MESSING ADAM & JASMINE

THE LABOR BEAT

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Negotiations

LOCAL 2881 IS OFFERED LONG-TERM MOU

After over a year of bargaining, CAL FIRE Local 2881 was still without a contract. Bargaining had commenced pursuant to a 2016 reopener on an increase in compensation only.

The State made very little progress over the course of that year in increasing the initial proposal, which was relatively thin. As a result, Local 2881 President **Mike Lopez**, at the direction of the Board of Directors, began a campaign to educate the State and the public regarding the pay deficiencies. The bargaining team, led by Chief Negotiator **Gary Messing**, and Bargaining Chair **Tim Edwards**, worked long and hard to develop proposals that ultimately became a reality after marathon bargaining sessions leading up to Christmas. Instead of negotiating solely over a compensation increase for one year, the parties essentially reopened the entire contract, which had been set to expire in 2017, and agreed to a deal running from January 2017 through July 2021.

Most of the 6,000 firefighters in the bargaining unit, which represents firefighters to Battalion Chiefs (including paramedics and heavy fire equipment operators), will receive increases in taxable compensation that range from 20-25% or more. For example, if the proposal is ratified, Fire Apparatus Engineers/Paramedics will receive 6.5%, effective January 2017, 6% effective July 1, 2017, 3% effective July 1, 2018, 2.75% effective July 1, 2019, and 2.5% effective July 2020.

There are concessions that must be accepted as part of the package. They include a reduction in health contributions for post-retirement health benefits, as was agreed to by all other state bargaining units. The reductions reach 4.4% (matched by the State) by July 1, 2019. Also, new hires will be subject to a longer vesting period for retiree health and a slightly lower retiree health benefit.

On the other hand, the uniform and boot allowance will surge from $830 per year to $2,130 per year.

Special note should be taken of the assistance provided by the lobbying team, **Aaron Read** and **Terry McHale** of **Aaron Read & Associates**, who were indispensable to the final result.

The proposal is too detailed and voluminous to convey here, including issues that were covered in one bargaining session that lasted 22 hours.

However, the bargaining team persevered, resulting in the proposal that now needs to be ratified by the membership in a process that takes two months. The bargaining team, in addition to **Gary Messing** and **Tim Edwards**, also included alternates **Kevin O'Meara**, **Liz Brown**, **Darren Dow**, **Chris Carrera**, **Glenn Flamick**, **Shane Vargas**, and **Chris Placke**.

FRESNO DEPUTY SHERIFF'S ASSOCIATION RATIFIES NEW MOU

Special by Anthony Gomez – FDSA 2nd Vice President

On February 9, 2017, the Fresno Deputy Sheriff's Association ratified a substantial new contract with the County of Fresno. This deal came about after many years of modest contract increases and even a painful decrease, which included furloughs and salary reductions at the onset of the Great Recession. Led by Chief Negotiator **Gary Messing** and FDSA President **Eric Schmidt**, the Association was able to strike a deal that was flush with improvements and no takeaways for the membership.

Prior to entering into formal negotiations with the County of Fresno, the FDSA Board polled its membership to determine the most pressing wants/needs throughout each job classification. As a result of this poll, emphasis was placed on salary improvements, but other realistic requests were also considered. The FDSA also utilized compensation surveys to compare the various classifications in the Association with those in comparable jurisdictions. A forensic audit of the County's finances was conducted in order to determine its fiscal health. Armed with this information, Gary Messing and Eric Schmidt began extensive conversations over a period of several months leading up to formal negotiations.

Meanwhile, Eric Schmidt attended every Board of Supervisors meeting in order to show an ongoing presence and to stay abreast of important topics being discussed. Additionally, the FDSA Political Action Committee endorsed and campaigned for candidates it believed would place an emphasis on public safety. Eric also continued to build upon an already strong relationship with the County of Fresno Director of Personnel Services, Paul Nerland. Eric and Paul had numerous conversations and agreed that the FDSA should be rewarded for many years of cooperation during hard times. Paul recognized that the FDSA always led the way for other bargaining units as an example of collaboration.

The DSA was also able to convince the County that the wage disparity between Fresno County Sheriff's Office Dispatchers and their counterparts in other agencies could no longer be ignored. After a salary compensation study was completed, the County agreed to immediately grant a 10% salary increase to all Dispatchers in the FDSA in order to address retention and recruitment in the communications center, which has endured a drastic reduction in staffing levels. This salary increase at the Dispatcher level is on top of the additional benefits gained in the new contract for the entire Association.

The newly ratified MOU spans a time frame of almost three years and concludes in December of 2019. The MOU bestows improvements to all classifications in the bargaining unit which includes Deputy Sheriffs, Dispatchers, Deputy Coroners, Identification Technicians, Community Service Officers, Crime Lab Personnel, and the Rangemaster. The prominent feature of this MOU is that all members will receive a 5% salary increase in July of 2017, another 5% salary increase in July of 2018, and a final 5% salary increase in July of 2019. Compounding these increases results in an almost 16% salary increase over the life of the contract.

Over the course of the contract term, health insurance contributions from the County of Fresno to each member will increase from $243 bi-weekly to $298 bi-weekly for member-only health plans. For members with dependent coverage, the health insurance contributions increase from $333 bi-weekly to $448 bi-weekly. This equates to an increased benefit of $120 per month for members without dependent coverage and $250 for members with dependent coverage.

The FDSA Insurance Trust is personally managed by its own members and is separate from the Fresno County various health plans that are offered. The FDSA Insurance Trust recently negotiated two consecutive years of reductions to its health plans which resulted in a total savings of about 10% across the board for all health plan options. Factoring in the increased contributions by the County, combined with additional anticipated health plan cost savings in future years, some members could realize a net of zero dollars deducted for their health insurance premiums.

Other improvements in this MOU include increases to uniform allowances for Deputy Sheriffs and Community Service Officers that gradually go from an annual sum of $500 today to an annual sum of $1000 in January of 2019. All other classifications in the bargaining unit (except Dispatchers) will now also enjoy an annual uniform allowance for the first time; $250 in January of 2018, increasing to $350 in January of 2019. Pilots and Tactical Flight Officers in the Fresno County Sheriff's Office Air Support Unit will see their incentive pay more than double. Pilot bi-weekly incentive pay will increase from $300 to $750 while Tactical Flight Officer bi-weekly incentive pay will increase from $200 to $400. Graveyard shift differential pay will gradually be fully restored to the 8% that it was prior to the Great Recession, rather than the 4% that it is today.

The agreed-upon MOU also contains protections for current and future salary disparities among the various classifications within the bargaining unit by way of contract reopeners. The first contract reopener calls for a salary study to be conducted for Community Service Officers, Deputy Coroners, Crime Lab Personnel, and Identification Technicians. The costs of the studies are to be shared between the FDSA and the County of Fresno. The studies will compare the salaries of the aforementioned classifications in Fresno County to those in other agreed upon jurisdictions.

There is also a separate contract reopener specifically intended to address any potential salary disparity for Deputy Sheriffs. The reopener calls for a continuous comparison between the salary of a top-step Fresno County Deputy Sheriff and that of a top-step Fresno City Police Officer. Should the salary of a Fresno City Police Officer surpass that of a Fresno County Deputy Sheriff, the FDSA and the County will negotiate for additional increases. This important consideration is intended to address retention and recruitment in the Deputy Sheriff Classification. Additional reopeners were included to study the impact of Productive Time, the County's "Return to Work" Program which streamlines the worker's compensation process, and future considerations of Detective Incentive Pay.

Depending on which classification one belongs to, the total compensation of this package ranges anywhere from 20%-35% worth of enhancements. The FDSA anticipates this MOU being applied up the ranks within the Fresno County Sheriff's Office so that other bargaining units can reap the benefits of all the work that has been expended over more than a year. The Fresno Deputy Sheriff's Association Board, along with **Messing, Adam & Jasmine LLP**, are very proud to be able to bring forth this contract to the membership. The bargaining team of **Gary Messing**, **Eric Schmidt**, **Isaac Torres**, **Anthony Gomez**, and **Kelly Mayfield** worked tirelessly to achieve this result, and all are pleased with the outcome for the Association.

FRESNO LIEUTENANTS SIGN OFF, TOO

The Fresno Sheriff's and Correctional Lieutenants Association signed off on a three-year package that tracks the Fresno Deputy Sheriff's Association package described above. The agreement covers three years, with three 5% raises each July through July 2019. The uniform allowance increases from $500 to $1,000 during the term of the contract, and health insurance increases by the same amounts described in the article concerning the DSA's contract.

