CBM CARROLL, BURDICK & McDONOUGH

THE LABOR BEAT

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CALIFORNIA SUPREME COURT HOLDS THAT PUBLIC EMPLOYERS MUST ABIDE BY ARBITRATION AGREEMENTS IN DISPUTES OVER WAGES AND/OR WORK HOURS, EVEN DURING A FISCAL CRISIS

On June 20, 2013, the California Supreme Court published one of the most important decision in decades protecting the collective bargaining rights of public employees by confirming that disputes over wages and work hours are subject to arbitration, even during a declared fiscal emergency. The Supreme Court also confirmed the presumption in favor of arbitrating labor contract disputes, even when the parties disagree over whether disputes implicate reserved "management rights."

The backdrop to *City of Los Angeles v. Superior Court (Engineers & Architects Association)* (2013) S192828 was a dispute over whether the City of Los Angeles's ("the City") imposition of furloughs during a declared fiscal emergency violated the wage and work-hours provisions of several Memoranda of Understanding ("MOUs") between it and the Engineers & Architects Association ("EAA"). In an earlier ruling, the Second District Court of Appeal had determined that arbitration of such a dispute would unlawfully delegate to the arbitrator the City's discretionary salary-setting and budget-making authority.

CBM persuaded the Supreme Court to review the decision of the Court of Appeal at the request of EAA (represented by CBM Partners **Gregg Adam, Jonathan Yank, Gonzalo Martinez,** and **Gary Messing**). The decision reversed the lower court's "unlawful delegation" holding, reasoning t hat, "[b]y ratifying the MOUs, the City made discretionary choices in the exercise of its salary-setting and budget-making authority. By deciding whether the furlough program violates the terms of those MOUs, the arbitrator would not be exercising any such discrectionary authority. Rather, the arbitrator's role would be limited to interpreting the MOUs for the purpose of determining whether the furlough program violates the terms of those MOUs." In a nutshell, the City had already exercised its discretionary powers by agreeing to abide by terms of the MOUs, and the arbitrator would merely determine whether it had violated those terms.

On a second issue (raised by the City), the Supreme Court rejected a claim that "management rights" language in the MOUs precluded arbitration of the dispute. The Court reaffirmed the strong presumption in favor of arbitrating labor disputes and, while acknowledging some ambiguity in the MOUs' "management rights" provisions, held that it was for the arbitrator to determine the substance of those terms.

The significance of this case to public sector labor associations and the public servants they represent cannot be overstated. Had the Supreme Court ruled in favor of the City on the "unlawful delegation" issue, it would have effectively eviscerated employees' collective bargaining rights by precluding enforcement of any contract provisions impacting wages and work hours. By ruling in favor of EAA, the Court's decision ensures the ability of public employee associations to bargain for and enforce contract protections of their members.

CBM TEAM AT TRIAL IN SAN JOSE PENSION LITIGATION

CBM Labor Partner **Gregg Adam**, Appellate Partner **Gonzalo Martinez,** and Labor Associate **Amber West** recently represented the San Jose Police Officers' Association in a one-week trial over the constitutionality of a city charter amendment, Measure B, passed by the San Jose voters in June 2012. The trial played to a packed courtroom that included multiple local, state, and national media representatives, political representatives, and local movers and shakers. The case concerns Mayor Chuck Reed's efforts to impose draconian changes in pension benefits on current City of San Jose employees. If the charter amendments are upheld by Santa Clara Superior Court Judge Patricia Lucas, employee pension contributions would increase by up to 16% of salary within three years, employee contributions to retiree health care will increase by another 6%, disability retirement rights would be decimated, and retiree COLA and supplemental benefits will be reduced.

Trial involved consolidation of five separate challenges to the lawsuit, putting at issue the rights of police officers, firefighters, miscellaneous employees, and retirees.

The City's primary argument is that a generic "reservation of rights" clause within the San Jose charter permits the City to unilaterally reduce current employees' pension formulas prospectively. Thus, argues the City, a current police officer's accrual rate may, for example, be reduced from 2.5% per year of service to 1% per year service (San Jose police officers have a

backloaded 90% formula based on 2.5% for the first 20 years of service and 4% for the last 10). Specifically at issue is whether the City's adoption in 1979 of two municipal code sections that required the City to pay all unfunded liability for the San Jose Police and Fire Department Retirement System created vested rights for employees. In addition, if the City's effort to increase employee contributions is invalidated, Measure B has a poison pill provision that automatically reduces employee salaries by 4% each year for four consecutive years.

Measure B contains a so-called Voluntary Employee Plan ("VEP") that would allow current employees to opt into a new retirement plan, with 2% accrual rates, in order to avoid having to pay unfunded liability. The City has been unable to implement the VEP because it has not secured IRS approval.

The City also preserved a second, far broader argument, which it purports to raise in the Court of Appeal if Measure B is invalidated. The City believes that evidence of its financial condition during the Great Recession will support an argument that the vested rights doctrine, as articulated in a series of decisions by the California Supreme Court going back to the 1950s, should be re-examined. The City wants to argue that the vested rights doctrine was never intended to prevent an employer from prospectively reducing retirement benefits. One notable piece of evidence that was introduced at trial, however, was the fact that while the City flirted with declaring a financial emergency in late 2011 (we believe, to support its legal theory), it ultimately decided not to declare an emergency, largely because in 2012 its pension liability was actually $50 million less than had previously been projected. City Manager Debra Figone also testified that, notwithstanding her recommendation to city Council to put a sales tax measure on the November 2012 ballot, the Council refused. Multiple other local jurisdictions passed sales-tax measures on that same ballot.

