CARROLL BURDICK

THE LABOR BEAT

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SOME SHOUT-OUTS FOR OUR LABOR LAWYERS ON THE BEAT...

Gary Messing will be inducted as a Fellow into The College of Labor and Employment Lawyers this November at the 19th Annual Induction Dinner, a red carpet affair in Los Angeles, held in conjunction with the ABA's 8th Annual Labor and Employment Law Conference. The primary purpose of the College is recognition of individuals, sharing knowledge and delivering value to the many different groups who can benefit from its value model. Gary's nomination and election evidence, amongst other things, his highest professional qualifications, ethical standards, integrity, professional expertise and leadership. The prestigious college has a nationwide membership of just over 1,000 and Gary is the only union attorney of just 5 elected fellows in California north of the Bay Area. Congratulations, Gary, on this well-deserved distinction!

In the last issue of the Labor Beat, we reported that **Gregg Adam** was selected in 2013 by the *Daily Journal* as the only union-side lawyer among the Top 20 Municipal Lawyers in California. This year, the *Daily Journal* recognized him again, naming him as one of California's leading Labor & Employment Lawyers. The *Daily Journal* published a profile of Gregg in its July 16, 2014 issue, recognizing his victory in convincing a Santa Clara judge to strike down key provisions of Measure B. (More about this case in this issue.) The *Daily Journal* provides news of interest to California lawyers and includes profiles of judges and counsel, appellate decisions and other legal information. We are proud of Gregg's continued recognition by the prestigious *Daily Journal!*

We are pleased to be recognized this year, as in years past, by Super Lawyers in the field of Employment and Labor Law amongst Northern California lawyers: **Gary Messing, Gregg Adam** and **Jonathan Yank** were named this year as Super Lawyers, and **Jason Jasmine** and **Jennifer Stoughton** were recognized as Rising Stars. Candidates for Super Lawyers are evaluated based upon peer recognition and professional achievement. While up to five percent of the lawyers in the state are named to Super Lawyers, no more than 2.5 percent are named to the Rising Stars list. Congratulations to all!

CARROLL BURDICK HELPS SAN FRANCISCO DEPUTY PROBATION OFFICERS WIN INTEREST ARBITRATION AWARD WITH SIGNIFICANT SALARY INCREASES

The San Francisco Deputy Probation Officers' Association ("SFDPOA") recently won an interest arbitration award, which will result in base salary increases totaling between 9.75% and 10.75% over a three-year term. This includes 4.25% in 2014, 3.25% in 2015, and a range of 2.25% to 3.25% in 2016, based on changes to the Consumer Price Index. Salary was the only outstanding issue in arbitration.

The bargaining and arbitration team was comprised of SFDPOA President **Armando Garcia,** the SFDPOA Board of Directors, and Carroll Burdick Labor Partner **Jonathan Yank.**

CARROLL BURDICK ASSISTS FOLSOM MIDDLE MANAGEMENT GROUP TO OBTAIN SIGNIFICANT MID-CONTRACT GAINS

As part of a previously negotiated reopener, the Folsom Middle Management Group ("FMMG"), represented by Chief Negotiator Carroll Burdick Partner **Jason Jasmine** and FMMG President **Dave Nugen,** came back to the table with the City to discuss various issues. After just a few meetings, FMMG was able to secure for its members an additional 2.5% salary step, increases to the health care "cash in lieu" option, and other changes that the parties felt were mutually beneficial regarding leave and other matters.

CARROLL BURDICK WORKS WITH SACRAMENTO COUNTY MANAGEMENT ASSOCIATION TO SOLVE COMPACTION ISSUES WITH BIG GAINS IN NEW MOU

The Sacramento County Management Association ("SCMA"), led by their Chief Negotiator, Sacramento Labor Partner **Jason Jasmine,** with the hard work and valuable assistance of a bargaining team made up of **Kelsey Johnson, Jan Holm, John Hinkley** and

Lisa Scott-Lee, negotiated a strong new MOU that accomplished two primary goals: (1) making up for some of the ground lost during the recession; and (2) resolving many of the compaction issues that had plagued this group of management-level employees since before they were represented.

Over the course of the contract that will end in June of 2018, SCMA-represented employees will receive a Cost of Living Adjustment of 2% in July of 2014, and between 2% and 4% in July of 2015, depending on inflation. In June of 2016 they will receive a 4% COLA, and in July of 2017, they will receive between 2% and 5% depending on inflation. Employees also received additional increases of 1.9% in July of 2014, and 1% in July of 2015 to compensate for an increase that should have been received in prior years during the recession. These increases (of between 12.9% and 17.9%) are offset by increases to retirement contributions that will total approximately 4.3% spread out over that same period.

Many of the compaction issues were addressed through a series of new differentials, incentives and equity adjustments of anywhere between 1% and 10%—on top of the increases discussed above. Certain of these increases can be "stacked" by employees in certain positions, resulting in very large increases for employees with the greatest compaction issues. Over the term of the contract some employees could see increases of as much as 33%. Employees will also receive 64 hours of Administrative Time Off that may be used anytime during the course of the MOU, but will be lost if not used by the expiration. SCMA obtained a guarantee of no furloughs during the term of the contract, as well as increases to the education reimbursement and transit pass subsidy. Finally, the County agreed to mid-contract re-openers to discuss salary increases only. The new MOU also made a few relatively small, but important, language changes to protect the rights of its members.

SAN JOSE MAYOR CHUCK REED LOSES LAWSUIT ON STATEWIDE PENSION REFORM BALLOT MEASURE

By Amber Griffiths

San Jose Mayor Chuck Reed's 2014 statewide pension reform initiative suffered a fatal blow this year. The Sacramento County trial court rejected a lawsuit challenging the wording that Attorney General Kamala Harris used in the state's required, official summary of the measure. Reed and four other California mayors behind the initiative argued that the first sentence in Harris' summary was misleading because it told voters the measure would "eliminate constitutional protections" for public workers, "including teachers, nurses and peace officers." But the very word objected to—"eliminate"—is exactly how Reed has publicly described the effect of the measure on vested rights.

Despite the weakness of his arguments, Reed pushed forward, seeking rewording of the measure's summary. He also objected to the summary naming the largest groups that could be impacted: peace officers, nurses, and teachers. After the Court shot down his arguments, Mayor Reed issued a press release stating that efforts regarding the measure will be re-launched for the November 2016 election.

