THE LABOR BEAT

MESSING ADAM & JASMINE

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ONCE AND ALWAYS LABOR LAWYERS

By Janine Oliker

On April 6, 2015, **Messing Adam & Jasmine LLP** opened its doors. **Gary Messing, Gregg Adam** and **Jason Jasmine**, taking with them **Jonathan Yank, James Henderson, Jennifer Stoughton, Lina Cockrell**, and staff, began – or rather continued – a law practice that focuses on the representation of public employee associations. While the name is new, the crew is the same, with attorneys who have collectively practiced labor law for more than 100 years.

But our history is greater than merely the sum of our years. Carroll, Burdick & McDonough formed in 1948, and before it became the international law firm it is today with emphasis on product liability and class action litigation, its attorneys were primarily plaintiffs' attorneys. In the early 1950's, its attorneys started representing labor organizations. And in 1974, **Chris Burdick** and **Ron Yank** helped create the first prepaid legal defense plan in the country. That plan has grown into todays' PORAC Legal Defense Fund. Our labor forefathers at CBM represented the Vallejo firefighters in the first organized strike in California by a public safety association. We and they have fought for collective bargaining and retirement protections in hundreds of precedential cases.

Messing Adam's attorneys are the recipients and also the vessels of this continuity. They have had the privilege to practice alongside these trailblazers and now play it forward as a new generation of attorneys have joined the good fight.

Messing Adam has six months now under its belt and is greatly appreciative of the support it has received from our clients who unhesitatingly accepted the wisdom of this venture and followed us to this place. But why wouldn't you? We are the same attorneys, with the same long history and experience that you have known for years. We look forward to focusing our practice on these priorities on which it was built and continuing to represent you in all of your labor needs.

We are very excited to continue the tradition of the Labor Beat with this inaugural issue.

TENTATIVE SETTLEMENT OF SAN JOSE PENSION LITIGATION—CHUCK REED'S MEASURE B TO BE ABANDONED BY THE CITY OF SAN JOSE

By Gregg Adam

The City of San Jose and its police and fire unions have reached a settlement agreement to end their five-year battle over pension reform. The agreement must be endorsed by other non-safety unions. If that happens, the City, **San Jose Fire Fighters Local 230**, and the **San Jose Police Offices' Association** would ask a Santa Clara County Superior Court Judge to invalidate the entire 2012 ballot measure based on the City's failure to fulfill its bargaining obligation under the Meyers-Milias-Brown Act prior to putting the measure before the voters.

This is a huge victory for the Unions—and an untimely blow to Chuck Reed as he tries to take his toxic brand of pension reform statewide through a November 2016 Ballot Measure.

As Scott Herhold, an editor at the San Jose Mercury News, and one of the biggest supporters of Measure B, concluded in a devastating column on the City's abandonment of Measure B: "[POA president **Paul**] **Kelly's** statement underscored a growing consensus about Measure B: Never mind. We didn't really need our long civic nightmare."

Background

In July 2011, then-San Jose Mayor Chuck Reed presented a proposed ballot measure to the City's unions. The City of San Jose had seen a dramatic increase in its pension costs as a result of the financial downturn. San Jose is a charter city with its own pension system. As a result of the stock market collapse and the layoff of hundreds of city employees, employer contribution rates had reached in excess of 60% for safety employees. Both sides recognized something had to be done, but Reed's Measure was unprecedented. Among its extreme proposals were:

- It required existing employees to either opt into a significantly lower pension benefit or pay up to 16% more in contributions to cover unfunded liabilities—previously these were, by ordinance, the sole obligation of the City to pay;

- It gave the City the power to reduce or eliminate retirees' COLAs in any period the City determined that a financial emergency existed;

- It decimated disability retirement protections for police and firefighters—employees would be entitled to a disability retirement only if they were incapable of performing "any gainful employment" for the City—images abounded of parayzed cops being forced to work in evidence rooms;

- It required a new, non-vested (meaning it could be reduced in the future) retirement benefit for new police officers and firefighters capped at 2% at 60;

- It required the retirement board to give equal consideration to taxpayer interests as member interests in performing its fiduciary obligations in administering the retirement plan.

