

THE LABOR BEAT

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Victory for Public Employees in Orange County Retirement Case

Your pensions have been under attack for the last couple of years—a trend that is alas unlikely to subside any time soon. One of the first salvos in the pension battle was the County of Orange's ("County") attempt to rescind its own actions granting the Orange County Deputy Sheriffs the 3% at 50 retirement formula for prior service (in addition to prospective service). The County spent *millions* of dollars arguing this case, going through several law firms, all with the purpose of demonstrating that its own actions (or at least those of a prior incarnation of the board of supervisors) were illegal.

Recently, and within a week of the oral argument in the case (an unusually short turnaround) the Court of Appeal for the Second Appellate District affirmed the decision of the trial court and **REJECTED** the claims by the County of Orange (and the arguments made in *amicus curiae* briefs filed by various taxpayer groups supporting the County of Orange), that the application of the 3% at 50 formula to past service violated the California Constitution's prohibition on gifting of public funds.

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.

On April 23, 2011, the California Supreme Court denied the County's Petition for Review, thus affirming the Court of Appeal decision.

Carroll, Burdick & McDonough ("CBM") gathered a coalition of 21 public safety and miscellaneous associations throughout California to support the preparation and filing of an *amicus* brief, focused primarily on the impact the County's position would have on the rights of public employees throughout California if its position were adopted by the Court. The *amicus* brief also focused on the frequent retroactive nature of the collective bargaining process.

The County made two primary arguments under the California Constitution and the Court of Appeal ruled against the County on both of those arguments.

First, the Court found that the crediting of prior service at the increased rate did not violate the restriction under the California Constitution on a local public entity incurring "indebtedness or liability ... exceeding in any year the income and revenue provided for such year ..." The Court agreed with a 1982 Attorney General opinion, dealing with the analogous constitutional provision limiting the State's indebtedness, which opined that an "unfunded liability" such as future pension obligations is not a legally enforceable obligation, but is nothing more than an actuarial evaluation of projected future events. Thus, because the unfunded liability created by the crediting of prior service is nothing more than a projection, it cannot violate the municipal debt limitation in the California Constitution.

Second, the Court also ruled that the County's actions in crediting prior service under the enhanced formula did not violate the

California Constitution's prohibition against extra compensation for services already rendered. On that issue, the Court provided a detailed analysis of a long history of California cases to come to the conclusion that the prior service portion of the enhanced benefit is not unconstitutional extra compensation, based in part on the fact that the enhancement did not provide additional compensation, but rather changed the calculation of the pension benefits upon retirement. The Court echoed arguments that we set forth on behalf of our coalition. The County altered the prior pension benefits and perhaps provided an incentive to retire, but did not provide additional compensation as that term is defined in the California Constitution.

This is a huge win for public sector unions and the employees they represent. If this decision is left undisturbed it should help deter other groups from challenging retroactive pension increases throughout the state. But the battle may not be over. Although U.S. Supreme Court review is incredibly unlikely, the County has previously indicated that it might attempt to persuade that Court to review the case. We anticipate that the coalition we have formed will fight any attempt by the County to come after vested pension benefits.

CB&M represented 21 associations (with approximately 80,000 members) on whose behalf we filed an amicus curiae brief setting forth the interests of state and local public employees in support of the Association of Orange County Deputy Sheriffs. This was a group effort by CB&M in which the Public Sector Group (led in this case by Gary Messing, Gregg Adam, Jason Jasmine, Jonathan Yank, and Jennifer Stoughton) enlisted the assistance of CB&M's Appellate Group (led in this case by Laurie Hepler and Gonzalo Martinez).



Troubling Decision Limiting Right to Arbitrate Issued by Court of Appeal concerning Los Angeles Furloughs; CBM Retained to File Petition for Review

The Second District Court of Appeal recently issued a decision that has caused significant concern among union side labor lawyers throughout the State. The case is *City of Los Angeles v. Superior Court (Real Party in Interest Engineers and Architects Association)* (2011) 193 Cal. App. 4th 1159. The backdrop of the case concerned Mayor Villaraigosa's decision in May, 2009 to ask the City Council to declare a fiscal emergency and adopt an urgency ordinance permitting him to furlough all nonsafety employees. When the Council passed such an ordinance and the furloughs were implemented, hundreds of members of the Engineers' and Architects' Association filed grievances based on violations of the workweek provisions in their memorandum of understanding.

The City refused to recognize the grievances as arbitrable, arguing that the decision of the council to furlough was a nondelegable legislative function. The union brought a petition to compel arbitration on behalf of all of the grievants, and the trial court ordered the matter to arbitration.

The City filed a Petition for Writ of Mandate with the Court of Appeal (normally orders compelling arbitration are not appealable), and in a wide-ranging decision, the Court of Appeal reversed the trial court and held that the grievances could not be decided by an arbitrator. In doing so, the court relied on case law (*see County of Sonoma v. Superior Court* (2009) 173 Cal. App. 4th 322) striking down as unconstitutional statewide legislation that would have required interest arbitration for the

breaking of impasses involving police and firefighter associations.