DON'T ASSUME YOUR EMPLOYER HAS A RIGHT TO INSPECT YOUR PHONE

By Jonathan Yank

A public sector labor client approached us recently when a member was ordered by his department to surrender his mobile phone for inspection of text messages. This was his personal mobile phone, not a department-issued device, so our client wondered whether the employee had any kind of protection from such an intrusion into his private communications. While the answer as to whether a particular search is legitimate is (like many things involving the law) "it depends," the general principle is that privacy protections do apply in this type of situation involving a public employer. The question then becomes whether the employer's reason for the

search justifies the intrusion and whether the intrusion is excessive under the circumstances.

As noted by the United States Supreme Court in *O'Connor v. Ortega* (1987) 480 U.S. 709, "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." In that case, the Supreme Court created a two-part test to determine whether a public entity may undertake a warrantless search of personal belongings of its employees:

(1) the search must be justified at the time it is conducted, meaning that "there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a non-investigatory work-related purpose such as to retrieve a needed file[;]" and

(2) the search, as carried out, must be reasonably related in scope to the circumstances that justified it in the first place, meaning that "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of … the nature of the" alleged misconduct or other subject matter of the investigation.

Applying this test in another case, *City of Ontario v. Quon* (2010) 560 U.S. 746, the Supreme Court found that a warrantless search of text messages in an employer-provided, employer-paid device was permitted based primarily on the following factors:

- The employee was told that the device was subject to search.
- The reason for the search was to determine, in light of the officer incurring overage charges (from a high volume of messaging), whether the City's contract with the wireless provider allowed adequate usage for work-related communications—i.e., it was purely work-related with no intent to delve into personal matters.
- Critically, the Court specifically noted that "the OPD's audit of messages on Quon's employer-provided pager was not nearly as intrusive as a search of his personal email account or pager, or a wiretap of his home phone line would have been."
- The Court also explicitly recognized that "under the circumstances a reasonable employer would not expect that such a review [of an employer-provided device] would intrude on" protected matters of a purely personal and private nature.

In light of these factors, all of which flow from the fact that it was an employer-provided, employer-paid device, the Supreme Court ruled that the employer's search was lawful. The Court specifically found that the search in that case was reasonable because it did not involve the employee's private equipment or device, a fact that strongly suggests it would have been unlawful if it had.

Based on *O'Connor* and *Quon,* we believe the search of a public employee's personal text messages on his personal mobile phone may violate his Constitutional rights. While the answer in a given situation will vary depending on the circumstance, the following considerations are critical:

- A public employee retains Fourth Amendment rights, and other constitutional protections, in spite of being employed by a public entity.
- The employer must have reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct.
- The unlimited search and review of text messages would be excessive under most circumstances, particularly if there are less intrusive ways to identify the messages that concern the employer.
- In regard to personal mobile phones, as opposed to employer-provided devices, the expectation of privacy is at its fullest.
- Unlike the search of an employer-provided device, one would necessarily expect the search of a private phone to reveal private communications.

Comment: We believe that a public employer would need very strong and direct justification to require the surrender and inspection of a personal mobile phone. Thus, if you or one of your members is ordered to submit a personal mobile phone for inspection, consider whether such a search would infringe on his/her Constitutional rights. Based on the foregoing analysis, our client was able to convince the employer to back off of its inspection demand.

PERB HOLDS THAT ECONOMIC EXIGENCIES AND AN IMPENDING BUDGET DEADLINE DO NOT JUSTIFY AN EMPLOYER DECLARING IMPASSE AND IMPOSING ITS LAST, BEST, AND FINAL OFFER

By Jonathan Yank

In Selma Firefighters Association, *IAFF, Local 3716 v. City of Selma* (2014) PERB Decision No. 2380-M, the Public Employment Relations Board held that economic exigencies and an impending budget deadline did not justify the City of Selma declaring a bargaining impasse and imposing its alleged last, best, and final offer ("LBFO"). The Board explained "it has long been noted that such economic exigency provides no justification for suspending the duty to bargain in good faith." And it disagreed with the City that language in the MMBA requiring that the parties "endeavor to reach agreement ... prior to the adoption by the public agency of its final budget for the ensuing year" required or even suggested that agreement must occur *before* adoption of a budget. Citing a prior decision, the Board stated that "collective bargaining has no necessary linkage with the ... budgetary process." "Consistent with this reasoning, the City was not justified in its rush to conclude bargaining, declare impasse and impose its LBFO prior to its adoption of its budget."

We have noticed that tactics and arguments like those utilized by the City of Selma are on the rise, particularly with employers attempting to justify unilateral action based on asserted "fiscal emergencies." We are in the process of litigating a number of challenges to such employer actions, and we hope that this decision pours some cold water on employers' aspirations to create a financial/budgetary-needs exception to the bargaining obligation.

DON'T READ TOO MUCH INTO THE CALIFORNIA SUPREME COURT'S DECISION NOT TO REVIEW *DAILEY V. SAN DIEGO* REGARDING VESTING OF RETIREE HEALTHCARE BENEFITS

By Gregg Adam

The anti-pension scribes are already overreaching on the implications of the California Supreme Court's failure to grant review of the appellate court decision in *Dailey v. City of San Diego* (2013) 223 Cal.App.4th 237. But the reality is there is not much to it. The California Supreme Court only accepts review of about 3-5% of the cases for which review is sought in any given year. *Dailey* was never a realistic candidate for review, largely because it involved very case-specific facts and was probably rightly decided on them. It never lent itself to establishing statewide precedent as did, say, the Supreme Court's decision in *Retired Employees Association of Orange County v. County of Orange* (2011) 52 Cal.4th 1171 (establishing that vested retiree health benefits can be created under an implied contract theory).

Of potentially far greater long-term impact was the decision of the United States Supreme Court to grant review in *M&G Polymers USA, LLC v. Tackett,* in which it will determine whether specific language in a collective bargaining agreement is required to create a vested right to retiree medical benefits. That is likely to have greater emotional weight notwithstanding it is a federal law issue, and some states, particularly California, have paved their own way on vested retirement rights issues.

CLARITY MAY BE ON THE WAY REGARDING THE VESTING OF RETIREE HEALTH BENEFITS

By Jason Jasmine

In May, the Supreme Court agreed to hear *M&G Polymers USA, LLC, et al. v. Hobert Freel Tackett, et al.,* a private sector case involving when retiree health care benefits vest where the union contract is silent on the question. The Supreme Court is hearing the case in large part due to a split among the Circuits, and many observers expect some guidance that can be applied nationwide. It's a frustrating subject for many employees who assumed that they will have retiree health care benefits because the contract they were working under at the time they retired said they would.

