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APRIL 2012 - VOL. 25 NO. 1

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Landmark New Impasse Resolution Procedures Mandated for Collective Bargaining Under Meyers-Milias-Brown Act

By Gary Messing and Gregg Adam

With interest arbitration for California public employees already severely threatened, if not already on "endangered species" lists, it was heartening, from the labor perspective, for the governor to sign into law Assembly Bill 646 ("AB 646"). Effective January 1, 2012, AB 646 amends the Meyers-Milias-Brown Act to give employee associations (but not employers) the power to invoke fact-finding once an impasse is reached in collective bargaining.

What Is Factfinding?

Factfinding presently exists in similar form for employees covered by the Educational Employment Relations Act and the Higher Education Employer-Employee Relations Act, and for some local jurisdictions. (See, e.g., City of Sunnyvale Municipal Code section 2.24.260.) Factfinding is similar in some respects to interest arbitration: a three-person panel (one neutral, two party representatives) may "make inquiries and investigations, hold hearings, and take any other steps it deems appropriate" and, if settlement does not occur, "shall make findings of fact and recommend terms of settlement, which shall be advisory only." Thus, unlike in interest arbitration, the panel's findings do not impose terms of employment.

Significant Questions Remain

The statutory revisions and additions have prompted much debate among practitioners. Two of the most significant questions are: (1) does it apply to employers who are neither required by local rule to mediate upon reaching impasse nor voluntarily agree to mediate?[1] and (2) does factfinding apply only to "main table" negotiations, or does it also apply to impact bargaining and other meet and confer negotiations within the term of an MOU?

Representatives from both sides of the labor-management divide have been staking out conflicting positions on these issues, but, for now at least, labor's position has the edge. On December 29, 2012, the California Office of Administrative law approved an emergency regulation promulgated by the California Public Employment Relations Board ("PERB") providing that AB 646 creates a mandatory new impasse resolution procedure. Under this regulation, if elected by the employee association, factfinding must occur, notwithstanding whether mediation has taken place. (See "MMBA Factfinding Regulations Effective January 1, 2012" at http:// www.perb.ca.gov/ news/default.aspx.)

AB 646 May Fundamentally Change the Bargaining Landscape

No matter how the key questions about its intent are resolved – whether through PERB's regulations, clarifying legislative amendments, or litigation – AB 646 significantly changes the landscape. Previously, absent binding interest arbitration,[2] a labor association would often be faced with the difficult choice of either accepting an unfavorable final offer or risk unfavorable terms and conditions being imposed upon its members. AB 646 changes that significantly. Now, if impasse occurs and the employee association invokes factfinding, the following steps must occur before the employer can impose its last, best, and final offer:

[1] The issue is prompted because the plain language of the statute gives the employee organization the right to invoke factfinding only after mediation, and MMBA makes mediation voluntary, unless a local agency rule requires it.

[2] AB 646 exempts charter cities, charter counties and charter city and counties (i.e., San Francisco) from factfinding if a process for binding interest arbitration exists. However, in San Francisco, for example, interest arbitration only applies to main table negotiations, prompting the question of whether factfinding applies if impasse is reached in negotiations during the term of an MOU.

- A factfinding panel will be appointed within 10 days;
- The panel will meet with the parties within 10 days after appointment;
- The panel may then "make inquiries and investigations, hold hearings, and take any other steps it deems appropriate;"
- If the dispute is not settled within 30 days, "the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only;"
- "The public agency shall make these findings and recommendations publicly available within 10 days after their receipt;" and,
- The public agency is required to hold a "public hearing" on the impasse before it can unilaterally implement terms and conditions of employment.

The factfinding panel includes a neutral whose cost is shared by the parties. Invoking factfinding may be costly to both the employer and the employee association, and may add up to three months after a declaration of impasse before an employer can unilaterally implement its last, best, and final offer.

Differing Application to Peace Officers and Other Public Employees

For associations falling under PERB's jurisdiction, the emergency regulation will fill in some of the gaps in the legislation. But because peace officers do not fall under PERB's jurisdiction (see Gov. Code § 3511), the emergency regulations likely would not apply directly to them. Local rules governing the implementation will have to be negotiated. For "peace officer only" bargaining units, we suggest that employee organizations demand to meet and confer about local rules applying AB 646.

What Employee Associations Should Be Doing to Best Position Themselves

AB 646 may generate greater incentive for employers to try to reach agreement without resort to mandatory factfinding. Factfinding will give rise to additional costs and delays before an employer can impose terms. It seems likely that many employee organizations will elect to "test the water" on factfinding, given the appearance that there is nothing to lose – i.e., even after a factfinding panel has issued its findings, there is nothing to stop the employee association from accepting an employer's last, best, and final offer and thereby creating an agreement.