In speaking with a number of leading labor practitioners, there is tremendous concern about the potential mischief that can be created from this decision. One reading of the case is that whenever a public entity has agreed in an MOU to some limitation upon its legislative powers (e.g., to set salary), if the MOU provision is violated, that violation cannot be presented to arbitration. The decision disregards the well established legal distinction between "interest arbitration" and "grievance or rights arbitration," is fundamentally at all odds with the practical experience of most labor side union lawyers, and runs counter to the strong public policy in California of encouraging arbitration for the resolution of labor disputes.

CBM, led by Labor Partners **Gary Messing, Gregg Adam, Jonathan Yank and Jason Jasmine**, together with Appellate Associate **Gonzalo Martinez**, has been hired by the Engineers' and Architects' Association to work with its counsel, Levy, Stern, Ford & Wallach, to prepare a Petition for Review to file with the California Supreme Court. CBM anticipates reaching out to many associations to ask them to write letters in support of the Supreme Court taking the case for Review.



CBM Victorious in Challenge to State Employers' Calculation of Lump Sum Due for Accumulated Leave Credits

As we reported last year, CBM partners **Gary Messing** and **Gregg Adam**, along with associate **Jennifer Stoughton**, prevailed in a class action lawsuit on behalf of CDF Firefighters (who represent State Bargaining Unit 8) and their members challenging the way the state employer calculates the lump sum due

to Unit 8 members for their accumulated leave credits at the time they separate from service (i.e. any voluntary separation including retirement and end of fire season layoffs). We successfully argued that under Government Code section 19839, which requires the State employer to cash out any unused accumulated leave credits balance in a lump sum payment “equal to the amount” the employee “would have been paid had [he/she] taken the time off but not separated from the service,” the state must include planned overtime in the lump sum calculation for bargaining unit 8 members. We relied on the undisputed fact that Unit 8 members work planned overtime as part of their regular schedule and are compensated for it when they use accumulated leave credits while still employed.

In a last ditch attempt to reduce their liability, the state belatedly argued that they only need to include planned overtime when an employee has a accumulated leave credit balance over 212 (the equivalent of one month of work). The Court rejected this argument and, in doing so, clarified that the state must compensate class members a planned leave component for *every* accumulated leave credit they have at the time of separation. Now that all issues have been decided, the parties are working to calculate the damages owed to all class members.



Former CB&M Partners Move Into Powerful Positions

Ron Yank was a partner in CBM’s Public Sector Group for decades before his recent retirement. The tumultuous relationship between public sector labor unions and Governor Schwarzenegger, however, had left Ron greatly concerned about the future of labor relations in California. When Jerry Brown was

elected Governor, and Ron was asked to become the Director of the California Department of Personnel Administration (“DPA”), he decided to put retirement on hold so that he could try to help rebuild labor relations between DPA and California’s public sector unions. While he has already been forced to take a tough stand against the monetary interests of some of his former allies, he has attempted to do so in a respectful manner that leaves open the lines of communication and recognizes that DPA and the public sector unions do not need to be unnecessarily adversarial.

Former CBM Employment Law attorney (and former CBM Managing Partner), **Angela Bradstreet**, recently stepped down from her post as the California Labor Commissioner in order to take a seat on the bench as a San Francisco Superior Court Judge. Angela joins former CBM Managing Partner John Stewart on the San Francisco bench.

We wish Ron and Angela success in their challenging new roles.



New MOU for CCPOA

Gregg Adam was co-chief negotiator for the **California Correctional Peace Officers' Association** (together with CCPOA's Steve Weiss) as it recently concluded a new tentative agreement with the Brown administration. CCPOA has been without an MOU since September 2007.

Negotiating an entirely new contract, albeit one that revived many provisions from the parties' last MOU, in the current budget climate proved extremely challenging. The MOU has something for everyone to dislike; however, after four years of nonexistent labor relations with the Schwarzenegger Administration, it

offers some hope for restoring collaborative labor relations.

On the takeaway side, employees will receive one "PLP" (Paid Leave Program) day per month, while seeing their salaries reduced approximately 4.5%, a deferred retirement contribution of 2% will end, and holiday credits will be reduced. On the positive side, the state employee furlough program will end, medical contributions will upgrade to 2011 levels from 2006, the vast majority of former terms and conditions of employment will be restored within the MOU, and a top step salary increase of 4% will occur in July, 2013.

Much is being made of the MOU in the news media. Sadly, however, much of what is being written is either false or misunderstands the provisions.