The POA and other unions relied on the vested rights doctrine and multiple promises made to employees in collective bargaining agreements and municipal ordinances over the last 30 years.

The parties are currently engaged in post-trial briefing for the judge. The decision, which is being followed nationwide, is expected late in the year.

CHANGES TO THE MMBA EXPAND PAID RELEASE TIME RIGHTS: LABOR GETS A BIG WIN IN WISCONSIN

By Amber West and Jonathan Yank

On September 9, 2013, Governor Jerry Brown signed a bill that significantly expands release time rights under the Meyers-Milias-Brown Act ("MMBA"), which governs local public entities' labor relations. Currently, the MMBA provides that an employer must allow a reasonable number of employee representatives paid time off when "formally meeting and conferring with representatives of the public agency on matters within the scope of representation." (Gov. Code § 3505.3.) Effective January 1, 2014, paid time off rights expand to include testifying or serving as the union representative in a proceeding before the Public Employment Relations Board ("PERB"), as well as testifying or serving as the union representative in a personnel or merit commission hearing. An employee organization must provide notice to the employer within a reasonable time frame prior to the requested leave.

The new provisions do not specify whether leave is allowed for fact-finding impasse-resolution procedures recently added to the MMBA. (Gov. Code §3505.4.) However, because the MMBA "meet and confer" process appears to include applicable impasse resolution procedures (see Gov. Code § 3505), it is reasonable to argue that fact-finding would be covered as part of "meeting and conferring" with the public agency. As is common with amendments to the MMBA, this and other issues will have to be worked out, either through PERB's enacting regulations or through development of case law.

AGENCY FEES AND OPT-OUT MEMBERSHIP SYSTEMS UNDER ATTACK ONCE AGAIN

By Amber West

In one of the most radical attacks on agency fees after the Supreme Court's 2012 ruling in K*nox v. Service Employees International Union*, a group of teachers comprised of union non-members opposed to agency fees have filed suit against local, state, and national teachers' unions. In *Friedrichs v. California Teachers Association*, the plaintiffs have asked a federal district court in Los Angeles to find the agency fees system violates the First Amendment. In the alternative, the plaintiffs ask the court to forbid the agency fees opt-out system currently in place so that non-members are only charged agency fees if they affirmatively opt in.

Last year, in *Knox v. SEIU*, the Supreme Court's justices seemed to invite this type of challenge. The majority in *Knox* opined far beyond the relatively narrow question being appealed (in which the court ruled unions must issue a fresh Hudson notice before collecting special assessment dues to avoid violating non-members' First Amendment rights). Suggesting it might in the future abrogate decades of case law accepting the constitutionality of "opt-out" systems, the court questioned the validity of long-standing precedent establishing that "opt-out" systems adequately safeguard First Amendment rights of non-members (by only charging them for expenses supporting the unions' bargaining work that benefits them). The court went so far as to express hostility toward the existence of agency shop altogether. Thus, the *Knox* court seemed to invite the opportunity to hear the very type of challenge now being brought in *Friedrichs v. CTA*. Potentially, a Supreme Court decision on a case such as *Friedrichs* threatens the very existence of 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 will continue to monitor this situation closely and work with public sector labor associations to proactively address and protect associations' fiscal stability.

In *Friedrichs v. CTA*, the plaintiffs' representation includes counsel at an organization in Washington, D.C., the Center for Individual Rights (funded in significant part by the Koch brothers), and the teachers' organization (a named plaintiff), Christian Educators Association International. Defendants include the CTA, the National Education Association, the local unions, and school superintendents who administer the plaintiffs' agency fees opt-out system.

CALIFORNIA SUPREME COURT HOLDS THAT PUBLIC EMPLOYEE ASSOCIATIONS ARE ENTITLED TO THE NAMES AND CONTACT INFORMATION FOR NON-MEMBERS

By Jonathan Yank

The California Supreme Court held that, under a statute governing labor relations between local public entities and their employees, an employer is required to disclose to a union the home addresses and phone numbers of all represented employees, including those who have not joined the union. The Court noted that both decisions under the National Labor Relations Act and decision by the California Public Employment Relations Board construing California's labor statutes generally have required disclosure following a balancing of the union's interests versus the potential privacy intrusion.

Applying a balancing test, the Court noted that the union's duty of fair representation requires it to keep both members and non-members informed of the status of negotiations, as well as give them an opportunity to be heard. It also noted that a union has an obligation to provide so-called Hudson notices to all employees, and that a union violates the duty of fair representation if it fails to do so. The Court determined that direct communication between a union and members and non-members alike is critical for these purposes. Balancing these serious interests against the minor privacy intrusion occasioned by the disclosure of contact information, the Court determined that disclosure is required.