But because of the relatively short statutory time lines, associations should be prepared ahead of time for the possibility of impasse. Subject matter experts should be ready to offer competent testimony supporting association proposals on the matters the statute directs the panel to consider, as referred to above, including comparability studies with "other employees performing similar services in comparable public agencies," the consumer price index, and other facts "normally or traditionally taken into consideration in making the findings and recommendations." Some management-side commentators have opined that the short statutory time frames imply that an informal factfinding process is anticipated. We take the view that mandatory factfinding is a formal process to be treated like interest arbitration – albeit that the results are not binding.

Employee associations should also develop strategies to take best advantage of the requirement that the findings of the panel must be published and must be subject to a new mandatory public hearing that occurs prior to an employer imposing terms and conditions of employment.

Factfinding is a new tool that can be very useful in combating the misinformation disseminated by employers and the resulting

hysteria in the public over public safety pay and benefits. It is imperative that employee organizations develop "war chests" to be available to use when necessary. The cost of factfinding may be difficult to bear, given cutbacks in salary and benefits that many groups have endured, but it will also be a cost to employers that may lead them to come to agreements and avoid the factfinding process. Although new to local jurisdictions, factfinding is familiar to us and our colleagues in other labor law firms, and it offers significant potential strategic advantages to our clients – if they are prepared to take advantage of them.

CBM Asks the California Supreme Court to Reverse a Court of Appeal Decision That Would Allow Public Employers to Refuse to Arbitrate Contract Disputes

Last year, on behalf of the Engineers and Architects Association ("EAA"), CBM convinced the California Supreme Court to review a terrible decision by the Second District Court of Appeal that would have permitted public employers throughout California to refuse to arbitrate most contract disputes with impunity. In *City of Los Angeles v. Superior Court* (previously published at 193 Cal.App.4th 1159) the Court of Appeal departed from decades of court precedent under the Meyers-Milias-Brown Act ("MMBA") by refusing to enforce the grievance arbitration provision of the parties' memorandum of understanding ("MOU").

The case arose as a result of Los Angeles Mayor Antonio Villaraigosa's decision in May of 2009 to furlough employees represented by EAA pursuant to a recently-enacted city ordinance purporting to grant him such authority. Hundreds of EAA members filed grievances over the furloughs, but the City refused to recognize the grievances as arbitrable, arguing that the decision of the City Council to authorize the furloughs was a non-delegable legislative function. The union brought a petition to compel arbitration on behalf of all of the grievants, and the Superior Court ordered the matter to arbitration.

The City then asked the Court of Appeal to intervene and, in a broadly-worded but poorly-reasoned decision, the Court of Appeal reversed the trial court, ruling that the grievances could not be decided by an arbitrator. The court relied on prior cases finding unconstitutional a portion of the MMBA that previously required "interest arbitration" when a bargaining impasse was reached between a municipality and an association representing police or firefighters. (See, e.g., *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322.) According to the Court of Appeal, arbitration over the dispute would have resulted in an unlawful delegation of the City's authority to control its employees' salaries and work schedules to an arbitrator. But that rationale disregarded the well established legal distinction between "interest arbitration" (which imposes contract terms) and "grievance arbitration" (which enforces them), and it ran counter to the strong public policy in California of encouraging arbitration for the resolution of labor disputes.

There is no end to the mischief that employers armed with the Court of Appeal's decision could have made. For example, following the reasoning of the court, whenever a public entity has agreed in an MOU to some limitation upon its legislative powers (e.g., to set salaries), if the MOU provision is violated, that violation could not be grieved to arbitration.

CBM, led by **Labor Partner Jonathan Yank** and **Appellate Associate Gonzalo Martinez**, and backed by **Labor Partners Gregg Adam** and **Gary Messing**, was retained after the Court of Appeal issued its decision and succeeded in convincing the Supreme Court to review the case (effectively depublishing it). Briefing on the merits was recently concluded.

Oral argument before the Supreme Court is likely to be scheduled in late 2012 or early 2013.

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CBM Wraps Up a $15 Million Class Action on Behalf of CDF Firefighters

CBM is in the process of wrapping up the settlement of damages in a case that will bring approximately $15 million in back-pay to retired CDF Firefighters. It will also ensure tens of millions of dollars in lump-sum payouts for current employees when they separate or retire from service.

The case, called the "Cash-Out" lawsuit was filed in San Francisco Superior Court to recover money owed firefighters under Government Code section 19839, which requires the State as an employer to cash out accrued credits for vacation, annual leave and compensatory time off ("CTO") for firefighters in the same amounts as if they had utilized these leave credits while employed. In other words, firefighters would have to be paid as if they had used their leave credits instead of cashing them out. The State had long violated this provision by providing lump-sum payouts based only on their base salary, and not including what used to be called planned overtime (now called extended duty week compensation or EDWC). The planned overtime results from the fact that most CDF Firefighters work a 72 hour week. Under the FLSA so-called "7k exemption," 53 of those hours are paid at a straight-time rate, while the remaining 19 must be paid at a premium overtime rate.