Although there are a number of conflicting interpretations of whether and how such benefits vest, there are two primary competing views. One, espoused by the Sixth Circuit, holds that retiree health benefits obtained through a collective bargaining agreement are presumed to vest and create a lifetime entitlement, unless the agreement specifically provides otherwise. The other, espoused by the Third Circuit, holds that unless the collective bargaining agreement clearly provides that the parties are agreeing that the benefits would continue indefinitely, then the benefits do not survive the expiration of the contract.

Given the current make-up of the Supreme Court, and the apparent willingness of the majority to go after the rights and benefits of employees, we do not believe the Supreme Court's decision to hear the case bodes well for the Sixth Circuit's presumption in favor of vesting.

IS YOUR EMPLOYER CALCULATING YOUR OVERTIME PAY CORRECTLY?

By Jennifer Stoughton

In the past year, we have had an increase in questions about whether our clients' employers are calculating overtime correctly. Here is a general overview of the FLSA and its application to you:

- The FLSA requires payment of 1.5 times the "regular rate of pay" for all overtime hours worked. For miscellaneous employees, overtime is required for all hours worked above 40 hours actually worked in a week. For safety employees, overtime is required for all hours worked above 7(k) thresholds (up to 171 hours in 28 days for law enforcement personnel and 212 hours in 28 days for fire suppression personnel).
- Under the FLSA, overtime is NOT simply your base hourly rate multiplied by 1.5 times the number of hours of overtime worked. Instead, the FLSA requires that all payment an employee receives as remuneration for time worked must be INCLUDED to calculate your premium overtime rate. Only pay categories specifically excluded by federal law are not applied when calculating the "regular rate of pay." Payment for shift differentials, education incentives, longevity premiums, hazardous duty, working out of classification, and specialty assignment—to name just a few—MUST be included when the employer calculates FLSA overtime. Note that this requirement cannot be changed by an MOU.
- Among the pay categories specifically EXCLUDED from overtime calculations are: sums paid as gifts or rewards for service (such as a holiday bonus), clothing allowances, call-back pay (except for the time actually worked), and reimbursements for expenses.
- For some pay types, such as holiday pay, the manner in which payment is structured determines whether it should be included or excluded. For example, if holiday pay is received without reference to actual hours worked, it will typically be INCLUDED.

In our experience, employers often struggle to calculate the "regular rate of pay" correctly. The rules are complex and administration of them is difficult, particularly as more and more agencies move to automated payroll systems. This is made more complicated by the fact that FLSA overtime can be distinct from contractual overtime—that is the

contractual rate agreed to by the parties in the collective bargaining agreement. However, the FLSA places the burden on the employer to prove that a particular payment should not be included as part of your regular rate of pay for overtime calculation purposes.

Even small mistakes in overtime calculations can have a big impact on your paycheck, so we recommend that you review your paycheck to ensure all of your overtime is being calculated correctly.

PUBLIC EMPLOYEES SUSPENDED WITHOUT PAY ARE ENTITLED TO BURN COMPENSATORY TIME OFF TO SUPPORT THEMSELVES AND THEIR FAMILIES

By Jonathan Yank

A labor association client recently approached us because members were placed on unpaid suspension and were denied the ability to cash out accrued compensatory time off ("CTO") credits. Our client wondered whether the employer had the authority to deny employees the right to burn CTO to support themselves and their families financially. Obviously the answer to this question may be critical to an employee's ability to keep his/her family clothed, sheltered, and fed. Thankfully, we believe the answer is clear—an employer has no discretion to deny employees the right to utilize their accrued CTO under such circumstances.

Some public employers provide employees with CTO in lieu of cash compensation for overtime hours worked. Like cash overtime compensation, CTO accrues at a rate of 1.5 hours per hour of overtime worked. It goes without saying that any accrued CTO represents hours already worked by an employee who, consequently, "owns" such compensation. Thus, it stands to reason that the employer should be required to allow the employee to utilize his/her CTO at any time unless subject to some legally-permissible exception.

CTO is made permissible by the federal Fair Labor Standards Act ("FLSA"). The FLSA states that an employee "shall be permitted by the employee's employer to use such time within a reasonable period after making the request "if the use of the compensatory time does not unduly disrupt the operations of the public agency." (29 USC section 207(o)(5) [emphasis added].)

Interpreting this provision, the United States Supreme Court concluded that it "is more properly read as a minimal guarantee that an employee will be able to make some use of compensatory time when he requests to use it. As such, the proper [necessary] inference is than an employer may not, at least in the absence of an agreement, deny an employee's request to use compensatory time for a reason other than that provided in § 207(o)(5)." (*Christensen v. Harris County* (2000) 529 U.S. 576, 583.)

Thus, an employer must permit an employee to burn CTO upon request unless doing so would "unduly disrupt the operations of the public agency." And no employer can reasonably claim that allowing the use of CTO would disrupt its operations when the requesting employee is already out on employer-mandated leave.

Based on the foregoing analysis, we were able to ensure that the suspended members were able to utilize their accrued CTO.

A PUBLIC ENTITY MUST DISCLOSE THE NAMES OF POLICE OFFICERS INVOLVED IN ON-DUTY SHOOTINGS ABSENT SPECIFIC THREATS TO THE OFFICERS

By Jennifer Stoughton

The California Supreme Court recently issued a troubling, but expected, decision in *Long Beach Police Officers Association v. City of Long Beach* (2014) 59 Cal.4th 59. The ruling requires public entities, upon request, to disclose the names of police officers involved in officer-involved shootings absent a showing that disclosing a particular officer's name would compromise the officer's safety or the safety of the officer's family.

The case arose when the Los Angeles Times made a request, pursuant to the California Public Records

Act, for the names of the two Long Beach police officers involved in a December 12, 2010 shooting, as well as the names of all Long Beach officers involved in any officer-involved shooting from January 1, 2005 through December 11, 2010. The trial court and the appellate court ruled that disclosure was mandated by the Public Records Act and that any harm from disclosure to the officers or their family was merely speculative.

The California Supreme Court agreed. The Court analyzed both the Public Records Act and the *Pitchess* statutes (Penal Code § 832.5 et seq.) and determined that the "personnel records" of officers, including personal and family information, medical history, election of benefits, as well as matters related to the officer's advancement, appraisal or discipline, are confidential and may not be disclosed. However, the Court found that the disclosure of officer names only, without revealing any investigatory or disciplinary matter that may arise out of the incident, is not considered a personnel record and is therefore not exempted from disclosure.