The parties met and conferred over the Summer and Fall of 2011. The City continued to roll out revised versions of the Measure. After an initial mediation in November 2011, the City continued to revise the Measure but, wanting to make sure it could choose when to put the measure before voters, it refused to further meet and confer with the Unions. This turned out to be its greatest error. Additional revised versions of the Measure were issued by the City in December 2011 and February 2012, but it still refused to further meet and confer.

This was all a huge lost opportunity. The police and fire union leaderships recognized that something significant had to be done to reduce costs. They put forward 3 significant counter-proposals, the last of which, in early March 2012, would have guaranteed the City savings of hundreds of millions of dollars through an-opt-in reduced benefit (3% at 55) and pay cuts for current employees. Ignoring the union's proposal, on March 6, 2012, the City Council voted, by an 8-3 majority, to put Measure B to the voters on June 6, 2012.

The measure passed 70%-30%. The unions did not fight it politically. At that time, in San Jose, the voters would have approved anything called pension reform. It was on to the courts.

The Legal Battles

The unions were in court the next day. A stay was implemented in state court to prevent Measure B from being implemented until its legality could be determined. The City sued the unions in federal court seeking a quick validation of the Measure, but the federal judge dismissed the lawsuit.

Ultimately in February 2014, after a trial in the summer of 2013, a Santa Clara Superior Court judge invalidated the central portions of the measure as unconstitutional. Some aspects were upheld and both sides appealed.

Separately, both the POA and Local 230, which had bargained in coalition at the same negotiating table, had filed charges that the City failed to meet and confer in good faith before putting Measure B before the voters. Under the Meyers-Milias-Brown Act, whereas firefighters are under the jurisdiction of the Public Employment Relations Board with respect to unfair labor practice allegations, peace officers are not, and generally must go to court with unfair practice charges.

However, because this action concerned a municipal election, the POA was required to first secure the approval of the California Attorney General to give it leave to sue the City in a *quo warranto* action (more on this below). Approval was given in late 2012 and the POA filed suit in Santa Clara Superior Court. In November 2014 (just days after the mayoral election—see below), our colleague **Chris Platten**, of Wylie, McBride, Platten & Renner, secured, on behalf of Local 230, a tentative 68-page decision from a PERB administrative law judge finding that the City had violated its bargaining obligation with respect to placing Measure B on the ballot. The ALJ ruled that the Resolution through which Measure B was placed before the voters was invalid.

(Note: PERB has recently held that, while it has the statutory authority to determine a City violated MMBA, it does not have the authority to itself order a City to invalidate a charter amendment. That power rests with a judge.)

That's when the politics kicked in.

The Politics of Measure B

Scott Herhold was not exaggerating when he described Measure B as San Jose's civic nightmare. Hundreds of employees have left, across all city departments, taking with them hundreds of years of institutional knowledge of running the City of San Jose.

They left not only because other agencies paid more, but also because of the particularly vindictive approach Chuck Reed took. He portrayed the City's employees as the enemy, infamously telling police officers that "the gravy train was over."

In the police department alone, 500 cops left over 5 years. San Jose PD had historically lost 5 or 6 police officers per year to resignation—by the height of the crisis, officer were leaving at the rate of 12 or 13 per month. If one considers that the cost of fully training a police officer over his or

her first 2 or 3 years is something to the order of $250,000, one starts to see the financial magnitude of these departures.

Reed's 2% at 60 second tier was a complete disaster. Academy classes that could hold 60 struggled to fill 15 places.

Recruits left as soon as they graduated. As the number of San Jose police officers plummeted from 1400 to below 900, public safety became the number one issue dominating last year's San Jose Mayor's race between Reed's prodigy Sam Liccardo and County Supervisor Dave Cortese.

Labor went all in on Cortese but Liccardo prevailed by less than a percentage point—about 2,000 votes. Nonetheless, it was clear that, notwithstanding his pledge to litigate to the California Supreme Court, Measure B would be an anvil around the new Mayor's neck unless he resolved it.