Mixed Peace Officer/Non-Peace Officer Units Can Now Challenge PERB's Failure to Issue a Complaint

By Jennifer Stoughton

In *International Association of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Board* (2011) 51 Cal.4th 259, the California Supreme Court reaffirmed that a public employer does not have to bargain over its *ultimate decision* to lay off employees, but is required to bargain over the *effects* of the layoff decision, such as the number and identity of the employees to be laid off and the timing of the layoffs. The Court also set important precedent in holding that a public employee association can seek judicial review of a decision by the Public Employment Relations Board ("PERB") not to issue a complaint on the association's unfair labor practice charge. (Although this precedent does not apply to

peace officer-only groups who are excluded from PERB's jurisdiction under the Meyers-Milias-Brown Act ("MMBA"), it will apply to mixed units that contain both peace officers and non-peace officers (e.g., dispatchers, community service officers, parking enforcement, etc..)

The case arose in 2003 when the City of Richmond laid off 18 firefighters as a result of a significant budget shortfall. The International Association of Fire Fighters, Local 188 ("Local 188"), demanded to bargain over the City's layoff decision and argued that other cost-saving measures were available that would make the layoffs unnecessary. Local 188 did not make a separate demand to bargain over the effects of the decision. The City declined the request to bargain over the layoff decision itself and PERB dismissed the unfair practice charge filed by Local 188, which argued that the reduction in staffing levels threatened employee safety and would increase remaining employee workloads, thus making the layoff decision a mandatory subject of bargaining.

A Decision by PERB Not to Issue a Complaint on an Unfair Practice Charge is Subject to Judicial Review on Limited Grounds

The California Supreme Court held that, although PERB's decision not to issue a complaint on the unfair labor practice charge is generally not subject to judicial review, there are limited circumstances when a party can seek judicial review: (1) the decision violates a constitutional right; (2) the decision exceeds the Board's grant of authority; or (3) the decision is based on an erroneous construction of an applicable statute.

The Court found that eliminating all avenues of judicial review, as argued by PERB and the City, would raise "serious constitutional

issues,” because employees would have no way to seek relief. In this case, judicial review was warranted because Local 188’s petition claimed that PERB misconstrued Government Code section 3509 (part of the MMBA).

In reaching this decision, the Court stressed that judicial review is *not* available when a party alleges that there was insufficient evidence supporting PERB’s factual findings or that PERB misapplied the law to the facts. The Court also cautioned that “courts must narrowly construe and cautiously apply the exceptions we here recognize.”

Although this decision sets an important precedent, its practical impact is limited. First, under the MMBA, although PERB has jurisdiction over labor relations for many city and county employees, its jurisdiction does not include bargaining units comprised exclusively of peace officers, management employees, and employees of the City of Los Angeles or the County of Los Angeles. Thus, this component of the Supreme Court’s decision has no direct relevance to peace officer-only units. Moreover, because the scope of judicial review is strictly limited to the three circumstances described above, there are limited instances where it can be applied. The most common of these circumstances is likely to be when it is alleged that PERB’s refusal to issue a complaint was based on an erroneous statutory interpretation. However, in light of the Supreme Court’s admonition to apply its holding narrowly, most such decisions by PERB will remain irreversible.

The Decision to Lay Off Employees is a Management Prerogative

The Court reaffirmed that an employer is not required to meet-and-confer prior to making the initial decision to lay off employees and

rejected Local 188’s argument that the City was obligated to negotiate because the layoffs affected the workload and safety of the remaining firefighters.

It is important to note that the Court distinguished the situation at issue here (a layoff decision motivated by a desire to reduce labor costs and not involving transferring work outside the bargaining unit) and a transfer of bargaining unit work to non-unit employees (such as retired annuitants or private contractors). In the latter situation, the decision to transfer work is a mandatory subject of bargaining.

The take-away message from this case is that an employer can unilaterally decide to lay off employees, but it must meet and confer over the impact that decision will have on the remaining employees when a request to bargain is made by the exclusive representative. A union seeking to preserve its rights, including its right to challenge an employer’s failure to bargain over the impact of a layoff decision, must specifically request to bargain over the *effect* of the layoffs, such as the timing of the layoffs, the number of employees to be laid off, and the effect on workload and safety of remaining employees. Failing to demand to negotiate over these issues may waive a union’s right to bargaining at all.



MOU Extension for Marin Firefighters

Gregg Adam recently helped negotiate a two-year extension to the memorandum of understanding between **Marin County Fire Department Firefighters' Association** and the County of Marin. Marin has weathered the current economic downturn better than many local agencies, and that combined with long-standing strong labor relations, permitted the

parties to extend their MOU until June 30, 2014. The parties agreed to a cost-of-living adjustment between 2% and 4% in July 2013. The agreement gives the county a reopener to discuss retirement and has a reopener for the association to increase medical benefits.