The CBM team, consisting of **Labor Partners Gary Messing**, **Gregg Adam**, **Jonathan Yank** and **Associate Jennifer Stoughton** were successful in obtaining class certification and winning several definitive rulings from the Court establishing the State's liability under the Government Code. However, it became a long and difficult process to identify and calculate the damages for each of the firefighters, made difficult by the lack of records that were maintained by the State. After extensive negotiations, the parties agreed that the State would pay 95% of the amount that the firefighters would have been paid, based upon a formula. A formula was required because the State's records of the lump-sum accumulations of leave also included some leave that would not be subject to the cash-out (e.g., personal leave program credits), and did not include the CTO credits that had been cashed-out by separated employees.

In addition to the 95%, the State has agreed to pay 3% interest compounded annually on the total amount owed to each employee who separated prior to July 1, 2011. Those who separated between July 1, 2011 and January 1, 2012 will be compensated based on a calculation that results in their receiving 100 cents on the dollar, but will not receive interest. Payments will not be made until after the Court enters a final settlement order. All employees separated before January 1, 2012 will receive 7% interest compounded annually if payment is delayed after the Court enters its Final Order Approving the Settlement. Those separating from service on or after January 1, 2012, will receive 100% of their appropriate cash-out upon their separation.

The formula established for compensating individuals who have retired or separated through no fault of their own, is based on the top step in each of the classifications covered, including Fire Apparatus Engineers, Fire Captains, Fire Captain Paramedics, Battalion Chiefs, etc. Seasonal firefighters' payments are based upon the average of the salary steps for the Firefighter I classification, due to the fact that Firefighter I's are separated and cashed-out on an annual basis at the end of each of their 8 or 9 month seasonal employment periods.

Before the settlement is finalized, notice must go out to the class of the terms of the

settlement, and then the Court must file an Approved Settlement Agreement. We expect final approval of the settlement sometime in the middle or toward the end of April. The lawsuit was filed in 2007, and will provide cash settlements for over 5,000 employees who retired or otherwise separated from employment commencing on August 20, 2006. Although settlement of the damage portion of the case was laborious and time consuming, CDF Firefighters and the California Department of Personnel Administration worked closely together to reach the final result. CDF Firefighters Retiree Representative **Ray Snodgrass** and Board Member **Kevin O'Meara** were involved throughout the settlement process and were indispensable in achieving this result.

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CBM Assists in Fight to Prevent the City of Costa Mesa from Outsourcing City Functions and Laying Off Most of Its Civil Servants

CBM **Labor Partner Jonathan Yank** and **Associate Jennifer Stoughton**, along with **Stephen Silver** and **Richard A. Levine** of Silver, Hadden, Silver, Wexler & Levine ("SHSWL"), are litigating on behalf of the Costa Mesa City Employees' Association ("CMCEA") and the Orange County Employees' Association to prevent the City of Costa Mesa from laying off the majority of its workforce and outsourcing most of its municipal functions. On March 15 and 31, 2011, at the direction of the City Council, various city departments issued layoff notices to 110 CMCEA members. Around the same time, the City began issuing "Requests for Proposals" to private entities to take over various City functions.

On March 16, 2011, SHSWL filed a lawsuit on behalf of the CMCEA, asserting that the City's proposed actions would violate statutory limits on private contracting, as well as provisions of the memorandum of understanding ("MOU") between it and the City. And on July 15, 2011, **SHSWL Partner Richard A. Levine** convinced the Orange County Superior Court to issue a preliminary injunction preventing Costa Mesa from moving forward with private contracting. The court ruled that CMCEA succeeded in making a preliminary showing that such outsourcing would violate Government Code sections 37103 and 53060 and would cause irreparable harm to CMCEA and its members.

Shortly thereafter, CBM was brought into the case as co-counsel to assist in rebuffing efforts by the City to have the preliminary injunction lifted and have the case thrown out of court, as well as to assist in preparing the case for trial. On November 22, 2011, the CBM and SHSWL team overcame an attempt to by the City to eliminate CMCEA's claims that the City's threatened contracting would violate the parties' MOU. And on March 13, 2012, the CBM and SHSWL team obtained a ruling denying the City's motion for summary judgment.

The case is now cleared to move forward for trial on the merits, although the parties have stipulated to delay the trial until an appeal on the trial court's preliminary injunction is heard and decided, probably in the next two to three months. The appeal, which will be argued by **Jonathan Yank**, is likely to determine whether the statutory provisions relied on by CMCEA place limits on a City's ability to outsource municipal functions to private entities.

This may be a pivotal case in California, as many politically-motivated attacks on public employees generally, and on labor associations in particular, ramp up. Several other cities and counties throughout California have been considering and even taking steps toward similar mass layoffs and private outsourcing.

