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CBM's Public Sector Group Attorneys Once Again Selected as *Super Lawyers* and *Rising Stars*

The CBM Public Sector Labor Group had an excellent showing in the annual list of Northern California Super Lawyers and Northern California Super Lawyer Rising Stars. For the 8th time, Sacramento partner **Gary Messing** has been named to the Northern California Super Lawyer list as one of the top attorneys in Northern California. No more than 5% of the attorneys in Northern California are selected for this honor. For the third year in a row, Sacramento partner **Jason Jasmine** and San Francisco partner **Jonathan Yank** were named to the Northern California Super Lawyer Rising Stars list as two of the top up-and-coming attorneys under the age of 40 in Northern California. No more than 2.5% of the attorneys in Northern California are selected for this honor.

United States Supreme Court Sets Dangerous Precedent in Case Involving "Fair Share" Agency Fees for Nonmembers

By Jennifer S. Stoughton

A recent decision out of the United States Supreme Court in *Knox et al., v. SEIU*, Local 1000 (2012) 132 S.Ct. 2277 may have long-term consequences for public sector labor associations because the majority opinion was loaded with troubling language about the legality of agency shop and opt-out fee systems in general. We believe that the case may be a signal for even more devastating opinions down the road.

The *Knox* case arose after SEIU levied a special assessment aimed at raising funds for various political purposes, including opposing Propositions 75 and 76 (proposed by Governor Schwarzenegger for a special election). Proposition 75 would have required all unions to use an opt-in system to determine the amount of dues paid and Proposition 76 would have given the Governor the authority, in some circumstances, to unilaterally decrease appropriations for public employee compensation regardless of what was required in a collective bargaining agreement. While SEIU made no secret of the fact that the special assessment was intended to fund opposition to these ballot propositions, it did not provide nonmembers with a new *Hudson* letter or a chance to opt out of the special assessment.

The majority decision held that when a union imposes a special assessment or dues increase levied to meet expenses that were not disclosed previously (i.e. when the regular *Hudson* letter was sent out), it must provide a new notice and may not exact any funds from nonmembers without their affirmative consent. This is the first time that a court has required any agency fee system to be opt-in. The Court specifically noted that the sentence in SEIU's *Hudson* notice stating that the agency fee was subject to increase at any time without further notice did not cure the violation. Thus, the Court found that, in order to comply with the First Amendment, special assessments must be opt-in and preceded by a fresh *Hudson* letter, regardless of whether the original *Hudson* letter advised nonmembers of the possibility of a mid-year special assessment.

While this case presented the Court with the relatively narrow issue of whether SEIU was required to send out a *Hudson* notice prior to imposing a special assessment, the majority used it as an opportunity to opine on several issues related to agency fee. This is very troublesome, because the legality of the opt-out aspect of the special assessment was never raised as an issue by the parties; nor did either party challenge the legality of opt-out systems in general. Thus, the Court seems to be encouraging a broader challenge to agency fee collection methods.

For instance, the majority spent a significant amount of time analyzing the history

and validity of the opt-out system as it has developed under *Hudson* and its progeny. And in one of the clearest signals of disdain for the concept of opt-out systems, the conservative majority characterized prior Supreme Court case law's acceptance of the constitutionality of agency shops as an "anomaly," and called agency shops a "remarkable boon" to unions. The majority concluded that case law approving opt-out systems as constitutional were more a "historical accident" than the result of a thorough analysis of First Amendment principles. Essentially, the majority said that no court has ever carefully considered whether opt-out systems violate the First Amendment. This signals to us that when the Court next hears an agency fee case, it will ignore precedent and create new law.

The majority's bias against opt-out systems was demonstrated repeatedly. For instance, the majority used the discussion of the constitutionality of opt-outs to opine that, even though prior decisions permitted the use of opt-out systems, those decisions "approach, if they do not cross the limit for what the First Amendment can tolerate." The majority also faulted the Ninth Circuit for finding that *Hudson* requires a balancing of the "right" of the union to collect agency fees against the rights of nonmembers. The majority made clear throughout the opinion that unions do not have rights to collect union dues and that the only "rights" to be considered are the rights of nonmembers to be free of compulsory fees. The underlying message is that, if given the opportunity, the majority will rule that using an affirmative opt-out system is unconstitutional.

The majority also questioned the way most unions use prior year's audits to calculate the chargeable fees for the coming year. The majority said that, for special assessments, any refund, no matter when it comes, does not remedy the First Amendment violation. The majority noted that unless a union can determine in advance what portion of its fees will be chargeable for a coming year, it cannot place the risk of overcharging on the member. The union must take that risk. In other words, unions may never overcharge in any year.