In addition to the above, the Association was able to restore an additional 4% for shift differential, returning the differential to the 8% that existed prior to the recession. The County also agreed to reopen bargaining should the DSA obtain a pay raise for deputies based upon the DSA's reopeners.

The Association was pleased to take care of another problem that had been troubling it for many years. Historically, Sergeants, upon promoting to Lieutenant, would lose their 5% differential for holding a POST Supervisory Certificate. Newly-promoted lieutenants would then have to wait in excess of two years to restore the 5% upon earning a Management Certificate (and having the paperwork processed by POST). The County agreed to maintain the POST Supervisory Certificate pay for up to two-and-a-half years until Lieutenants can obtain a Management Certificate. The County also agreed to reopen to address parking issues for Correctional Lieutenants.

Gary Messing was the Chief Negotiator for the Lieutenants, whose bargaining team was chaired by **Mark Padilla**. Other members of the team included **John Copher**, **Matt Alexander**, **Brandon Purcell**, **Jose Salinas**, and **Robert Salazar**. The bargaining team established an excellent relationship with the Personnel Director for the County, Paul Nerland and his team, which reflected the good working relationship the Association has had with the County for many years.

NEW CONTRACT FOR SAN JOSE POLICE OFFICERS' ASSOCIATION

MAJ attorney **Gregg Adam** recently represented the San Jose Police Officers' Association in its negotiations for a new collective bargaining agreement (San Jose calls its collective bargaining agreement Memorandum of Agreement, or MOA, as opposed to the more conventional MOU). At the table with Gregg were **Paul Kelly**, POA President, **Franco Vado, John Moutzouridis,** and **David Woolsey.** Everybody knows the tragedy that has been the San Jose Police Department in recent years after the existential threat posed by former Mayor Chuck Reed and his disastrous efforts at pension reform. As part of the rebuilding of the Police Department, the City Council must be applauded for providing police officers with a strong contract and helping to make SJPD somewhat competitive again in an extremely competitive environment for police salaries.

The terms of the contract are as follows:

- Three-and-a-half-year term from January 1, 2017 – June 30, 2020.
- Immediate $5,000 one-time retention bonus, subject to a fall back for employees who leave before July 1, 2019.
- 10% general wage increase beginning July 1, 2017.
- 3.25% general wage increase + 2.75% Crisis Intervention Training premium beginning July 1, 2018.
- 3% general wage increase and 1% additional Crisis Intervention Training premium beginning July 1, 2019.

The parties are still at the bargaining table over mostly non-monetary items, having agreed to prioritize wage discussions to keep officers in San Jose. The San Jose Police Department has lost roughly 500 officers since 2009, when they employed almost 1400 officers compared to just 900 by the end of 2016. We believe, with the end of the pension wars and the approval of this contract, that the SJPD is making a comeback.

PETALUMA POA GETS RAISE/EXTENDS CONTRACT

The Petaluma POA recently negotiated a mid-term contract increase of 3.5% across the board, effective September 25, 2016. The bargaining unit members also received a $1,000 one-time, non-PERSable cash payment at ratification.

The reopener was based on an agreement to look at comparable agencies in an agreed-upon survey. This methodology worked so successfully, the parties agreed to extend the contract by one more year to 2018, and to employ the same methodology for a reopener in 2017. \

The bargaining team consisted of **Michael Page**, **Ron Kline**, **Robert Barnes**, and President **Garrett Glaviano**, along with Chief Negotiator **Gary Messing**.

The bargaining team was extremely gratified by the members' unanimous vote of approval of the MOU, mirroring a unanimous adoption of the last MOU itself. Under the previous two-year MOU, all bargaining unit members received a 4% salary increase in September 2015. That increase came along with increases in dental benefits, certification pay for dispatchers, improvements in shift differential, and an ongoing agreement to increase health insurance to keep pace with increased costs.

ROSEVILLE FIREFIGHTERS APPROVE 2-YEAR DEAL

Negotiations did not appear promising when they began. The Roseville Firefighters have long been among the region's most highly compensated firefighters. The City began bargaining by announcing that it had publicly stated it no longer wanted its employees to be among the region's most highly compensated, that it wanted to begin working compensation down toward the median of comparable jurisdictions, and that among all City employees, only the firefighters had "escaped" certain concessions during the last round of bargaining.

The City's initial proposals did nothing to shift the perception that bargaining would be difficult and an agreement hard to achieve. The first proposal would have resulted in a net negative contract with significant economic and non-economic takeaways. The City focused on implementing a new lower salary schedule for new employees, taking away CTO, getting rid of contract overtime, and for the most part otherwise maintaining the economic *status quo.*

To further complicate matters, throughout bargaining the Roseville Firefighters continuously struggled with the City's refusal to acknowledge the impact of cost-savings proposals on the total estimated cost of a contract.

In spite of never coming to terms on how to interpret the overall cost of the contract, the City and the Roseville Firefighters were eventually able to come to an agreement on a two-year MOU that results in some significant increases.

The highlights include 2% wage increases on January 1, 2017 and January 1, 2018, the preservation of CTO and contract overtime, additional deferred compensation equivalent to 1% of salary for all employees with 5 years of service (bringing the total to 3%), health and welfare contribution increases in both years of the agreement, enhanced educational incentives and educational reimbursement, and an increase in retirement sick leave cash out. The 2017 increase was in exchange for the elimination (the following year) of the Employer Paid Member Contribution benefit. The EPMC — for purposes of retirement only — had the impact of increasing the amount of pensionable income. While no one will see a decrease in their highest years of income for purposes of retirement, the elimination of the EPMC will result in the final retirement incomes for those retiring within the next few years not increasing substantially (with the exception of 2017 which includes both the EPMC and the 2% increase in salary).

All told, the value of the increases in the contract equate to a little over 8% over the two-year deal. Especially considering how the negotiations started, the bargaining team was pleased with the results.

The Chief Negotiator for the bargaining team was **Jason Jasmine**, and the bargaining team consisted of Roseville Firefighter Association President **Jamie Pepin**, **Rob Arnett**, **Mark Page**, **Scott Pepper** and **Eric Sanchez**.

TUOLUMNE DSA SIGNS OFF ON MOU

The Tuolumne Deputy Sheriffs Association recently approved a 3-year Memorandum of Understanding with the County. The January 1, 2017 through December 31, 2019 MOU provides for across the board salary increases of 4% on January 1, 2017, 3% on January 1, 2018, and 2% on January 1, 2019. This is in addition to the cumulative increases of slightly over 4% provided by the County in exchange for two separate extensions of the prior MOU from June 30, 2015 through December 31, 2016, while negotiations continued.

Additionally, several classifications have received or are scheduled to receive additional wage increases based on their position within a recent compensation survey.

Although the DSA already had longevity pay, it was able to obtain increases in the amount of longevity pay at both 10 and 20 years, for an increase of 2.5% at both of those marks (and now a total of 20% longevity for employees with 30 years of service).

Other increases and/or beneficial economic changes were obtained with respect to the uniform allowance, K9 Handler pay, and CTO. Noneconomic improvements included an improved shift selection process and the expansion of POBR rights to additional classes.

Health care was the tricky component during this round of bargaining. As many of our readers will know, the recent *Flores v. City of San Gabriel* decision significantly increased employers' overtime exposure because certain

elements (most notably the cash received in lieu of health benefits) now must be included in the rate of pay for purposes of calculating overtime. This, together with requirements of the Affordable Care Act (if it is not overturned), led to the County insisting on significantly limiting the cash in lieu for those employees who opted out of health care and the "cash back" for single employees who received health insurance but were able to receive certain amounts above the cost of the premiums received in cash. These changes negatively impacted those individuals. However, in an attempt to mitigate these negative changes (which disproportionately impacted those employees with greater seniority), the DSA negotiated the above-referenced increases in longevity pay, significant increases in the amount the County pays toward health insurance premiums, and pay increases larger than the County average.

The Chief Negotiator for the bargaining was **Jason Jasmine**, and the bargaining team consisted of Tuolumne DSA President **Mark Kerzich, Greg Rogers, Eric Davis, Alden Gillette, Carl Benson** and **David Vasquez.**

YOLO COUNTY ATTORNEYS INK A THREE-YEAR DEAL

The Yolo County Attorneys Association, representing both Deputy District Attorneys and Public Defenders, arrived at a three-year agreement with the County of Yolo. The agreement runs through June 2019.