Arbitrator Rules Yolo Court Deputies May Schedule Days Off at Their Discretion

In late 2004, Yolo County was determined to balance its budget on the backs of its employees by implementing an across the board furlough. The Deputy Sheriffs Association (“DSA”), however, was in the middle of a contract with the County which did not expressly permit furloughs and which contained a full modification and waiver (zipper) clause. The DSA filed a grievance, which ended up in arbitration, alleging that its zipper clause prohibited the imposition of furloughs without the DSA’s consent. The Arbitrator agreed, concluding that since the parties waived their rights to negotiate during the contract over matters within the scope of bargaining, the county waived its right to impose any changes, including furloughs during the term of the contract.

With that background, the County was again experiencing a budget shortfall in 2009 when it approached the DSA in an effort to gain concessions and ease the County’s financial burden. Ultimately, the DSA agreed to furloughs in an effort to mitigate the County’s financial shortfall. As part of the DSA’s concession, however, it insisted (and the County agreed) to language that guaranteed that furlough time “will be taken at the discretion of the member in compliance with the policies and procedures of the affected Department for the scheduling of compensatory time off”.

Once the furloughs were instituted, the Department forced the Deputies to schedule their furloughs by seniority and apply a rule (which only applied to the Courts) that no more than two Deputies could be off at any one time, a process that previously applied only to vacation sign ups. This forced Court Deputies of lower seniority to choose the days that were “left over” by the more senior Deputies and denied them discretion in choosing their preferred days. Deputies were forced to choose these days (even if they did not want to use them) since any remaining furlough time would be forfeited and could not be cashed out at the end of the year.

When the County came to the DSA in 2010 looking for additional concessions, the DSA wanted to ensure that if it agreed to help the County achieve its necessary savings (again), the Department would not deny the DSA’s members’ preferred choices for days off. The parties agreed that in exchange for the Deputies picking up 7 percent of their PERS contribution for the term of the contract, sunseting in June of 2011 (under the MOU at the time, the County was required to pay the full 9 percent), DSA-represented employees would be credited with 104 hours of Personal Time Off (“PTO”). The Parties also agreed to a salary survey in September 2010, to be implemented retroactively, effective July 1, 2010 for any increases in the average for comparable agencies. This resulted in a 4.6% pay increase.

Under the side letter, PTO was to be used in the same manner as furloughs. Since furloughs were supposed to be scheduled in the same manner as Compensatory Time Off (“CTO”) the DSA and the County agreed to amend the section regarding CTO to add “...and shall not be denied based upon the cost of backfilling to maintain staffing levels”. DSA members voted to approve the PERS concession

based on the assumption that they would accrue the additional PTO and be able to have their preferred days off when using their PTO.

Once the side letter went into effect, the Department almost immediately began to violate the agreement, by ordering deputies in the Courts to exhaust their newly acquired PTO before any other leave time was used. The Department even went so far as to substitute PTO for the requested leave if leave time other than PTO was submitted. Since the Vacation sign up schedule had already been circulated, Deputies were forced to use PTO to cover scheduled vacations.

Since the time frame for requesting PTO is more flexible than that of Vacation, PTO has more “value” and the Deputies are significantly disadvantaged by being required to utilize the PTO in a manner other than contemplated in the side letter. The MOU requires that a request to use Vacation cannot be unreasonably denied only if it is made 30 days in advance. With PTO, one would have to submit an Absence Request slip only two work shifts prior to your desired day off.

After multiple attempts to resolve the matter informally, the DSA chose to grieve the matter to Arbitration. Led by **Carroll, Burdick & McDonough Sacramento Labor Partner Gary Messing**, and assisted by **Labor Representative Brian Parino**, the DSA successfully showed that Deputies in the courts had applied for PTO (some more than 60 days in advance) and had been denied that time based solely on the fact that two other Deputies had already requested the day off. Arbitrator William Riker concluded that, “PTO has the same level of schedule flexibility as the CTO and should not be denied based on similar challenges to backfilling staffing gaps.” The County was ordered to immediately implement

the provisions of the PTO side letter agreement and stop denying time based on the cost of backfilling.



Compelled Search of Firefighter’s Home During Internal Affairs Investigation Violates Fourth Amendment

By Lina Balciunas Cockrell

In the case of *Delia v. City of Rialto*, 621 F.3d 1069 (9th Cir. 2010), the plaintiff firefighter brought a federal civil rights action against the city, the fire department, the fire chief, a private attorney, and others, alleging a violation of his Fourth Amendment rights during an internal affairs investigation. The plaintiff became ill after working to control a toxic spill and received a series of off-duty work orders, though with no activity restrictions. The City became suspicious of his off-work activities and began conducting surveillance on him. During the surveillance, the plaintiff was filmed buying building supplies, including several rolls of insulation at a home improvement store. The City subsequently began an internal affairs investigation of the plaintiff to determine whether he was off work on false pretenses.

