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Sacramento County Attorneys and Accountants Prevail Yet Again at PERB, Protecting the Health Benefits of Retirees

The Public Employment Relations Board ("PERB") recently upheld a Proposed Decision by Administrative Law Judge Bernard McMonigle overturning Sacramento County's unilateral actions to deprive many retirees of their health benefits. The Sacramento County Attorneys Association ("SCAA") and the Sacramento County Professional Accountants' Association ("SCPAA") were represented throughout this process by CB&M Sacramento Labor Partner **Gary Messing** and Associate **Jason Jasmine**. Although these are two of the smaller public sector unions in Sacramento, they were the first to challenge the County's actions. They were eventually joined by a broad coalition of Sacramento County public sector unions presenting a unified front against the unilateral diminution of health benefits for retirees. (continued on page 13)

NOTICE: Avandia & Byetta

If your health has been adversely affected by taking Avandia or Byetta to treat diabetes, please contact our office so that you can learn about potential legal action against the manufacturers of these pharmaceuticals. Many people have suffered heart attacks or other cardiac issues as a result of taking these medications. Call our Sacramento office at (916) 446-5297 and state that you are calling about Avandia or Byetta. If you call during off hours, leave a clear message, spelling your name and slowly leaving a return telephone number and an address where you can be reached by mail.



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 legal 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 and interpretation of these developments to any particular situation.

Court of Appeal Strikes Down Binding Interest Arbitration for Local Peace Officers and Firefighters

By Lina Balciunas Cockrell

In a somewhat expected, but nonetheless disappointing decision, the California Court of Appeal struck down legislation that allowed peace officers and firefighters to compel interest arbitration when the county and employee organization are unable to implement an MOU. *County of Sonoma v. Superior Court*, 173 Cal.App.4th 322 (2009). The court concluded that the arbitration procedures set forth in Code of Civil Procedure sections 1299 et seq. impermissibly infringe upon a county's constitutional authority to establish compensation and terms of employment for county employees.

In this case, the County of Sonoma and the Sonoma County Law Enforcement Association ("SCLEA") were unable to agree to the terms of a new MOU and declared an impasse in negotiations. SCLEA voted to reject the County's last, best and final offer and after unsuccessful mediation, SCLEA made a written request to the County to submit the matter to binding arbitration. The County denied SCLEA's request and submitted a resolution to the board of supervisors seeking unilateral implementation of the County's last, best and final offer, which the board adopted. SCLEA subsequently filed a petition to compel arbitration pursuant to Code of Civil Procedure sections 1299 et seq. The trial court granted SCLEA's petition and ordered the County to submit to arbitration. The County appealed by filing a petition for writ of mandate.

Under the statutory scheme set forth in Code of Civil Procedure sections 1299 et seq, if in the course of labor negotiations, local peace

officer or firefighter organization reached an impasse, the organization (but not the employer) could request referral of the dispute to a three-person arbitration panel. Prior to the panel's hearings, each party would be required to submit its "last best offer of settlement" as to each of the issues being arbitrated. After the conclusion of the hearing, the panel would decide the disputed issues by selecting, without modification, the last best offer "that most nearly complies with" certain enumerated factors. The panel then delivers its decision to the parties and there is a five-day window for the parties to meet privately and amend or modify the decision by mutual agreement. Code of Civil Procedure section 1299.7(b) originally provided that at the conclusion of the five-day period, the decision would be made public and automatically became binding on the parties. The California Supreme Court declared this statutory scheme to be unconstitutional in the case of *County of Riverside v. Superior Court*, 30 Cal.4th 278 (2003) because it took away the authority to establish local salaries from the counties and gave that power to an arbitration panel.

The Legislature amended the statute in 2004 to allow the employer to reject the decision of the arbitration panel by a unanimous vote of all of the members of the governing body. However, the court held that the new statutory scheme deprived Sonoma County of its constitutional legislative authority to provide for the compensation of its employees and instead, gave that authority to the arbitration panel, with the County retaining a mere veto power. Moreover, even the County's veto power was limited by the statutory requirement of a unanimous vote. Thus, the court also found the statutory scheme unconstitutional on the ground that it permits less than a majority of the governing body to set employee compensation by making the arbitrators' decision final and

binding upon the County. In other words, just one vote in favor of the arbitrators' decision would impose that decision upon the County, something the Court concluded was far more than a minimal burden on the democratic functions of local government.