The new contract includes 2% COLAs during each year of the MOU and a 1% equity adjustment. These figures are based upon a comparability survey performed by the County and the Association.

There were also various other increases in the MOU, including a nearly $50 per pay period increase from the County in contributions to health and welfare as well as an increase in retiree medical contributions by the County from $370 to $400 per month.

Further increases included the institution of a deferred compensation match of up to $500 per calendar year and a $750 per year professional development reimbursement expense. Changes also included general language changes to update the contract on such matters as kin-care law and the like.

The bargaining team was led by **Gary Messing** of MAJ and **Bret Bandley** of the Public Defender's Office. **Peter Baruso** and **Stephen Betts** from the Public Defender's Office, as well as **Deanna Hayes, Jay Linden** and **Matt DeMoura** of the District Attorney's Office rounded out the bargaining team. The contract was well-supported by the membership in its ratification vote.

YOLO DSA GETS 5% MID-CONTRACT BOOST

The Yolo Deputy Sheriffs Association enjoyed a boost to salaries by 5.57% for deputies and 4.82% for D.A. Investigators. While the increases came in the fall, they were made retroactive to July 1, pursuant to an agreement for annual increases based upon the salary survey referred to in the final year of the current MOU (2017).

Going forward, the County will commence reducing salaries by 0.75% for the purpose of establishing sufficient funds for the retiree medical trust to cover employees retiring after July 1, 2018, for the full coverage that has currently been afforded to current retirees for health insurance. Currently, the County pays the equivalent amount for retirees as it does for active employees. That will change in 2018, when it is intended that individuals retiring after that date continue to receive the same level of benefits as those retiring before January 1, 2018, but at that time it will be funded jointly between the County and the retiree medical trust.

Current Yolo DSA President **Evan Alder** and Chief Negotiator for the DSA, **Gary Messing**, were pleased with the County's ability to work with the DSA to establish the initial Memorandum of Understanding, and to also achieve agreement on the calculations leading to the interim raise.

On The Home Front

NEW KIDS ON THE BLOCK

By Janine Oliker

By now you may have already met or spoken with **Paul Bird, Tylor Dominguez,** or **Steve Kaiser**. Here we would like to introduce them to you, officially, and tell you a little bit about them.

In November, **Paul** started with MAJ's San Francisco office and is already knee deep in our FLSA cases (reported on by him in this issue). For 18 years prior to arriving at MAJ, Paul litigated matters for large corporations at various firms including, most recently, the global law firm of Dentons US LLP. Since starting with MAJ, Paul has found working to protect the hard-won rights and benefits of those serving the public sec-

tor to be an extremely rewarding experience. After spending his formative years in a small town in Tennessee, Paul served as a U.S. Army enlisted soldier in West Germany, prior to the fall of the Berlin Wall. Upon being honorably discharged, he attended the University of Tennessee (Knoxville) and then returned to the Army as a tank officer serving in South Korea, just miles from the Demilitarized Zone (DMZ) separating North Korea. After his second honorable discharge, he attended law school at the University of San Francisco and has lived in the area for over 20 years. Paul's other interests include performing *pro bono* work defending the rights of individuals and animals (which he hopes to pick up again, soon) as well as rooting for the Golden State Warriors and SF Giants.

Tylor reported for duty in our San Francisco office at the end of September. He comes to us with his freshly minted law degree and a background in law enforcement. Yes, Tylor was a police officer in Las Vegas, where he worked as a patrol officer, Firearms and Defensive Tactics Instructor, Gang Response and Intelligence Officer, Area Command Intelligence Officer, and Crisis Intervention Team (CIT) member. He attended nearly one thousand hours of in-service training covering a wide range of police investigative and operational subjects, instructed hundreds of officers on topics including the use-of-force, search and seizure, report writing, tactical deployment of police personnel and critical incident response, and testified in dozens of trials. He walks the walk and talks the talk. Tylor earned his undergraduate degree from the University of Nevada while working full time as a police officer. He later moved to the Bay Area to attend Hastings. Tylor was born and raised in Southern California. In his free time, he enjoys reading, exercising, watching soccer and spending time with his wife and young daughter.

Steve has worked with Messing Adam & Jasmine for some time but came on board officially as of the first of the year. Steve is stationed in our Sacramento office. He attended Oberlin College (Ohio) for undergraduate and McGeorge for his law degree. Since then, he has spent most of the last thirty-five years working in labor and employment law in the Sacramento area, much of it from the other side of the fence. He served as Deputy County Counsel for the County of Sacramento, and Deputy Attorney General for the State of California, with the last dozen or so years in private practice. Steve is happy to be on the side of our working men and women now. When he is not practicing law, you might find him with a couple of drum sticks in his hands, listening to jazz, or playing in a local orchestra.

End note: **Jennifer Stoughton** has left the building, departing MAJ in September to work in the San Francisco City Attorney's Office. We wish her the best in her new career.

Fighting The Good Fight

MAJ PURSUING FEDERAL LAWSUITS FOR OVERTIME PAY

By Paul Bird

MAJ is actively pursuing overtime payment claims for scores of its public sector employee clients who work for police and fire departments all across Northern California. Recently, in the case *Flores v. City of San Gabriel,* a group of police officers sued their city employer for three years of unpaid overtime and liquidated damages under the Fair Labor Standards Act ("FLSA"). The officers contended that the FLSA required their city employer to include cash payments made in lieu of health benefits in the city's calculation of their regular rate for overtime pay purposes. In its mid-2016 ruling, the Ninth Circuit agreed with the officers. (See also "Cash-in-Lieu, Medical Premiums and the Overtime Rate of Pay" in the last issue of The Labor Beat.)

Since the *Flores* ruling, MAJ has been working closely with its clients to evaluate how they have been paid and whether cash in-lieu of health or any other premiums were not correctly paid to them. (For example, for one group of clients MAJ has determined that the employer failed to include cash in lieu of holiday pay in calculating their overtime.) To protect its clients' claims, MAJ has filed eight federal FLSA collective action lawsuits for clients from five different counties while continuing to work with their employers in an effort to quickly obtain their long overdue pay. MAJ continues to bring its decades of experience to fight the good fight and ensure police officers, firefighters, and other public sector employees receive the benefits they have rightfully earned.

SUPERIOR COURT UPHOLDS ARBITRATION DECISION AGAINST CAL FIRE, BACK PAY TO BE AWARDED

In the September 2016 issue of The Labor Beat, we published an article titled "MAJ Secures Huge Arbitration Victory on Behalf of CAL FIRE, Local 2881." This article addresses the victory that was secured on behalf of Local 2881 for the Alma Helitack unit against the State of California. The arbitration decision involved a violation of the MOU between the parties arising from unilateral

changes in how overtime was paid during helitack/short-haul training. The change in the past practice was instituted in an attempt to pay firefighters only for hours worked, instead of for entire shifts, even though fire personnel were required to remain on the employer's premises.

The changes violated the Entire Agreement Clause in the MOU, which prevents unilateral changes in matters contained in the MOU or changes that diminish substantial economic monetary benefits, even if they are not set forth in the MOU. The arbitrator's decision provided a substantial amount of back pay for the impacted employees for dates ranging from 2011 through the present.

Gary Messing handled the arbitration with the assistance of **Cliff Allen**, Statewide Vice President of the Union. After securing the victory, the Union filed a petition in Superior Court to confirm the arbitrator's award. The confirmation of the arbitrator's award is important because it gives the decision of the arbitrator the full force and effect of a Superior Court judgment, thus making it enforceable in court. However, around the same time, the State filed a petition to vacate the award.

The law only allows narrow grounds on which an Arbitrator's award can be vacated or corrected. Such situations usually require a showing of fraud, duress, or coercion of the arbitrator, or require that the arbitrator make a decision that is clearly against public policy. Additionally, an award could also be overturned if it could be shown the arbitrator did not have jurisdiction over the case.

Local 2881 secured a tremendous victory in the Superior Court of Sacramento when the Court rejected the State's petition to vacate the award and instead ruled in favor of Local 2881, confirming the arbitrator's award. In a legally nuanced battle, the Court held that the State failed to file and serve the petition within the required time limits. More importantly, the Court held that even if the State had timely filed and served its petition, the Court still would not have overturned the arbitrator's award. This is because the Court found that the State failed to show that the arbitrator exceeded his powers or his jurisdiction in his interpretation of the MOU. Thus, the arbitrator's award stands.