In addition, although the majority opinion did confirm that *Hudson* approved the use of prior year's audits to calculate the regular agency fee as an "administrative convenience," the implication for calculating regular fair share fees is of great concern, because of the majority's apparent willingness to consider extending this holding to regular agency fees. Again, although the Court limited this holding to special assessments, the underlying message was that they are open to reconsidering the issue for regular dues collections as well.

Finally, the majority also questioned SEIU's characterization of what is chargeable, describing it as "expansive." SEIU argued that expenses for lobbying the electorate were "germane" to the implementation of its contracts because Prop 76 would have effectively permitted the Governor to bypass the Union and abridge agreements reached through the collective bargaining process. The majority disagreed and noted that, because public employee salaries, benefits, and pensions constitute a substantial percentage of public entity budgets, many ballot questions and campaigns will have an effect on present and future contracts. Permitting such political action to be considered chargeable, the majority found, would eviscerate the distinction between chargeable and non-chargeable expenses.

In light of the majority's clear animosity toward opt-out systems and agency fees in general, it appears that, unless the composition of the Court changes, a majority of the Supreme Court's justices are inviting a challenge to the very existence of the agency shop, which public sector unions have relied on for decades. Given the financial ramifications of a reversal of long standing precedent concerning agency fees, we believe that all public sector labor associations should take affirmative steps as soon as possible to ensure financial stability.

Ruling Allows Disclosure of Names of Officers Involved in Shootings

By Gary Messing

The Court of Appeal in *Long Beach Police Officers Association v. City of Long Beach, and Los Angeles Times Communications, LLC* (2012) 203 CalApp.4th 293 has ruled that the names of police officers involved in shootings are not exempt from disclosure to the public under the California Public Records Act. The case arose from the accidental fatal shooting of an unarmed man in Long Beach in 2010. After the shooting, a Public Records Act request was made by a reporter for the names of the officers who were involved in the incident. The City intended to release the names of the officers, so the Long Beach POA ("POA") sued for an injunction to prevent the release of those names.

The injunction was denied by the trial court, which ruled that the California Public Records Act requires disclosure of the names, and that the POA had failed to prove that the names were exempt from disclosure.

The POA appealed the case to the Court of Appeal, which upheld the trial court's decision. The Court of Appeal held that the POA had failed to show that the names were exempt from disclosure and ruled that there is no right of privacy in the fact of an officer's name or employment. The Court also ruled that there was no unwarranted invasion of privacy because there was a lack of evidence demonstrating that the information would create any safety risk for the officers who were involved in the shooting.

The Court ruled that the public's interest in the disclosure of the names of the officers outweighed the general desire for privacy of the officers and their non-specific fears of violence.

Negotiated Retirement Benefit Invalidated Due to Conflict with Federal Law

By Jason Jasmine

In one recent example of the types of cases that will become commonplace as the battle over public employee retirement benefits continues to rage, the San Diego City Firefighters and several of its members claimed that the City and Retirement Board unlawfully repealed a retirement program that had allowed them to convert their annual leave to service credit for the purpose of calculating retirement benefits. The City also repealed a retirement program that calculated retirement benefits of incumbent presidents of municipal employee unions based on a combination of their salary from the city and their salary from serving as union president.

The union filed a lawsuit alleging breach of contract, asserting unconstitutional impairment of contract, and seeking declaratory relief and an order compelling the City and the Retirement Board to reinstate the retirement program and benefits. The trial court sustained the defendants' demurrer, and the union and firefighter plaintiffs appealed.

The Court of Appeal affirmed the trial court's decision in a published decision, *San Diego City Firefighters, Local 145, AFL-CIO v. Board of Administration of San Diego* (2012) 206 Cal.App.4th 594. The court noted that the savings clause in the MOU between the union and the City reads: "This Memorandum is subject to all current and future applicable federal, state and local laws, regulations and the Charter of City of San Diego. If any part or provision of this Memorandum is in conflict or inconsistent with such applicable provisions of federal, state or local laws or regulations, or is otherwise held to be invalid or unenforceable by any court of competent jurisdiction, such party or provisions shall be suspended and superseded by such applicable law or regulations, and the remainder of the Memorandum shall not be

affected thereby." The savings clause declared a conflicting contract provision to be unenforceable, but did not impose an obligation to renegotiate a substitute provision.

The relevant MOU allowed members of the union "to convert annual leave to retirement service credit on a pre-tax basis." The MOU also provided that employees in the bargaining unit would no longer be able to cash out annual leave. An annual leave conversion program was put into effect, and each firefighter completed and signed a form indicating that he or she wished to convert his or her eligible annual leave hours as payment for the purchase of retirement service credit. The IRS, however, issued a compliance statement finding the program to be noncompliant with section 401(a) of the Internal Revenue Code. The IRS concluded that the program was an impermissible cash or deferred arrangement, and ordered the City to amend its retirement plan retroactively "to remove any provisions relating to the Annual Leave Conversion Program." The City complied with the IRS' order, retroactively depriving the firefighters of their negotiated benefits – leading to the lawsuit alleging the City could not unilaterally modify the terms of the MOU.