The Settlement Framework

On July 15, 2015, the parties reached a Settlement Framework after 3 months of hard negotiations. The Settlement replaces Measure B with a negotiated settlement containing the following key terms:

- A competitive, vested Tier 2 model for new police officers and firefighters: 80% benefit, back-loaded but average accrual rate of 2.66%;

- The ability of former San Jose police officers or firefighters and "classic" PEPRA employees to rejoin the department as Tier 1 employees;

- Restoring disability retirement to the prior system, with some systematic changes to protect against abuse;

- Reduced cost of retiree healthcare for Tier 1 employees (it had been 10% of salary);

- Closing the defined benefit retiree healthcare plan for new employees in favor of a Voluntary Employee Benefit Association (VEBA) account into which the employee will contribute 4% of salary.

- For Tier 1 employees, a one-time opt-in for Tier 1 employees to the VEBA.

- An attorney fee award to the Unions.

On August 14, 2015, the parties reached the second part of their Settlement Framework. The City has agreed to replace Measure B through the quo warranto proceeding described above. So long as the non-safety unions conclude their litigation with the City over Measure B in similar settlement agreements, the City will stipulate to the fact that it did not fully comply with its bargaining obligations and that, as a consequence, Measure B should be invalidated. Once a judge signs the order, the City will replace Measure B with ordinances and a retirement MOU reflecting the Settlement Framework.

If the other unions do not resolve their litigation, the City, Local 230 and the POA would take their agreement to the voters in November 2016 to replace Measure B. Last, but certainly not least,

the POA agreed to a one-year extension of its MOU. Officers will receive an immediate 5% one-time bonus, a 4% retention pay premium beginning on January 1, 2016, and a 4% general wage increase on July 1, 2016, as well as other sundry improvements.

Conclusion

This is a massive victory for San Jose POA and Local 230, and for all San Jose employees. It is really a victory for all of San Jose, including the City, and the City Council deserves significant credit for having the courage to finally acknowledge that Measure B had not worked and needed to be replaced. Whether this portends a new day in San Jose remains to be seen. The dire situation will not be turned around overnight; however, this agreement provides a new foundation for the City to try to recapture former glories.

The San Jose POA won because it married political savvy, with legal victories, a cutting-edge public relations campaign, and a completely unified membership.

But this is perhaps an even bigger victory for collective bargaining. Reed rejected a collaborative approach (and a better offer than the City ultimately settled for) in favor of unilateral changes and litigation. He lost and this threatened to destroy the city. When a new City team meaningfully engaged in a collaborative approach, an agreement was reached. That the City of San Jose has so completely abandoned Chuck Reed's legacy can only undermine his efforts to bring that toxic brand statewide with his proposed ballot initiative.

VESTED PENSION RIGHTS UNDER ATTACK AGAIN

By Jennifer Stoughton

Your pension rights are under attack again by a familiar foe, with a familiar proposal. After decimating the City of San Jose's workforce, former Mayor Chuck Reed wants to take his toxic brand statewide by amending the California Constitution to open public employee pensions to collateral attacks from anti-public employee groups. In 2013, Reed made a similar attempt but, after losing a battle with Attorney General Kamala Harris over the ballot title and summary, he folded with the promise to return.

Recently he and his allies made good on that promise and filed an initiative which, if sufficient signatures are collected, would appear on the November 2016 presidential ballot. Although ambiguous in some areas, his proposal appears designed to fundamentally change California law on vested pension rights. Reed has long championed giving employers the right to change retirement benefits prospectively for current employees.

We believe that this is Reed's ultimate goal. Beyond pensions, the initiative also seeks to undermine collective bargaining, by giving voters authority to determine compensation levels overturning decades-old California Supreme Court precedent.

WHAT WE KNOW

- **No Increase to Pension Benefits Without Voter Approval:** The initiative forbids any pension benefit increase, no matter how insignificant,

without voter approval. We think this would effectively close the pension systems for all current employees because the transaction costs associated with running a ballot measure and the public appetite for public employee pension benefit increases is too high of a hurdle to clear.