CHANGES IN SOME RULES GOVERNING INTERNAL AFFAIRS INVESTIGATIONS ARE NON-NEGOTIABLE

By Gary Messing

The California Court of Appeal recently held that certain changes in department investigation procedures are not negotiable. In *Association of Orange County Deputy Sheriffs v. County of Orange* (2013) 217 Cal.App.4th 29, an order was issued by the Sheriff that an employee who was under investigation for misconduct would no longer be permitted access to the department's internal affairs investigation files before being interviewed. This was upheld by the Court of Appeal, which found that withdrawing pre-investigative access to the investigation file was done to ensure the integrity and reliability of internal affairs investigations and to bring the department in line with what is considered to be "best practices" in conducting internal affairs investigations. The court found that the matter had to do more with the department's freedom to manage its affairs as opposed to employment practices, and therefore found it to be a management right.

The court expounded that even if the decision impacted working conditions of employees, on balance, the Sheriff's need for unencumbered decision-making in this area outweighed any benefit that could be gained in the area of labor-management relations by bargaining about the action. It is disturbing that (relying upon declarations that were submitted by the County) the court concluded that withholding the evidence and statements of witnesses would lead to more

truthful and forthright statements by targeted peace officers. The court cited the declaration of a Captain who indicated that if multiple officers were targeted by the investigation and read the statements of the others and if one resigned before his or her investigative interview as a result of reading their statements, the department would be unable to compel that individual to give a statement because he/she would no longer be an employee subject to the orders of the Sheriff. This, according to the Captain, would be an impediment to the completion of the investigation.

Attorneys who regularly represent peace officers in IAs generally believe that the more information that is available to refresh the recollection of an officer, the more accurate the statements given and the less likely it is for there to be allegations of untruthfulness.

INTERNAL WORKERS' COMPENSATION INVESTIGATIONS TOLL ONE-YEAR PERIOD FOR FILING DISCIPLINARY CHARGES UNDER PUBLIC SAFETY OFFICERS PROCEDURAL BILL OF RIGHTS ACT (AND PRESUMABLY THE FIREFIGHTERS PROCEDURAL BILL OF RIGHTS ACT)

By Amber West

Disciplinary charges against a public safety officer generally must be filed within one year after the misconduct is discovered, subject to certain exceptions, under Government Code section 3304 (part of the Public Safety Officers Procedural Bill of Rights Act). One exception includes tolling the statute while a criminal investigation or prosecution is pending. Whether workers' compensation fraud investigations are included was addressed in *California Department of Corrections and Rehabilitation v. State Personnel Board* ("Moya") (2013) 215 Cal. App. 4th 1101. Moya, who was a corrections sergeant at Centinella State Prison, filed a workers' compensation claim for a fracture to the wrist, which he alleged was accidentally slammed in a door while he was on shift. Subsequently, Moya was seen riding his motorcycle and working out at a gym. Both activities were undisputedly in violation of his work restrictions. At that point, the employer also received an anonymous tip that the injury actually occurred during an off-duty event, at an organized fight called the Battle of the Badges.

The prison asked the Office of Internal Affairs ("OIA") of the California Department of Corrections and Rehabilitation (CDCR) to investigate whether Moya had committed workers' compensation fraud. In December 2009, a little over a year later, the OIA submitted a report to the Imperial County and San Diego District Attorneys' Offices, both of which declined to prosecute the matter.

Following a fraud investigation, CDCR dismissed Moya based on a finding that he had filed a fraudulent workers' compensation claim and had dishonestly reported how he injured his wrist in the OIA interview. The State Personnel Board found Moya's notice of dismissal was time-barred under Government Code section 3304(d) after finding internal workers' compensation fraud investigations do not toll the statute of limitations. The Superior Court disagreed, and the Court of Appeal affirmed.

There are a number of enumerated exceptions to the one-year statute of limitations, including one which states that the one-year time period does not apply "if the investigation involves an allegation of workers' compensation fraud on the part of the public safety officer." (See Gov. Code § 3304 (d)(2)(H). The Court of Appeal looked at the plain language of the exception and held that it is neither unclear nor ambiguous, nor does it state that the investigation must be conducted by a third party. The Court also looked to the legislative history and found nothing indicating that the Legislature intended to limit the workers' compensation exception to fraud investigations conducted by third parties. On that basis, it affirmed the decision of the superior court.

Because the Firefighters Procedural Bill of Rights Act has an identical exception to the one-year rule, the Court's decision should have equal application to firefighters. (See Gov. Code § 3254(d)(7).)

COURT OF APPEAL RULES THAT REPORT MUST NAME POLICE OFFICERS INVOLVED IN PEPPER SPRAY INCIDENT

The event commonly known as the "Davis Pepper Spray Incident" occurred nearly three years ago, but the litigation resulting from it continues. Recently, the Court of Appeal ruled that the names of police officers in reports prepared for the UC Regents about the "Pepper Spray Incident" were not within a Public Records Act ("PRA") exemption and must be disclosed. In *Federated University Police Officers Association v. Superior Court* (2013) 218 Cal.App.4th 18, two newspapers sought access to complete, unredacted versions of two reports commissioned by the UC Regents. The reports reviewed the Pepper Spray Incident, made conclusions regarding responsibility for the incident and made policy recommendations regarding student protests on campus.

Several UC police officers were interviewed in the preparation of one of the reports, but these officers did not include any who were the target of citizen complaints or the subject of internal affairs investigations with respect to their role in the Pepper Spray Incident. When the reports were issued, the names and ranks of all officers - both witness and subject officers - were redacted, with the exception of two individuals whose identities were already widely known: Lieutenant John Pike (the primary officer doing the spraying) and then-UC Davis Police Chief Annette Spicuzza. CBM Partner **Jason Jasmine** and Associate **Lina Balciunas Cockrell** represented Chief Spicuzza in the university's internal affairs investigation and subsequent civil litigation.