The Court also held that the statutory scheme impermissibly delegates to the arbitration panel the power to interfere with county money and to perform municipal functions.

We do not anticipate that this will be the end of the attempts to obtain interest arbitration statewide. However, this ruling seems to indicate that the only way to accomplish mandatory interest arbitration in the event of impasse is to amend the California Constitution. In this economic climate, such a fight will be an uphill battle.



Update on the Attack on Orange County Deputy Sheriff's Pension

By Jennifer S. Stoughton

Last year, we reported that the Orange County Board of Supervisor's ("the B.O.S.") filed a legal action aimed at repealing the retroactive portion of a pension agreement with the Association of Orange County Deputy Sheriffs ("the Deputy Sheriffs"). The B.O.S contended that a 2001 labor agreement that retroactively increased the pension benefits of the Deputy Sheriffs from 2% at 50 to 3% at 50 violated the California State Constitution's prohibitions on deficit spending and gifts of public funds. The B.O.S sought to repeal that agreement along with the increased pension benefits that resulted from it. We are happy to report that on February 26, 2009, the Judge threw out the B.O.S' case in its entirety prior to

trial on the grounds that its argument had no legal merit.

The Court ruled that the increased pension benefits did not violate the prohibition against deficit spending because the estimated total cost of a pension plan cannot be seen as a debt. California Constitution Article XVI, section 18(a) provides, in pertinent part, that "[n]o county ... shall incur any indebtedness or liability in any manner or for any purpose exceeding in *any year* the income and revenue provided for *such year*, without the assent of two-thirds of the voters of the public entity voting at an election to be held for that purpose" (emphasis added.) Relying on legal precedent, the Court found that this language only prohibited Counties from incurring debt obligations that had to be paid out in one year and exceed county revenues for that year. The B.O.S. did not, and presumably could not, establish that Orange County would ever have to pay out the total estimated value of the pension increase in one year. An attempt by the County to amend its Complaint to allege such facts was summarily dismissed by the Judge in April 2009.

The Court, citing to a mountain of legal precedent, also ruled that the pension enhancements are not an unconstitutional gift of public funds.

Like the similarly unsuccessful lawsuit by the City of San Diego to strip away enhanced pension benefits agreed to in a prior MOU, the only tangible result of this case was over 1 million dollars in legal fees incurred by the Orange County tax payers.

Despite this victory, CB&M remains committed to fight any attempt to retroactively reduce public employees' pension benefits. While we are not directly involved in the

Orange County case, we intend to file an Amicus Curiae brief on behalf of an existing coalition of public sector unions if the case reaches the Court of Appeal and beyond. Any union interested in joining the coalition against the attack on retirement benefits should contact CB&M associate Jason Jasmine in the Sacramento Office (916-446-5297).



San Diego Police Officers’ Association v. San Diego City Employees’ Retirement System

By Jennifer S. Stoughton

The San Diego Police Officers’ Association (“SDPOA”) was recently dealt a blow by the Ninth Circuit over changes to their retirement benefits. The SDPOA had filed suit against the City of San Diego, the San Diego City Employees’ Retirement System and various individual defendants (collectively referred to as the “City”) alleging that (1) the City’s involvement in approving and enacting a city ordinance that reduced City’s contributions to the employees’ retirement fund violated Association’s contractual right to an actuarially sound pension system and (2) the City’s imposition of its last, best and final offer (“LBFO”) after the breakdown of 2005 labor negotiations violated the SDPOA’s vested contractual rights.

The case arose after labor negotiations between the parties broke down. The City had been bargaining with three Unions including SDPOA and proposed that they all either agree to a salary reduction or a reduction to the City’s subsidy, or “pickup,” of the employees’ pension contribution. Although the City was able to reach agreement with the other two Unions, it did not reach agreement with SDPOA and an

impasse was declared. Subsequently, the City imposed its LBFO which included its sought after decreases. The majority of employees suffered the 3.2% decrease through a reduction to the City’s “pickup”; however members who were enrolled in the Deferred Retirement Option Plan, a supplemental pension plan for members working beyond the age set for retirement, received an equivalent reduction in salary.