The Court rejected the Union's argument that, because every on-duty shooting is routinely investigated, the details of every such incident (including the names of the officers involved) are records "relating to" officer "appraisal or discipline." The Court determined that such an interpretation would sweep virtually all law enforcement records into the protected category, a result that the Legislature did not intend. Thus, the Court distinguished between the records of factual information about an incident that must be disclosed with the records generated as part of an internal investigation of an officer in connection with the incident, which generally are confidential.

The Court also dismissed the notion that peace officers have a right to privacy in their identification. Generally, when it comes to the disclosure of a peace officer's name, the public's substantial interest in the conduct of its peace officers outweighs, in most cases, the officer's personal privacy interest. The Court determined that the public's interest is particularly high with officer-involved shootings because they often lead to injury or harm and there is no countervailing privacy interest on the part of the officer to countermand that.

Additionally, the Court discounted the Union's argument and evidence that disclosing officer names would subject them, and their families, to harm. The Court agreed with the lower court that all the evidence presented by the Union was speculative and that there was no evidence of a specific threat to any of the officers involved in shootings since 2005. The Court did, however, clarify that *if* there was evidence of a specific threat, an entity could refuse to release an officer's name but that such analysis would have to be conducted on a case-by-case basis.

Although expected, this decision is troubling and endangers the safety of peace officers, and their families, across the state. We fully expect media outlets to take advantage of this decision and submit Public Records Act requests for the names of all officers involved in shootings going back decades. Associations should proactively prepare their members for the release of names and work to identify specific threats made against officers that could be used to prohibit disclosure.

EMPLOYER MUST BARGAIN OVER DECISION TO ELIMINATE CLASSIFICATION ENTIRELY AND TRANSFER TO ANOTHER BARGAINING UNIT

By Gary M. Messing

The Sacramento Police Department traditionally had two dispatcher series: the Supervising Dispatchers in the general supervisory bargaining unit represented by Stationary Engineers Local 39, and the rank and file Dispatchers I, II and III, who are a part of the Sacramento POA bargaining unit. The City came to an agreement with Local 39 regarding a layoff procedure that allowed employees to bump downward from the Supervising Dispatcher classification to the Dispatchers I, II and III series in the Sacramento POA bargaining unit.

In 2011, a police captain began meeting with supervising dispatchers regarding a redistribution of

their job duties in anticipation of upcoming staffing cuts and the reorganization of the Department. Up until April 2011, the Supervising Dispatcher and the Dispatcher III had many overlapping duties.

Subsequently, the Chief of Police sent an e-mail to all employees advising them of the elimination of positions as a result of a substantial budget shortfall. The employees filling positions to be eliminated, including supervising dispatcher positions, were given the option of bumping down into Dispatcher III positions. All of the Supervising Dispatchers chose to bump down to the lower position.

Local 39 demanded a meet and confer over the decision to eliminate the positions and transfer duties from Local 39 to the Sacramento POA and demanded that the status quo be maintained until the negotiations process was completed. While an initial meeting was held, only "preliminary" matters were discussed. So, Local 39 filed an Unfair Labor Practice charge with PERB.

The Administrative Law Judge in the case ruled against Local 39, holding that Local 39 had waived its right to bargain over negotiable effects by failing to make a timely request to bargain the effects of the decision to lay off the Supervising Dispatchers.

However, the PERB Board overturned the ALJ, determining that the police department had made a unilateral change because it had already made a decision to change the policy, the policy was within the scope of representation, the action was taken without giving the exclusive representative notice or an opportunity to bargain and the action had a continuing impact on the terms and conditions of employment. PERB distinguished other cases regarding overlapping duties by holding that when an entire classification is eliminated and transferred to another unit performing many of the same duties, there is a duty to bargain, in contrast to situations where only some positions are eliminated because there is an overlap of duties and some of the duties of one classification are transferred to another. It should be noted that when employers determine whether or not they will notice a union and meet and confer over layoffs, whether the decision itself is negotiable or only the effects are negotiable, the employer is still required to satisfy its obligation to bargain. (*Stationary Engineers Local 39 v. City of Sacramento* (2013) PERB Decision No. 2351-M.)

QUARTET OF PERB DECISIONS RULE AGAINST EMPLOYERS WHO ATTEMPT TO AVOID THEIR MEET-AND-CONFER OBLIGATIONS UNDER THE MMBA

By Jason Jasmine

The Public Employment Relations Board has issued a series of decisions recently vindicating public sector employee unions' meet-and-confer rights. While there will continue to be a number of challenges in the courts (cases attacking these rights are winding through various courts of appeal as this issue goes to press), it does seem that for now PERB is taking seriously its duty to enforce the Meyers-Milias-Brown Act's ("MMBA") meet-and-confer requirements.

In the first of four decisions discussed here, PERB affirmed an ALJ's proposed decision that the union and the County of Riverside were not at genuine impasse when the County unilaterally suspended step increases that had previously been scheduled and agreed upon. (*Service Employees International Union, Local 721 v. County of Riverside* (2014) PERB Decision No. 2360-M.) While there are several relatively interesting components of the case, we mention it to you for only one aspect—PERB rejected the County's argument that PERB could not order the County to retroactively pay step increases as a remedial measure. PERB found that such a remedy is NOT akin to ordering a new wage rate (which it would not have the authority to do), but rather was simply enforcing the union's procedural rights to bargain collectively prior to having the previously agreed upon increase taken away. PERB ordered the step increases implemented retroactively, together with an order for back pay and interest.

The next decision, from April, held that the factfinding procedures added to the MMBA by AB 646 apply to any bargaining impasse over any

negotiable terms and conditions of employment (even a single issue), not just impasses over new or successor MOU. (*County of Contra Costa v. AFSCME Local 2700* (2014) PERB Order No. Ad-410-M.) PERB concluded that in order to determine the merits of this case, it first had to determine the Legislature's intent in passing AB 646. PERB determined that the Legislature intended to import to the MMBA the factfinding processes and procedures of EERA and HEERA and that as such, the Legislature did not intend to artificially restrict factfinding only to disputes arising during negotiations over a new or successor MOU.

In June, PERB relied heavily on the decision in *Contra Costa* to find that factfinding procedures applied to a bargaining impasse between the County and the Union in *County of Fresno v. Service Employees International Union,* Local 521 (2014) PERB Order No. Ad-414-M. With respect to the issue of the duty to participate in the factfinding process over any matter within the scope of representation, PERB's decision was nearly identical to its decision in *Contra Costa.* But PERB also held that while such a decision might overlap with an issue in a related unfair practice case, it does not prejudice nor determine the ultimate outcome in the unfair practice case.

