and cumbersome for the county and the Sheriff's Department and which they would like to eliminate. This has also resulted in an abnormally high proportion of cases categorized as minor discipline whose appeals are decided in-house - a process which has proved unsatisfactory for our members. Now case law requires a full evidentiary hearing for minor discipline as well. The proposed policies sought to circumvent what we believed our members are entitled to under the law. Together with representatives of the county and the Sheriff's Department, we were able to work out a new policy which streamlined the procedures for major discipline and referred appeals of minor discipline to a three person board made up of two retired law enforcement officers and one county management representative not from the Sheriff's Department, which is an enlightened and positive change for our members. Additionally, new proposals by the county agreed to by other bargaining units would limit the ability of injured worker's to return to work and allow the county to terminate injured employees appealing worker's comp denials or seeking an Industrial Disability Retirement, both of which were ultimately dropped after Gary Messing explained the potential legal ramifications as well as the consequences for the employees.

We thank the bargaining representatives of both Yolo County and the Sheriff's Department for their fair minded, reasonable, open-minded, think-outside-the-box attitude, which allowed us all to reach agreement on a contract which we believe will benefit all of us – and in record time!

Update on Sacramento County Sheriff's Detective Scott Kolb

We previously reported on Sacramento County Sheriff's Detective Scott Kolb's victory in the Sacramento Superior Court, which vindicated his right to a hearing concerning a loss of the 10% hazard pay associated with a transfer out of the Narcotics Division. As you may recall, Kolb, represented by CB&M Labor Associate **Jason Jasmine**, obtained an order requiring the Department to provide Kolb with a full evidentiary hearing, as well as back pay to make up for the 10% hazard pay that was inappropriately taken from Kolb, until such time as a neutral third-party determines (after a full evidentiary hearing) that a transfer and loss of pay is appropriate.

Subsequent to the Court ruling, the parties scheduled Kolb's full evidentiary hearing. Prior to that hearing, however, the parties were able to reach an amicable settlement.

SPFAOA Obtains Impressive Increases

The South Placer Fire Administrative Officers Association ("SPFAOA") recently negotiated a new 39-month MOU with

impressive salary and benefit increases considering the local, state, and national economy. The agreement, with front-loaded raises, calls for a 6.87% salary increase upon ratification, an additional 4% on July 1, 2009 and an additional 5% on July 1, 2010, which will result in a compounded increase of almost 17% over the first 18 months of the MOU.

Effective July 1, 2010, the employees' will also be moved from the current CalPERS 2% @ 50 retirement formula to the CalPERS 3% @ 55 retirement formula. They also bargained for a single highest year computation, a sick leave buyout and the Employer Paid Member Contribution amendments. The District will continue to pay the employees' nine percent (9%) retirement contribution.

Effective January 1, 2010 the employees will begin to receive longevity bonuses ranging from $500.00 after 15 years to as much as $1,500.00 bonuses after 35 years.

Finally, the employees will receive large increases in the monthly employer contribution toward medical insurance. On January 1, 2010, the employees will begin receiving an additional $200.00 per month contribution toward their insurance costs. On January 1, 2011, the contribution will increase by another $100.00 per month.

CB&M labor representative **Richard Reed** was the Chief Negotiator for the SPFAOA.

SHRAEA's Hard Work Results in Good 4-Year Contract

The Sacramento Housing and Redevelopment Agency Employees Association ("SHRAEA") recently negotiated a new 4-Year MOU with some significant salary and benefit increases considering the local, state, and national economy. Although the SHRAEA agreed to forego a cost of living increase for 2009, SHRAEA obtained increases of 2.5% in January 2010, 3% in January 2011, and 3% in January 2012. Additionally, the agreement provides for salary adjustments of 5% in July of 2009, for seven classifications, as well as a 5% salary adjustment in January of 2011, for three additional classifications.

Critically, the agreement provides for significant increases in health insurance benefits. Over the life of the contract, the increases will be as much as $410 per month. The agreement also locked in the Employer "pick-up" of half of the employee contribution to PERS, through December of 2012.