In its ruling, the Ninth Circuit found that SDPOA’s allegations about the underfunded pension system were precluded by a prior case on that same issue. Because the two cases were virtually identical (the same injury – financial insecurity of the Retirement System, and the same wrong by the City – failure to adequately fund the Retirement System), the Court ruled that the SDPOA was bound by the Settlement Agreement that had been reached in the prior case. As to the second cause of action based on the reduction of salaries, the Ninth Circuit found that under well-established precedent, public employees have no vested rights to particular levels of compensation.

Finally, in the most troubling portion of the opinion, the Court found that the implemented changes to eligibility requirements for retiree health benefits did not impact vested rights because retiree health benefits are a term of employment that can be negotiated and changed through the collective bargaining process (including an LBFO). The Court’s ruling contradicts prior California State court decisions that held the exact opposite and sets a dangerous precedence that retiree health benefits can be changed by the employer.



Tuolumne DSA Extends Contract

The Tuolumne DSA extended its MOU for one year, providing some concessions for the County which is suffering. The County has been suffering financial stress, as are many other cities and counties in the State. The MOU between the County and the DSA was to expire in December of 2010, and was extended for one year.

Effective July 1, 2009 through June 30, 2010, the deputies gave up \$150 from the current amount of cafeteria contributions and cash rebates that the employees receive. However, the medical, dental and vision premiums shall continue to cover the entirety of family coverage.

The DSA also agreed not to cash out holidays until the expiration of the Agreement. However, individuals who had planned to cash out holidays who are planning to retire shall be entitled to cash out holiday pay within the twelve months prior to their retirement. In return, the vacation leave maximum accrual was increased substantially. The 3% salary increase scheduled for July 9, 2009 is postponed until July of 2010. The DSA is hopeful that these concessions will allow the County to survive this current period of financial instability.

Sacramento Labor Partner **Gary M. Messing** was the Association's Chief Negotiator.



Tuolumne Management Employees Association Reaches Agreement

The Tuolumne Management Employees Association (MEA) agreed to fifteen furlough days, amounting to a salary reduction of 6% over twenty-four pay periods. The furlough

days can be used in lieu of approved vacation. However, the MEA will receive 120 hours of additional management leave for 2009-2010 and personal leave accruals will be increased from four, five, and six times the annual accrual rate, to five, six, and seven times the annual accrual rate, based upon the employee's longevity with the County. Provisions were made to ensure that employees planning to retire would be exempt from the furloughs for twelve months prior to retirement.

Like the DSA (supra), cafeteria amounts were reduced \$150 per month and family medical will continue to be fully covered under the PERS health plan.

The MOU has other additional adjustments and tweaks, but the agreement is for a new contract that replaces the MOU that expired in July of 2009. Like the DSA, the MEA was led by Chief Negotiator **Gary M. Messing**, Labor Partner in the Sacramento office of Carroll, Burdick & McDonough.



Yolo County DSA Agrees to Modify MOU

The Yolo DSA has recently agreed to a one time 120 hour furlough to be implemented during fiscal year 2009 to 2010. Time off can be taken at the discretion of the individual and utilizing liberal procedures for the taking of compensation time off.

As a result of the 120 hour furlough, vacation accrual limits were raised substantially from 280 hours to 400 hours, although at the end of fiscal year 2011, the employee is expected to reduce the balance of vacation hours back to 280. If a deputy is unable to achieve that reduction, each deputy will be paid for any hours remaining over 280.

During the term of the Agreement, the County agrees not to lay off any deputies, except if there are additional reductions in funds from the State that are not offset by new or additional revenues.

Sacramento Labor Partner **Gary M. Messing** was the Association's Chief Negotiator.