During his internal affairs interview, the plaintiff explained that he had some duct work done in his home and had purchased some rolls of insulation, but that the rolls were currently sitting, bagged, in his house. After refusing to consent to a warrantless search of his home for the insulation, the plaintiff was ordered by the fire chief, through a private attorney hired by the City, to be followed home by two battalion chiefs, bring the insulation out from his home, and to have the insulation inspected by the battalion chiefs. He was advised that failure to follow this order would constitute

insubordination that could result in termination. The district court granted summary judgment in favor of all of the defendants because: (i) the individual defendants were entitled to qualified immunity, and (ii) the City could not be held liable under the U.S. Supreme Court's decision in *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978) because the plaintiff failed to show that a municipal policy caused his injury.

The Ninth Circuit Court affirmed the district court's decision in part, but on different grounds, and reversed in part. The appeals court determined that the individual defendants from the fire department *did* violate plaintiff's Fourth Amendment rights because the order was not consensual -- it was coerced and involuntary -- and, therefore, the warrantless search of his home was unreasonable.

But, because this right, under these or similar facts, was not clearly established *at the time*, the city employees in this case were entitled to qualified immunity. Whether a right is clearly established depends upon whether the action was objectively reasonable, "assessed in light of the legal rules that were clearly established at the time it was taken" such that "a reasonable official would understand what he is doing violates that right."

However, the Ninth Circuit concluded that this case did not neatly fit into any previous category of Fourth Amendment law. In other words, there was no previous case where a court held that this kind of a search violated the Fourth Amendment. Thus, the plaintiff could not demonstrate that a constitutional right was clearly established as of the date of the fire chief's order, such that the defendants would have known that their actions were unlawful.

This case was published by the Ninth Circuit and now likely "clearly establishes" that

a public employee has a constitutional right, in the course of an internal affairs investigation, not to be ordered – under the threat of discipline – to consent to a warrantless search of the employee's home.

The Ninth Circuit also affirmed the grant of summary judgment for the city on plaintiff's *Monell* claim because the plaintiff failed to show that his injury was caused by an official policy, longstanding practice or custom, or by a final policymaker. The appeals court, however, reversed the grant of summary judgment for the private attorney because the precedent in that circuit holds that private attorneys hired by a sovereign are not entitled to qualified immunity.



Employer Conducting Simultaneous Criminal and Administrative Investigations Runs Serious Risk That Employee's Statements Will Be Considered Compelled

By Jason Jasmine

In Georgia, an officer involved in a fatal shooting of a criminal suspect was being investigated both administratively and criminally, and was not told that he was free to refuse to participate in the investigation. When the officer was later criminally prosecuted, the officer filed a motion to suppress the statements he made. The Georgia Supreme Court agreed with the officer and ordered that the statements be suppressed.

Applying a "totality of the circumstances" test, the Court determined that the officer's statement was coerced because the officer *subjectively* believed that he could lose his job for failing to cooperate, and that his belief was *objectively* reasonable given the State action involved. Even though the officer wanted to

cooperate, the evidence demonstrated that the officer did believe he would be punished if he did not speak to detectives, and that belief could not be deemed to be objectively unreasonable. Because the criminal and administrative investigations were being conducted simultaneously, and because he was instructed that he could not leave the scene, the statements could be considered compelled.

Thompson v. State, 2010 WL 4394265 (Ga. 2010)



**An Employer May “Preemptively”
Require a Fitness for Duty Examination
Based on Observation of Symptoms
That Do Not Yet Impact Performance**

By Jonathan Yank

In *Brownfield v. City of Yakima* (2010) 612 F.3d 1140, the Ninth Circuit Court of Appeals was called upon to determine whether it was permissible for a city employer to require a police officer to undergo a fitness for duty examination upon becoming aware of several strange behaviors by the officer both during and after work hours. These actions included swearing at a superior, becoming highly agitated when a young child teased him during a traffic stop, domestic violence at home, and making comments perceived as suicidal. The city terminated the officer after he refused to comply with an order that he undergo a fitness for duty examination to determine whether he could continue performing his law enforcement duties. The officer then sued, claiming that the city had violated the Americans with Disabilities Act (“ADA”) when it fired him for refusing to submit to the examination.

The Court of Appeals upheld the trial court’s determination that the city did not

violate the ADA by requiring the fitness for duty examination. Under the ADA, an employer may not require a fitness for duty examination “unless such examination ... is shown to be job-related and consistent with business necessity.” The Court rejected the officer’s argument that an examination cannot be job-related unless the employer can show that the employee’s job performance was impacted by his/her behavior.

The Court of Appeals ruled that a “prophylactic” examination may be “job-related” and satisfy the business necessity standard even though job performance is not affected. The Court adopted a “reasonable person” standard, permitting a fitness for duty examination when there is “significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job.” However, the Court cautioned against abuse of the standard, holding that “an employee’s behavior cannot be merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether that employee can perform job-related functions.”