- **Effectively Eliminates Defined Benefit Pension Plans for Public Employees Hired After January 1, 2019:** The initiative also contains several provisions that are aimed at eliminating defined benefit plans entirely for employees hired on or after January 1, 2019. The initiative would prohibit government employers from offering employees hired on or after January 1, 2019 a defined benefit pension plan without voter approval. And, in the event voters approve a defined benefit plan, the initiative mandates that the employers not pay more than 50% of the total cost of the retirement plan, including unfunded liability. Again, we think the practical impact of this would be to eliminate defined benefit pension plans for government employees all together because of the transaction costs and public appetite for such benefits. It is also unclear how this would be implemented. For example, would voter approval be required for each employee, each class of employees, or something else?

- **Forbids Penalties For Government Employers Who Stop Offering Defined Benefit Plans:** Further evincing Chuck Reed's true goal to end public sector pension plans entirely, the initiative prohibits retirement boards from penalizing jurisdictions that stop offering defined benefit plans to its employees.

- **Cannot Negotiate Around the Initiative:** Although the initiative will not negate collective bargaining agreements in effect at the time the initiative passed, it supersedes any successor labor agreement, renewal or extension entered into after the effective date of the initiative. In other words, parties will not be able to negotiate around this.

WHAT WE BELIEVE REED IS ULTIMATELY TRYING TO DO

- **Allows the Reduction of Accrual Rates Going Forward:** Reed's proposal has already generated significant debate about what it does and what it does not do. Section 3(j) states: "Nothing in this section shall be interpreted to reduce the retirement benefits earned by government employees for work performed." This could be interpreted as only applying to future employees; however, given Reed's longstanding philosophy, our experiences with his ballot measure in San Jose, and the fact that sections 3(c), (d) and (g) specifically apply to "new government employees" only, the initiative's failure to so limit the application of section 3(j) might indicate an intention to apply it to current employees as well. This would mean that decreased accrual rates, increased retirement age, decreased COLAs, elimination of defined pensions going forward could all be realities if the initiative is approved by the voters. We note, however, that even if this is the true intent of the drafters, we believe such changes to vested rights of current employees is unconstitutional under the law as it stands today.

- **Not Limited to Pension Rights: Puts Compensation Changes to the Voters Too:** Although not state explicitly, the initiative does not appear to be limited to an attack on pension benefits.

It specifically, and repeatedly, states that voters have the right to determine the "amount of and manner in which compensation and retirement benefits" are provided. If any compensation and pension benefits can be determined unilaterally via the initiative/referendum process, it could change the collective bargaining system as we know it. We can imagine any number of ways this could be interpreted to supplant the collective bargaining process. For example, voters could approve an initiative that precludes any compensation increases absent voter approval, require voter approval on all collectively-bargained compensation changes no matter how insignificant, or even dictate the compensation ceilings and/or forbid compensation increases entirely. Any of these alternatives would effectively negate the purpose and the benefit of collective bargaining.

On August 11, as required by law, the Attorney General issued the title, the **Public Employees. Pension and Retiree Healthcare Benefits**, and summary of Reed's initiative that will appear on the 2016 ballot. It is clear through the summary that AG Harris recognizes that this initiative is, in fact, an assault on pension rights of current and future employees, despite Reed and his cohorts' assertions to the contrary. You can view the summary in its entirety on our blog at *http://www.laborbeatblog.com/?p=494*.

We will continue to keep you updated as the fight over your pension moves forward.

MERCED POA SIGNS MOU WITH THE HELP OF MESSING ADAM & JASMINE

By Brian Parino

After making concessions in the last contract which included, among other items, the entire employee contribution to PERS and the implementation of FLSA overtime, the **Merced POA** has been at the bargaining table for almost two years looking to make up some ground. The POA had been working without a contract since January of 2014. Led by Chief Negotiator **Gary Messing** and MPOA President **Joe Deliman**, the POA was determined to hold the line on what they had and push for the restoration of concessions and monetary increases which were long overdue.

Unfortunately, once negotiations began the bargaining team was limited in its ability to bargain for its members since the City had just ratified an agreement for a miscellaneous group which included a "me too" clause. The most favored nations clause stated that any increase to base wages over the amount they obtained by any other bargaining unit would be given to them as well.