Local 2881 State Rank and File Director **Tim Edwards** and Local 2881 President **Mike Lopez** were thrilled with the award. President Lopez noted that the result in this case affirms the integrity of the arbitration process.

LOCAL 2881 PARTIALLY SETTLES LOCKDOWN ULP, ACADEMY CADETS TO RECEIVE COMPENSATION

In 2014, Local 2881 filed an unfair labor practice charge with PERB seeking to prevent CAL FIRE from "locking down" the fire academy by either preventing students from leaving the academy located in Ione, California, or by highly discouraging them from leaving during their off-duty, unpaid hours in the days immediately preceding their graduation. CAL FIRE unilaterally instituted a practice of "locking down" its academy students initially in response to the 2014 state-wide manhunt for former Battalion Chief Orville "Moe" Fleming who was, at the time, wanted in connection with the stabbing death of his alleged girlfriend, Sarah Douglas. The practice was continued during several additional academies in an effort to discourage off-campus celebrations during off-hours in the days preceding the academy graduation. These lockdowns impacted four Company Officer Academies during 2014.

Local 2881 sought not only to prevent such lockdowns from reoccurring, but also sought compensation for academy cadets who had been subject to these imposed lockdowns. Additionally, the PERB complaint addressed the matter of CAL FIRE requiring academy cadets to perform uncompensated work during their off-duty hours.

The PERB complaint was settled with respect to the lockdown of the academy by awarding four hours of overtime compensation for every student in each of the four academy sessions that were improperly locked down. The settlement prevents future lockdowns as well.

The remaining portion of the case is scheduled for hearing in March and April of 2017. These allegations concern the requirement that cadets perform uncompensated work during their scheduled off-duty hours. Such work includes conducting daily engine checks, cleaning activities in the common areas of the dormitories, performing tasks such as line-up as well as other duties that may qualify as work without additional compensation. The Union is seeking to reach back for lost overtime compensation for several years prior to the filing of the unfair labor practice charges in 2014. These offensive practices continue through the present day.

The settlement was negotiated by **Gary Messing** and **Kimberly Chapman** of the Sacramento office of Messing Adam & Jasmine, together with CAL FIRE Local 2881 State Rank and File Director **Tim Edwards**.

In The News

MARIN PEPRA CASE TO BE REVIEWED BY CALIFORNIA SUPREME COURT

By Gregg Adam

As readers of our periodic alerts will know, the California Supreme Court granted review of the Court of Appeal decision in *Marin Association of Public Employees, et al. v. Marin County Employees' Retirement Association, et al.*, California Supreme Court, Case No. S237460, on November 22, 2016. The Supreme Court will not hear the case immediately, but instead will wait for the appellate decision to issue in a parallel case, *Alameda County Deputy Sheriffs' Association et al. v. Alameda County Employees' Retirement Association et al.,* A141913. The *Alameda* case has yet to be scheduled for oral argument, so it is likely that the decision in that case is some months away. Thus, briefing in the *Marin* case will probably occur in the second half of 2017, with the likelihood that the oral argument will be in mid-to-late 2018. All of this is speculative, and one hopes that the matter will be heard sooner.

Messing Adam & Jasmine, representing the **Marin County Fire District Firefighters Association** and the **Marin County Management Employees Association**, wrote the petition for review in the *Marin* case in conjunction with our colleagues Arthur Liou at Leonard Carder LLP (representing Marin Association of Public Employees) and Anne Yen at Weinberg Roger & Rosenfeld (representing Service Employees International Union Local 1021, CTW, CLC). Our efforts received a tremendous response from more than 200 *amici curiae* public sector unions, including from: the former Silver, Hadden, Silver & Levine law firm on behalf of almost seventy associations, including Los Angeles Police Protective League, Peace Officers' Research Association of California (PORAC), PORAC Legal Defense Fund; Rains Lucia Stern, PC, on behalf of almost sixty unions, including Oakland Police Officers Association; and many more from or written on behalf of public safety unions up and down the state. In addition, a number of parties filed requests for depublication, including the California State Teachers' Retirement System. No one supported the Court of Appeal decision.

The Court of Appeal decision sets up a full analysis of the entire history of public pension laws in California and the vested rights doctrine in particular. As the Petition for Review explained (a copy of the Petition as well as the letters from *amici curiae* are available at MAJlabor.com), the concept that a public employee is entitled to no less than the pension benefits that he or she is offered upon his or her acceptance of employment with a public entity goes back 70 years — back almost as far as the allied concept that once a pension benefit is granted, while it is subject to reasonable modifications that are consistent with the theory of a pension system, any disadvantages that result to an employee as a result of the modification must be offset by a comparable advantage to the employee. These concepts were sustained through a series of pension cases in the 1950s, 60s, 70s, 80s and 90s, and have been adopted by other states as the "California Rule."

It has been some 25 years since the Supreme Court analyzed this specific issue; however, in 2011, a unanimous Supreme Court seemed to reinforce the strong protections afforded to California public employee pensions in a case called *Retired Employees Ass'n of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171. That case considered whether or not vested rights could be created by an implied contract – a contract created by actions of the parties involved, rather than being written or spoken. The employer groups who filed briefs in the case all argued vehemently that California law did not recognize implied vested pension rights. The Supreme Court disagreed and recognized that vested pension rights could be created through an implied contract.

Should the Supreme Court not overturn the Court of Appeal's ruling in this case, it will be a major setback for all public employees in California and may also impact other states that abide by the California Rule.

COURT OF APPEAL FINDS NO VESTED RIGHT TO PURCHASE ADDITIONAL SERVICE CREDIT – ANOTHER COURT OF APPEAL DECISION PERPETUATING THE MARIN PENSION CASE

On December 30, 2016, Division Three of the First District Court of Appeal rejected the challenge by **CAL FIRE Local 2881** to the Legislature's elimination of the right of state and local government employees to purchase additional service credits – known as air time – as contained in former Government Code section 20909. Section 20909 was enacted in 2004 and permitted state and local employees with at least five years of service to purchase up to five years of additional service credits in annual increments. As the legislative history explained, the purpose behind the statute was to allow employees who took family leave, educational sabbaticals, or the like, to do so without reducing the value of their pension. The cost of the benefit was designed to be borne by the

employee, who would pay the entire actuarial liability that the benefit was calculated to cost. The statute informed employees that they could purchase this benefit at any point prior to retirement. In 2012, however, as it crafted the California Public Employees' Pension Reform Act (PEPRA), the legislature decided to repeal the statute. It gave current employees 13 weeks (until December 31, 2012) to make any final air time purchases. Any employee who did not have the money or had not yet accrued five years of public service was not able to purchase air time.

CAL FIRE Local 288's Chief Counsel, **Gary Messing**, sued, citing numerous instances of members who either did not yet qualify (one employee missed the cut-off by 16 days) or did not yet have the financial wherewithal to purchase additional service credits, but nonetheless planned on doing so at some time in the future. The Union lost in the trial court, and on appeal, the case was heard by the First District Court of Appeal. **Gregg Adam** represented the Union at oral argument, which occurred on December 21, 2016. The decision issued the following week.

The Court of Appeal founded its decision on three rationales. First, the Court, citing the 2011 California Supreme Court decision in *Retired Employees Ass'n of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, stated that in order to establish that the statute created a vested right, the statute had to say in clear and unmistakable terms that the benefit was intended to be vested or otherwise indicate that the statute could not be modified or eliminated. Finding no such language in Government Code section 20909, the Court of Appeal determined that no vested benefit had been created. Second, the Court of Appeal reasoned that even if a vested benefit had been created, it agreed with its colleagues in Division Two of the First District Court of Appeal, who in August had held that the vested rights doctrine did not protect public employee pensions against modification. (See the *Marin* case, discussed in previous article.) Finally, the Court of Appeal reasoned that because the entire cost of air time was borne by the employee, it was not deferred compensation, and therefore could not be considered a pension benefit.