According to the Court of Appeal, regardless of the cause of the conflict between the MOU and the Internal Revenue Code, the Savings Clause was triggered by the Annual Leave Conversion Program's inconsistency with federal law. The IRS Compliance Statement required the City to amend the retirement program to remove "any provisions relating to the Annual Leave Conversion Program."

Because of the conflict and inconsistency with federal law, the MOU sections describing the Annual Leave Conversion Program were "suspended and superseded" by operation of the Savings Clause. Thus, according to the Court, the MOU "does not provide a basis for any of the claims requiring the existence of valid contractual obligation on the part of City to provide benefits under the Annual Leave Conversion Program."

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Peace Officers Have a Right to Join or Participate in Mixed Units of Safety and Non-Safety Employees

By Amber West

Peace officers are not prohibited from joining or participating in units that include both non-safety and safety employees. In *SEIU Local 1021 v. County of Calaveras* (*Calaveras County Public Safety Employees Association*) (2012) PERB Decision No. 2252-M, the Public Employment Relations Board ("PERB") dismissed an unfair practice charge filed by SEIU alleging that Calaveras County violated the Meyers-Milias-Brown Act ("MMBA") when it approved a mixed unit of non-safety and safety officers.

PERB noted that while section 3508(a) of the MMBA provides peace officers the affirmative right to join or participate in units exclusively composed of peace officers, nothing in the MMBA prohibits peace officers from being in a mixed unit; to hold otherwise would defeat one of the purposes of the MMBA, freedom of choice. Consequently, PERB refused to enforce a local rule precluding mixed units like the one requested by the Calaveras County Public Safety Employees Association ("CCPSEA"). PERB found the County did not violate the MMBA when it approved CCPSEA's severance petition for a mixed bargaining unit.

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Fourth Amendment Does Not Require Reasonable Suspicion for Strip-search of Non-Indictable Offenders

By Amber West

The U.S. Supreme Court recently held that courts may not supplant the judgment of correctional officers in determining "whether

every detainee who will be admitted to the general population" of a jail, prison, or other detention facility "may be required to undergo a close visual inspection while undressed." In *Florence v. Board of Chosen Freeholders of County of Burlington* (2012) 132 S.Ct. 1510, the Court held that the Fourth Amendment does not require reasonable suspicion for corrections officers to strip-search non-indictable offenders. Instead, the search procedures at detention centers need only strike a reasonable balance between inmate privacy and institutional needs.

Albert Florence was arrested during a traffic stop on an unrelated bench warrant. He was detained in two different jails and each time was subjected to a strip search. He "was required to lift his genitals, turn around, and cough in a squatting position as part of the process." He subsequently filed an action under 42 U.S.C. § 1983, arguing that his Fourth and Fourteenth Amendment rights were violated. He argued the Court should find an exception based on the seriousness of the offense, so that individuals arrested for a minor offense would not be required to remove their clothing during routine intake procedure.

The Supreme Court rejected this argument, because "deference must be given to the officials in charge of the jail unless there is 'substantial evidence' demonstrating their response to the situation is exaggerated." The Court stated that correctional officials have a significant interest in conducting a thorough search as a standard part of the intake process. Although the Court acknowledged that the exception proposed by Florence would limit privacy intrusions, it would do so at too high a price because the exception would necessarily increase the risk to everyone in the facility, including the less serious offenders themselves. The Court also emphasized that the seriousness of an offense alone does not provide a reliable indication of whether a detainee has contraband, so it would be difficult for officials to determine whether an individual detainee fell within the exception. The Court concluded that this difficulty made the application of such an exception untenable, because officers who interact with individuals suspected of violating the law have an "essential interest in readily administrable rules."

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Appellate Court Confirms that PERB has Exclusive Initial Jurisdiction to Interpret and Apply the MMBA Even in the Context of Voter Initiatives

By Jennifer S. Stoughton

In one of the many challenges to so-called "pension reform" initiatives pending across the State, the Court of Appeal in *San Diego Municipal Employees Association v. Superior Court* (2012) 206 Cal.App.4th 1447, recently confirmed that, even in regard to disputes over voter initiatives, the Public Employment Relations Board ("PERB") typically has initial exclusive jurisdiction to interpret and administer the Meyers-Milias-Brown Act ("MMBA"). The case arose after proponents of a voter initiative entitled the Comprehensive Pension Reform Initiative ("CPRI") circulated petitions to qualify the CPRI for placement on the San Diego County ballot. Among other things, the CPRI would have modified retirement benefits for certain City employees.