**DA’s Office Granted Immunity in *Brady*
List Case**

By Lina Balciunas Cockrell

In the case of *Neri v. County of Stanislaus District Attorney’s Office*, 2010 U.S. Dist. LEXIS 99839 (E.D.Cal. 2010), the plaintiff lost his job as a police officer with the City of Ceres as a result of being placed on a “Brady List” by the District Attorney’s Office (“DA”). A “Brady List” is typically a list of officers who have been identified as knowingly lying or engaging in other actions which may need to be disclosed to defense counsel, and “Brady Material” consists of exculpatory or

impeachment information, pursuant to the U.S. Supreme Court's ruling in *Brady v. Maryland*, 373 U.S. 83 (1963).

The DA had conducted an impromptu investigation of the officer at issue and came up with several hundred pages of documents pertaining to the officer that it deemed "Brady Material." The officer never had the opportunity to object to the DA's review and dissemination of his employment records and other personal information.

While Ceres supported the officer and challenged his placement on the Brady List, the DA refused to remove the officer's name and informed Ceres that it would not allow the officer to testify for the prosecution in any of their cases without independent corroboration.

Ceres ultimately terminated the officer on the grounds that as a result of his placement on the Brady List, he had automatically violated rules and policy, and because the officer could no longer give testimony in legal proceedings as his job requires. The appeals board found the officer credible, but upheld his termination because of his placement on the Brady List.

The officer filed suit against the County and the DA, claiming that Defendants violated his civil rights through a policy or practice of placing officers on a Brady List without the aide of established and objective criteria and that his 14th Amendment right to pursue a profession was violated by placing his name on the Brady List and disclosing personal information.

The court ultimately dismissed the officer's case on the grounds that the Defendants are protected from suit by 11th Amendment State immunity. The acts of placing the officer on the Brady List, disclosing the Brady Material and allegedly failing to maintain objective criteria for placement on a

Brady List are done pursuant to the prosecutorial capacity of the DA and as such, is considered to be that of the State, not the County. Thus, 11th Amendment immunity is applicable.

The moral of the story from this case is that a district attorney's office has considerable latitude when it comes to investigating an officer and obtaining documents that can be used as Brady Material. The DA then has even more discretion in determining that an officer may be placed on a Brady List. However, this is not the end of the story, nor should placement on a Brady List automatically be considered as the end of an officer's job.

First, a peace officer's personnel records are still presumptively confidential – even vis-à-vis the DA – and disclosure is still subject to the stringent procedures set forth in Evidence Code sections 1043 and 1045. Second, the officer can still make the argument that the Brady Material need not be disclosed to defense counsel because it is irrelevant to the officer's potential testimony in a specific case. For example, only documentation of past officer misconduct which is similar to the misconduct alleged by defendant in the pending litigation is relevant and therefore subject to discovery. Therefore, a peace officer still has significant protections against inclusion on a Brady List.

Finally, we have been successful in appealing cases where the primary grounds for termination is the DA's inclusion of the officer on a Brady List. Should you be faced with such a situation, please talk to an attorney prior to making any decisions regarding your career.

First Amendment Freedom of Intimate Association Cannot Protect Deputy From Termination

By Lina Balciunas Cockrell

In the case of *Bautista v. County of Los Angeles*, 190 Cal.App.4th 869 (2010), a deputy sheriff was terminated for engaging in a personal relationship with a known prostitute and heroin addict in violation of the Department's "prohibited association" policy. The policy required the Department's express written permission prior to knowingly maintaining "association with persons who are under criminal investigation or indictment and/or who have an open and notorious reputation in the community for criminal activity, where such association would be detrimental to the image of the Department."

On its face, this seems like a clear cut case based on a common sense rule. However, the situation was actually fairly complicated because, whatever the reasons the deputy had for beginning his association with the prostitute, he wound up marrying her. On a petition for writ of mandate challenging the denial of his appeal, the deputy claimed, among other things, that the Department's policy violated his federal constitutional right to "intimate association." The First Amendment guarantee of intimate association protects, among other things, those personal relationships "that attend the creation and sustenance of a family, including marriage, childbirth and cohabitation with one's relatives."

The Court concluded that the policy was subject to a rational basis review because it did not "substantially burden" the deputy's fundamental right to marry. The Court further concluded that the Department has "a legitimate interest in regulating the behavior of its sworn

officers to minimize conflicts of interests and protect the credibility of the Department." The deputy's association with the prostitute, even though it had a happy ending, embarrassed the Department and undermined its reputation in both the law enforcement community and the public it is charged with protecting. Accordingly, the Court denied the petition for writ of mandate and upheld the termination.

This case demonstrates that even where there are no "bad" motives, "prohibited association" policies impact peace officers in their personal conduct. This case leaves unanswered the more difficult question of what happens when a family member later becomes somebody who would fall under the "prohibited association" policy of your department.