Decision to Layoff Not Negotiable

By Jonathan Yank

Toward the end of 2003, as a result of a significant budget shortfall, the City of Richmond laid off 18 firefighters. The International Association of Fire Fighters, Local 188 ("Local 188") demanded to bargain over the City's layoff decision, but did not make a separate demand to bargain over the effects of the decision. The City declined the invitation to bargain. (*International Association of Fire Fighters, Local 188, AFL-CIO v. PERB* (2009) 172 Cal.App.4th 265, 270-271.)

As a result, Local 188 filed an unfair labor practice charge with the Public Employment Relations Board ("PERB"), asserting that the reduction in staffing levels threatened employee safety and increased workloads, thus falling within the mandatory scope of bargaining. However, PERB's Office of General Counsel dismissed the pertinent portion of the charge, stating that the decision to lay off personnel is not within the scope of bargaining. The dismissal further noted that, while the effects of such a decision are subject to bargaining, Local 188 did not seek to bargain over the effects of the layoffs. (*Id.* at 271-273.)

On appeal, PERB sustained the dismissal. Local 188 then filed a Petition for Writ of

Mandate in the Superior Court, under Code of Civil Procedure section 1085, challenging the Board's refusal to issue a complaint as an abuse of its discretion and failure to perform its mandatory ministerial duty. (*Id.* at 273-274.) The Superior Court denied the Petition and Local 188 appealed.

- *A Decision by PERB Not to Issue an Unfair Practice Complaint is Subject to Judicial Review on Limited Grounds Under an "Abuse of Discretion" Standard*

In the Court of Appeal, PERB and the City of Richmond argued that the Board's decision not to issue an unfair labor practice charge "is generally not subject to judicial review." (*Id.* at 277.) Acknowledging this rule, the Court of Appeal nonetheless noted that precedent arising under California's Agricultural Labor Relations Act suggests that such a decision *is* subject to review under limited circumstances. In particular, the Court of Appeal looked to *Belridge Farms v. Agricultural Labor Relations Board* (1978) 21 Cal.3d 551, 556-557, in which the California Supreme Court ostensibly adopted precedent under the National Labor Relations Act permitting limited review of a dismissal when: (1) there is a colorable argument that the decision violates a constitutional right; (2) the decision arguably exceeds the Board's grant of authority; or (3) the decision is based on an erroneous construction of an applicable statute. (*Id.* at 277-278.) The Court of Appeal "conclude[d] [that] the *Belridge Farms* holding permitting limited judicial review of non-final ALRB decisions applies equally to non-final PERB decisions, including a decision upholding a refusal to issue a complaint." (*Id.* at 278.)

However, the Court of Appeal held that, even in these narrow categories of cases, "the

court's review is limited to considering whether the decision constitutes an abuse of discretion." (*Id.* at 280.) Thus, under most circumstances, a decision by PERB not to issue an unfair labor practice complaint remains irreversible.

- *The Decision to Layoff Employees is Management Prerogative*

Reaching the merits of the case (after having determined that Local 188's petition charged an erroneous construction of Government Code section 3509 by PERB), the Court of Appeal purported to construe and clarify the California Supreme Court's decision in *Firefighters Union v. City of Vallejo* (1974) 12 Cal.3d 608. In *Vallejo*, the Supreme Court held that, due to the dangerous nature of firefighting, "to the extent [] that the decision to lay off some employees affects the workload and safety of the remaining workers, it is subject to bargaining" (*Id.* at 622.) Local 188 argued that this and other language from the *Vallejo* decision requires a public employer to refrain from implementing layoffs until it engages in collective bargaining with the union representing the impacted employees. (*Local 188, supra*, 172 Cal.App.4th at 284-287.)

However, the Court of Appeal rejected Local 188's argument, holding that, under *Vallejo*, the decision to reduce staffing levels through layoffs is a managerial prerogative and not subject to bargaining. (*Id.* at 287.) Nonetheless, the Court of Appeal confirmed that the Union may bargain over safety and workload issues impacting the "remaining employees" as a result of the reduction in staffing. (*Id.* at 283.)

Although the result is unfortunate, this case resolves a longstanding dispute over the meaning of the *Vallejo* decision. Here, the Court of Appeal unambiguously held that the

decision to impose layoffs is a management right and not subject to the duty to bargain.