After the San Diego County Registrar of Voters certified the CPRI for placement on the June 2012 voter ballot, the San Diego Municipal Employees Association ("MEA") filed an unfair labor practice charge against the City, alleging that the City had violated the MMBA by placing the CPRI on the ballot before meeting and conferring with the Union. PERB issued a complaint against the City and filed an action in Superior Court seeking, among other things, an order temporarily enjoining the City from putting the CPRI on the June ballot. The City filed its own motion seeking to stay the administrative hearing. The trial court ruled in favor of the City and stayed all administrative proceedings.

The appellate court reversed, finding that PERB has exclusive initial jurisdiction over the MEA's charge. In so holding, the Court rejected the City's argument that a dispute over the constitutional rights of City officials is beyond PERB's purview. Instead, the Court reaffirmed that parties must exhaust their administrative remedies through PERB before seeking judicial relief when construing employee relations laws, even when the dispute may ultimately implicate constitutional rights and protections. Thus, the Court reversed the trial court's order staying the PERB proceedings.

Although PERB has no jurisdiction over bargaining units comprised solely of peace officers (see Cal. Gov. Code § 3511) or solely of certain management employees (see Cal. Gov. Code § 3509(f)), courts generally defer to PERB's interpretation of the MMBA.

Where Contract Expressly Provided Retiree Healthcare Until Age 65, the Employer's Obligation to Provide Such Coverage Did Not Expire With the Contract

Lina Balciunas Cockrell

In the case of *Alday v. Raytheon Company* (2012) --- F.3d ----, the Ninth Circuit federal appeals court concluded that, in a series of collective bargaining agreements (CBAs), an employer expressly agreed to provide 100% company-paid healthcare coverage for eligible retirees. Because the agreement also expressly provided that this coverage would be extended until the retirees reached age 65, the employer's obligation survived the expiration of the CBAs.

Furthermore, the employer's agreed-upon obligation could not be unilaterally abolished by the employer, regardless of whatever rights the employer reserved for itself in its separate ERISA welfare benefits plans. Although the plans contained reservation-of-rights provisions, they expressly allowed only modifications to the plans, not the CBAs, and the court found that the CBAs prevail over any plan modifications. Accordingly, the actions of the employer to start charging retirees monthly premiums for their health insurance violated the CBAs.

Ordinance Implementing Earlier-Agreed MOU That Eliminated Certain Retirement Benefits for New Employees Does Not Implicate Vested Rights Where it is Retroactive to the Date of the MOU

By Amber West

The Court of Appeal upheld a trial court ruling that the City of San Diego's purportedly retroactive termination of eligibility to receive certain pension benefits did not violate employees' federal or state constitutional rights. In *City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, the Court held that the agreements between the unions and the City, as well as the ordinance implementing those agreements ("Implementing Ordinance"), contained unambiguous language discontinuing eligibility for employees hired after July 1, 2005 as to four pension benefits, including: 1) an extra retirement check at the end of any year in which excess funds were deemed available; 2) an alternative rate of benefit accrual; 3) the right to purchase up to five years of additional service credits; and 4) retiree medical health benefits ("the Four Benefits"). Each memorandum of understanding (MOU) between the City and four of its five unions, as well as a last, best, final offer (LBFO) imposed on the fifth bargaining unit, all of which were in effect before July 1, 2005, required elimination of the Four Benefits for new hires, retention of the benefits for those already employed.

The City asked the trial court for relief in the form of a declaration stating that the City could legally terminate eligibility to receive the Four Benefits as to new employees, retroactive to July 1, 2005. The defendants, employees hired after July 1, 2005, claimed the City violated their constitutional due process and

contracts clause protections because, according to their argument, their rights to the Four Benefits had vested before the City Council passed the Implementing Ordinance on January 17, 2007. The employees argued the City could not overcome the usual presumption that ordinances apply only prospectively.

The Court of Appeal affirmed the trial court's finding that the City rebutted this presumption, based on the plain language in the implementing ordinance, MOUs, LBFO, and a City Council resolution, all of which indicated the City and the unions had agreed before July 1, 2005 that the Four Benefits would not be available to anyone hired on or after that date. The fact that the City's implementing ordinance was not passed until 18 months after July 1, 2005 was of no legal import, because a date upon which an ordinance or statute becomes law does not control over the parties' unambiguously expressed intent.

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Court Overturns State Personnel Board's Reduction in Penalty and Reinstates Termination

By Lina Balciunas Cockrell

While the State Personnel Board ("SPB") has broad discretion to modify discipline imposed by California State agencies, its discretion is not absolute. In the case of *Cate v. California State Personnel Board* (2012) 204 Cal.App.4th 270, the Court of Appeal concluded that an SPB administrative law judge abused her discretion in reducing a correctional officer's disciplinary action from termination to a 30-day suspension. The officer appealed his termination by the California Department of Corrections and Rehabilitation ("CDCR") after being charged with misconduct relating to harassing an inmate who tried to hang herself and intimidating a fellow correctional officer and witness to the inmate incident. Following the presentation of the evidence at hearing before the SPB, the original administrative law judge ("ALJ") retired without issuing a decision. Consequently, the new ALJ had to render her decision based solely on the record.