CAL FIRE Local 2881 disagrees strongly with each basis of the Court of Appeal's ruling. In the first place, the *Retired Employees'* case relied on by the Court was dealing with the creation of implied vested rights. An implied contract is created by a pattern of conduct or representations — whereas an express contract is based on written terms. When dealing with a benefit that exists in a statute, one is dealing with an express, not an implied, contract. Accordingly, the Court of Appeal should have looked to the words of the statute to establish the vested benefit, not sought additional indicia of a vested right. Second, for all kinds of reasons, the *Marin* pension case was wrongly decided and is a mischaracterization of 60 years' worth of public sector pension cases. Third, the vested rights doctrine has long protected not just the basic pension formula, but also other elements of other pension rights, including the right to elect to utilize a disability retirement, to a set level of contribution, to the level of funding of the system by the employer, and to the right to a supplemental COLA based on pension funding exceeding earnings assumptions.

Messing Adam & Jasmine, on behalf of CAL FIRE Local 2881, petitioned for review in the hope that the Supreme Court will also take this case and determine it in conjunction with its deliberations on the *Marin* pension case.

FURTHER CHALLENGES TO FAIR SHARE FEES IN THE PIPELINE

By Janine Oliker

As we knew when *Friedrichs v. California Teachers' Association* ended in a stalemate after the death of Justice Antonin Scalia (with the Supreme Court declining to rule after oral argument and upholding the Ninth Circuit's decision), this would not be the end of the fight. At least three cases appear to be working their way up to – and aiming for – Supreme Court review.

The first case to test the waters is *Janus v. American Federation of State, County, and Municipal Employees, Council 13* (Northern District, Illinois, United States District Court, Case No. 1:15-cv-01235) now pending in the United States Court of Appeals for the Seventh Circuit (Case No. 16-3638). The *Janus* plaintiffs, represented by the National Right to Work Legal Defense Foundation and the Liberty Justice Center, are appealing the Court's Order ruling that "Plaintiffs continue to argue that *Abood* was wrongly decided, but recognize it remains controlling in the instant case. Consequently, defendants' motion to dismiss is granted." In short, the case is merely a vehicle to get to the United States Supreme Court and is biding its time now in the Court of Appeals.

Judgment was issued February 8, 2017 in *Hamidi, et al. v. Service Employees International Union Local 1000, et al.* (Eastern District, California, United States District Court, Case No. 2:14-cv-00319) denying plaintiff's motion for summary judgment and upholding the lower court's de-

termination that Local 1000's opt-out requirements were acceptable under *Chicago Teachers Union, Local 1 v. Hudson* (1986) 475 U.S. 292. Plaintiffs, represented by the National Right to Work Legal Defense Foundation Inc., must file any appeal by March 10, 2017.

The latest case to pick up the fight is *Yohn, et al. v. California Teachers Association, et al.* (Central District, California, United States District Court, Case No. 8:17-cv-00202). Plaintiffs, here represented by the Center for Individual Rights, allege their First Amendment rights are impermissibly abridged in being required to pay any fees to any union as a condition of public employment. The complaint was filed February 6, 2017, and the case is just getting underway.

Messing Adam & Jasmine will continue to keep you updated on these cases as they develop in these pages and in interim Labor Beat Alerts.

Around The State

WHEN DOES FFBOR PROTECT YOU? A RECENT COURT DECISION PROVIDES GUIDANCE

By Paul Bird

You're a firefighter/paramedic and your department has charged you with alleged misconduct it contends is "contrary to your responsibilities" — are you protected by the Firefighters' Procedural Bill of Rights ("FFBOR")? The California Court of Appeal provides guidance in the recent case of *Seibert v. City of San Jose, et al.* (2016) 247 Cal.App.4th 1027.

In 2008, the San Jose Fire Department charged firefighter Grant Seibert with various instances of misconduct including his alleged unwelcome touching and inappropriate remarks toward another firefighter, at least some of which occurred while they both were assigned to the Department's training center. The Department conducted a Skelly hearing, after which it advised Seibert they were dismissing him. At Seibert's request, the Civil Service Commission of the City of San Jose took testimony and received documentary evidence on the matter, but it also determined he should be dismissed. He then asked the Santa Clara Superior Court to reverse the decision. The trial court set aside all charges but one and found that that charge was not serious enough to merit his termination. Both Seibert and the City appealed from the trial court's decision. By 2016 the case made its way to the Court of Appeal, which ultimately decided that the protections of FFBOR were triggered because Seibert was performing his firefighting/paramedic duties when the alleged misconduct occurred.

FFBOR protects a non-probationary firefighter by requiring that his or her department provide an opportunity for administrative appeal before it can take any punitive action against him or her. He or she may also seek binding arbitration if there is a memorandum of understanding between the union and the employer. But, according to the language of the statute, FFBOR is only triggered when the conduct in questions arises "during events and circumstances involving the performance of [the firefighter's] official duties."

In *Seibert*, the Court noted the awkwardness of FFBOR's undefined "performance of … official duties" language and sought to clarify what triggered FFBOR's protection. The Court found the City's argument that FFBOR was not triggered because Seibert's alleged misconduct was "contrary to his responsibilities" as a firefighter/paramedic was premature, as it was based upon an assumption that the allegations against Seibert were true. The Court stated that the question was not whether Seibert's alleged misconduct fell outside his official duties but was, instead, whether Seibert was performing his official duties when the alleged misconduct was committed. Here, the Court held that FFBOR's protections were triggered because Siebert allegedly harassed the other firefighter while they were performing firefighting duties at the Department's training center where they both were assigned.

PUBLIC EMPLOYEES ENTITLED TO SEEK INDEMNIFICATION BUT MUST SHOW UNDERLYING ACTION AROSE FROM ACTS WITHIN THE SCOPE OF EMPLOYMENT OR THAT NO MISCONDUCT OCCURRED

By Lina Balciunas Cockrell

In the case of *Daza v. Los Angeles Community College District* (2016) 247 Cal.App.4th 260, the Court addressed the issue of a public employer's general duty to defend and indemnify an employee in a civil lawsuit that alleges acts outside the scope of employment. Here, a student filed a lawsuit against Plaintiff and the District alleging that Plaintiff, her assigned guidance counselor, sexually harassed and molested her. The Plaintiff filed a cross-complaint against the District seeking indemnity and reimbursement for his defense. Among other things, Plaintiff claimed that there had been no factual determination that he committed the acts alleged by the student. The trial court concluded that the Plaintiff's con-

duct alleged by the student in the main lawsuit fell outside the scope of his employment as a matter of law.

The Court of Appeal reversed. Though the Court agreed that the acts alleged by the student were not within the scope of Plaintiff's employment, the Court concluded that, because there had been no factual determination in the main case, Plaintiff could bring a lawsuit against the District for reimbursement of his defense fees and costs by claiming that no sexual assault occurred. A public employee plaintiff would also, obviously, be able to seek indemnification and a defense by claiming that the alleged acts occurred within the scope of employment. So Plaintiff was entitled to maintain his lawsuit. However, in order to prevail on the merits, it is the employee who bears the burden of proving that either the alleged acts did not occur or that they fell within the scope of employment.

SUPREME COURT LIMITS PROTECTIONS OF GOVERNMENT ATTORNEY BILLINGS UNDER THE PRA

By Steven Kaiser

In a recent case, *Los Angeles County Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, the California Supreme Court declared that citizens have a broad right under the Public Records Act to the billings paid to private law firms hired to defend against law suits filed by prisoners of the County's jails. This ruling is a mixed but important one for public sector unions. Stating that "To the extent that billing information is conveyed 'for the purpose of legal representation'—perhaps to inform the client of the nature or amount of work occurring in connection with a pending legal issue—such information lies in the heartland of the attorney-client privilege." Nonetheless, the Public Records Act, which derives its authority from the California Constitution, also mandates disclosure. Balancing those two important principals was the task of the Court.

The Court noted that attorney billings for legal services "are generally not communicated for the purpose of legal consultation. Rather, they are communicated for the purpose of billing the client and, to the extent they have no other purpose or effect, they fall outside the scope of an attorney's professional representation." And, importantly, the Supreme Court went beyond attorney billings to state that under the PRA "government agencies must disclose '[a]ny reasonably segregable portion' of a public record 'after deletion of the portions that are exempted by law.'"

The Court, however, put a significant limitation on the disclosure requirement: it does not apply when the subject matter of the billing is in "active and ongoing" litigation. During that period, the Court held that the billings were completely privileged in order to protect broadly the need for open communications between client and attorney.