The newspapers made requests under the PRA and filed a petition for writ of mandate to compel the university to disclose the complete, unredacted versions of the reports. The trial court granted the petition but stayed the effect of its order to allow the Federated University Police Officers Association ("FUPOA") to appeal the ruling. The Court of Appeal upheld the trial court's ruling, but also stayed the effect of the order to allow the FUPOA to appeal to the California Supreme Court. The Supreme Court remanded the matter back to the Court of Appeal with directions to order the trial court to show cause why the officers' names should be disclosed.

The FUPOA based its position against disclosure solely on the confidentiality of peace officer personnel records and records of investigations of citizens' complaints set forth in Penal Code section 832.7(a). The Court of Appeal concluded that this situation was not a de facto investigation of a citizen's complaint because it took a larger view than a specific complaint about a specific officer's actions and examined the entire internal workings of the UC and UC Davis Police Department. Moreover, while the reports make policy level recommendations, they expressly do not make any recommendations regarding disciplinary action against any police officer in connection with the Pepper Spray Incident. Accordingly, the officer names could not be withheld from disclosure on the grounds of confidentiality as an investigation of a citizen complaint.

With respect to whether the names were part of police "personnel records," the Court noted that the California Supreme Court has found that a police officer's identity and conduct on the job are not private and rather, a matter with which the public has a right to concern itself. Furthermore, police officers never have anonymity because their names are on their uniforms and they routinely identify themselves when they go about their official duties. In the Pepper Spray Incident, the identities of the officers involved had already been recognized and disseminated through photographs and videotaped recordings by members of the public, as well as news reports. The Court concluded that "[w]hile the statute clearly exempts information about a complaint or investigation of a complaint about an individual officer's conduct, the statute does not exempt information relating to the identities and conduct of the police in general during a high-profile incident that is under scrutiny and review of the purpose of undertaking a system-wide review of police procedures."

Accordingly, the Court ruled that the FUPOA failed to meet its burden of proving that the information the newspapers sought is exempt from disclosure under Penal Code section 832.7(a). However, the order has again been stayed to allow the FUPOA to appeal to the California Supreme Court. So this may not be the final word on the subject.

FORCE USED IN A STRUGGLE WITH FLEEING SUSPECT REASONABLE AS A MATTER OF LAW

By Jennifer Stoughton

In *Gonzalez v. City of Anaheim* (2013) 715 F.3d 766, the 9th Circuit Court of Appeal recently affirmed a lower court's summary judgment in an action in which plaintiffs' alleged that a police officer used excessive force in a struggle that led to the death of a person suspected of possessing drugs. The incident in question began when two Anaheim Police officers pulled over a van that was being driven erratically. As the officers approached the van, they saw the decedent reach back into the van and then clench something in his fist. Believing the driver had a weapon or drugs and was attempting to swallow them, the police officers ordered the suspect to open his hands and get out of the van. When the suspect refused, a protracted struggle ensued in which the officers were forced to use various levels of force including striking the suspect's arm three times with a flashlight and attempting to apply a sleeper hold. As the struggle escalated, one of the officers entered the van through the passenger side door and continued to use force by punching the suspect in the head and face and hitting him with his flashlight in an effort to gain compliance. Despite repeated

uses of force and demands to comply, the suspect continued to resist arrest and eventually put the van into gear and hit the accelerator with enough force to slam the passenger side door shut confining one of the police officers in the van as the suspect tried to flee. Fearing for his life, the officer trapped in the van, without warning the suspect, shot the suspect in the head. The suspect later died.

The Court relied on the oft-cited Supreme Court decision, *Graham v. Connor* (1989) 490 U.S. 386, to determine that all of the instances of the use of force were reasonable for the following three reasons: First, the court found that the severity of the crime (the belief that the suspect possessed illegal drugs and was actively trying to dispose of them) weighed in favor of the officer. Next, the Court found that the suspect posed an immediate threat to the officers because they believed he was reaching for a weapon and then tried to flee with the officer confined in the van. Finally, the Court determined that the suspect was actively resisting arrest. Thus, the Court concluded that the plaintiffs had failed to show as a matter of law that the officers had violated the decedents' constitutional rights.

DISTRICT ATTORNEY'S ACTIONS RELATED TO PLACEMENT OF OFFICER ON BRADY LIST DOES NOT TRIGGER POBR PROTECTIONS

By Jason Jasmine

A recent unpublished decision out of the Los Angeles area, though not breaking any new legal ground, confirmed the chipping away of peace officer rights under the Public Safety Officers Procedural Bill of Rights Act ("POBR"). (*Nazir v. County of Los Angeles, et al.* (2013 WL 1303327).)

The case arose out of an arrest in which a Torrance Police Department officer allegedly improperly failed to document the use of a confidential informant in his arrest report. As a result, the Los Angeles District Attorneys office placed the officer on its Brady list. Although the officer was afforded the right to provide objections or other written materials to the senior special assistant in the DA's office responsible for the office's Brady list, he was not afforded the right to any sort of actual administrative hearing. Further, the decision of the senior special assistant – as to inclusion on the list – was final.