The new ALJ concluded that the officer had committed most of the misconduct alleged by CDCR, however she nonetheless reduced the penalty from termination to a 30-day suspension. CDCR appealed and the court concluded, among other things, that the ALJ's decision to reduce the penalty was not supported by substantial evidence. As the court noted, "the overriding consideration is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, harm to the public service. Other factors include the circumstances surrounding the misconduct and the likelihood of its recurrence." Here, the ALJ had sustained most of the allegations against the officer, allegations that the court felt would independently support the penalty of termination, and also recommended that the officer not be reassigned to work with vulnerable mentally ill inmates. The court found this "tantamount to a determination that [the officer]'s misconduct might indeed be repeated and that such misconduct would likely result in harm to the public service."

Accordingly, the court concluded that the SPB abused its discretion by reducing the officer's punishment from termination to a 30-day suspension, and it ordered that the termination be reinstated.

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No Right of Reimbursement for Attorneys' Fees Incurred in Defending Disciplinary Investigation

By Lina Balciunas Cockrell

The Court of Appeal recently addressed the question of whether a public employee has a right of reimbursement from her agency for attorneys' fees and other expenses incurred during an investigation by law enforcement when no formal civil action or proceeding was commenced against the employee. In the case of

Thornton v. California Unemployment Insurance Appeals Board (2012) 204 Cal.App.4th 1403, the plaintiff was appointed to the Board and later hired as an administrative law judge for the Board. Consequently, the State Auditor commenced an investigation into whether there was a conflict of interest with hiring a former Board member to be an ALJ and referred the matter to the district attorney and attorney general. In response, the plaintiff hired an attorney to defend her in the investigation.

The investigation subsequently concluded without any civil claim or criminal charges being filed against the plaintiff. The plaintiff then sued the Board for reimbursement of the attorneys' fees and expenses she incurred in responding to the investigation. The Board asked that the case be dismissed on the grounds that the plaintiff had no legal basis to seek reimbursement of her fees and costs.

The Court agreed. Plaintiff had claimed a right to reimbursement under two statutes – Government Code sections 995 and 996.4 and Labor Code section 2802. Government Code section 995 requires a public entity to "provide for the defense of any civil action or proceeding brought against" her in her official capacity and Government Code section 996.4 entitles the employee to reimbursement of reasonable attorneys fees and costs "necessarily incurred by [her] in defending the action or proceeding" where the public entity refuses to provide the employee "with a defense against a civil action or proceeding brought against [her]." Here, the case turned on whether an investigation that ultimately did not lead to a lawsuit constituted a "civil action or proceeding." The Court, looking at the "well-established meanings" of "civil action or proceeding," concluded that they did not encompass an investigation that stopped short of a lawsuit. In other words, Sections 995 and 996.4 are limited in scope to the defense of a formal civil lawsuit against the employee in a court.

With respect to plaintiff's claims for reimbursement under Labor Code section 2802, the Court concluded this section requires an employer to reimburse an employee for defense costs only when the employee was sued by a third party. Finally, in response to plaintiff's claims that it was generally "unfair" to preclude reimbursement, the Court advised her to take the matter up with the Legislature, as it is not up to the courts to rewrite statutes. The Court ultimately dismissed plaintiff's case without leave to amend the complaint.

Federal Court in Wisconsin Upholds Wisconsin Law Stripping Collective Bargaining Rights from Public Sector Employees

By Jennifer S. Stoughton

In 2011, at Wisconsin Governor Scott Walker's request, the Legislature passed the "Budget Repair Bill," (the "Bill") which essentially stripped away the rights of "general public employees" to unionize, collectively bargain, and collect union dues, while maintaining those same rights for "public safety employees." Although they ostensibly justified the public safety employee exemption as designed to limit any strikes or other orchestrated work stoppages among public safety employees in response to the Bill's passage, the political animus behind the move was clear: all labor organizations that endorsed Governor Walker during his election campaign fell into the classification of "public safety employees," while labor organizations who did not support the Governor fell within the "general employee" classification.

A coalition of seven of Wisconsin's largest public sector unions challenged the Bill's creation and its disparate treatment of the two classifications of public employees, asserting that they violated constitutionally-protected free speech, freedom of association, and equal protection. The legal challenges focused on

three aspects of the Bill: 1) the elimination of mandatory dues and fair share fees, and the stripping of all collective bargaining rights, except on "total base wages" for general public employees; 2) the requirement for annual recertification by an absolute majority of union members; and 3) a prohibition on the voluntary withholding of union dues from a general employee's paycheck.