This case has created a rule for when the government must disclose attorney billing information (or any other similarly privileged information): during its active use (i.e. while the case is active) the information and the billings are not accessible; however, they must be disclosed after a case is concluded pursuant to a PRA request, although information at the "heartland of the attorney-client privilege" may still be redacted. What exactly that information is will likely be the focal point of future litigation.

MANDATORY REST PERIODS FOR "ON CALL" EMPLOYEES

By Jill Menning

In *Jennifer Augustus et al., v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, the Supreme Court of California held that employers must give their employees off duty rest periods free from employer control, including a directive to remain "on call."

In *Augustus*, Defendant, ABM Security Services, Inc. employed Plaintiffs as security guards. ABM required Plaintiffs to remain vigilant and responsive to calls at all times, even during rest periods. This required the guards to have their pagers and radio phones turned on and to remain responsive to any calls they may receive. Plaintiffs filed suit against ABM for failing to provide mandatory rest periods provided under state law.

The trial court held ABM liable and granted around $90 million in damages to Plaintiffs, however, the Court of Appeal reversed. Plaintiffs petitioned the Supreme Court for review to decide the issue of whether employers had to allow their employees off duty rest periods and whether, during these rest periods, the employers could require employees to be "on call." The Supreme Court reversed the Court of Appeal and held ABM liable for not providing rest periods in compliance with state law.

First the Court held that the employer must "relinquish any employer control" and relieve the employee of his or her duties during rest periods. In reaching its holding, the Supreme Court analyzed both the Labor Code and

Industrial Welfare Commission ("IWC") wage orders[1], both of which have a policy of employee protection. The Labor Code and the IWC wage orders both mandate employee "rest period[s]." The Court noted that "[t]he reference to a 'rest period' … evokes, quite plainly, a period of rest." Second, the Court held that requiring employees to be "on call" during rest periods did not comport with "relinquish[ing] any employer control" nor did it relieve the employee of his or her duties[2]. If employees are required to stay "on call" during 10-minute rest periods, they must remain nearby in order to respond to any incidents. Furthermore, they are limited in performing personal matters that require uninterrupted attention[3]. The Court concluded that it "cannot square the practice of compelling employees to remain at the ready, tethered by time and policy to particular locations or communication devices, with the requirement to relieve employees of all work duties and employer control during 10-minute rest periods."

ONE-YEAR STATUTE OF LIMITATIONS FOR INVESTIGATIONS UNDER POBR IS TOLLED DURING CRIMINAL INVESTIGATIONS, EVEN WHEN INVESTIGATION IS CONDUCTED INTERNALLY

By Kimberly Chapman

The California State Department of Corrections and Rehabilitation (CDCR) conducted an administrative investigation into the conduct of one of its Parole Agents, Shiekh Iqbal, for the unauthorized use of government resources. Specifically, Iqbal was accused of accessing criminal history information concerning a third party for personal purposes unrelated to his job. At the same time, instead of using an outside agency, CDCR also conducted its own criminal investigation into the conduct of Iqbal. The District Attorney ultimately declined to prosecute the criminal case because it fell outside the one-year criminal statute of limitations.

Following its administrative investigation, CDCR determined that an adverse action was warranted against Iqbal. Iqbal appealed his salary reduction to the State Personnel Board on the grounds that the discipline violated the statute of limitations under the Public Safety Officers Procedural Bill of Rights Act (POBR). POBR provides for a one-year statute of limitations for the notice of intended discipline. However, there are exceptions to this administrative statute of limitations. One such exception is that the administrative investigation can be tolled, or suspended for a period of time, while a criminal investigation or criminal prosecution is pending.

After hearing Iqbal's case, the Administrative Law Judge for the State Personnel Board revoked CDCR's discipline based on the statute of limitations defense finding that since CDCR had conducted the criminal investigation internally the statute of limitations was not tolled.

CDCR appealed this ruling. (See *Department of Corrections & Rehabilitation v. State Personnel Board* (2016) 247 Cal.App.4th 700.) Ultimately, the Court of Appeal reversed and held that the plain language of POBR does not impose a restriction on who conducts the criminal investigation in assessing whether or not the statute of limitations has run. As a result, the POBR tolling period for criminal investigations applies regardless of whether the investigation is conducted by the employing agency or by an external agency.

MY EMPLOYER'S INVESTIGATOR PREPARED A REPORT REGARDING MY GRIEVANCE: CAN I GET A COPY?

By Paul Bird

You've filed a grievance and your employer's investigator has prepared a report — are you allowed to have a copy? A recent ruling by a Public Employee Relations Board Administrative Law Judge found the employer's obligation to produce information regarding an employee's grievance to include any reports prepared by the employer's investigator. (*International Association of Firefighters, Local 55 v. Alameda County Fire Department* (2016) 41 PERC ¶69.)

Upon request, an employer has the duty to meet and confer in good faith and provide all "necessary and relevant" information regarding the employee's grievance. (CA Govt. Code section 3505, *Trustees of the California State University* (1987) PERB Decision No. 613-H, *Chula Vista City School District* (1990) PERB Decision No. 834, *City of Burbank (*2008) PERB Decision No. 1988-M.) Unless the employer has a valid defense against producing the information — which it has the burden of proving — the employer violates its duty unless it provides the information. (*Stockton Unified School District* (1980) PERB

[1] IWC is California agency authorized to enact regulations concerning wages, hours, and working conditions.

[2] IWC wage order 5 does, however, provide exemptions wherein employers can require on duty rest periods. For example, "employees with direct responsibility for children who are under 18 years of age … and who … are receiving 24-hour residential care." These exceptions were not applicable to the ABM security guards.

[3] For example, the Court noted that breastfeeding and arranging for child care require time which remains uninterrupted.

Decision No. 143; Chula Vista City, supra; *Bakersfield City School District* (1998) PERB Decision No. 1262.)

The employer's obligation to produce all "necessary and relevant" information means the employer should also provide a copy of its investigator's report, possibly even in instances where express promises of confidentiality have been made to witnesses who the investigator interviewed for the report. If the employer asserts such a confidentiality defense, a "balancing test" is applied to determine if the union's interest in the witness' statement outweighs the employer's interest in confidentiality. (*Modesto City Schools and High School District* (1985) PERB Decision No. 479; *American Baptist Homes* (2015) 362 NLRB No. 139.) It is the employer's burden to prove the defense: that it has a "legitimate and substantial confidentiality interest in the information that outweighs the requesting party's need for the information." (*American Baptist, supra*.) The determination of whether any confidentiality interest has been established is a question to be determined within the factual context of each case. (*Northern Indiana Public Service Co.* (2006) 347 NLRB 210.) Even with a claim of confidentiality, the employer should accommodate the employee's request: for example, the employer may provide the names of the witnesses who were interviewed, but not the content of their statements; or the employer may provide a summary of the report to the employee while providing a complete copy of the report to the ALJ for in-camera review and determination that the summary was sufficient. (*Northern Indiana, supra*, *West Penn Power Co.* (2003) 339 NLRB 585, *Modesto, supra*.)

The take away? Upon request, an employer must provide all necessary and relevant information regarding an employee's grievance and include any report prepared by the employer's investigator. The employer must prove any claim of privilege covering the report and, in any event, must ensure accommodation of the employee's request.

DEPARTMENT VIOLATED POBR BY FAILING TO DISCLOSE CONFIDENTIAL MEMORANDA REGARDING FITNESS FOR DUTY

By Lina Balciunas Cockrell

In the unpublished case of *White v. County of Los Angeles,* 2016 WL 2910095 (2016), the Court upheld a finding that a peace officer who worked as a District Attorney Investigator was entitled, under the Public Safety Procedural Bill of Rights Act ("POBR") (Gov. Code §§ 3300 *et seq.*), to review and respond to memoranda regarding her fitness for duty that ultimately served as a basis for ordering the officer to undergo a medical reevaluation to assess her fitness for duty.

The officer's supervisors wrote confidential memoranda documenting their concerns about her workplace behavior. The memoranda were never placed in the officer's personnel file. Sometime later, the DA's office sought to compel the officer to submit to a medical reevaluation regarding her fitness for duty. The officer refused to appear for the medical reevaluation and sought a court order prohibiting the County from requiring her to appear or from disciplining her for failing to appear on the grounds that the Family Medical Leave Act allowed her to be restored to her employment based solely on her physician's certification that she was able to return to work. It was from the County's filings in this litigation that the officer first became aware of the existence of the memoranda.