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CBM Gets CDCR Parole Agent Reinstated Following Termination

CBM Labor Partner Jason Jasmine and **Associate Lina Balciunas** Cockrell secured a significant victory on behalf of the California Correctional Peace Officers' Association ("CCPOA") by negotiating a settlement that not only reinstated a parole agent to his former position after he had been terminated, but also reassigned him to an office closer to his home. The California Department of Corrections and Rehabilitation ("CDCR") had charged Parole Agent Todd Gillam with a number of offenses, including dishonesty, related to the manner in which he kept his parolee visitation logs and conducted anti-narcotics tests. Gillam maintained that he had, in fact, completed all the visits recorded and had used approved "quick tests" for the anti-narcotics tests, which returned results immediately without samples having to be sent to the lab. CCPOA discovered a conflict of interest in late October 2011, with the appeal hearing before the State Personnel Board set for mid-November, and asked CBM to take over the case. We were able to get a short continuance to January and, in the meantime, set about carefully reviewing Agent Gillam's logs and CDCR's audit of his anti-narcotics tests. We discovered several flaws in CDCR's investigation, including 20-30 anti-narcotics tests for which there WERE lab results that CDCR seemingly had missed. We were also able to show that Agent Gillam had access to a sufficient number of "quick tests" at his previous field office in Redding and a viable explanation for using the "quick tests" on his rural parolees.

CDCR originally took the position that it would never allow Agent Gillam to be reinstated in any capacity, despite his stellar 17-year history with the Department both in institutions and in paroles. Eventually, CDCR conceded that Agent Gillam might be able to return to employment with the Department, but it could not be in paroles. However, when we presented our evidence to the Department, it ultimately agreed to reinstate Agent Gillam to his former position as a Parole Agent and even reassigned him to a field office that greatly reduced his commute. Agent Gillam returned to work on January 9, 2012.

The California Supreme Court Holds That Public Employers May Be Bound by Implied Contracts That Give Rise to Vested Retirement Benefits

By Jonathan Yank

The California Supreme Court recently ruled that a public employer's actions may give rise to an implied contract with its employees, and can even give rise to constitutionally-protected rights, such as vested retirement benefits. In *Retired Employees Association of Orange County, Inc. v. County of Orange ("REAOC")* (2011) 52 Cal.4th 1171, the California Supreme Court answered a question posed by the Ninth Circuit Court of Appeals: "Whether, as a matter of California law, a California county and its employees can form an implied contract that confers vested rights to health benefits on retired county employees."

The case arose as a result of a 2007 decision by the County of Orange to split active and retired County employees into separate pools for purposes of calculating health insurance premiums. When that decision resulted in significantly-increased premiums for retirees, REAOC sued the County, asserting that its long-standing practice of pooling active and retired employees had created an implied and vested contractual right to require to County to continue to utilize a unified pool. Thus, the association argued that the County's decision to split the pool resulted in an unconstitutional impairment of contract.

Though not called upon to determine whether a vested right was created in this particular case (something the Ninth Circuit

Court of Appeals will now decide), the California Supreme Court held "that a county may be bound by an implied contract under California law if there is no legislative prohibition against such arrangements, such as a statute or ordinance." The reach and import of this decision remains to be seen, particularly in regard to how freely the lower courts will find that such implied contractual rights may be created. However, the Court's reasoning and reaffirmation that promises of retirement benefits made during employment may give rise to constitutionally-protected "vested rights" is encouraging and bodes well for public employee associations that are already seeing an assault on their well-earned pension and retiree healthcare benefits.

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The Availability of Injunctive Relief for Bad Faith Bargaining Clarified by the Ninth Circuit Court of Appeals

By Gary Messing

In *Small v. Avanti Health Systems, LLC*, 661 F.3d 1180, 1187 (9th Cir. 2011) in an opinion penned by Judge Reinhardt, the Court clarified the standards for obtaining injunctive relief when there has been a failure to bargain in good faith. Traditionally, a preliminary injunction could be issued when a union demonstrated that there was a failure to bargain in good faith, the union had a likelihood of success on the merits, there was a possibility of irreparable harm, and the balance of the equities tipped in favor of the aggrieved party. (See *Winter v. Natural Resource Defense Counsel*, 555 U.S. 7 (2008).)

In *Avanti*, the Ninth Circuit Court of Appeals seemingly raised the required standard for the irreparable harm factor to a showing that irreparable harm is "likely" as opposed to "possible." However, the Court noted that "failure to bargain in good faith has long been understood as likely causing irreparable injury to union representation." The case makes it clear that the union is irreparably harmed where there is a refusal to bargain or if there is a failure to bargain in good faith.