After several rounds of negotiations, the POA bargaining team felt they had reached the limit to what the City was going to offer and decided to take three bargaining proposals back to its members for ratification. The members had to make a decision between three proposals. The first was whether to go for a one-year contract with a 2% wage increase in order to bypass the "me too" clause and be back at the table in a couple of months. This agreement would immediately implement a split of healthcare premium increases, with the employer covering 55% and the employee covering 45%. Currently, the

employer is responsible for the initial 5% increase and any increase above the 5% is split 50/50.

The second option was a three-year deal, which added a 2.25% and 2.5% wage increase in years 2 and 3 and pushed the implementation of the 55/45 split of health premiums to the third year. The third option was a four-year deal which mirrored the three-year deal, but added a 2.75% increase in the fourth year.

Since the City Council has not been overly favorable to paying its law enforcement personnel, and with a flat local economy along with the drought affecting the Central Valley more than any other region in California, the members decided to go with the stability of a four-year contract. In addition to the nearly 10% wage increase (compounded) during the life of the contract, the members received the restoration of their 3% shift differential (from 1.5%), Martin Luther King, Jr. holiday pay, three-hour minimum for court appearances on a duty day (from 2 hours) and intermediate ($100 from $80 per month) and advanced ($200 from $180 per month) POST certificate pay. Along with these restorations, the POA was able to add a 3% specialty pay for the Disruptive Area Response Team, Gang Violence Suppression Unit and the Multi Jurisdiction Task Force, as well as an increase in uniform allowance ($1,050 from $1,000).

Also, dispatchers will now receive a 1.5% wage increase when training new dispatchers, and they are now eligible for intermediate ($50) and advanced ($100) Dispatcher POST certificate pay. All non-sworn members will no longer have to contribute 1.95% towards the employer retirement contribution, which translates to an immediate pay increase.

The bargaining team of **Joe Deliman, Dan Dabney, Emily Foster, Will Avery and Paul Johnson** worked very hard to achieve this result.

MERCED ASSOCIATION OF POLICE SERGEANTS ALSO SIGN MOU

The Merced Association of Police Sergeants, ably led by their bargaining team consisting of **Alan Ward, Don King, Joseph Weiss** and **Jay Struble**, opted to agree to the same four-year MOU as entered into by the Merced POA described above. **Gary Messing** was the chief negotiator for the POA.

MESSING ADAM & JASMINE ASSISTS FRESNO DSA IN CONFIRMING PAST PRACTICE REGARDING INVOLUNTARY TRANSFERS IN ARBITRATION WIN

The Fresno Deputy Sheriff's Association and its President **Eric Schmidt** achieved a significant victory with an arbitration decision upholding the longstanding past practice by the Department of not involuntarily transferring deputies out of special assignments except in limited circumstances. The arbitrator also held that the Department violated the Waiver Clause, which served as a "zipper clause" in the MOU, that prohibited the Department from unilaterally changing the terms and conditions of employment.

At the arbitration, the DSA, represented by **Gary Messing** and **Lina Balciunas Cockrell**, introduced substantial evidence that once a deputy earned a

special assignment into a detective unit, he or she would not be transferred out of the assignment involuntarily unless there were documented performance issues, discipline, layoff or pending disability retirement. However, in 2014, the Department unilaterally transferred two deputies back to Patrol who had been in their special assignments for at least seven years with no disciplinary or documented performance issues.

The Department claimed that it had the authority to involuntarily transfer deputies out of special assignments by virtue of the management rights clause. The arbitrator concluded that the Waiver Clause trumped the Management Rights Clause and thus, the Department was obligated to give prior notice of a change to the practice relating to transferring deputies and the opportunity to meet and confer. The arbitrator's decision also afforded the two affected deputies in this case the opportunity to return to their original detective units.

We belive the County is appealing the arbitration decision in Superior Court under Code of Civil Procedure section 1094.5, which provides for judicial review of administrative decisions.