The officer alleged that placement on the Brady list without affording him an administrative appeal hearing violated his rights under the POBR. The trial court sustained the County's demurrer, finding that the rights under the POBR apply only as between a peace officer and his/her employing agency.

Because the County of Los Angeles and the District Attorney's Office are public entities independent and unrelated to the officer's employing agency, the Court of Appeal upheld the trial court's decision.

Although this decision is hard to attack as it is consistent with other authority under the POBR, it is nonetheless frustrating. Placement on a Brady list can have a dramatic impact on a peace officer's career, effectively ending career advancement opportunities in many cases (assuming the officer keeps his or her job). Putting the power to make such an important determination into the hands of a person or a few people in another department, without any ability to have an administrative appeal is a large loophole in the rights afforded to peace officers under the POBR.

PRISON OFFICIALS ENJOY ABSOLUTE IMMUNITY FROM SECTION 1983 ACTION

By Jennifer Stoughton

In a case of first impression, the Ninth Circuit Court of Appeals ruled in *Engebretson v. Mahoney* (9th Cir. 2013) 724 F.3d 1034 that prison officials who simply enforce facially-valid court orders are absolutely immune from any liability under 29 U.S.C. § 1983 even if those court orders are later found to be unconstitutional. Citing a long line of decisions by other courts , the Court relied on three factors in reaching its decision. First, the Court found that it is common sense to give prison officials immunity for executing facially-valid orders. Second, the Court found that it was consistent with the United States Supreme Court's precedents. Finally, the Court noted that absolute immunity is necessary to allow prison officials to do their job free from the fear of litigation.

THE MISTAKEN APPLICATION OF A SETTLEMENT TO PROVIDE AN ENHANCED DISABILITY RETIREMENT FORMULA DID NOT CREATE AN IMPLIED VESTED RIGHT

By Jason Jasmine

As anyone who has not been living under a rock for the last 5 years knows, pensions and associated retirement benefits have been front page news and the subject of hundreds of lawsuits throughout the state and nation recently. Under the California

Supreme Court case, *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, the idea that there could be an entitlement to certain retirement benefits based on implied promises has given hope to various groups of retirees who have seen the benefits they anticipated receiving attacked and otherwise eroded.

In *Chisom v. Board of Retirement of County of Fresno Employees' Retirement Association* (2013) 218 Cal.App.4th 400, however, the Fifth District Court of Appeal made it clear that such arguments about the creation of implied vested rights will not be an easy sell.

Fresno County is a '37 Act County and Appellants are retired public employees and members of the Fresno County Employees' Retirement Association ("FCERA"). From 2001 to 2009, if a member of FCERA qualified for a non-service-connected disability retirement, the amount of his or her monthly retirement allowance was calculated based on an "enhanced" benefits formula that exceeded the formula provided in the statutes governing such matters as found in the County Employees Retirement Law of 1937 (Gov. Code, § 31450 et seq. ["CERL"]).

The rationale for using the enhanced benefits formula was an interoffice letter by the chief deputy county counsel stating that, in his opinion, a 2000 settlement agreement ("the settlement agreement"), which resolved certain claims against the County of Fresno ("the County"), FCERA, and others, relating to retirement benefits, was intended to include an enhancement of disability retirement benefits. The letter advised that disability retirement allowances should be increased according to a formula attached to the letter. FCERA followed that advice, even though the settlement agreement had enhanced only "service" retirement benefits and was silent as to disability retirement benefits.

In 2009, the governing board of FCERA, known as the Board of Retirement ("the Board"), reexamined the issue and concluded that it had been erroneously using the enhanced benefits formula to calculate non-service-connected disability retirement, and it voted to discontinue that practice. Appellants then filed the present action against the Board, FCERA, the County, and other plan sponsors ("collectively respondents"), to require them to resume the use of the enhanced benefits formula.

The trial court sustained respondents' demurrer on the ground that, as a matter of law, the settlement agreement did not include the enhanced benefits formula for disability retirement. Appellants appealed, arguing that under *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, the enhanced benefits formula for disability retirement was arguably an implied term of the settlement agreement.

The Court of Appeal disagreed, affirming the judgment of the trial court. The Court examined the underlying settlement agreement and found that it was silent as to disability retirement benefits, that it expressed that ALL issues relating to the litigation were being resolved, and that there were NO other expressed or unexpressed agreements. Thus, according to the Court, the agreement was clear and unambiguous and nothing therein served to create an implied vested right to enhanced disability retirement benefits. Further, as the settlement agreement was so clear and unambiguous, attempting to create an implied right to certain enhanced disability retirement benefits would actually contradict the express language of that agreement.

AN UNLAWFUL ARREST AND BEATING BY A SHERIFF'S DEPUTY DURING ARREST CONSTITUTES A VIOLATION OF THE BANE ACT'S PROHIBITION AGAINST "THREATS, INTIMIDATION, OR COERCION", EVEN WITHOUT A SHOWING OF A VIOLATION OF SOME SEPARATE AND DISTINCT CONSTITUTIONAL RIGHT IN ADDITION TO THE FOURTH AMENDMENT VIOLATION

By Jason Jasmine

Most of the times we handle allegations of excessive force against one of our peace officer clients, the allegations are baseless and are made by someone trying to deflect from their own conduct – whether it be their illegal underlying conduct, resisting arrest, or otherwise inappropriate behavior. In almost every case, the force used by our officers is found to be appropriate for the circumstances.