Some of the other highlights included a doubling of the parking subsidy, from $45/month to $90/month and some "cleaning-up" of previously troubling MOU language. For the first time, the SHRAEA was also able to negotiate for the creation of a "leave bank" for SHRAEA officers, to conduct SHRAEA business.

The entire SHRAEA bargaining team, led by its Chief Negotiator – CB&M labor representative **Richard Reed** – put in a considerable amount of time and effort and helped to turn what was initially a somewhat contentious negotiation process into one that was conducive to obtaining an MOU acceptable to all parties.

Decision Requires "No-Huddle" Defense During Shooting Investigation

By Erick Munoz

In *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal.App.4th 1625, the Court was faced with the issue of whether an attorney could meet with more than one officer at a time prior to the initial interviews after a shooting. The case arose from a new department rule that prohibited what it termed "huddling," the act of several officers gathering with an attorney or other representative at the same time to discuss their upcoming interviews regarding the shooting.

The union brought the case asking the Court for injunctive relief to stop the enforcement of the "no-huddling" rule. The Court denied the union's request, finding that there was not enough harm to justify an injunction and also ruling that the union was not likely to succeed at the trial stage.

It is important to note that although the case was ultimately dismissed, this ruling does not necessarily apply to all peace officers, because the Court only ruled on the propriety of injunctive relief, it did not issue a ruling on whether the policy itself was lawful. If your individual department does not have a "no-huddling" policy, then the case changes nothing. However, if the department does have such a rule, or is considering implementing it, the case makes it difficult for a union to challenge such a rule, because this case strongly suggests that such rules are reasonable.

It is equally important not to overstate the Court's ruling. This case does not suggest that every officer must be assigned his or her own representative prior to a shooting investigation. The case only suggests that the representative cannot meet with all clients simultaneously. Likewise, the case only spoke approvingly of the department's rule in regards to those interviews that occur right after a shooting. The court wrote, "In other words, after an initial interrogation, any number of officers may choose to be represented by the same lawyer in any subsequent administrative or criminal proceeding." ALADS at 1638.

In sum, this ruling goes a long way toward validating any no-huddling rules already in effect or in the works. The Court did not say that huddling is unlawful, but it indicates strongly that policies preventing huddling will be upheld by the Courts. Practically, however, even if such rules are in place, it only means that a representative must meet with officers involved in shootings one at a time during the initial investigation. The case does not otherwise affect typical protocols for shooting investigations.

Following Copley Press, the Court of Appeal Closes Berkeley Police Review Commission Meetings to the Public When it Investigates Citizen Complaints

By Natalie Leonard

In *Berkeley POA v. City of Berkeley*, 167 Cal.App.4th 385 (2008), the California Court of Appeals affirmed the Berkeley POA's Superior Court victory, holding the City of Berkeley's Police Review Commission (PRC) must close its meetings to the public when it investigates citizen complaints. This protects peace officers' rights under the penal code and the Public Safety Officers Procedural Bill of Rights Act (POBR, Cal. Government Code § 3303 et seq.) First, Penal Code section 832.7, requires that peace officers' personnel records remain confidential. Second, any such investigation by

the PRC must provide peace officers full protection of their rights under the POBR. This decision fully affirmed the lower court's decision.

The City of Berkeley formed the Berkeley PRC in 1973. This nine-member, all-volunteer commission was designed to offer citizen participation and insight regarding citizen complaints. While the PRC held hearings open to the public from its inception through 2006, the Berkeley POA sought to change this in 2002 to protect its rights under the POBR and other statutes. The superior court held off making a decision until the Supreme Court's decision in a companion case, *Copley Press v. San Diego*, ruled that documents typically used in these hearings are confidential. The superior court decided the Berkeley POA case soon after Copley, closing the hearings to the public. The Court of Appeals in *Berkeley POA* simply extended Copley's reasoning to hearings involving those documents, seeing no reason to treat a hearing involving confidential documents differently than the documents themselves.

The court also found that the PRC needed to follow proper procedure under the POBR, which is required any time a peace officer is subject to interrogation or investigation by the employing agency that could lead to discipline. Even though the PRC is an independent agency, it functions as an arm of the employing agency because the Police Chief orders officers to cooperate with the PRC under penalty of discipline, and because the chief could look at the PRC's investigatory documents when determining whether to impose discipline.