On July 8, 2009, the California Supreme Court granted a Petition for Review. We will keep you posted as to any major developments.



Court Limits Exonerated Peace Officer's Right to Examine Materials Used to Clear Him

By Natalie Leonard

In *McMahon v. City of Los Angeles*, the Second District Court of Appeal affirmed the trial court's ruling and held that the Los Angeles Police Department did not have to provide McMahon with the materials used in investigations of his conduct, if he had been cleared of all charges in those investigations.

Officer McMahon worked on gang related issues. Citizens filed around twenty citizen complaints against him, but after investigating the complaints, the Department found all of these claims to be "exonerated" or "unfounded." In other words, they had no basis in fact at all.

After the investigations concluded, Officer McMahon requested all materials used in the investigations of the citizen complaints pursuant to Government Code 3306.5. Government Code 3306.5 requires the Department to turn over "personnel files that are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination, or other disciplinary action." He also requested them on policy grounds, stating that he needed to see the full complaints and

investigatory materials which might hurt his career or require some other kind of response.

The Department refused his request. Instead, they turned over a more limited set of documents summarizing the complaint and identifying the complainants in case Officer McMahon felt a need to respond to the complainants in any way. The department reasoned that it was not required to turn over all materials because the department had not taken any disciplinary action or used the complaint to affect the officer's employment.

The court agreed with the Department's decision to share only summaries, noting that Government Code 3306.5 allows a peace officer to inspect his or her personnel file under specified circumstances, but that none of the circumstances existed here for reasons described above. The court further noted that he requested to see his personnel file, but it was not even clear that the documents he sought were still part of his personnel file.

The court pointed out that "citizen complaints 'that are determined by the peace or custodial officer's employing agency to be frivolous ... or unfounded or exonerated, or any portion of a complaint that is determined to be frivolous, unfounded, or exonerated, shall not be maintained in that officer's general personnel file.' ... By virtue of this provision, complaints found meritless are excised from the personnel file used by the officer's employer for making personnel decisions." Therefore, when Officer McMahon requested to see his personnel file, the documents about which he complains were not part of the personnel file, since he had been exonerated.

As a practical matter, this decision appears to hold that the files related to complaints which are exonerated or otherwise

determined to be unfounded do not need to be turned over to the affected officer. Under any other finding, it is likely that Departments must still turn over all materials used in the investigation to the officer who is the subject of the investigation.



Failure to Follow Appeal Procedures Forfeits the Right to a Hearing

By Jason Jasmine

A recently published decision out of the California Court of Appeal for the 2nd District held that an employee's failure to follow the proper procedures for filing an appeal to the Los Angeles County Civil Service Commission forfeited that employee's right to a hearing. *Munroe v. Los Angeles County Civil Service Commission*.

After a *Skelly* hearing, Ms. Munroe was discharged from her job and was notified that she had a 15-day window in which to seek an appeal hearing from the Commission. The Notice clearly stated that the request for a hearing must be sent within fifteen business days from the mailing of the Notice, and also provided the address to which the request for a hearing must be sent. The Notice also indicated that a copy of the request for hearing must be sent to the employer. Ms. Munroe's attorney sent a request for hearing to the employer within 15 days, but did not send a request for hearing to the Commission, until almost two months after the Notice was mailed. The Commission nonetheless informed Ms. Munroe that her matter would be considered, and that although her presence was not required, she would be entitled to present her case should she choose to appear. Although Ms. Munroe denied receiving this notice, a proof of service was attached. Ultimately, the Commission denied Ms.

Munroe's appeal request "based on untimely filing of the appeal."

The trial court reversed the Commission decision, finding that even though the Commission's decision not to consider the appeal was not arbitrary, capricious or lacking in evidentiary support, it nonetheless abused its discretion in failing to deem Ms. Munroe's late request for a hearing to constitute good cause for an extension of time to file an appeal.

The Court of Appeal reversed the trial court, noting that the requirements for filing the request for an appeal hearing were clear and unambiguous, that the request was not timely, and it was not an abuse of discretion for the Commission to deny the appeal on these grounds.