It should be noted that there has been a ruling by a superior court in *County of Riverside v. Public Employment Relations Board* (2013) Case No. RIC 1305661, which enjoined PERB from approving any request for factfinding in any bargaining dispute other than for a new or successor comprehensive MOU. That decision, however, has been appealed by PERB, with the appeal staying the superior court's decision until the case is finally determined by the appellate courts. Thus, for now, PERB's rulings in *Fresno* and *Contra Costa* remain law.

The final decision, issued by PERB in August, is *International Association of Firefighters, Local 1319, AFL-CIO v. City of Palo Alto* (2014) PERB Decision NO. 2388-M. There, the Board addressed the City of Palo Alto's attempts to adopt new employer-employee relations rules, including adopting a motion to submit to voters a ballot measure to repeal from the City Charter procedures for binding interest arbitration of collective bargaining impasses with police and firefighter employee organizations.

PERB concluded that the duty to consult in good faith pursuant to Government Code section 3507 (regarding changes to employer-employee relations procedures) is indistinguishable from the duty to meet and confer in good faith under Government Code section 3505 (regarding wages, hours and other terms and conditions of employment). Thus, the City was required to provide notice and consult in good faith prior to taking action to adopt or alter the rules and regulations at issue. This included the obligation to work through impasse procedures should the parties fail to reach an agreement.

The City took the position that interest arbitration was a permissive, not mandatory, subject of bargaining, and therefore the City would not meet with Union representatives, but would instead listen to their concerns—along with the concerns expressed by the public generally. PERB found that by refusing to meet with Union representatives, the City failed and refused to consult in good faith before approving submission to voters of a ballot measure to repeal interest arbitration of collective bargaining disputes concerning the City's police and firefighter employees.

Overall, these four decisions signal a welcome trend from PERB—strict enforcement of the duty to meet and confer.

FIREFIGHTERS SUFFER HIGHER RATES OF SOME FORMS OF CANCER

By Jonathan Yank

According to a recent study conducted by the National Institute of Occupational Safety and Health, firefighters suffer higher rates of cancer than the general population. Cancers of the respiratory, digestive, and urinary systems account for much of the increased rates, with a small to moderate increase in such malignancies. And rates of mesothelioma, an extremely rare cancer often

associated with exposure to some types of asbestos, were double that of the general population. This is likely attributable to the fact that firefighters have been exposed to asbestos-containing insulation materials in fires involving older buildings. The full article may be viewed at http://www.cdc.gov/niosh/firefighters/pdfs/OEM_FF_Ca_Study_10-2013.pdf.

The study included approximately 30,000 individuals who worked as firefighters during the period from 1950-2009. Because asbestos and some carcinogens have been eliminated from building materials over the last few decades, the study may not represent the current risks associated with firefighting. Nonetheless, we wish to stress the importance of utilizing all protective measures to reduce exposure to toxins and carcinogens.

THE SUPREME COURT CONTINUES ITS ASSAULT ON FAIR SHARE FEES

By Amber Griffiths

The United States Supreme Court recently continued its assault on fair share fees (also known as agency fees) in an opinion issued in *Harris v. Quinn* (2014) 134 S. Ct. 268. The good news is that the majority did not find fair share fees unconstitutional, as many had feared it would. Carroll Burdick had filed an amicus curiae (friend of the court) brief with the Supreme Court on behalf of a national coalition of public safety employees' unions urging the Court not take that drastic step. The coalition was composed of nearly one million public safety employees.

The bad news is that the court also continued to express hostility toward fair share fees and union shop in general, as it had in its 2011 decision, *Knox et al., v. SEIU, Local 1000.* In each case, the court narrowly ruled on the issue at hand: *Harris* held in-home health workers are "partial" public employees not subject to fair share fees; *Knox* set rules on special assessments. In each case, the court departed from that subject matter and attacked the legitimacy of its own precedents, including decades of well-established law upon which many unions have relied, to pass along some of the costs of representation to non-members. Both times, Justice Alito wrote for the majority.

The court left prior precedent intact, based on stare decisis, which is a doctrine that supports leaving prior rulings undisturbed. Unfortunately, it seems the Court will not rest until it has overturned *Abood* and its predecessors. Whether it is based solely on a challenge to the constitutionality of agency fees and whether the Court has enough votes to strike down more than four decades of agency fee case law remain to be seen.

In *Harris v. Quinn,* Carroll Burdick partners **Gary Messing, Gregg Adam,** and **Gonzalo Martinez** filed an amicus brief on behalf of the following public safety employees' unions and their members: California Correctional Peace Officers' Association, CDF Firefighters, Engineers & Architects Association, San Jose Police Officers' Association, Internal Association of Fire Fighters, Local 1775, Deputy Sheriffs' Association of Santa Clara County, Fraternal Order of Police, National Association of Government Employees, International Brotherhood of Police Officers, International Brotherhood of Correctional Officers, National Association of Police Organizations, Inc., International Association of Fire Fighters, Corrections Officers and Forensic Security Assistants of the Michigan Corrections Organization, and National Troopers Coalition.

PERB HOLDS THAT LABOR ASSOCIATION MUST MAKE FINANCIAL RECORDS AVAILABLE TO MEMBER UPON REQUEST AT ANY TIME

By Jonathan Yank

In *California School Employees Association & Its Chapter 47 ("CSEA")* (2014) PERB Decision No. 2355, the California Public Employment Relations Board ("the Board") recently ruled that a labor association governed by the Educational Employment Relations Act ("EERA") must produce financial records for inspection within a reasonable time following a request by a member. As explained below, we believe the reasoning of the CSEA decision applies equally

to other California public sector labor-relations statutes.

In the *CSEA* case, an association member made a vague request for "financial records (Treasurer's Report)" and filed an unfair labor practice charge when the association allegedly failed to respond to the request. In defending the charge, the association claimed that it only had to provide such information within 60 days of the end of the fiscal year. The association relied on language in EERA, specifically Government Code section 3546.5, stating that "[e]very recognized or certified employee organization shall keep an adequate itemized record of its financial transactions and shall make available annually, to the board and to the employees who are members of the organization, within 60 days after the end of its fiscal year, a detailed written financial report thereof … signed and certified as to accuracy by its president and treasurer, or corresponding principal officers."