In *Wisconsin Education Association Council v. Walker* (2012) 824 F.Supp.2d 856, the Court upheld the aspect of the law that stripped collective bargaining rights from general employees. While the Court recognized the clear political purpose behind the Bill, it found that carving out public safety employees was rationally related to a legitimate government interest in avoiding disruptions in public safety functions due to strikes, work stoppages, etc. The Court stated that political favoritism was not grounds for heightened judicial scrutiny under the Equal Protection clause and that, under our system of government, it was a matter for the next election.

The Court did, however, rule in favor of the plaintiffs on the annual recertification requirement and withholding of dues aspects of the Bill. Unlike the collective bargaining portion of the Bill, the Court found that for the "onerous" annual recertification requirement, the defendants' asserted basis for distinguishing between "general employees" and "public safety employees" (avoiding strikes, work stoppages, etc.) bore no obvious relationship to the Bill's purpose. The Court noted that even this "onerous" requirement would normally pass the admittedly-low bar of rational basis review, but it was irrational to impose such a unique burden on a voluntary union with highly restrictive bargaining rights, while maintaining a far lower burden on public safety unions.

The Court also ruled that the Bill's prohibition of agency fee deduction for general employees violated the First Amendment. Citing a long history of case law, the Court confirmed that agency fees implicate speech and that selectively prohibiting public employers from deducting agency fees only from general employees diminishes both the employees right to fund the union financially and the union's ability to fund its speech. The Court further found that the Bill impermissibly treated general employees and their unions differently as speakers than public safety employees and their unions. Finally, the Court concluded that there could be no rational basis to justify the ban on agency fee deductions from only general employees' paychecks because it amounted to favoritism and entanglement with partisan politics by discriminating in favor of fundraising efforts of public safety unions over general employee unions.

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Multiple Reorganizations that Might Impact State and Local Employees

By Jason Jasmine

The California Department of Human Resources ("CalHR") has been created out of a reorganization of the Department of Personnel Administration ("DPA") and the State Personnel Board ("SPB"). Although the SPB will retain its responsibilities over employee discipline appeals, policymaking, and oversight of the merit principle, all SPB functions regarding the recruitment and selection process for state employees will be merged with DPA's existing functions into the new department – CalHR.

Effective July 1, 2012, approximately 100 SPB employees joined all DPA employees in the new agency. The goal is to eliminate overlapping functions and, apparently, administrative costs have already been reduced significantly.

The Director of CalHR will report directly to the governor on labor-relations issues. Although it is still early, thus far, the impact appears minimal and the biggest "problem" seems to be remembering to use the new name.

In another significant development, the State Mediation and Conciliation Service ("SMSC"), formerly under the Department of Industrial Relations, moved under the jurisdiction of the Public Employment Relations Board ("PERB"), effective July 1, 2012. Very little is expected to change as a result of this reorganization. SMCS will continue to administer elections to certify or decertify unions as exclusive bargaining agents, conduct agency shop elections, and run card check procedures. SMCS will also continue its role of mediating bargaining and other disputes between employers and unions. We anticipate that PERB and SMCS will be able to consolidate functions as they begin their integration.

This merger has been discussed for many years, and seems to make sense – allowing cost savings and the more efficient allocation of scarce resources when it comes to matters such as settlement conference and other hearings.

In addition to absorbing SMCS, PERB is likely to be absorbed by the Labor and Workforce Development Agency ("LWDA"), which already oversees the Department of Industrial Relations, the Employment Development Department, the Agricultural Labor Relations Board, and the Workforce Investment Board.

Labor has raised issues regarding potential conflicts of interest if PERB were under the LWDA and had to adjudicate labor-relations disputes involving employees of the LWDA or its various components. LWDA Secretary Marty Morgenstern has testified (to the Little Hoover Commission analyzing this issue) that the LWDA would not influence PERB on policy matters or PERB authority. Rather, according to Morgenstern, the goal is merely the efficient administration of budget and expense paperwork, and assistance in processing PERB's administrative requests.

It is too early to tell what the impact of this ongoing effort at reorganization and consolidation will have on public employees. Of course, if the result is increased efficiency and cases are able to be resolved more quickly, that would benefit most of our clients who now wait months, and sometimes more than a year, for a decision in cases involving their fundamental rights as public employees and public employee unions.

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U.C. Davis Pepper Spray Incident Leads to Attacks on Peace Officer Rights

Anybody that was not living in a cave on November 18, 2011, heard about what quickly became known as the "UC Davis pepper spray incident." The incident, which involved the use of pepper spray against protestors at U.C. Davis who had stated their intent not to allow peace officers to transport arrestees to waiting vehicles, made world-wide news when images of Lt. John Pike deploying pepper spray against the seated protestors went viral within hours of the event.

The incident spawned multiple investigations, reports, and, now, a civil lawsuit, and the repercussions continue to be felt by many of those involved. As the news first broke, Sacramento labor partners **Gary Messing** and **Jason Jasmine** were contacted by one of the key peace officers in the incident, and have been deeply involved in providing both administrative and civil representation ever since.