The moral of the story: Follow all applicable requirements for requesting an appeal from an adverse decision or you may waive your rights.



New Case Clarifies The "Could Lead To" Punitive Action POBR Requirement

By Jonathan Yank

The plaintiffs in this case were two married Los Angeles Police officers, Robert and Scarlett Paterson. (*Paterson v. City of Los Angeles* (2009) 95 Cal.Rptr.3d 333, 335.) In December of 2004, Robert Paterson called the department stating he was sick and unable to report to work. Apparently suspecting that Robert Paterson was abusing sick leave, his Supervising Lieutenant instructed a subordinate Police Sergeant to go to the Patersons' home to verify Officer Paterson's claim of illness. The Sergeant spoke to both Robert and Scarlett Paterson during his visit to their home.

Subsequently, internal Los Angeles Police Department complaints were filed against both Robert and Scarlett Paterson. The complaints alleged that each officer had made false and misleading statements to the investigating Sergeant. While the charges were under investigation, both officers were temporarily relieved from duty. However, they were later exonerated by the Board of Rights and were reinstated with back pay.

The Patersons then sued the City of Los Angeles claiming deprivation of their rights under the Public Safety Officers Procedural Bill of Rights ("POBRA"), California Government Code sections 3300- 3313. The Patersons also sued the City of Los Angeles and the investigating Sergeant for intentional infliction of emotional distress and negligent supervision.

The defendants moved for summary judgment or summary adjudication. On the claim arising under POBRA, the City argued that the Act's protections only apply where there has been punitive action and that, due to the Patersons' exoneration, no punitive action had occurred. As to the claims of intentional infliction of emotional distress and negligent supervision, the defendants argued that they were barred by governmental immunity and workers' compensation exclusivity. The trial court granted the motion on all theories and entered judgment for the defendants. The Patersons appealed.

- *POBRA Applied to an Investigation in Which Officers Were Exonerated*

As to whether the protections of POBRA applied, the Court of Appeal found that the plain language of Government Code section 3303 left no room for doubt that it did:

Section 3303 provides that it applies to an investigation or interrogation “that could lead to punitive action.” “Punitive action” itself is defined in section 3303, and the definition is in accord with the rest of the statute. It is “any action that *may* lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.”

...

Application of the Act is determined at the beginning of the action, not after its end. In this case, it is easy to determine that the sick check might have led to punitive action, because it did lead to punitive action. ...

Thus, according to the express language of POBRA, the investigation that led to the filing of disciplinary charges constituted "punitive action," for which the City could be held liable under the Act, even though no discipline was ultimately imposed.

- *The City and the Investigating Sergeant Were Immune from Claims of Intentional Infliction of Emotional Distress or Negligent Supervision Arising from Sergeant's Investigation of Alleged Sick Time Abuse*

As to whether the defendants were immune from suit for intentional infliction of emotional distress and negligent supervision, the Court of Appeal found in favor of the defendants.

Under [Government Code] § 821.6, “[a] public employee is not liable for injury caused by his

instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.” Under section 815.2, subdivision (b), “Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.”

“The policy behind section 821.6 is to encourage fearless performance of official duties.... State officers and employees are encouraged to investigate and prosecute matters within their purview without fear of reprisal from the person or entity harmed thereby. Protection is provided even when official action is taken maliciously and without probable cause.”

...

[S]ection 821.6 extends to actions taken in preparation for formal proceedings, including investigation, which is an “essential step” toward the institution of formal proceedings.

Thus, the Court of Appeal found that the City and investigating Sergeant were immune from traditional tort liability for actions taken during and as a result of their investigation. Having done so, the Court of Appeal declined to consider whether workers’ compensation exclusivity also applied to bar the tort claims.



High Court Upholds Union's Right to Limit Age Discrimination Remedies to Arbitration

By Natalie Leonard

In one of the most radical labor decisions of the year, the Supreme Court upheld, 5-4, a collective bargaining agreement term that required members to arbitrate claims under the Age Discrimination in Employment Act (ADEA) rather than filing those claims in court. *14 Penn Plaza LLC v Pyett*, 556 U.S. ____ (2009). Until *Pyett*, for the last thirty five years, the thinking had been that compulsory arbitration agreements in CBA's could not require arbitration of claims under federal discrimination statutes. *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974).