An Arbitrator Can Issue a "Make Whole" Remedy -- How to Make the Employee Whole is Subject to Negotiation Between the Parties

By Natalie Leonard

In *Mossman v. City of Oakdale*, 170 Cal.App.4th 83 (January 14, 2009), the court affirmed an arbitrator's ability to write an award containing a "make whole" remedy to be determined by the parties at a later date. The court rejected the City's attempt to declare the award unenforceable when the parties could not agree on a "make whole" remedy. Instead, the court simply refused to confirm the judgment and returned the case to the arbitrator for clarification.

In this case, Ms. Mossman was a secretary whose job was eliminated as part of a layoff. Her employer denied her the right to bump into one of two open secretary positions in another department, even though she was qualified and had more seniority than those awarded the positions. She filed a grievance that ultimately went to arbitration. The arbitrator found that, indeed, the City had violated its own personnel rules when it prevented Ms. Mossman from exercising her bumping rights. The arbitrator further ordered that the parties should meet to figure out how to make Ms. Mossman "whole" in compensation for the violation. The arbitrator ordered the parties to meet and discuss how to make her whole, and to bring any unresolved issues to the arbitrator for resolution within thirty days. The parties failed either to agree or to bring the unresolved problems to the arbitrator within the timeframe.

The City then sued, arguing that the arbitrator's award was unenforceable because the arbitrator failed to resolve a dispute before

her by using the "make whole" language without specifying a particular remedy.

The court held that a decision including a make whole remedy was not unenforceable, though it could not be confirmed by the court either. Instead, if the parties could not agree on the "make whole" remedy, the solution was to return to the arbitrator to resolve the ambiguities.

So long as the arbitrator had found sufficient facts to resolve the dispute, this was sufficient. Here, the parties simply needed clarification of the arbitrator's award when they could not agree on a remedy. The arbitrator had offered the "make whole" remedy as a courtesy. The obvious solution would have been to reinstate Ms. Mossman and provide her with back pay. Since a year had passed, the other two individuals had been performing the jobs that Ms. Mossman sought, and Ms. Mossman may have moved on herself, the arbitrator was simply giving the parties the flexibility to craft a solution that best met everyone's needs. No issues were left completely unresolved.

The court indicated that the arbitrator was the proper person to resolve any clarification needed with the award.

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Statute of Limitations Equitably Tolled While Pursuing Administrative Remedy

In *McDonald v. Antelope Valley Community College District* (2008) 45 Cal.4th 88, the California Supreme Court held that the statute of limitations for pursuing racial harassment, discrimination and retaliation claims against the Antelope Valley Community College District ("District") was tolled while the plaintiffs were voluntarily pursuing internal administrative remedies against the District.

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Tuolumne DSA's Efficient Negotiations Lead to Increases

By Eric Erhardt, Tuolumne DSA Bargaining Team Member

There is a long standing history of the Tuolumne County Deputy Sheriff's Association (DSA) working without a contract for a number of reasons. The DSA met with the county in June of this year hoping to secure a contract before the current one expired. Thanks to all the hard work by the negotiation team and **Gary Messing** of Carroll, Burdick & McDonough the Tuolumne County Deputy Sheriff's Association quickly obtained a contract.

Despite the dwindling economy the DSA did not come away empty handed. Effective July of 2009 the DSA will see a 3% pay increase for all its members. In addition to the pay increase, the DSA members received an increase in their medical, dental and vision coverage. Under the current contract, DSA members receive a cafeteria allowance to pay for their medical benefits. Effective January 1st 2009, DSA members began receiving 100% paid medical, dental, and vision for themselves and their dependents. Those who receive benefits from their spouse, military, or from a private provider will continue to receive their $1200.00 a month allotment.