The case of *Bender v. County of Los Angeles* (2013) 217 Cal. App.4th 968, however, involved facts that – if true – not only demonstrate an egregious example of excessive force, but create negative perceptions against peace officers that taint the appropriate uses of force by the vast majority of peace officers.

In this case, if the facts presented are accurate, a Los Angeles Sheriff's deputy – without cause or provocation – unlawfully

searched, handcuffed, arrested, punched, kicked, pepper-sprayed and otherwise beat and manhandled the plaintiff, all while verbally insulting and humiliating him. There were numerous witnesses, and none of them saw the plaintiff resist in any way – even while being beaten, having his ribs cracked, and pepper spray sprayed directly into his eyes, up his nose and in his mouth.

One of the many theories of recovery alleged by the plaintiff was a violation of the Bane Act (Civil Code section 52.1), which authorizes a civil action against anyone who "interferes, or tries to do so, by threats, intimidation, or coercion, with an individual's exercise or enjoyment of rights secured by federal or state law." The defendants (the County and the officer) contended that the Bane Act does not apply when a Fourth Amendment search and seizure violation is accompanied by the use of excessive force, because "coercion is inherent" in any unlawful seizure. Defendants argued that in an excessive force case, the Bane Act requires a showing that the "threats, intimidation, or coercion" caused a violation of a separate and distinct constitutional right in addition to the Fourth Amendment violation.

The Court disagreed, finding that an unlawful arrest (a violation of the Fourth Amendment) – when accompanied by unnecessary, deliberate and excessive force – is squarely within the protection of the Bane Act. The judgment, which included approximately half a million dollars in damages, and almost a million dollars in attorneys' fees and costs, was upheld.

PERB WILL NOT ISSUE INJUNCTIVE RELIEF FOR EMOTION PAIN AND HARM TO REPUTATIONAL INTEREST

By Jennifer Stroughton

In PERB Order No. IR-56-H, the Public Employment Relations Board ("PERB" or "the Board") issued a decision denying the Charging Party's fifth request for injunctive relief. The Board noted that much of the irreparable harm claimed was in the nature of emotional pain and suffering and harm to reputational interests. The Board decided that, because it does not have the authority to grant such relief even at the conclusion of the administrative proceedings, issuing injunctive relief on that basis would be improper. The Board also found that the remaining basis for the claimed injunctive relief, loss of wages and health benefits, are the type of economic harms that PERB can remedy should the Charging Party ultimately be successful in his unfair practice charge.

As noted above, PERB does not have jurisdiction over MMBA bargaining units comprised solely of peace officers (Gov. Code § 3511). PERB's rationale for not seeking the injunctive in the Superior Court—that the Board itself lacks jurisdiction to remedy the conduct sought to be enjoined—would not apply to the Superior Courts, which have initial jurisdiction over disputes involving peace officer associations.

IMPACT OF INSTALLATION OF SECURITY SURVEILLANCE CAMERAS FOUND WITHIN SCOPE OF REPRESENTATION

By Amber West

The Rio Hondo Community College District ("District") decided to install security surveillance cameras in its new resource center as well as adjacent parking lots. The District notified the California School Employees Association ("CSEA"), which demanded bargaining over the effects of the decision on discipline and performance evaluations, almost two months after notification occurred. The District denied the request, claiming the demand occurred after so long a period of time as to constitute waiver of bargaining rights, and CSEA filed an unfair practice charge with the Public Employment Relations Board ("PERB"). The Administrative Law Judge ("ALJ") found the District's denial constituted a refusal to bargain.

PERB adopted the findings and conclusions of the ALJ in *Rio Hondo Community College District* (2013) PERB Decision No. 2313. In particular, PERB found that a delay of less than two months could not constitute clear and unmistakable intent to waive bargaining rights. PERB also noted intent to waive might be found where some delay is paired with other indicia of intent, but that generally a union's silence alone is insufficient to waive statutory rights. For example, waiver can be shown where the employer provided notice of an external deadline which then passed. Intent to waive also can be shown by the delay being so long as to be unreasonable. PERB noted the Court of Appeal has held delay exceeding 3 months can be sufficient.

PERB found that the subject matter fell within the scope of representation. The District had argued that the union's letter did not identify the "specific effects" of the District's decision, but PERB held that was unnecessary given that it is reasonably foreseeable that work evaluations and employee discipline could be impacted by video footage and, moreover, the letter stated the union sought to specifically address potential impacts on evaluation and discipline. The District also argued that the

installation decision only related to "type of evidence" and therefore was not within the scope of representation. PERB agreed that the cameras tied into type of evidence that could be used to substantiate evaluations and discipline, but such evidence logically and reasonably relates to those procedures, because the impact of the evidence could be large and could depend on how it is used. For example, surveillance video evidence could be proffered to corroborate a first-hand account, or it could even be allowed as the only evidence of misconduct, and negotiation appropriately could address this issue. Therefore, PERB concluded that an employer's decision to install security surveillance cameras in areas where employees work or take breaks has an effect on discipline and performance evaluations, and is a subject matter within the scope of representation.