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Names of Peace Officers in Officer-Involved Shootings Are Not Exempt From Disclosure Under the California Public Records Act

By Jason Jasmine

Although the Court recognized the privacy concerns relative to peace officer personnel records, it determined that the concern is with linking names to other personal information, and that the mere disclosure of the names of peace officers involved in shootings does not violate the confidentiality of peace officer personnel records. Because the records request at issue sought only the identity of officers involved in shootings, and nothing further, the information must be disclosed in response to a Public Records Act request. (*Long Beach Police Officers Assn. v. City of Long Beach* (2012) 203 Cal.App.4th 292.)

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POBRA Rights of High Ranking Law Enforcement Officers Cannot Be Eliminated by a Blanket Waiver

By Lina Balciunas Cockrell

The California Court of Appeal has determined that waivers for high-ranking law enforcement officials purporting to make them at-will employees with no POBRA rights are invalid. In the case of *Jaramillo v. City of Orange*, 200 Cal.App.4th 811 (2011), the plaintiff was an assistant sheriff in Orange County who was fired for his alleged disloyalty to the sitting sheriff. The County refused to afford him notice of the discipline and an administrative hearing as required under the Public Safety Officers Procedural Bill of Rights Act ("POBRA"). As a result, he filed a

complaint in Superior Court to enforce his POBRA rights.

The County argued that the plaintiff had waived his POBRA rights through two waivers he had signed. The first, in 1998, was a short, three-paragraph document that stated that he was an at-will employee serving "solely at the pleasure" of the County Sheriff, and that he agreed he could be "released from this position at any time without notice." The second, in 2000, was similar to the 1998 waiver, but included language that plaintiff could be terminated "at any time without notice, cause or rights of appeal." The 2000 waiver also included a severance package of 90 calendar days of pay and health benefits from the date of termination.

The trial court found that the County had violated the plaintiff's POBRA rights, his 14th Amendment right to due process, and California Labor Code section 1102.5 (based on the idea that he was fired for whistleblowing on the Sheriff's activities). The County appealed, claiming, among other things, that plaintiff had waived POBRA protections by signing the 1998 and 2000 waivers.

The Court of Appeal upheld the ruling of the trial court. Looking to the California Supreme Court's decision in *County of Riverside v. Superior Court* (2002) 27 Cal.4th 793, the court noted that there could be no "blanket" waivers of POBRA rights and that, typically, only "limited" waivers for investigation of matters arising prior to employment are permitted.

The Court of Appeal concluded that the 1998 and 2000 waivers signed by plaintiff constituted "blanket" waivers of plaintiff's POBRA protections. Furthermore, unlike the waiver upheld in County of Riverside, the 1998 and 2000 waivers were entirely prospective. Finally, the Court of Appeal reasoned that the 1998 and 2000 waivers would "clearly undermine POBRA and not serve it" by allowing the protections afforded to high-ranking peace officers by POBRA to be easily circumvented. Accordingly, the Court of Appeal affirmed the trial court's judgment awarding the plaintiff back pay from the date of his termination.

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POBRA Rights May Be Waived as Part of a Disciplinary Settlement Agreement

By Lina Balciunas Cockrell

The Court of Appeal has held that waivers of rights arising under the Public Safety Officers Procedural Bill of Rights Act ("POBRA") as part of disciplinary settlement agreements are valid where the agreement was lawfully executed. In the case of *Lanigan v. City of Los Angeles* (2011) 199 Cal.App.4th 1020, the plaintiff was a city police officer whose first incident of misconduct occurred when he was off-duty and wrongly driving his personal vehicle in the carpool lane. The Department proposed termination for plaintiff's conduct in interacting with the Los Angeles Unified School District Police officer that stopped him, including harassment and refusal to comply. Prior to his appeal hearing, he entered into a settlement agreement with the City whereby, in exchange for reduction of the penalty to a 22-day suspension, he agreed to resign immediately if he engaged in any acts of harassment toward any officers of an outside agency and/or failed to cooperate with an on-duty officer of an outside agency. He also agreed to waive several of his rights under POBRA and promised to forego legal or administrative remedies.

The plaintiff subsequently was involved in another off-duty incident and, as a result, was charged with providing false information to, and failing to cooperate with, a Los Angeles County Sheriff's Deputy. The Department sustained the complaint, processed plaintiff's resignation pursuant to the Settlement Agreement, and removed him from employment.

The plaintiff filed a petition in Superior Court for judicial review of the Department's decision. He argued that the Settlement Agreement was unenforceable because it purported to waive statutory rights under POBRA and was, therefore, contrary to law and public policy. He further argued that the Settlement Agreement was procedurally and substantively unconscionable.

The Court of Appeal disagreed, concluding that plaintiff's waiver of his POBRA protections was lawful because the waiver was made during employment and not as a condition of being hired. Moreover, by signing the Settlement Agreement, plaintiff was able to enjoy the benefits of continued employment that could be limited only by the happening of a future contingent event that was within his control. Finally, the Court found that the waiver was knowingly made with sufficient knowledge of the circumstances and likely consequences. The plaintiff could have taken his chances by appealing the first disciplinary decision, but by signing the Settlement Agreement, he agreed to continued employment under the condition that he accept resignation and the loss of certain POBRA rights as a consequence of future misconduct.