Dispatchers are now eligible for P.O.S.T. incentive pay. This is due to new language in the Memorandum of Understanding (MOU) and the new guidelines under P.O.S.T. for dispatch certificates. Uniform allowance for all persons required to maintain a uniform will increase from $900.00 to $1000.00 a year, with an advance of $400.00 for new hires. Also new hires for patrol and probation that live out of the area are eligible for a $2,500.00 moving

allowance. For those looking to further their education, DSA members can now receive up to $5000.00 per year in tuition assistance from the county.

The DSA received another new benefit that will have a positive impact on those looking to retire. Under the current contract when a DSA member retires, they can cash out up to 240 hours of unused sick leave at 100% and the remainder of their sick leave is cashed out at only 50%. Under the new contract, upon retirement, DSA members can apply any or all of their sick leave to PERS service credit, or they can cash out the same maximum as under the old MOU, and use the balance for service credit.

This is the first time in many years the DSA completed negotiations before the expiration of its current contract. The new contract is a one year deal and took effect January 1st, 2009.

Fresno DSA Settles Contract

By Eric Schmidt, Fresno DSA President

Although it is no secret that the economy is in bad shape with cities and counties scrambling to make sure their budgets are not going to get hacked by the State, the Fresno County Deputy Sheriff's Association (FDSA) wrapped up bargaining with the County of Fresno and locked up a two-year deal.

Gary Messing, with Carroll, Burdick, and McDonough was the chief negotiator for the FDSA. The negotiating team consisted of **Eric Schmidt, Isaac Torres, James Bewley, Manuel Flores, and Anthony Gomez**.

The FDSA and the County of Fresno opened up bargaining in July of 2007. The County immediately took an adversarial approach towards the FDSA. We believe this was in part due to the very lucrative contract the FDSA (led by Messing) negotiated with the County of Fresno in December 2005. We knew immediately we were in for a long haul.

The County's approach was to attempt to take back many benefits, which would have amounted to reversing most of the progress made at the table the last go around. The FDSA wasn't going to stand for it. Everything proposed throughout bargaining were take-aways and there was never a raise on the table. The motto of the negotiator was, "It's not that the County lacks the means to pay, but rather the willingness."

In October of 2008 with some major elections around the corner, there was a changing of the guard on the side of the county. On October 15, 2008 the FDSA and the County came back to the table and knocked out an agreement. From the time we started bargaining to the time we reached a deal, the economy had taken a nose dive and it was being reflected through constant budget constraints and criticism of the Sheriff and how she is spending her money. The FDSA and Messing took the approach of going in and getting a quick deal with the goal to reconvene at the bargaining table at a later time. Our tactic worked and a deal was reached. Below are some key points.

The contact is a two year deal, retroactive to December of 2007. Uniform allowance was previously broken down into a two-tier system, and is now all at one-tier, irrespective of whether the employee is a detective or a uniform-wearing deputy. We retained our Take-Home Patrol Car program (all patrol deputies have a take-home car), which was in

jeopardy. Our Corporal position (Deputy IV) was the only position in the entire department that was not subject to civil service protection. That has now changed. Also, the County's Health Insurance contribution will remain status quo, although the County was trying to reduce it considerably. An across the board salary increase of 3% was given to all members of the FDSA.

The FDSA considers this a positive contract due to our not losing any ground from the prior contract, keeping our take-home patrol car program and getting a pay increase at a time when people are losing their jobs throughout the country. The contract expires in December of 2009, so we will be right back at the table with the County in late 2009. So will the Sheriff Sergeants Association, which settled for a similar contract, also with Gary Messing as its chief negotiator.

In light of the economy and the condition of state and county budgets, this was a very good result for the Fresno Deputy Sheriff's Association (FDSA) and its members. The FDSA thanks the efforts of Gary Messing and all his staff from CBM for the work they did to reach our result.

National Litigation Expenses are Chargeable to Fair Share Fee Payers

In *Locke v. Karass*, 555 U.S. ____ 2009, January 21, 2009, the Supreme Court held 9-0 that a national union may charge fair share fee payers a pro-rata percentage of national litigation expenses so long as: 1) the national litigation relates to collective bargaining rather than political topics and 2) the local unions share costs equally. Several Maine state employees who were not members of their union were required to pay a fair share fee, representing their share of the non-political work that the union did on behalf of all members including the plaintiffs. These fair share paying non-members believed that they should not be charged for litigation that the national union prosecuted in another jurisdiction, even when that litigation might benefit these plaintiff non-members in the long run. The Court rejected plaintiffs' reasoning, and said that the litigation expenses here were chargeable. The Court used the same framework it applies to determine whether the national affiliate's office expenses are chargeable. This is a great outcome that allows unions to be more strategic in their national planning for the benefit of all members.