While PERB does not have jurisdiction over MMBA bargaining units comprised solely of peace officers (Gov. Code § 3511), California courts generally defer to its construction and application of the State's bargaining statutes.

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

By Lina Balciunas Cockrell and Julia Johnson

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

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

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

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

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

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

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

STATE EMPLOYEES WITH TERMS OF EXPIRED MOUS STILL IN EFFECT LOSE TWO PAID HOLIDAYS

By Lina Balciunas Cockrell and Julia Johnson

The California Court of Appeal recently addressed the issue of whether changes to the Government Code could supersede terms set forth in expired MOUs, such as paid holidays. In *California Ass'n of Prof'l Scientists v. Brown* (2013), 216 Cal. App. 4th 421, the Court addressed the legality of newly- reenacted Government Code Section 19853, which removed two holidays, Lincoln's Birthday and Columbus Day, from the list of paid

holidays for state employees, despite those holidays remaining in expired MOUs still in effect by operation of law.

The original Section 19853, prior to its repeal, held that the terms of MOUs would control in the face of conflicting government code provisions. In *California Ass'n of Prof'l Scientists*, supra, the Court determined that the new section 19853 (which eliminated the two holidays) also provided that an MOU would only be controlling if it was executed or amended on or after February 20, 2009 (the date of the new enactment).

Another discrepancy existed in the Dills Act, which governs the collective bargaining process and provides that a conflicting MOU provision would control over specified Government Code sections, including Section 19853. The Court acknowledged that its role was to "harmonize the inconsistencies in the two statutes" and noted that allowing the Dills Act to supersede Section 19853 would render the language of Section 19853 regarding "MOUs executed or amended on or after February 20, 2009" superfluous. Moreover, the Legislature passed the reenacted Section 19853 eliminating two paid holidays in order to address the budget crisis. If MOUs could always supersede subsequent legislation, the purpose of the legislation would never be realized. Accordingly, the Court found that the later enactment, the new Section 19853, controls.

Thus, expired MOUs, which were executed prior to February 20, 2009 and still in effect by operation of law, did not control over the conflicting Section 19853 language and the employees in these bargaining units lost two paid holidays.

FRESNO DSA SETTLES ON A NEW 3-YEAR MOU

The Fresno DSA's negotiations this year were held in conjunction with the bargaining units for the Fresno Sheriffs Sergeants Association and the Lieutenants bargaining unit who all settled on three-year MOUs. All three units sat at the table together in coalition-style bargaining. The current MOUs were not set to expire until December of this year, but the DSA and the two other Associations seized on an opportunity to resolve their negotiations early and did so after a relatively short period of bargaining. CBM Sacramento Labor Partner **Gary Messing** worked closely with Eric Schmidt, the DSA President, Bob Kandarian, the President for the Sheriff Management Association, and Kevin Draughon, from the Sheriff Sergeants Association, along with their bargaining teams, to secure the agreement.

The prior two year agreements contained 6% salary reductions, which was far less than the 9% reduction experienced by other bargaining units in the County. The 6% salary reduction along with other reductions in compensation (uniforms, callbacks, and the like) were subject to a sunset clause. While the County is not quite back on its feet, the financial picture has improved significantly.

Working cooperatively with the County Administration, the salary reduction will be restored at 2% per year for three years. Other sunsetted reductions are also restored during the MOU, like court call out (which reverts back to a 4.5 hour minimum in 2015 and the $500 uniform allowance, which is restored in 2014).

There were also improvements made in court standby to include deputy coroners; comp time bank caps were increased from 60 hours to 80 hours; and air support pilots will receive increases from $200 to $300 per pay period while tactical flight officers will increase from $100 to $200 per pay period. The restoration of the 8% shift differential from the current 4% will be subject to reopeners in all of the out years of the MOU; and significantly, health insurance increases by approximately $15 per pay period in January 2014, with additional $10 per pay period increases in 2015 and again in 2016.

As part of the three year agreement, the County will be implementing a new step system which goes from 5% for 5 steps or 6 steps (depending upon the classification), to a 9 step process at 3.125% per step. As a result, classifications still at the 5 step system will receive a 5.2% additional salary increase during the term of the MOU, and all others will receive a slight bump in going to the 9 step system, with no employee suffering a reduction.

Reopeners in the contract, including reopeners for salary, may only result in increases during the term of the MOU. In addition, many important benefits were locked down for the term of the contract, including take home cars, the zipper clause, and the like. Several other reopeners were agreed upon including one for the possible establishment of a retiree medical trust.

The results achieved by the bargaining teams and the County illustrate the benefit and importance of cultivating relationships with the key players for the employer during the lengthy periods between contract negotiations.

NEW COLLECTIVE BARGAINING AGREEMENT FOR SAN FRANCISCO POLICE OFFICERS' ASSOCIATION

CBM Labor Partner **Gregg Adam** recently assisted the San Francisco Police Officers' Association in the negotiation of a three-year extension to its current collective bargaining agreement with the City and County of San Francisco. The agreement, which provides for 5% in increases from 2015 to 2017, continues a remarkable run wherein the San Francisco Police Officers' Association has pulled itself from being the 93rd highest paid agency in the State to being arguably the highest. The agreement comes at a time when San Francisco is recovering dramatically from the Great Recession, and both sides saw the agreement as cementing the very strong labor relations that have existed in recent years. One of the San Francisco Police Department's biggest challenges in the next three years will be filling approximately 400 officer vacancies.