FRESNO SHERIFF SERGEANT TERMINATED FOR ALLEGED JOB-RELATED DISHONESTY IS REINSTATED WITH BACK PAY AND RESTORED BENEFITS

The Fresno County Civil Service Commission recently ended the lengthy and financially-ruinous ordeal of Sergeant **Mike Nulick** when it exonerated him of charges of work-related dishonesty and reinstated him with back pay and restored benefits. Sergeant Nulick's ordeal began with what appears to have been a simple miscommunication or misunderstanding. This unfortunate saga began on New Years' Eve 2013, when the on-duty watch commander instructed Sergeant Nulick to go to the home of a Deputy who had called in sick for a mandatory overtime shift. As instructed, Sergeant Nulick drove approximately 35 miles across town to the Deputy's home—a fact that was confirmed by GPS records showing the location of Sergeant Nulick's squad car.

When Sergeant Nulick's knock on the Deputy's door went unanswered, he returned to his vehicle, looked up the Deputy's cell phone number, called, and left him a voicemail message. Approximately 10 minutes later, the Deputy returned Sergeant Nulick's call. While some of the details of the conversation were later disputed, it was agreed that the Deputy confirmed to Sergeant Nulick that he was indeed sick.

When Sergeant Nulick was later contacted by the watch commander, he reported his recollection of the conversation, including that the Deputy had indicated he was at his mother's house. Sergeant Nulick mistakenly reported that the Deputy's children were with him, when in fact the Deputy had no children at that time.

Following an inexplicable 6-month delay, an internal affairs investigation was instituted to investigate apparent discrepancies between Sergeant Nulick's description of the events of December 31, 2013 and the Deputy's description of those events. These discrepancies included that the Deputy claimed to be home that evening and, of course, the fact that he had no children. But rather than consider the possibility of a

misunderstanding or mistaken recollection, the IA investigators seized on Sergeant Nulick's mistaken statement about the Deputy having children and single-mindedly pursued dishonesty charges against him. In the rush to judgment, the investigators never examined numerous other possibilities. Among many conspicuous shortcomings: (1) the investigators failed to consider the simple and obvious explanations of misunderstanding or mistake; (2) the investigators made no effort to find evidence possibly corroborating Sergeant Nulick's account; (3) they outright ignored the fact that GPS records confirmed that Sergeant Nulick went to the Deputy's house; and (4) they failed to consider the fact that Sergeant Nulick had no reason to lie.

Relying on this one-sided investigation, the Fresno County Sheriff ordered Sergeant Nulick's termination, even though the Undersheriff, the Department's second-in-command, concluded that the dishonesty charges were unfounded and recommended that they be dismissed.

Unfortunately, following a Skelly hearing at which Sergeant Nulick was represented by other privately-retained legal counsel, the Sheriff confirmed the decision to terminate him.

Following the confirmation of his termination, Sergeant Nulick contacted the PORAC Legal Defense Fund and asked to have Messing Adam & Jasmine LLP represent him before the Civil Service Commission. The Legal Defense Fund granted Sergeant Nulick's request, and **Jonathan Yank** of Messing Adam & Jasmine LLP took up his cause.

At the Civil Service Hearing, our focus was on picking apart the Department's single-minded investigation and rush to judgment and on pointing out the many deficiencies in the investigation that resulted in more open questions than answers. Following a brief recess after the close of evidence and closing statements, the Commission unanimously passed a motion throwing out the dishonesty charge. Sergeant Nulick was soon ordered reinstated with back pay and benefits restored.

MESSING ADAM & JASMINE DEFEATS TWO DEMURRERS ON BEHALF OF IAFF LOCAL 2881 AGAINST THE CHP AND CAL FIRE

In its investigation of the "Fire Academy Scandal," the CHP, authorized by CAL FIRE, conducted administrative interrogations of CAL FIRE employees and Local 2881 members that could lead to punitive action, invoking the rights and protections of the Firefighters Procedural Bill of Rights Act ("FBOR") (Gov. Code 3250 et seq.). One firefighter, represented by **Lina Balciunas Cockrell**, is pursuing legal claims against the CHP and CAL FIRE for violations of his FBOR rights that led to CAL FIRE terminating his employment.

However, both the CHP and CAL FIRE sought a quick exit from the case through demurrers (a "so what?" objection to the complaint).

The CHP claimed that it faced no potential for liability because the FBOR only provides for injunctive relief or other extraordinary remedy against the "employing department," which the CHP was not. Gov. Code 32609(c)(1). However,

MAJ was able to keep the third-party investigators on the hook through a portion of the statute imposing a civil penalty, which provides that the fire department is not necessarily required to indemnify a subcontractor for its malicious violations of FBOR rights.