The Court also concluded that the Settlement Agreement was not procedurally or substantively unconscionable. Among other reasons, the Court noted that plaintiff was represented by an attorney of his choosing.

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Peace Officers Are Not Entitled to Review Their Own Files After Termination

By Jason Jasmine and Jennifer Stoughton

The Peace Officers Procedural Bill of Rights Act ("POBRA") permits a public safety officer to inspect any and all personnel records used to determine that officer's qualifications for employment, promotion, additional compensation, or termination at any time during usual business hours without any loss in compensation. Whether this right extends to separated employees was at issue in *Barber v. California Dept. of Corrections and Rehabilitation* (2012) 203 Cal.App.4th 638.

Parole Agent Patrick Barber was terminated by the California Department of Corrections and Rehabilitation ("CDCR") in April of 2009. In October of 2009, while his State Personnel Board ("SPB") appeal of the termination was pending, Barber sought copies of his CDCR personnel records from 2005 through 2009. When CDCR denied the request, Barber filed a lawsuit under the POBRA, asserting that he was entitled to the records under Government Code section 3306.5 and the MOU between CDCR and CCPOA.

In July of 2010, prior to a final disposition at the SPB, the trial court ruled against Barber, concluding that he was not entitled to POBRA rights after termination of his employment in April of 2009. The court explained that the purpose of the POBRA provision at issue was to permit an employee to respond to negative comments or correct any misstatements discovered in the personnel file. Once an employee is terminated, the court reasoned, there is no need for an employee to correct anything in the personnel file since the employment relationship has ended. In this case, the Court found that CDCR had provided the plaintiff will all investigative materials used in conjunction with his termination, and was not required to provide his broader personnel record.

Broadly stated, this case held that a terminated officer loses his or her rights under Government Code section 3306.5 to review his personnel file upon termination. In reaching this decision, the Court did not seem to critically analyze the issues of whether it may be necessary to correct errors in an employee's personnel file prior to a final determination on

the merits, or for the purposes of future employment with a new employer.

Under POBRA An Employer Must Provide Notice of an Adverse Action Within 30 Days After the Final Decision to Take Such Action Is Made, Not Within 30 Days of the *Sulier* Notice

By Lina Balciunas Cockrell

In the case of *Neves v. CDCR* (2012) 203 Cal.App.4th 61, the Court of Appeal clarified a key notice requirement under the Public Safety Officers Procedural Bill of Rights Act ("POBRA") in concluding that the 30-day notification requirement set forth in Government Code section 3304(f) is triggered by the final decision to impose discipline, not the *Sulier* or informal notice made pursuant to Government Code section 3304(d).

Originally, POBRA had no limit on the length of time an investigation of a peace officer could last. In 1997, the Legislature amended POBRA to require that an investigation be completed and the officer notified of its proposed disciplinary action within one year. See Gov. Code § 3304(d). In 2004, in the case of *Sulier v. State Personnel Board* (2004) 125 Cal.App.4th 2 (2004), the Court of Appeal held that Section 3304(d) requires only a preliminary informal notice of the proposed discipline within one year, while a subsequent formal notice must be issued within 30 days as set forth in Section 3304(f). The question unanswered by *Sulier* was what triggers the 30 day clock.

In *Neves*, the Department issued the *Sulier* notice pursuant to Section 3304(d) on December 30 and then issued the formal Notice of Adverse Action ("NAA") on January 27. The plaintiff did not receive the NAA and accompanying *Skelly* package until February 1 or 2. He claimed this violated Section 3304(f), since it was more than 30 days after the *Sulier* notice was issued.

However, the Court of Appeal ruled that it is not the *Sulier* notice that triggers the 30-day period, but rather the formal Notice of Adverse Action, and that the Department was well within that time period in getting the materials to plaintiff in early February.

Application for Retirement Benefits Does Not Divest Arbitrator of Jurisdiction to Hear Termination Appeal

By Jennifer Stoughton

In *Service Employees International Union, Local 1021 v. San Joaquin County* (2011) 202 Cal.App.4th 449, the Court of Appeal ruled that the Memorandum of Understanding ("MOU") between SEIU and the County required them to submit the disciplinary action at issue (termination) to arbitration, and that the terminated employee's application for retirement benefits did not constitute a waiver of the right to arbitrate or deprive the arbitrator of the power to decide the validity of the disciplinary action. The case arose after SEIU member Robert Riedinger was terminated by the County for theft. Two days after the termination, SEIU, on behalf of Riedinger, requested arbitration over the decision to uphold the termination. Following his termination, Riedinger applied for and began receiving monthly retirement payments.