While the internal investigations were still in process, another investigation – conducted by the Kroll Consulting firm went forward. This investigation, which seemed to have as its focus the allocation of blame, rather than an analysis of what actually happened, generated a report which was then forwarded to a so-called "task force" led by former California Supreme Court Justice Cruz Reynoso. Justice Reynoso was selected to chair the committee that would review, analyze, and make recommendations on the investigation, which was conducted at the

request of the President of the University of California. Prior to heading up this "task force," Justice Reynoso served as the Chair of an "Independent Civil Rights Commission" that investigated an officer-involved shooting in Yolo County that was investigated by multiple independent agencies. Each of those agencies found no wrong-doing on the part of the officers, yet Justice Reynoso formed the "Independent Civil Rights Commission," apparently for the purpose of second guessing these other investigations.

Although the selection of Justice Reynoso to chair the U.C. Davis "task force" to review the Kroll report was disconcerting, all concerns about bias were confirmed when Justice Reynoso presented his analysis of the Kroll report. Without delving into the merits of the report – the substance of which will be at issue in pending litigation – Justice Reynoso seized the opportunity to go beyond the scope of the investigation and attack the rights afforded to peace officers under the Public Safety Officers Procedural Bill of Rights Act. Justice Reynoso opened his presentation of the report – at a well-orchestrated, televised, standing-room only event – with a lengthy diatribe against peace officer rights. Stating that such protections for peace officers do a "great disservice" to the community, Justice Reynoso asserted that the pepper spray incident was an example of why the Legislature should take away procedural due process rights afforded to peace officers.

With this back drop, it is no surprise that the Reynoso "task force" sought to publicly disclose the names and other confidential information of all peace officers involved in the incident – prior to any finding of potential wrongdoing. While ultimately the Court ruled that much of the information could be published (as it was already publicly known, or was otherwise not protected), the names of peace officers who had not been on front pages around the world remained redacted from the report.

Both administrative and civil actions remain unresolved, and we will continue to represent the interests of peace officers in general, and our client in particular. But the Reynoso report, and the public comments associated with that report, are more evidence that the rights of peace officers are constantly under attack. Given an opportunity, there will continue to be powerful people who want to strip those rights away.

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Initial Victory in Fight Against Unilateral Rescission of Permanent Employee Status

As many of our clients already know, a small group of Hanford City employees is fighting a battle against the City of Hanford that could have a huge impact on due process rights for public employees throughout California. Initially, a district court judge from the Eastern District of California held that a public employee's right to permanent status and bumping rights can be revoked and/or legislated away, even after that right has vested.

After filing an amended complaint, and responding to a second motion to dismiss filed by the City, we are pleased to report that the Court denied the City's motion to dismiss most of the significant causes of action. The Court's recent ruling denying the bulk of the City's motion was a huge victory for the Hanford Executive Management Employees' Association ("EMEA"). Much of the Court's order simply confirmed that the City had not made any new arguments that would allow the Court to dismiss the causes of action that the Court had previously stated were validly pled. So, while it was gratifying to see the Court once again deny the City's motion to dismiss with respect to our First Amendment claims (and related State law claims) and injunctive relief claims, that denial was anticipated by both sides.

The crux of this case is the assertion that the City, in converting executive management

employees from permanent to at-will status violated those employees' due process rights. The court denied the City's motion to dismiss these claims, stating that we have properly alleged causes of action for violations of both procedural and substantive due process under both the Federal and State Constitutions. Although, technically, both our claims for procedural and substantive due process survived, our procedural due process claim is the one that looks especially strong.

The Court did grant the City's Motion to Dismiss our POBR and FFBOR causes of action, as well as our cause of action for declaratory relief. Interestingly, the Court's ruling on the POBR and FFBOR causes of action relied on its conclusion that no punitive action has yet been taken against the Fire Chief or Police Chief (as punitive action is defined under those statutes). Yet, in its ruling on the due process causes of action, the Court held that the stripping of permanent status and removal of bumping rights of executive management employees not only constituted a deprivation of a protected property interest, but also was akin to a demotion. This was precisely the argument we made with respect to the POBR and FFBOR causes of action, but the Court failed to address the argument that the City's actions resulted in a *de facto* demotion sufficient to trigger POBR and FFBOR protections. Since we are going to prepare and file a Second Amended Complaint for the reasons discussed below, we believe it makes sense to try one last time to convince the Court to see it our way regarding the POBR and FFBOR arguments.