In the meantime, CAL FIRE challenged the complaint on the grounds that FBOR rights did not attach to the interrogation because the alleged misconduct did not occur during events and circumstances involving the performance of the firefighter's official duties. Gov Code 3262. After CAL FIRE's demurrer was filed, the CHP's demurrer was overruled, so the CHP sought to take a second bite at the apple by joining CAL FIRE's demurrer.

It didn't work. The Court dismissed the CHP's second demurrer and joinder as improperly filed. The Court further overruled CAL FIRE's demurrer, agreeing with MAJ's argument that all the conduct alleged in the Notice of Adverse was encompassed within the "universe" of the CAL FIRE Academy and part of the training to which the firefighter was assigned. The incident for which the plaintiff was punished was also part of that universe and thus, FOBR rights should attach. After an amendment to the Complaint to shore up a claim for attorneys' fees, the case will proceed to a determination of the merits.

OFFICERS MUST HAVE EVIDENCE THAT TRANSFER WAS FOR PURPOSES OF PUNISHMENT IN ORDER TO ESTABLISH RIGHT TO AN ADMINISTRATIVE APPEAL

By Jason Jasmine

The California Court of Appeal issued a decision that has been certified for publication, which discusses the right to an administrative appeal of a "transfer for purposes of punishment" under the Public Safety Officers' Procedural Bill of Rights Act ("POBR"). The case is *L.A. Police Protective League v. City of Los Angeles* ("*LAPPL*") (2014) 232 Cal.App.4th 136.

Most of the commentary we have seen thus far has, in our opinion, missed the point by focusing on the unremarkable fact that the transfer must be for "purposes of punishment". It is not surprising, and it is entirely consistent with precedent, that the Court held that in order to be entitled to an administrative appeal of a transfer, the transfer must be for purposes of punishment (or there is a direct negative impact on compensation or other specified rights).

Among other cases, *Orange County Employees Assn. v. County of Orange*, in 1988, and *Benach v. County of Los Angeles*, in 2007, both held that the transfer must be for purposes of punishment in order for the officer to have a right to an administrative appeal.

What is new in the *LAPPL* case that we believe was lacking in earlier cases is a clear statement that to obtain an administrative appeal, evidence is required—in other words, an employee cannot merely state a belief that the transfer was for the purpose of punishment. The argument that

had been espoused by the officers in this case was that as long as the employee had a subjective belief that a transfer was made for purposes of punishment, an administrative hearing should be held and as part of the determination on the merits, the finder of fact could determine whether in fact the transfer was punitive. Not so, according to the Court of Appeal, which ruled that the burden is clearly and unequivocally on peace officers to put forth some evidence that the transfer was for purposes of punishment, otherwise the right to an administrative hearing is not triggered.
The upshot to all of this is that we anticipate seeing a slight drop in administrative appeals from transfers. But, we also anticipate seeing more litigation involving cases where the employer has denied the right to an administrative appeal of a transfer and the officers are forced to go to Court to demonstrate that the transfer was for purposes of punishment.

CALIFORNIA SUPREME COURT CONFIRMS PRIVACY RIGHTS OF PEACE OFFICERS

By Jennifer Stoughton

In *Brady v. Maryland* (1963) 373 U.S. 83, the United States Supreme Court ruled that prosecutors have an obligation to disclose to the defense material evidence favorable to the defendant. Separately, the California legislature has enacted procedures, codified in Evidence Code sections 1043 and 1045, to implement the California Supreme Court decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and allow criminal defendants to seek discovery of potentially exculpatory information located in peace officer personnel records deemed confidential under Penal Code sections 832.7 and 832.8.
These so-called "*Pitchess* motions" require the Court, upon a threshold showing, to review personnel records in camera and disclose to the defense only that information it deems material to the underlying case.