The County initially agreed to proceed to arbitration, and the parties selected an arbitrator. However, in July 2010, counsel for the County advised Riedinger's attorney that it would not participate in the arbitration because Riedinger retired during the pendency of the termination appeal. According to the County, this negated any future employment rights. SEIU subsequently petitioned the court to compel the County to arbitrate the aforementioned issues. The trial court, however, agreed with the County and denied SEIU's Petition to Compel Arbitration on the grounds that the MOU did not contain an agreement between the County and

its ***former*** employees to arbitrate disciplinary actions, and that Riedinger's retirement deprived the arbitrator of jurisdiction.

The Court of Appeal reversed the trial court and ordered the parties to arbitrate. The Court relied on well-established law that the scope of the issues to be arbitrated are delineated by the agreement between the parties. Here, the MOU between SEIU and the County expressly allows SEIU members to elect binding arbitration for the appeal of their disciplinary actions, including termination. In so holding, the Court rejected the County's argument that the MOU did not require the County arbitrate former employees' claims. The Court found that the County's argument would necessarily preclude SEIU members from arbitrating termination, a result the MOU clearly did not intend.

The Court also found that Riedinger's retirement did not constitute a waiver of his right to arbitrate because he did not take steps inconsistent with his intent to invoke arbitration. The Court noted that the right to vested retirement benefits is independent of the interest in continued employment with the County and was, therefore, not inconsistent with the intent to invoke arbitration. Finally, the Court found that Riedinger's retirement did not divest the arbitrator of jurisdiction to hear the appeal because the receipt of retirement benefits did not negate the parties' agreement to arbitrate terminations.

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Humiliation Is Not Enough to Establish an Eighth Amendment Claim for Cruel and Unusual Punishment

By Jennifer Stoughton

Raymond Watison, an inmate at Nevada State Prison, sued several prison officials under 42 U.S.C. § 1983, alleging that they violated his rights under the United States Constitution. In *Watison v. Carter*, 668 F.3d 1108 (9th Cir. 2012), Watison alleged, among other things, that Correctional Officer LaGier sexually harassed him in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. The entirety of Watison's allegations against Officer LaGier was as follows: Officer LaGier entered Watison's cell and conducted a search while he was on the toilet, Watison asked the Correctional Officer to leave the room, but, instead of leaving, the Correction Officer approached Watison, rubbed his thigh against Watison's thigh, and "began smiling in a sexual contact" way, before leaving the cell laughing.

The Ninth Circuit Court of Appeal found that, based on these allegations, the "humiliation" Watison allegedly suffered does not rise to the level of severe psychological pain required to state an Eighth Amendment Claim. The Court likened it to "the exchange of verbal insults between inmates and guards" which is a "constant and daily ritual" in all prisons across the country. The Court noted that while it does not approve of such conduct, it did not violate the Eighth Amendment, because not "every malevolent touch by a prison guard gives rise to a federal cause of action." Thus, the Court ruled in favor of Officer LaGier and dismissed the causes of action against him.

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Police Chief Was "Removed" From Office, for Purposes of POBRA, on Date Advised of Termination

By Jennifer Stoughton

Following his termination from employment as the Police Chief of Chowchilla, John Robinson filed suit alleging, among other things, that defendants never provided him with written notice, a statement of reasons for his termination, or an opportunity for an administrative appeal prior to his removal as police chief, as required by the Public Safety Officers' Procedural Bill of Rights Act ("POBRA"), Government Code section 3304. In

interpreting the language of section 3304, the Court of Appeal in *Robinson v. City of Chowchilla* (2011) 202 Cal.App.4th 368, ruled in favor of the former police chief and found the clear statutory language required the City to provide Robinson with the three factors listed above (written notice, statement of reasons and administrative appeal) before it removed him from office.

The Court also found that the word "removed" in the context of POBRA was the point at which the City informed Robinson of its intention to replace him, despite the fact that it continued to pay him for another three and a half weeks. The Court noted that the same day the City informed Robinson of its decision to terminate him, it directed him to pick up his belongings and leave the department immediately, and appointed an acting chief of police to replace him. The Court concluded that these acts "took away Robinson's authority to exercise the powers residing in the office of police chief" and, therefore, he no longer held the office of police chief because the authority and responsibility of the police chief were no longer his.

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Poor Legislative Drafting and Politics Conspire to Destroy Redevelopment in California

By Jason Jasmine

In *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, the California Supreme Court was called upon to review legislation that was drafted to allow the State to eliminate local redevelopment agencies (and get around a prohibition on diverting funds from those agencies), but would also permit such agencies to continue to exist if they "agreed" to return a portion of their funds to the State. In a result that was probably unanticipated by the drafters of the legislation, the California Supreme Court found the first part of the legislation constitutional, while the second part was determined to be unconstitutional. The result is that redevelopment agencies statewide are being forced to shut down or (in the best case scenarios) significantly reduce work and layoff many employees. We are already seeing massive layoffs statewide, together with the mothballing of redevelopment projects aimed at reducing urban blight. From both the direct and indirect impacts, it is anticipated that thousands of jobs will be eliminated and much of the work that had been done to make improvements in urban areas will come to a grinding halt.