The officer then filed a lawsuit that her POBR rights were violated because the County never disclosed the memoranda and/or gave the officer an opportunity to respond, as required by Government Code section 3305. The trial court issued an order preventing the County from requiring the officer to undergo a future medical reevaluation based on the memoranda. The Court of Appeal affirmed, concluding that the memoranda, though confidential and not maintained in the officer's personnel file, were available to individuals with the authority to make personnel decisions about the officer's personnel status. In addition, it was undisputed that the memoranda were used to make a formal request to order the officer to submit to a medical reevaluation regarding her fitness for duty. Thus, the County violated POBR by failing to disclose the memoranda to the officer and failing to give her an opportunity to respond.

CUSTODIAL DEPUTIES ENTITLED TO CARRY CONCEALED FIREARMS UNDER PEACE OFFICER EXEMPTION EVEN WHEN OFF-DUTY

By Kimberly Chapman

The Stanislaus County Sheriff's Department had a policy of requiring sworn custodial deputies to obtain a permit to carry a concealed weapon before being allowed to carry a concealed firearm off-duty. Pursuant to Penal Code Section 830.1(c), custodial deputies are defined as those who are "employed to perform duties exclusively or initially relating to custodial assignments with responsibilities for maintaining the operations of county custodial facilities, including the custody, care, super-

vision, security movement and transportation of inmates..."

The Sheriff's Department policy was based on an opinion issued by the Attorney General in 2002, stating that custodial deputies, as defined in Penal Code Section 830.1(c), did not have peace officer status when they were away from County detention facilities. The Attorney General opined that without peace officer status, custodial deputies would be subject to statutory prohibitions such as those against carrying a concealed weapon.

In August of 2016, the Court of Appeal declined to follow the Attorney General's opinion. The Court held that Penal Code Section 830.1 (c) "declares without any qualification that a custodial deputy is a peace officer, and then goes on to delineate a custodial deputy's scope or extent of authority." Thus, while 830.1 limits the scope of custodial deputies' authority, it does not deprive them of their peace officer status, whether on or off duty. As a result, custodial deputies may carry concealed weapons while off duty without the necessity of obtaining a separate permit or license.

The Court notes that this ruling does not apply to other types of custodial positions. It also does not apply when a sheriff or police department imposes restrictions on a particular officer's privilege to carry for public safety purposes.

POBR PROTECTIONS DO NOT EXTEND TO NON-DISCIPLINARY REMOVAL FROM ASSIGNMENTS

By Steven Kaiser

In *Perez v. City of Westminster* (2016) 5 Cal.App.5th *358,* a Police Officer was served a Notice of Intent to terminate his employment for testimony he provided in an investigation of police brutality. After testifying during an Internal Affairs investigation that he had not seen any such acts by the officer who had been accused, he was told that his testimony was inconsistent with that of several other people who had witnessed the incident and advised to be careful how he answered the question. Perez then told the investigating officers that he had not witnessed such an incident, but that that did not mean it had not occurred. Perez appealed his termination, and the Chief of Police reversed the termination decision on the basis of insufficient evidence. While Perez was accepted back, he was removed from the SWAT team and honor guard, with resulting loss of overtime pay. He brought a suit for violation of POBR.

The Court held that the loss of collateral assignments such as assignment to the SWAT team and honor guard, and loss of prestige or loss of ability to earn additional, overtime pay are not disciplinary actions under POBR and denied the appeal. The Court found that the actions were not taken as a form of disciplinary action but resulted from his employer's loss of trust and confidence in the officer. The Court noted that the Chief had stated that his decision not to terminate Perez was because of lack of sufficient evidence and should not be taken as an exoneration. The Court also noted that Perez had received a substantial pay raise two months after the Chief decided not to terminate him.

ARBITRATION AGREEMENTS BINDING AND NOT PRECLUDED BY USERRA

By Jill Menning

In *Kevin Ziober v. BLB Resources, Inc.* (2016) 839 F.3d 814, the Court of Appeals for the Ninth Circuit held that the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") does not preclude the use of arbitration agreements for an employee claiming its employer violated the provisions thereunder.

In this case, Plaintiff-employee**,** Kevin Ziober, informed Defendant-employer that the Navy recalled him to active duty. Defendant told Plaintiff he would not have a job upon his return from duty. Plaintiff sued Defendant for violations of USERRA, a federal statute enacted to protect the employment and reemployment rights of veterans. However, Ziober, previously signed an arbitration agreement with Defendant-employer that required the parties to arbitrate all legal controversies. Based on the agreement between the parties, the employer moved to compel arbitration. The District Court granted the employer's motion and held that the arbitration agreement was not superseded by USERRA and therefore, the parties must arbitrate the dispute. Plaintiff appealed to the Court of Appeals to decide whether or not USERRA prohibits the use of the arbitration agreement for claims arising under its provisions. The Court of Appeals held that the language and the history of USERRA did not preclude the use of the arbitration agreement.

The Court made its decision by viewing the Federal Arbitration Act ("FAA"). The FAA states that unless there is a "contrary congressional command," courts must stay proceedings and compel arbitration if a written agreement exists. The Court reasoned that there is no "contrary congressional command" in either the text or legislative history of USERRA and therefore, must compel arbitration. USERRA does not create "a procedural right to a judicial forum." Further, Plaintiff loses no substantive rights by arbitrating his claims versus presenting

them in federal court. The Court of Appeals, therefore, dismissed the suit.

In sum, while USERRA protects many of those who have served in the armed forces, it most likely cannot override an arbitration agreement and will keep any veteran with such an agreement out of court and in the hands of an arbitrator.

CALIFORNIA COURT HOLDS THAT PITCHESS MOTIONS EXTEND TO OFFICERS WHO NEITHER WITNESS NOR ENGAGE IN MISCONDUCT

By Tylor Dominguez

In the case *Riske v. Superior Court (City of Los Angeles)* (2016) 6 Cal.App.5th 647, the Second District Court of Appeal held that California Evidence Code sections 1043 and 1045 ("the *Pitchess* motion statutes") governing the discovery of peace officer personnel records, are not limited to cases involving officers who either witnessed or committed misconduct. The Court extended the use of *Pitchess* motions to obtain discovery of disparate treatment evidence.

Robert Riske joined the Los Angeles Police Department in 1990 and served in a variety of roles, including time as a narcotics detective. In 2008, while operating in this latter role, Riske reported two fellow officers for filing false police reports, and he later testified against them in an administrative hearing that ultimately resulted in the officers' terminations. Riske's colleagues subsequently labeled him as a snitch and refused to work assignments with him, sometimes going so far as to ignore his requests for assistance while out in the field. During the period from 2008 to 2014, Riske applied for 14 different detective assignments, but was never selected, despite being the most senior and often the most experienced candidate for the position.

In 2014, after several failed promotional attempts, Riske retired from the LAPD. He subsequently sued the City, alleging that the LAPD had refused to promote him in retaliation for his protected whistleblower activity in 2008. The City denied Riske's allegations and asserted that the reason Riske was never selected for the various detective positions was because other candidates were more experienced and/or qualified than him.

To support his allegations, Riske sought certain personnel records of the successful candidates. In order to acquire these documents, Riske filed a *Pitchess* discovery motion, stating that he needed the documents to show that the City's claims — that the other, successful candidates were more qualified than him — were simply pretexts for the retaliatory conduct toward him.

The City opposed Riske's discovery motion, and the Los Angeles Superior Court ruled in the City's favor, holding that the discovery procedures for obtaining peace officer personnel records under *Pitchess* are not applicable to the records of officers who had neither committed nor witnessed any misconduct themselves. Riske then filed a writ of mandate with the California Court of Appeal seeking to compel the City to produce the requested records.

In a noteworthy decision, the Court of Appeal ordered the City to produce the requested personnel reports for the Superior Court judge to conduct an in camera review. The Court of Appeal determined that peace officer's personnel records may be subject to discovery even where the officers have not witnessed or committed some form of misconduct, so long as a plaintiff can demonstrate that the records are material to the litigation's subject matter. Upon inspection, the trial court is then responsible for ordering production of those records that are deemed both relevant to the action at hand, and are not otherwise protected from disclosure through privilege or on public policy grounds.