Employer Unlawfully Bypassed Union By Establishing a "Focus Group" to Consider Changes to Bidding Procedure

By Jason Jasmine

Prior to the dispute in this case, Extra Board ("EB") driving assignments (essentially, overtime shifts for bus drivers employed by this employer), were made based on a rotation of drivers on the EB roster. Drivers could make bids to be placed on the EB roster. There were a number of complaints by drivers about how the EB assignments were given and administered, and that the procedures were difficult to understand. Rather than meeting with the union to discuss these issues, the employer formed a focus group consisting of management, and several individuals representing different classifications. The focus group made several recommendations, and the employer then offered to meet and confer over those recommendations. The meet and confer did not occur after the union insisted that the meet and confer encompass all aspects of the EB matters,

not just those recommendations by the focus group.

PERB found that the employer unlawfully bypassed the union, in violation of the Meyers-Milias-Brown Act, by establishing the “focus group” to consider changes to the bidding procedures for Extra Board drivers. This was, in essence, nothing more than the employer meeting directly with employees, surveying their preferences and using that information to bypass its obligations to the union.

Amalgamated Transit Union Local 1704 v Omnitrans, PERB Decision No. 2143-M (2010)

NLRB Rules that Remedial Notices Must Be Distributed by Electronic Means

By Jennifer Stoughton

The NLRB recently held that given the prevalence of electronic communication in the workplace (i.e., email), remedial notices should be distributed electronically when that is the customary means of communicating with employees or members. We believe that the same rationale applies here in California and PERB will adopt this in the very near future. (*J. Picini Flooring*, 356 NLRB No. 9, 2010 NLRB LEXIS 429 (October 22, 2010).)

PERB Upholds Employer’s Unilateral Changes to Class Specifications Regarding Minimum Requirements

By Jason Jasmine

The City of Alhambra unilaterally changed the minimum job requirements for the class specification for fire captain, eliminating certain previously required qualifications. The union objected, claiming (consistent with prior PERB precedent) that changes to job specifications were within the scope of

bargaining. The administrative law judge assigned to hear the case issued a proposed decision finding that the City committed an unfair practice by unilaterally changing the class specification. In spite of relatively clear precedent, the Board attempted to distinguish those cases in overturning the ALJ’s proposed decision. The Board found that the City’s change did not adversely impact wages or hours and was therefore not within the scope of bargaining. The Board also held that the establishment of minimum job qualifications is a fundamental managerial or policy decision. Finally, the Board held that the City’s need for unencumbered decision making in this situation outweighed the benefit of bargaining over the decision, even if bargaining had otherwise been appropriate.

We are hopeful that Governor Brown’s upcoming appointments to the Board will reverse the recent shift toward embracing “management rights” at the expense of the duty to bargain.

Alhambra Firefighters Association v. City of Alhambra, PERB Dec. No. 2139-M (2010).

Non-Union Employees Must Be Given Notice and Opportunity to Object Before the Employer Releases Personal Information to the Union

By Jennifer Stoughton

In *County of Los Angeles v. Los Angeles County Employee Relations Com’n*. (2011) 192 Cal.App.4th 1409, the Court of Appeal held that Los Angeles county employees who had opted out of union membership were entitled to notice and an opportunity to object to disclosure of their contact information to the union. This case arose when SEIU, Local 721 sought personal information of non-members to communicate with them about union activities, layoffs and

other job-related activities and to present information for recruitment into the union.

The Court found that non-members had a reasonable expectation that their home address and home telephone numbers would remain private. In order to protect this constitutional right to privacy, each non-member must be given notice and an opportunity to object to the disclosure of their personal information. In the event of an objection, the Union has the right to challenge it before the Los Angeles County Employee Relations Committee. In so holding, the Court rejected PERB precedent which gave unions access to personal information of non-members because it was based on traditional labor law and not California law.

Employee Entitled to Administrative Hearing Appealing Discipline, Even After Her Disability Retirement

By Jason Jasmine

Sanchez was a probation corrections officer in the County of Riverside. The County terminated her based on a medical condition that prevented her from performing the essential functions of her job. The County denied her request for an administrative appeal because, according to the County, she was terminated based solely on her medical condition and not for “disciplinary reasons”. The County ultimately rescinded her termination and applied to CalPERS for disability retirement benefits on her behalf, retroactive to the first day she was on unpaid status with the County. Sanchez informed the County that she wished to appeal her disability retirement, and also petitioned the court for a writ of mandate directing the County to hear her administrative appeal from termination.

The County contended that it had rescinded Sanchez’s termination and her

exclusive remedy was to appeal her disability retirement. The Court of Appeal affirmed the trial court decision granting Sanchez’s petition on the ground that she was denied wages and benefits of her employment, notwithstanding the rescission of her termination.

Sanchez was entitled to an administrative appeal – not of her termination (since that had been rescinded) – but of the County’s “disciplinary actions” denying her wages and benefits from and after the retroactive date of her disability retirement.