The Board disagreed with the association's reading of the statute, concluding that the 60-day period referenced in the statute refers to the time period during which the association must prepare such records—it is not a limitation on when a member may seek to review them. The Board did note, however, that the obligation to prepare financial records within 60 days of the end of the fiscal year does not imply that the association is required to automatically distribute them in the absence of an inspection request. Finally, the Board determined that the vague request for "financial records (Treasurer's Report)" was sufficient to put the association on notice that he was requesting financial reports within the meaning of the statute.

While this case arose under EERA, the same rationale should apply under the Meyers-Milias Brown Act, the Ralph C. Dills Act, the Higher Education Employer-Employee Relations Act, and other California public sector labor-relations statutes containing similar financial reporting requirements. And while the Board does not have jurisdiction over most peace officer bargaining units and some management units under the MMBA, California courts having jurisdiction over such units strongly defer to the Board's interpretation of the MMBA.

This is a welcome clarification of labor association reporting requirements. While the association lost the dispute, the outcome does not impose any new reporting requirements—it merely requires that reports an association must already prepare be made available at any time upon request, rather than during a limited 60-day period. And, frankly, the Board's reading of the statute makes more sense than the position argued by the association.

PERB FINDS EMPLOYER COMMITTED UNFAIR LABOR PRACTICE BY TERMINATING EMPLOYEES SEEN AS "ADVERSARIAL" BASED ON UNION ACTIVITY

By Amber Griffiths

PERB recently upheld a retaliation claim made by four nurses whose employer, the Rocklin School District, laid them off after telling them that they were "increasingly being seen as adversarial" due to their union activities. (*Rocklin Teachers Professional Assoc. v. Rocklin Unified School District* (2014) PERB Decision No. 2376.) Like other labor-relations statutes (including the Meyers-Milias-Brown Act), the Educational Employment Relations Act ("EERA") bars retaliation for union activity.

The District argued the decision was made to lay off all nurses and many other district staff, and therefore, there was no evidence of retaliation. But PERB found that, under the circumstances, other evidence demonstrated the District's retaliatory motive. The Superintendent sent an email to the nurses and all school board members stating that the nurses' decision to attend the layoff hearing (itself a protected activity) was "regrettable." Two witnesses testified the Superintendent had stated he included the board members because he thought his email would convince members to vote in favor of the layoff and also to approve elimination of the four nurses' positions altogether.

PERB also agreed that the argument that layoffs were solely for budgetary reasons held no water. No evidence of a budget crisis existed by the time the nurses were laid off. In addition, the District further campaigned for the layoff of the nurses—and elimination of their positions—in a presentation to the school board using proposed budget figures PERB stated were "taken from thin air in that the elements of the alternative health care services delivery option are not costed out."

Finally, the District cited difficulties with its interactions with the nurses as a reason to restructure its health care services, but PERB affirmed that this demonstrated the presence of retaliatory motive. This is because District representatives had told the board that the highest-quality option for delivery of health care would be "the status quo," meaning the retention of the nurses. PERB stated that, moreover, the "difficulties" the District had with the nurses smacked of a retaliatory motive: "Considering that the very issue at the heart of the nurses' protected activities—communication, workload and leadership—are the same issues cited by the District as justification for terminating the nurses' employment, we are all the more persuaded that the District's justifications were pretextual, not the true reason for the layoff of the school nurses, and that the District's affirmative defense is wholly without merit."

In this case, the evidence of retaliatory motive was obvious. But members should be aware that the right to engage in union activities is also protected where more subtle conduct shows a retaliatory motive. Although motive evidence in this case dated back a few years, the retaliatory motive became more obvious in recent events, as reflected in the witness' testimony regarding the Superintendent's stated motives. Although such evidence is compelling, it is not necessary. In fact, it is often the case that circumstantial evidence is the only evidence. The law takes into account that an employer may try to hide a retaliatory motive underneath a permissible one. For example, courts have found that the timing of an employer's adverse action in relation to protected activities in itself may provide adequate evidence of a retaliatory motive.

INJURIES SUSTAINED WHILE EXERCISING TO MEET DEPARTMENT FITNESS STANDARDS COVERED BY WORKERS' COMPENSATION LAWS

By Jennifer Stoughton

In *Young v. Workers' Compensation Appeals Board* (2014) 227 Cal.App.4th 472, a unanimous Court ruled that a county jail sergeant's off-duty injury, sustained while he was doing jumping jacks as part of his regular warm-up exercise regimen, arose in the course of his employment such that he was covered by workers compensation. Whether a particular injury is covered by workers compensation depends on how and when the injury is sustained. The Labor Code provides an exception for coverage of injuries sustained in recreational, social, or athletic activities where they are "a reasonable expectancy of, or are expressly or impliedly required by, the employment." The test for determining whether a particular injury falls within that definition is whether 1) the employee subjectively believes his or his participating in the activity is expected by the employer, and 2) the belief is objectively reasonable.

The Workers' Compensation Appeals Board ("WCAB") had denied Sgt. Young's workers compensation coverage because it found that it was not objectively reasonable for Sgt. Young to have believed that he was required to do jumping jacks based on the Department's general requirement to be physically fit. The Court disagreed and overruled the WCAB. The Court noted that decisions finding a belief "objectively reasonable" have generally found that the employer expected the employees to participate in the activity in question and took affirmative steps to express that expectation. Here, the Court found Sgt. Young's decision to do jumping jacks objectively reasonable because the Department required correctional officers to maintain a certain level of fitness and required its officers to undergo periodic training exercises that involved physical activity. In addition, the Court found that the lack of ability to exercise or

maintain a fitness regimen during work hours coupled with the Department's failure to provide guidance about the types of activities considered appropriate to maintain the requisite level of fitness established that it was reasonable for Sgt. Young to develop his own fitness routine, including jumping jacks.

PENSION-CUTTING MEASURE REMOVED FROM NOVEMBER BALLOT

By Amber Griffiths

On August 4, 2014, the Ventura County Superior Court ordered the County to remove an initiative from the ballot that would have phased out the County's defined benefits pension plan and replaced it with a 401(k). A second question on the measure, if approved, would have set a cap on retirement benefits. The court invalidated the measure in its entirety.

The measure had been widely touted by those who would cut or eliminate public employees' pensions as a model for other counties in California to replace their defined benefits pension plan with lesser retirement benefit. Nine of the County's unions filed suit in a coalition called Citizens for Retirement Security ("CRS"), which argued that the County cannot "repeal" unilaterally its participation in the County Employees Retirement Law of 1937 ("CERL"). The choice to participate in CERL was a decision Ventura County voluntarily made. Once made, however, the County became subject to CERL's requirements. This includes the mandate that the state legislature must determine the phase-out plan protects employees' pension rights. Only the legislature has the power to authorize the phase-out plan.