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Court Upholds Common Classification for Application of Bumping Rights During Layoffs

By Lina Balciunas Cockrell

The Court of Appeal upheld a trial court ruling that the City of Oakland's employee classification system allowed a Port engineer to preserve his employment during layoffs by virtue of his seniority over a City engineer. In the case of *LaGrone v. City of Oakland* (2012) 202 Cal.App.4th 932, the plaintiff worked for the Port as a civil engineer for 27 years, with various promotions. In 2002, the Port renamed its engineering job descriptions by adding "Port" to the job titles, but with no changes to job duties.

Pursuant to the City's personnel policies, City jobs fall into a classification system, and when layoffs occur, more senior employees within a classification are entitled to "bump" less senior employees within the same classification, resulting in the layoff the less senior employees. In 2008, the Port sought to eliminate the plaintiff's position and told him that, although he did not have sufficient seniority credits to bump any other Port employee, he did have seniority over other employees in the same classification at the City.

When the City Administrator learned of the potential for Port engineers to bump City

engineers, he consulted with the city attorney and concluded that the City was not required to allow Port engineers to bump into City positions. The City then declined to accept the Port employees, and the plaintiff was laid off.

He appealed to the Civil Service Board, which upheld the layoff on the ground that the Port engineer classification was not a city-wide classification and, thus, plaintiff had no bumping rights into a City engineering position. The plaintiff then filed a petition in Superior Court, which reversed the Board's decision upon finding that, while the Oakland City Charter exempts certain Port positions from the City's civil service rules, plaintiff's position was not one of them. The court further found that simply renaming the plaintiff's position to add the "Port" designation did not remove it from its previously-acknowledged common classification with City engineering positions.

The Court of Appeal affirmed the trial court's decision, first noting that it was undisputed that plaintiff was entitled to the protections afforded by the City's civil service rules because his position was not excluded. The question then was whether the Port changed the plaintiff's job classification with the title change, such that the position ceased to be a common classification within the City's engineer positions. The Court concluded that the change was in name only, with no reference to job classifications, duties, responsibilities, qualifications, or pay levels, and that the common classification remained, allowing plaintiff to bump a less senior City engineer.

Quicker Hearings on Tap at the State Personnel Board?

By Jason Jasmine

Assembly Bill 692 (effective January, 2012) allows a terminated state employee to request a priority (expedited) hearing at the State Personnel Board if a hearing has not commenced within 6 months of the filing of an appeal. If a request for an expedited hearing is made, the Board must schedule the hearing within sixty days of the written request.

The Civil Service Commission's Failure to Properly Transcribe a Hearing Costs a Lieutenant His Appeal

By Jason Jasmine

Lt. Roger Skinner appealed his termination to the Medina Civil Service Commission in the State of Washington. After the Commission upheld his termination, Lt. Skinner challenged the Commission's decision in court. Unfortunately for Lt. Skinner, the electronically-recorded hearing had significant gaps in the recording and could not be transcribed in its entirety. Because the Washington civil service laws required a certified transcript of the proceedings, the trial court determined that the record was inadequate for meaningful review. The Court of Appeal upheld the trial court's decision, thus finding that the City's failure to provide an accurate recording was sufficient to cost Lt. Skinner his right to challenge the Commission's decision. (*Skinner v. Civil Service Commission (Washington)*.)

Alert – Do You Have Sufficient Uninsured and Underinsured Auto Coverage?

By Gary Messing

If you get into a serious vehicle accident, your current auto insurance will probably be more than sufficient to cover the damages of other parties involved in the accident. However, you may not be covered or sufficiently covered by the other party's insurance to compensate you for your injuries caused by someone else's negligence.

In California it is estimated that more than 25% of all motorists on the road are uninsured. Add to that the unknown number of individuals who have very low limits of liability coverage, and it can conservatively be estimated that well over 50% of the drivers on the road do not have insurance coverage sufficient to protect you and your family, should you be involved in a serious auto accident. Recent studies have indicated that those numbers increase as the economy suffers. Additionally, those uninsured and underinsured drivers are also more likely to be involved in accidents. In an era when extended hospital stays in intensive care can easily cost hundreds of thousands of dollars (even with your own insurance), it is easy to see how an uninsured or underinsured motorist can – in a split second – ruin the financial future of you and your family. We recommend checking with your insurance company and determining whether increasing your uninsured/underinsured coverage is right for you. Many experts recommend obtaining uninsured/underinsured coverage equal to your liability coverage, and the cost is usually surprisingly affordable.

IMPORTANT NOTICE
TO ASSOCIATION BOARD MEMBERS

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CBM thanks all of you for your help.

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