The facts in *Pyett* involved three employees who worked as unionized security guards for many years. When the building owner (the employer) retained a new, non-union security subcontractor, the employer reassigned these employees to porter and janitorial positions under less favorable terms. The employee members sued in federal court under ADEA, and the company moved to compel arbitration, based on the compulsory arbitration clause in the contract. When the lower court declined to compel arbitration, the company appealed. The Supreme Court reversed, finding the arbitration clause enforceable.

The *Pyett* Court distinguished the issues in *Pyett* from those in *Gardner-Denver* in two ways. First, the court noted that the arbitration clause struck down in *Gardner-Denver* differed because it was not a clause that dealt specifically with discrimination claims. The term in the *Pyett* case stated that “[a]ll such claims shall be subject to the grievance and

arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.”

Second, the Court also opined that the opinions espoused by the Court about arbitration in *Gardner-Denver* “rested on a misconceived view of arbitration that this Court has since abandoned.” The court went on to talk about how arbitration has become an increasingly common and favored method for resolving disputes.

While this case may encourage employers to negotiate for clauses requiring arbitration of discrimination claims, unions should think twice before doing so. A union that agrees to compulsory arbitration for all discrimination claims may face more scrutiny as to its duty of fair representation. And discrimination claims can be complex and time consuming to assess.

At least two courts have already cited the *Pyett* decision, establishing the validity of compulsory arbitration for discrimination clauses, so long as the union does not completely control which claims proceed to arbitration. The court in *Matthews v Denver Newspaper Agency LLP* cited *Pyett* while **preventing** an employee from filing a discrimination lawsuit after he voluntarily opted to arbitrate his claims, a choice that his union's collective bargaining agreement allowed him to make. 07 CV 02097 WDM KLM, (D. Co. 2009).

In contrast, in *Kravar v. Triangle Services, Inc.*, a court cited *Pyett* when **permitting** an employee's claim to proceed to court when it was undisputed that the union, and not the employee, had the sole right to determine which claims went to arbitration, and

there was some evidence that the union did not intend to arbitrate Ms. Kravar's claims. 186 LRRM 2565/1:06 CV 07858 RJH (S.D.N.Y. 5/19/09).

Kravar was a daytime office cleaner who was fired when the office relocated and the employer declined to offer Kravar a job at the new location. A thin record suggested that there was some evidence that the union refused to allow her claim to proceed to arbitration. She filed a charge with the EEOC and alleged that the company had discriminated against her based on her national origin and disability and also retaliated against her for filing a charge. The employer moved to compel arbitration.

The *Kravar* court referred to the dicta in *Pyett* described above to infer that Kravar had been denied a forum in which to pursue her statutory rights. The *Kravar* court allowed her case to proceed to court, holding that "[t]he current record is sparse, but it only supports a single conclusion: The CBA here operated to preclude Ms. Kravar from raising her [disability-discrimination](#) claims in any forum. As such, the CBA operated as a waiver over Ms. Kravar's substantive rights, and may not be enforced."

Turning back to *Pyett* itself, the four member dissent who would have held the clause requiring arbitration of discrimination claims unenforceable may be comforted by the fact that there is already a bill in Congress that, if passed, will overturn *Pyett's* holding by providing that "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, franchise, or civil rights dispute." S. 931, April 29, 2009. The Senate has referred this bill to its Judiciary Committee. You can track the status here: <http://www.govtrack.us/congress/bill.xpd?bill=s111-931>.



Lina Balciunas Cockrell Joins CB&M

Lina Balciunas Cockrell joined the Public Sector Group in April 2009, after practicing law for almost four years in Los Angeles. Her prior experience involved a considerable amount of civil litigation, including employment issues, as well as real estate, bankruptcy, entertainment and civil family issues (e.g., trusts, family partnerships, cohabitation agreements, etc.). Lina graduated from UC Davis School of Law in May 2005 and received her undergraduate degree from the University of Notre Dame in 1996. Lina also holds a master's degree in broadcast journalism from Syracuse University and worked in sports media for several years before going to law school. Lina returns to the greater Sacramento area after having grown up in El Dorado County, where her family still lives.