In its holding, the Court noted that under California Evidence Code Section 1043(c) and a series of subsequent of California cases, a party seeking discovery of a peace officer's personnel records must satisfy a two-prong test before any information is disclosed. Under the "good cause" prong, the moving party must first show that the information sought is material to the subject matter of the pending litigation. This requirement creates a relatively low threshold for discovery purposes. In other words, if the first prong is satisfied, the records are then subject to the second prong, an in camera review for relevance and privilege.

Addressing the City's claim that providing access to peace officers' personnel records who were not witnesses or subjects of investigations would diminish their privacy rights under the Peace Officer Bill of Rights, the Court observed that Evidence Code section 1045 actually provides for additional protections and limitations on the extent of discoverable information. As such, the Court held that the critical determination is not whether the officers whose records are sought are innocent of any wrongdoing, but whether the information therein is material to the present action. If a plaintiff is able to show that otherwise confidential personnel records of officers are material to the litigation, then the material is subject to review by the trial court.

In this case, Riske was able to provide information to prove "good cause" by laying out his whistleblower activity, a history of being denigrated for carrying out that activity, his multiple applications for 14 promotional positions and his subsequently denial for each application, despite his superior qualifications. The appellate court, having established a material need of the requested personnel files, remanded the case to the trial court with instructions to review the records to determine the files' discoverability and scope.

An important takeaway from the Riske case is its clarification that peace officers' personnel records are not immune from discovery, even in circumstances where the officer has neither committed nor witnessed the conduct that is the subject of the lawsuit. In assessing *Pitchess* discovery requests, courts will initially focus on the materiality of the records to the litigation at issue. If it meets the materiality requirement, any information — even records that are otherwise confidential — may be subject to in camera review by the courts. This means that officers should focus on the second-prong of the test, and where appropriate, argue against disclosure on the basis of privilege or public policy.

MAKE-WHOLE REMEDY FOR A DISCRIMINATEE

By Jill Menning

In *King Soopers, Inc. and Wendy Geaslin,* Case 27-CA-129598, the National Labor Relations Board ("the Board") held that the remedy for a discriminatee shall include search for work and interim employment expenses separate from back pay, with interest, and be awarded regardless of interim earnings.

An administrative law judge held that Wendy Geaslin's employer, King Soopers, unlawfully interrogated her, suspended, and discharged her for engaging in protected concerted activity in violation of the National Labor Relations Act. The issue in this decision was whether the Board should modify its make-whole remedy for a discriminatee.

The current method used by the Board was to treat the employee's search for work and interim employment expenses as an offset to the amount of interim earnings, which was then deducted from backpay. However, the Board did not award any of these expenses if they exceeded an employee's interim earnings. The Board held that the current method did not make the discriminatee whole and may deter discriminatees from job searching. For instance, employees who cannot acquire interim work do not get compensated for their search for work and interim employment expenses. Further, employees will not be fully compensated for their search for work and interim employment expenses if they acquire interim jobs that pay wages lower than the amount of their expenses.

The new, and ultimately approved, method includes awarding search for work and interim employment expenses regardless of interim earnings. In addition to resolving the aforementioned issues, it also prevents tax complications, because it treats search for work and interim employment expenses separately from back pay, with interest. Backpay is taxable pursuant to the Internal Revenue Service ("IRS") and Social Security Administration ("SSA"). Search for work and interim employment are not subject to these payroll or social security taxes. By treating these separately, the discriminatee, the IRS, and the SSA can avoid having mixed expenses and instead have a clearer accounting.

Across The Country

ARIZONA SUPREME COURT UPHOLDS UNION'S RIGHT TO RELEASE TIME

By Tylor Dominguez

A majority of the Arizona Supreme Court sided 3-2 with Phoenix unions when it held that police officers and other public workers in Arizona can be paid by cities for time spent doing union work. The case, *Cheatham v. DiCiccio* (2016) 240 Ariz.315, arose when the City of Phoenix and the Phoenix Law Enforcement Association (PLEA), the 2,500 member police officers' union, negotiated a contract in which the City allowed for six full-time and 35 part-time employees (who are union members) to be excused from their usual duties to carry out union work ("release time") without having their pay docked.

Two Arizona taxpayers, Cheatham and Huey, backed by the conservative and libertarian policy think tank, the Goldwater Institute, sued the City on the grounds that the release time violated the state constitution's Gift Clause requirement that all government expenditures must serve a "public purpose." The Arizona Court of Appeals permanently enjoined the collective bargaining agreement ("CBA"), and the City and Union appealed.

Speaking for the majority, Chief Justice Bales held that government expenditures may survive a Gift Clause challenge if they can be shown to serve a public purpose and the government receives something in return which is not "grossly disproportionate" to the monetary outlay. The Court found that the "release time" provision in the

CBA was not disproportionate, because it was merely a minor component ($1.7 million) of the overall compensation package negotiated by the City and the Union ($660 million). Furthermore, the Court recognized that when the CBA is viewed in its entirety, the provision is lawful because it furthers the purpose of obtaining police services for the City. Finally, the Court ruled that the overall purpose of the lawsuit against the City would have been moot, because the amount in question would simply have been reallocated if the release time provision had not been agreed on.

More generally, the Chief Justice held that courts should adopt an overarching view of the transaction when analyzing the adequacy of consideration paid by a public municipality. This approach is especially appropriate when dealing with collective bargaining agreements, which are not merely an exchange of discreet promises, but instead serve as long-term contracts that encapsulate the whole employment relationship.

Chief Justice Bales also argued that when applying the "consideration" prong of the Constitution's Gift Clause, courts must give due deference to the decisions of elected officials. Even though an MOU/CBA did not obligate the Union to provide any specific duty in exchange for the release time, the Arizona Supreme Court was clear that a release time provision need not impose such a restriction in order to be upheld. When viewed in light of other provisions in the CBA, and in light of applicable local ordinances, the PLEA's agreement with the City clearly contemplated that release time would be used for activities related to PLEA's role as the authorized representative for the member officers, even if the CBA did not specify the minutia of how the release time should or could be used.

FIRST AMENDMENT BARS DEMOTION OF PUBLIC EMPLOYEE BASED ON EMPLOYER'S MISTAKEN PERCEPTION THAT THE EMPLOYEE SUPPORTS A PARTICULAR POLITICAL CANDIDATE

By Kimberly Chapman

Jeffrey Heffernan was a police officer employed by the City of Paterson, New Jersey. He worked as a detective for the Chief of Police. In 2005, Jose Torres was the incumbent mayor of the City seeking reelection against opponent Lawrence Spagnola. Torres had appointed the Chief of Police as well as Heffernan's direct supervisor.

During the mayoral campaign, Heffernan's mother was bedridden and requested that Heffernan drive downtown and pick up a larger Spagnola sign to replace the smaller version that had been taken from her front yard. At her request, Heffernan went to the distribution site and spoke with members of Spagnola's staff. He was seen by other members of the police force talking with campaign workers and holding the sign. The next day, Heffernan's supervisors demoted him from detective to patrol officer and assigned him to a "walking post."

Heffernan filed a lawsuit in federal court claiming that his demotion was the result of engaging in constitutionally protected speech under the First Amendment. However, the District Court decided that he was acting on behalf of his mother, and therefore he failed to engage in protected speech. Heffernan appealed to the Court of Appeals and then to the United States Supreme Court.

On April 26, 2016, the Supreme Court held that, with few exceptions, the Constitution prohibits a government employer from discharging or demoting an employee because the employee supports a particular political candidate. (*Heffernan v. City of Patterson (2016) 136 S.Ct. 1412.)* In applying the First Amendment to Heffernan's situation, the Court held that when an employer demotes an employee out of a desire to prevent the employee from engaging in political activity, such an action is unlawful. Therefore, the employee is entitled to challenge the actions of the employer, even if the employer made a factual mistake about the employee's behavior.

It should be noted that the Court recognized that government employers may have neutral policies regarding campaign participation that do comply with First Amendment standards. This case did not address whether or not such a policy existed in Heffernan's case.

In Memoriam

BOB WOLF

Robert Wolf was the longest serving president of CAL FIRE Local 2881. He died quietly in his sleep earlier this month, after a long illness. Bob was a long-time friend and colleague of Messing Adam & Jasmine. Bob had unbounded love for his family, friends, the Union, CAL FIRE, and Manchester United FC. With his passing, we share the pain of his loss with his fellow firefighters as well as his family and will always remember Bob for his wit and tireless devotion to his profession.

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