With respect to the Court's dismissal of the declaratory relief cause of action, we believe the Court simply got it wrong. The Court incorrectly interpreted our request for declaratory relief as seeking redress for past wrongs. While other causes of action certainly did seek redress for past wrongs, our request for declaratory relief was only prospective in nature (as is required in a request for declaratory relief). Specifically, we seek a declaration that the City's amended rules cannot be applied to executive managers going forward. Again, as we are going to amend the complaint for the reasons discussed below, we will once again try to persuade the Court on this issue as well.

While neither the POBR/FFBOR cause of action nor the declaratory relief claim is vital to our case, the opportunity to file a Second Amended Complaint was important for an entirely different reason. At the time we filed the First Amended Complaint, there were 6 employees represented by the Hanford EMEA. Since we filed the First Amended Complaint, the City has fired two of them – Mary Lindsay and Cathy Cain. Shortly thereafter, Ms. Cain passed away, but her grieving husband is stoically keeping up the fight. In both cases, the City claimed it need not provide these employees with any type of due process or other hearing or right to appeal. In the Second Amended Complaint, we will take one more shot at the POBR/FFBOR and Declaratory Relief causes of action, but more importantly, we will put these new facts before the Court.

This tiny association is fighting a battle that will have far-ranging implications for the rights of public sector employees throughout California. Especially now, with 2 of the 6 employees having been fired without cause, the financial burden on these individuals and their families is monumental. The City's strategy has been obvious from the beginning – make the case as expensive and difficult as possible in the hope that these individuals will simply give up. We are asking for the support of other public sector labor associations to help ease some of the ongoing burden being suffered by these few employees and their families. This is a crucial fight, and one that could cost public employees throughout the State if the outcome is negative. This group needs your help. Please contact any member of our public sector labor group to discuss ways to provide assistance.

The case is being handled by labor partners **Gary Messing** and **Jason Jasmine**,

with the assistance of **James Henderson** in Litigation and **Gonzalo Martinez** in the Appellate Section.

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Yolo County DSA Ratifies a Two-Year MOU

The Yolo County Deputy Sheriffs' Association (DSA) has ratified a two-year MOU with Yolo County. Despite the fact that the County, like many other public agencies, is suffering a deficit, the DSA entered into an MOU that will preserve pay and benefits over the course of the MOU.

The new MOU includes many language changes and improvements as well as a variety of small economic improvements. For example, the Association release time will increase from 40 hours to 160 hours for the term of the contract. Stand-by pay goes from $2.50 to $3.00, a 5% differential is added for gang assignment and medical in lieu is increased from $200 to $300 per month.

By way of concessions, the DSA agreed to two-tier retirement system with the 3% @ 55 plan for new hires. The new hires will, however, have the single highest year for the computation of final compensation.

Deputies have been paying 7% of their PERS employee contributions. The DSA will now pay the full 9%, but will also receive a 1.98% salary increase. With the application of the IRC 414(h)(2), take home pay will be increased by about 2% for all deputies. Additionally, the traditional total compensation survey will be performed in September of 2013, with the traditional formula applied, except there can only be increases to bring the DSA to traditional parity level in relation to comparable agencies, but not reductions if the DSA is ahead of defined parity.

Sacramento labor partner **Gary Messing** was the chief negotiator for the DSA and was ably supported by bargaining team members **Matt Davis**, **Brian Griep**, **Rial Price**, **Jose Pineda**, **Rafael Vicente** and **Don Harmon**.

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San Francisco Deputy Probation Officers' Association Ratifies a Two-Year MOU

In May, the San Francisco Deputy Probation Officers' Association (DPOA) ratified a two-year MOU with the City and County of San Francisco. The DPOA made significant non-monetary gains under the new agreement, but also obtained a 3% salary increase during the second year. **Jonathan Yank** was the chief negotiator for the DPOA.

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CB&M Settles Class Action Lawsuit on Behalf of a Class of CDF Firefighters Worth Over 15 Million Dollars

In the last edition of the Labor Beat, we reported that a CBM team, consisting of labor partners **Gary Messing, Gregg Adam**, **Jonathan Yank** and associate **Jennifer Stoughton**, had tentatively reached a settlement with the State of California on behalf of a class of firefighters and our client CDF Firefighters, whereby class members would received between 95% and 100% of the amount we alleged they were owed due to the State's failure to pay lump sums for vacation/annual leave and compensatory time off credits, as mandated by Government Code section 19839. We are happy to report that at the end of June, we received final court approval of the settlement, and the State is in the process of sending out checks to approximately 5,000 class members worth over $15 million.

IMPORTANT NOTICE
TO ASSOCIATION BOARD MEMBERS

CBM updates its Association Board Member list quarterly. To assist us in keeping accurate, up-to-date names of members and their positions on Association Boards, we would ask that you kindly fill out the form below 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 begin receiving the Labor Beat electronically, please contact **Joan Gonsalves** at **jgonsalves@cbmlaw.com**. In your request, please note whether you would like to receive both a hard copy and an electronic version, or an electronic version only.

CBM thanks all of you for your help.

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