Judge Kent Kellegrew agreed. He concluded that putting the decision to voters would amount to a waste of public tax dollars because voters are not empowered to approve a plan to withdraw from CERL. In addition, Judge Kellegrew invalidated the ballot language on a separate ground: it impermissibly contains two questions, rather than one, as required under the initiative system. Finally, he also provided the parties time to appeal prior to the election by staying his decision until August 14. The ruling was not appealed. Proponents of the measure vowed to continue their efforts in some form.

COURT OF APPEAL UPHOLDS CONFISCATION OF FIREARMS FROM THE DANGEROUSLY MENTALLY ILL

By Lina Balciunas Cockrell and Julia Johnson

In *City of San Diego v. Boggess,* 216 Cal. App. 4th 1494 (2013), the Court of Appeal affirmed that Welfare and Institutions Code Section 8102 permits police to confiscate firearms from the dangerously mental ill, subject to judicial review, and does not violate the citizen's Second and Fourteenth Amendment right to bear arms.

In 2011, police officers responded to a report of a suicide threat using a handgun, made by a seventy-two year old woman. Police officers brought the woman to the County Medical Health Services for an evaluation, and while she denied being suicidal, she was involuntarily admitted to the emergency psychiatric unit for treatment, pursuant to Welfare and Institutions Code Section 5150.

Pursuant to Section 8102, the City then filed a petition to retain and destroy the firearms seized from the woman. Section 8102 authorizes the seizure and possible forfeiture of weapons belonging to persons involuntarily detained for psychiatric examination under Section 5150 due to their mental condition. At the time the weapons are seized, the law enforcement agency must notify their owner of the procedure to have the weapons returned. The agency must make the firearm available for return unless the agency files a petition to determine whether returning the firearm would likely result in endangering the person or others, and must send a notice to the owner of his or her right to a hearing.

Law enforcement in this case filed a petition to prevent the return of the woman's firearms, and she requested a hearing. The court found that, based on medical opinion, returning the firearms would likely result in danger to the woman or others. Thus, the court ordered that the seized firearms be forfeited and destroyed.

The Court of Appeal affirmed the decision to destroy the firearms. The court found that there was substantial evidence to support its determination and also concluded that the circumstances leading to the psychiatric hold could reoccur if the firearms were returned.

The court also affirmed that Section 8102 does not violate the Second Amendment right to keep and bear arms. There are longstanding prohibitions on the possession of firearms by felons and the mentally ill and the Second Amendment does not protect the right to bear arms for people found to be a danger to themselves due to their mental health. The court concluded that those whose firearms are seized and forfeited under Welfare and Institutions Code Section 8102, fall outside of the protections of the Second Amendment.

Thus, the court upheld Section 8102 as a lawful regulatory measure prohibiting a person involuntarily detained on a psychiatric hold from recovering seized firearms when law enforcement proves returning the firearms is likely to result in danger to the individual or the public.

EMPLOYER MAY REQUIRE MEDICAL REEVALUATION AFTER REINSTATING EMPLOYEE FROM FMLA LEAVE

By Jennifer Stoughton

In *White v. County of Los Angeles* (2014) 225 Cal. App.4th 690, the Second District Court of Appeal recently ruled that an order requiring an employee to submit to a medical reevaluation upon return to work from FMLA leave did not violate the employee's rights under the FMLA.

The case arose after the plaintiff, a Senior District Attorney Investigator for the County of Los Angeles, took FMLA leave to address a serious bout of depression that had caused her to act unprofessionally and erratic at work. Plaintiff's behavior had escalated to the point that it had placed herself and her colleagues in danger while serving warrants and making arrests.

An eligible employee can take up to a total of 12 weeks of unpaid leave under the FMLA because of a serious health condition that renders the employee unable to perform the essential functions of the job. Plaintiff's employer approved her for the full 12 weeks of leave and, upon request from her doctor, provided her with unpaid, but authorized, medical leave beyond the 12 weeks guaranteed under the FMLA to finish her treatment.

Plaintiff was reinstated to employment with the County upon certification from her doctor that she was cleared to return and could perform the essential job functions. After her reinstatement, however, the employer demanded that Plaintiff submit to a medical reevaluation based solely on her erratic conduct prior to her FMLA leave. Plaintiff was advised that she would be subject to discipline if she failed to appear for the test. Plaintiff failed to appear at the scheduled appointment and instead sued claiming that submitting to such a medical evaluation violated her right to be restored to her original position following approved FMLA leave.

The Court of Appeal disagreed. Under the FMLA, an employee is entitled to be restored to his or her position of employment or an equivalent position upon a doctor's certification. An employer cannot demand a second opinion prior to reinstating the employee. Here, however, the Court drew a distinction between the requirement to return an employee to work upon certification and requiring an employee to submit to a fitness for duty test once that employee is restored to his/her position. The Court found that it was undisputed that the employer had properly reinstated the plaintiff to her position and had only sought the fitness for duty test after that reinstatement. The Court found that the result comported with certain amendments to the FMLA promulgated by the Department of Labor and the general public policy concern that peace officers who carry weapons be certified as fit for duty, especially those with diagnosed mental problems.

PERB CONFIRMS THAT ONLY A LABOR ASSOCIATION, NOT AN INDIVIDUAL MEMBER, MAY CHALLENGE AN EMPLOYER'S UNILATERAL ACTION

By Jonathan Yank

In *Edwards v. Lake Elsinore Unified School District* (2014) PERB Decision No. 2353, the California Public Employment Relations Board ("the Board") confirmed that only an employee labor association, and not an individual public employee, may pursue an unfair labor practice charge asserting that an employer has taken unilateral action in violation of its duty to bargain. In that case, the Board adopted the Warning Letter and Dismissal Letter issued by an administrative law judge ("ALJ"), ruling that an individual employee lacked standing to bring such a charge against her employer. While the case involved the Educational Employment Relations Act ("EERA"), as explained below, it should apply to all California public sector labor-relations statutes.

The Board reached its conclusion based on the following factors:

- The purpose of EERA is to promote the improvement of employer-employee relations by recognizing one employee organization as the exclusive bargaining representative of the employees in an appropriate unit.
- Because EERA does not contain any corresponding individual employee bargaining rights, the employer's duty to negotiation is owed only to the exclusive representative organization.
- Therefore, where an individual employee alleges that the employer has failed to fulfill its statutory duty to bargain in good faith, such an assertion necessarily interferes with the bargaining process.