Riverside Sheriffs’ Association v. County of Riverside, Case No. E050596 (CA Dist. 3 Ct. App., February 28, 2011)

Communicating With Your Attorney Via Your Employer’s Email System Waives Confidentiality

By Jason Jasmine

In *Holmes v. Petrovich Development Co.*, 2011 WL 117230, the employer used emails exchanged between the employee and her attorney as evidence to get portions of the lawsuit dismissed. The employee claimed that the emails were privileged, but the Court agreed with the employer that by using the employer’s computer to communicate with her lawyer, in violation of the employer’s communications policy, the employer could use those emails as they lost their protection. The Court analogized the emails as the employee consulting her lawyer in her employer’s conference room in a loud voice, with the door open.

Tuolumne DSA Gets a Contract

By Brian Parino

It is no secret what kind of financial situation cities and counties are facing in the

State of California, and now with the state legislature trying to squeeze more money out of counties to deal with the State's budget shortfall, that problem has only gotten worse. With this background, and with Tuolumne County ("County") facing a large deficit, the Tuolumne DSA ("DSA") was not looking forward to negotiating a new MOU to replace the MOU that was about to expire. The DSA represents Operational and Jail Deputy Sheriffs, Sergeants and Corporals as well as Dispatchers, Probation Officers and Booking Clerks.

The County was looking to make drastic cuts to deal with its current deficit. Besides wanting drastic retirement changes (a new 2% at 50 retirement tier for new employees, a 3-year average for determining final compensation, and the payment of the employee's PERS contribution by the employee), the County wanted to suspend the ability to cash out holiday and vacation leave for the term of the MOU, permanently cap employer-provided cafeteria rates as well as implement overtime based on the Fair Labor Standards Act (FLSA), which requires only "actual" hours worked count toward the threshold for calculating overtime.

Led by its chief negotiator, CBM Sacramento labor partner **Gary Messing**, the DSA went into bargaining looking to hold on to as much as it could, given the circumstances. Faced with the realization of what was happening financially in the State and County, the bargaining team looked to mitigate the impact on the DSA as much as possible and entered into a 2 ½ year agreement. The DSA was able to move the County off its position of implementing overtime based on FLSA, and agreed that only sick time would be considered "unproductive" time for the purposes of calculating overtime to deal with a problem that was occurring in one section of the Sheriffs office.

While most other units ended up taking a \$150 reduction in their cafeteria plan, the team locked in the Cafeteria Rates the bargaining unit had been receiving in 2009 and got a \$50 increase for the Family PORAC health option so that no one would be required to pay out-of-pocket for the term of the contract.

The DSA was also able to reinstate its ability to cash out holidays, and increase the vacation accrual cap by 168 hours for the term of the MOU. In exchange the DSA agreed to take 12 total furlough days over the term of the 30 month contract, and agreed to the new retirement tier for new hires.

Since other units in the County had taken anywhere from a 7 to 14.3% reduction per year, the 1.38% net loss per year from the DSA was considered by the bargaining team a proposal it had to bring back to its members. With an overwhelmingly favorable vote, the DSA ratified its contract which went into effect January 1, 2011.

Public Employer May Force Employee to Reimburse for Training Costs

By Jason Jasmine

In the City of Oakland a policy exists which requires peace officers who voluntarily separate from employment prior to completing five years of service must repay a pro-rata share of their training costs, beginning at 100% if the employee resigns during the first year. The Ninth Circuit Court of Appeals confirmed that because this policy existed (and was agreed to in the MOU between the City of Oakland and the Oakland POA), the training costs were essentially a loan which would be forgiven if the employee served a full five years.

Gordon v. City of Oakland, 627 F.3d 1092 (9th Cir. 2010)

CBM Attorneys Help Mentor Law Students at McGeorge School of Law

CBM Sacramento Labor Associate **Stephanie Miller** recently had the pleasure of heading back to law school, but this time as a speaker and not a student. Stephanie was asked to be part of a panel discussing negotiations before current law students at McGeorge School of Law in Sacramento. Panelists shared war stories of successes, as well as defeats, and insights in their personal preparations and strategies for different types of negotiations. It was a great opportunity for the law students to see that being a lawyer is not all about the fight. Frequently our greatest successes come when we reach agreement.

CBM Sacramento Labor Partner **Jason Jasmine** also recently spoke to a group of law

students, as a panelist discussing “A Day in the Life” of a labor & employment law attorney, with students from the McGeorge Employment & Labor Law Society

CBM Attorney Speaking at Employment Seminar

On May 13th, CBM Sacramento Labor Partner **Gary Messing** will be part of a panel speaking to the California Bar Association Labor and Employment section. The panel will be discussing hot issues involving public sector retirement, including issues of funding, legal challenges to retirement, and the like. The seminar will be held at the Radisson Hotel in Sacramento.

**IMPORTANT NOTICE
TO ASSOCIATION BOARD MEMBERS**

CBM 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: Stephanie Hosey**. If you would like to begin receiving the Labor Beat electronically, please contact Stephanie Hosey at **shosey@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.

CBM thanks all of you for your help.

NAME OF ASSOCIATION _____

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