Public Employee Speech Retains Some Protections

By Jonathan Yank

Until recently, in determining whether a public employee's speech is subject to protection under the First Amendment, the courts engaged in a purely legal analysis involving the following two inquiries: (1) whether the speech touched on a matter of public concern; and, if so, (2) whether the interests of the employee, as a citizen, in commenting upon matters of public concern outweighed the interests of the public employer in efficiently performing its public services. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the United States Supreme Court added a third step in the analysis, requiring a determination whether the plaintiff spoke as a public employee or, instead, a private citizen. However, the Supreme Court left open the question whether this third component involves a purely legal analysis or a mixed legal and factual assessment.

Thus, in *Posey v. Lake Pend Oreille School Dist. No. 84*, 546 F.3d 1121 (9th Cir. 2008), the Ninth Circuit Court of Appeals was called upon "to determine whether, following the Supreme Court's recent decision in *Garcetti v. Ceballos*, the inquiry into the protected status of speech in a First Amendment retaliation claim remains a question of law properly decided at summary judgment or instead now presents a mixed question of fact and law." *Posey*, *supra*, at 1123. The *Posey* Court held that, following the *Garcetti* decision, the inquiry into whether a public employee's speech is protected is no longer a pure question of law, but is instead a mixed question of law and fact. Under the new mixed analysis, summary judgment in favor of the public employer is inappropriate when the following three circumstances exist: "(1) plaintiff has spoken on a matter of public concern, (2) the state lacks an adequate justification for treating the employee differently from any other member of the general public, and (3) there is a genuine and material dispute as to the scope and content of plaintiff's employment duties." Id. With respect to the third factor, speech made pursuant to job duties is not protected by the First Amendment, while speech made as a private citizen may be subject to protection. Id. at 1127 and fn.2.

Robert B. Posey was employed as a "security specialist" at a high school in the Lake Pend Oreille School District. In the course of his work, Mr. Posey came to believe that the school's safety and emergency policies were inadequate to address some of the problems at the high school, including the presence of drugs and weapons on campus. Mr. Posey first expressed these concerns in November of 2002 to the principal of the high school, but he received no response.

Thus, in October of 2003, during his personal time and using his own resources, Posey drafted and sent a letter to the District's Chief Administrative Officer, with copies sent to the Superintendent and several other administrators. Posey's letter primarily concerned the perceived inadequacies in the school's safety and security policies, but it also raised several personal complaints about what Mr. Posey perceived as mistreatment, interference, and reductions in his responsibilities by the school principal. Each of the safety concerns raised in the letter was substantiated by one or more specific examples.

At the end of the 2003-2004 school year, Posey was advised that his position was being consolidated with others and that he would not be hired to fill the consolidated position. Posey filed a grievance with the School District, which initially determined that he had been subjected to retaliation due to his letter to the District administration. However, the District's governing board reversed that decision.

Subsequently, Posey filed suit claiming he was terminated in retaliation for engaging in protected speech activities in violation of the First and Fourteenth Amendments. The parties disputed whether Posey had any policy-making responsibility to support a conclusion that his letter was required as a part of his official duties. The district court granted summary judgment in favor of the District. The lower court concluded, as a pure matter of law, that Posey's speech had been made pursuant to his job responsibilities and, thus, in his role as a public employee. Consequently, the district court reasoned that his speech was not constitutionally protected.

The Ninth Circuit Court of Appeals reversed the district court's decision, concluding that: (1) Posey's speech related to a matter of

public concern; (2) the school district lacked an adequate justification for treating him differently from any other member of the public; and (3) there was a genuine dispute of material fact as to the scope and content of plaintiff's work duties and, consequently, whether the speech was protected.