Based on this reasoning, the Board confirmed prior case law finding that an individual cannot assert claims that an employer has violated its bargaining obligation.

Although this case arose under EERA, the same principle has been applied by the Board to other statutes And courts presiding over disputes involving peace officer and management units not subject to PERB's jurisdiction are almost certain to do so as well.

We welcome the Board's decision to confirm that it is only the exclusive bargaining representative that may pursue a failure to bargain charge. There may be many reasons why a labor association elects not to pursue a unilateral change charge, and there may be any number of changes that are welcomed by the association and/or majority of the membership. Allowing a disgruntled individual to insert himself in the process to the detriment of the association and membership would be highly disruptive and harmful to labor-management relations.

A COMEBACK FOR DROP PROGRAMS?

By Gregg Adam

In the depths of the economic recession, one concept that seemed pretty much buried was that of the Deferred Retirement Option Plan—a plan that typically allows police officers or firefighters to begin drawing their pension payments while continuing to work and draw a salary. But in January, the Los Angeles City Council began exploring the use of a DROP to help the Los Angeles Fire Department.

Staffing at the Department has dropped to critically low levels, and the only short-term scenario likely to reverse the trend is allowing veteran firefighters to postpone their retirement and continue to work and draw a salary. With many other police and fire departments statewide experiencing staffing crises, Los Angeles may not be the only entity that explores the DROP option until new academies can be recruited and trained. San Jose's Police Department is almost 400 officers down from where it was in 2008, and the San Francisco Police Department is facing hundreds of retirements in the next three years (although San Francisco, which just finished a DROP program, is ahead of the curve in dramatically amping up the number of academies).

Pension critics will no doubt assail these moves; but with serious public safety issues in many jurisdictions, there are few alternative short term options. Additionally, complaints have always been more emotionally driven than rationally. Is it a "double-dip"? Perhaps. But recall that the retiree has earned his right to retire and collect a constitutionally protected pension. Like anyone else, why would officers or firefighters keep working when they have reached their retirement? Again, like for any employee, if there is an incentive to do so. And the incentive is the chance to enhance their retirement benefits (which they may or may not be able to access while continuing to work—San Francisco's program paid the officers' pension monies into a trust account, to be accessed only when the officer had completed the DROP). It is also a cheaper option for the public entity in that the retiree will likely be collecting benefits from the retirement system, reducing the cost of the retiree compared to a new employee.

And, of course, the whole point of the exercise is that there are not enough new employees in the first place. We just have to wait and see how this plays out.

EMPLOYERS CANNOT DEMAND EMPLOYEES PROVIDE SPECIFIC MEDICAL INFORMATION IN SICK LEAVE NOTES

By Jennifer Stoughton

In the maze of leave laws, such as the Americans with Disability Act ("ADA"), the Family Medical Leave Act ("FMLA"), and their California counterparts, it is often difficult to sort out what information an employee must provide to their employer when requesting sick leave. This confusion is magnified when employers pressure employees to advise them of the particularities of their illness. Unfortunately, it is still the law in California that an employer can require an employee to submit a doctor's note even for a single sick day. However, the ADA has been interpreted to impose certain limitations on the type of information an employer can demand be included in a doctor's note. Specifically, the ADA prohibits employers from making inquiries into the disabilities of their employees unless 1) it is job-related and 2) necessary for the conduct of business. This means that an employer cannot demand that an employee provide specific medical information in a doctor's note for a routine sick day. Instead, the sick leave note need only say that the officer was out on a doctor approved reason, or something to that effect. Additionally, the employer must keep all personal, medical information confidential and inaccessible to all other employees. One of the areas we find this to be a problem is sick leave lists containing references to officers' specific medical conditions. Under the ADA, these lists are illegal even if the list is posted in a supervisor's office.

CALIFORNIA EXTENDS THE DEFINITION OF "FAMILY MEMBER" UNDER THE PAID FAMILY LEAVE LAW

By Jennifer Stoughton

Recognizing the proliferation of multi-generation families, the Legislature recently enacted Senate Bill 770 to expand the definition of "family member" under California's Paid Family Leave law ("PFL"). PFL is a part of the State Disability Insurance ("SDI") program and provides up to six weeks of partial wage reimbursement to workers who must take time off work to care for a seriously ill family member or to bond with a new child. Currently, the PFL law defines family member as a seriously ill child, parent, spouse, or registered partner. Senate Bill 770 broadens the definition of family member to allow workers to care for seriously ill siblings, grandparents, grandchildren, and parents-in-law. These changes go into effect July 1, 2014 and, like all other PFL benefits, will be entirely worker-funded.

SCMA AND CARROLL BURDICK OVERTURN UNJUST DISCIPLINE

The Sacramento County Management Association became the recognized employee organization for a large number of Sacramento County Managers and County Counsel just a few years ago, but it has already been active in representing its members in all types of matters. With the help of its Chief

Negotiator and attorney, Sacramento Labor Partner **Jason Jasmine,** it has negotiated an initial MOU and recently a successor MOU. Additionally, through its team of capable volunteer members, along with Carroll Burdick, it has handled dozens of issues involving bargaining, discipline, and grievances. Just recently, however, SCMA had its first opportunity to take a disciplinary appeal to arbitration. SCMA and Carroll Burdick have been very successful at resolving discipline involving SCMA members short of arbitration, but this one could not be informally resolved.

Sacramento Labor Representative **Howard Lewis,** assisted by SCMA representative **Lynn Wynn,** successfully appealed a 10-day suspension for grounds that the employee, SCMA, and Carroll Burdick found to be frivolous. SCMA pledged to do what needed to be done to fight the discipline, and Howard put on a strong case. Ultimately, Arbitrator **Buddy Cohn** agreed with us, overturning the discipline in its entirety and ordering a make-whole remedy.

THE LABOR BEAT

IMPORTANT NOTICE TO ASSOCIATION BOARD MEMBERS

Carroll Burdick 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 ask that you kindly fill out the form and mail it to:

Carroll, Burdick & McDonough LLP
44 Montgomery Street, Suite 400
San Francisco, California 94104
Attention: Joan Gonsalves

If you would like to receive the Labor Beat electronically, please contact **Joan Gonsalves** at **jgonsalves@cbmlaw.com**.

In your request, please note whether you would like to receive a print version, electronic or both.

Carroll Burdick thanks you for your help.

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