CALFIRE REINSTATES FIREFIGHTER AFTER FAILING TO FOLLOW ITS OWN AWOL POLICY

CDFF recently secured a significant legal victory on behalf of a member in the Riverside Unit, sending a strong message to CAL FIRE management that it cannot play fast and loose with its own policy. CDFF forced CAL FIRE to reinstate the member, who had been separated from his employment based on AWOL charges, and give him full back pay.

Peter Boctor, a FFII on Ladder Truck 33 in Palm Desert, had been dealing with some difficult issues in his personal life, including a contentious family court case. When the situation reached a point where Boctor felt his "head was not in the game" and he might pose a safety risk to his colleagues and the public, he asked for and was granted sick leave per Riverside Unit policy. He also kept his supervisors, Unit management, and CDFF Riverside Chapter representatives abreast of his circumstances.

On March 14, 2013, Boctor received a visit from law enforcement with a search warrant. Although he already had sick leave secured for his shift of March 15, 16 and 17, Boctor was so shaken by this turn of events that he called his station's FAE, his Fire Captain, and the Division Administrative Chief, among others, to give them an update and request more sick leave. No one with whom Boctor spoke on March 14 denied him leave.

The situation went from bad to worse the next day when Boctor was arrested and charged with criminal conduct arising out of his family court matters. After he was arrested, Boctor had his father call the Division Administrative Chief to notify the Department of Boctor's arrest and make sure he received enough leave to cover the time he needed to secure his freedom. The Division Administrative Chief said that he would take care of it.

Boctor vigorously denied the charges and is confident that his criminal case will be resolved in his favor. However, due to the nature of the charges and some other matters beyond Boctor's control, he remained incarcerated for 12 days. This time period covered two shifts – March 15, 16 and 17 and March 22, 23 and 24 – shifts for which Boctor was led to believe he had already secured sick leave.

Boctor received no further communication from CAL FIRE until, at a court hearing on March 26 while he was still incarcerated, CAL FIRE served Boctor with a notice alleging he was absent without leave under Government Code section 19996.2 for five consecutive days and would be separated from his employment.

This action by CAL FIRE violated its own policy regarding the handling of alleged AWOL situations. Section 1091.6.4 provides that AWOL separation may be implemented in only the two following situations: where the absence without leave is admitted or the employer reasonably believes an abandonment has occurred. Obviously, neither of these applied to Boctor.

The policy goes on to state that AWOL may not be used when there is a dispute about whether an employee is or is not absent without leave. A warning letter should be sent to the employee not later than the third scheduled work day of unauthorized absence. This letter will notify the employee of the statute and allow the employee the opportunity to return to work prior to invoking the statute.

CAL FIRE knew precisely where Boctor was at all times during the workdays at issue. However, Boctor was never given a warning letter or the opportunity to return to work.

The policy continues: If the employee returns to work, reports after receiving the notice within five days of effective service or exercises his/her *Skelly* rights, the automatic resignation must be rescinded. However, when Boctor attempted to return to work, ready, willing and able, on March 29 – three days after

effective service of the AWOL notice - he was escorted off the premises.

Finally, CAL FIRE policy provides that: The AWOL statute must be used only for those employees whom the employer reasonably believes have abandoned their positions in state service or who admit their absences without leave (an extremely rare occurrence). If the appointing power knows where the employee is, or that the employee intends to return to work, the AWOL statute should not be applied; instead, adverse action should be instituted.

On June 5, Boctor appeared before a CalHR administrative law judge to appeal his AWOL separation. Boctor was represented at the hearing by CBM partner **Gary Messing** and associate **Lina Balciunas Cockrell**. After opening statements, the judge requested that the parties leave the room so she could talk to the attorneys alone. Later in the day, the case was resolved with CAL FIRE reinstating Boctor to his position as a Firefighter II with no interruption of service and with full back pay, using sick leave for the days initially requested and back pay to fill the rest of the time prior to Boctor's return to work. Boctor is very pleased to be able to put this matter behind him and return to his station and crew.

CDFF Riverside Chapter representative Darren Hoopingarner was instrumental in being aware of the CAL FIRE AWOL policy and knowledgeable as to its application, or lack thereof, in this case, as well as marshalling the evidence and assisting counsel in preparing for the reinstatement hearing.

GUSTINE POA SUCCESSFUL IN RECENT NEGOTIATIONS

The Gustine POA, led by its Chief Negotiator, CBM Labor Representative **Richard Reed**, just wrapped up a one year agreement resulting in substantial gains in an otherwise concessionary environment. Bargaining did not look promising after an unsuccessful vote of no confidence taken by the POA against the Police Chief and the City Manager just before bargaining began. Additionally, prior to CBM's representation of the POA, it had suffered through several years of concession bargaining and an imposed last, best, and final offer.

In spite of this backdrop, the POA was to able reach an agreement that includes a new health care package affording officers up to $200.00 per month in savings, a one and one-half percent salary increase, and the restoration of officers' holiday pay. Non-economic improvements included language allowing probationary officers to use accrued leave time, as well as language allowing shift bidding.

THE LABOR BEAT

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 you kindly to fill out the form and mail it to:

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

If you would like to 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 hard copy and an electronic version, or an electronic version only.

CBM thanks all of you for your help.

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