Since coming to CB&M, Lina has handled a variety of labor issues, including appealing to the Federal Receiver and Cal OSHA Board of Appeals for disclosure of inmates with highly contagious diseases, in order to protect CCPOA employees, and representing peace officers in Internal Affairs investigations. Lina's passion for labor law comes in part from having many family members engaged in public employment, including her brother in federal law enforcement.

Lina is looking forward to providing CB&M clients with effective and efficient representation in all of their labor and employment issues.



SCAA and SCPAA Prevail Again (Cont. from p. 1)

We have previously reported on the attack on retiree health benefits for public sector workers in Sacramento County. As you may recall, Sacramento County unilaterally eliminated a retiree health subsidy program that had been in place for almost 30 years. The program not only gave employees access to health insurance after they left active employment, but also provided a subsidy to help fund participation in that program.

Most recently, in September of 2008, we reported that ALJ McMonigle issued a Proposed Decision ruling in favor of SCAA and SCPAA on all counts. The County was ordered to rescind its change to the Retiree Health plan, make whole all former employees who were improperly deprived of those benefits (with interest), refrain from making further changes without bargaining, and post notice of the violation. This was already the second time the County had lost before PERB on this issue. Nonetheless, the County filed a Statement of Exceptions to the Proposed Decision of the ALJ. Because of high volume and short staffing at PERB, it took more than a year between the issuance of the Proposed Decision, and PERB's issuance of a final decision. PERB's final decision affirmed the Proposed Decision in all respects.

The total cost to the County, because of its stubbornness, has now increased substantially due to interest it will have to pay on the benefits that were improperly withheld. Had the County taken the simple step of meeting and conferring, this fight (which has now been going on for more than three years) would not have been necessary.



The FLSA in Your Pocket and at Your Fingertips with a Public Sector Focus

Are you on top of the latest revisions to the Fair Labor Standards Act? There have been other changes since 2004, when the Department of Labor amended the white-collar exemptions to modify both the salary basis test and the duties test.

The most recent updates are clearly documented in a new edition of *Pocket Guide to the Fair Labor Standards Act*, published by the California Public Employee Relations Program at the Institute for Research on Labor and Employment at U.C. Berkeley. Written specifically for public sector practitioners, the Pocket Guide focuses on the Act's impact in the public sector workplace and explains the complicated provisions of the law that have vexed public sector practitioners, like the "salary basis" test and deductions from pay and leave for partial-day absences.

The 2009 edition includes the Department of Labor's significant changes to overtime exemption regulations, addresses common issues regarding hours worked by public employees, and discusses recent legal developments in compensatory time off. Two recent court decisions have held that counties and charter cities are not subject to any state wage laws or wage orders.

Each chapter tackles a broad topic by providing a detailed discussion of the law's many applications in special workplace environments. For example, the chapter that covers overtime calculation begins by defining regular rate of pay and then considers the payment of bonuses, fluctuating workweeks, and alternative work periods for law enforcement and fire protection employees. Other chapters focus on record keeping

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requirements, hours of work, and "white collar" exemptions. In each case, detailed footnotes offer an in-depth discussion of the varied applications of the FLSA.

The 88-page FLSA Guide is just \$16, making it very affordable. It is a valuable resource for all public sector workers as both a quick reference and as a training tool. To order the Guide or see a complete list of CPER's publications, visit <http://cper.berkeley.edu>. For questions, email cperservices@berkeley.edu or call 510.643.7093.

The California Public Employee Relations Program was established in 1969. For the last 40 years, it has continued to fulfill its mandate

to provide neutral, accurate information to practitioners involved in employment relations at all levels of government in California. CPER currently has 15 titles in its Pocket Guide Series documenting the various laws in the public sector. The program also publishes *CPER Journal*, the most comprehensive source of California public sector labor relations information. To subscribe or find out more about the program, visit the CPER website.

The original Pocket Guide was co-authored by former CB&M attorney Cathleen Williams with the assistance of labor partner **Gary Messing**.



**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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