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State Board of Chiropractic Examiners v. Superior Court (2009)

The Legislature enacted the California Whistleblower Protection Act (Gov. Code § 8547 et seq.) (the Act) to protect the right of state employees "to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution." (§ 8547.1.) In adopting the Act, the Legislature expressly found "that public servants best serve the citizenry when they can be candid and honest without reservation in conducting the people's business." (*Ibid*.) Therefore, the Act authorizes a state employee who is the victim of whistleblower retaliation to bring "an action for damages" in superior court (§ 8547.8, subd. (c), hereafter section 8547.8(c)) and to recover, if appropriate, punitive damages and attorney fees (*ibid*.), but the employee must "first file[ ] a complaint with the State Personnel Board ..., and the board [must] ... *issue [ ], or fail [ ] to issue, findings pursuant to Section 19683" (ibid.,* italics added).

Here, the employee filed a complaint with the State Personnel Board, and the board issued *adverse* findings. The Court of Appeal held that the employee had to succeed in having those adverse findings set aside before she could proceed with her court action for damages under section 8547.8(c), because otherwise the adverse findings would be binding in the damages action, precluding recovery. According to the California Supreme Court, this holding undermined the Act's purpose of protecting whistleblower employees by assuring them the procedural guarantees and independent fact-finding of a superior court damages action. Therefore, the Supreme Court reversed the Court of Appeal, thus allowing whistleblower complainants to proceed with actions in superior court, regardless of whether the employee succeeds in having adverse State Personnel Board findings set aside.

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Court of Appeal Rules that Teachers were Fired in Retaliation for Union Activity

By Jennifer Stoughton

The Court of Appeal, Fourth District, recently ruled in favor of California Teachers' Association ("CTA") on CTA's petition for review of a PERB order which dismissed its complaint against Journey Charter School ("Journey"). The complaint had alleged that Journey had improperly dismissed three teachers in retaliation for the teachers' efforts to unionize and for sending out a letter critical of Journey's management.

Journey was a charter school modeled on the "Waldorf" method of education that focuses on arts and music and has a "collaborative structure of governance involving teachers, parents and management." As part of this philosophy, teachers and parents serve on the governing School Council which is responsible for all school operations, including hiring and firing of all employees. In 2004, after learning that the charter would have to be rewritten, a rift developed between some of the teacher-members and parent-members of the School Council. In response to the increasing levels of animosity between the groups, the teachers collectively drafted a letter explaining their

position on the various issues that had arisen, including their concerns on the decisions made by the governing council. The letter was sent to all parents whose children attended Journey. In the months following the distribution of the letter, the three teachers who had conceived of the letter and were the primary force behind organizing the teachers to voice their opinions, were terminated.

Although it recognized that courts had limited authority to review a decision by PERB, the Court nonetheless overturned PERB's ruling. First, the Court found that the letter was protected activity under EERA because of the unique collaborative role of teachers in a charter school – and specifically Journey – were expected to play. Therefore, the letter, expressing the belief that the school was not being managed consistent with the collaborative structure of the Waldorf model, was protected under EERA because its content related to the teachers' interest as employees. Second, the Court clarified that even though the teachers ultimately decided to organize through CTA, the act of organizing all of the teachers to express and support a unified message about their collective concerns about management's policy change was contemplated in EERA's protections to "form" organizations. Since the teachers were fired for these efforts, it was a clear violation of EERA.

IMPORTANT NOTICE
TO ASSOCIATION BOARD MEMBERS

CB&M updates its Association Board Member list quarterly. To assist us in keeping accurate, up-to-date names of members and their positions on Association Boards, we would kindly ask you to fill out the form below and mail it to our Sacramento office to: **Carroll, Burdick & McDonough LLP, 1007 7TH Street, Suite 200, Sacramento, CA 95814-3409, Attention: Jacqueline Morris**. If you would like to begin receiving the Labor Beat electronically, please contact Jacqueline Morris at jmorris@cbmlaw.com. In your request, please note whether you would like to receive both hard copies and an electronic version, or an electronic version only.

CB&M thanks all of you for your help.

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