Over the years, Courts and public agencies in California have struggled to balance the interplay of the confidentiality of peace officers personnel records, a prosecutor's obligation to notify the defendant of potential "*Brady*" material when an officer is a material witness in a case, and the *Pitchess* motion process. Most jurisdictions have developed policies whereby a public safety department is obligated to notify the District Attorney's office of so-called "*Brady* officers" so that prosecutor can file a "*Pitchess/Brady* motion if necessary. When that happens, the personnel records in questioned are delivered directly to the Court by the employing agency who reviews them in camera and only discloses records to the defense and the prosecutor that it deems exculpatory and material.

A ruling from the San Francisco Superior Court, and confirmed by the Court of Appeal, threatened to upend that careful balance. The lower courts ruled that it is the prosecutor, and not the Court, that has the obligation to review the personnel records first to determine if exculpatory material exists. The court would only get involved to issue decisions on "close calls."

Giving prosecutors direct access to peace officer personnel records would have had a devastating impact on the privacy rights of peace officers. It would also have put the decision to determine what is exculpatory in the hands of individual

prosecutors, many of whom have little to no training on *Brady* or *Pitchess*.

Thankfully, in *People v. Superior Court* (2015) 2015 WL 4069243, the California Supreme Court overturned the lower courts' decisions and ruled that both prosecutors and defense counsel must file a "*Pitchess* motion" to access confidential peace officer personnel files. In doing so, the Court clarified that prosecutors do not have unfettered access to confidential peace officer records of police officers who are potential witnesses in criminal cases. The Court found that giving prosecutors routine access to personnel records is not necessary to protect defendants due process right to a fair trial and that the Pitchess procedure sufficiently protected this right while at the same time protecting peace officers' right to privacy in their personnel information.

COURT CONCLUDES THAT ARBITRATOR MUST USE INDEPENDENT JUDGMENT IN REVIEWING DISCIPLINE

By Lina Balciunas Cockrell

In the case of *Quintanar v. County of Riverside* (2014) 230 Cal.App.4th 1226, the Fourth District Court of Appeal held that where an MOU allows a neutral hearing officer to sustain, modify or reduce discipline on review, that hearing officer must exercise his or her independent judgment regarding the discipline to be imposed and not just review the discipline to determine whether it is arbitrary and capricious. A correctional deputy was demoted following an incident during which he allegedly used excessive force. He appealed the discipline and pursuant to the MOU, a neutral hearing officer held a three-day evidentiary appeal and upheld the demotion, stating that it was not appropriate to substitute his judgment for that of the employer, but rather to consider whether the discipline was arbitrary and/or within the range of discipline that would be reasonable for the proven misconduct.

The deputy filed a petition for writ of mandate, alleging, among other things, that the discipline imposed was excessive. The court raised the issue on its own of whether the hearing officer erred by concluding that he should not exercise independent judgment regarding the appropriate discipline. The Court granted the writ of mandate, ordering the hearing officer to clarify how he reviewed the discipline. Based on the hearing officer's response, the Court concluded he had not used independent judgment and remanded for a new decision using independent judgment.

The Department appealed. The Court of Appeal concluded that the MOU between the parties, by allowing the hearing officer to "sustain, modify or rescind" the discipline, requires an impartial review process, which in turn, requires the hearing officer to exercise independent judgment regarding the discipline to be imposed. In this case, however, the Court determined that any failure to exercise independent judgment was not prejudicial since the hearing officer made it clear in his response to the trial court's writ of mandate that the exercise of independent judgment would not have changed the outcome. Thus, the judgment of the trial court was reversed.

CONTRACT CLAUSE DOES NOT PROHIBIT LESS FAVORABLE BENEFIT FORMULA FOR NEW EMPLOYEES

By Lina Balciunas Cockrell

In the case of *Deputy Sheriff's Association of San Diego County v. County of San Diego* (2015) 233 Cal.App.4th 573, the Court concluded that the California Public Employees' Pension Reform Act of 2013 (the "Act") (Gov. Code § 7522 *et seq*) did not violate the contract clause in the California State Constitution by limiting pension benefits for new employees after the Act's effective date, in conflict with a more favorable pension rate in the preexisting MOU. The MOU gave covered employees defined pension benefits based on a 3 percent at age 55 ("3% @ 55") formula. However, the Act, which went into effect during the term of the MOU, limits the defined benefit formula available to new members of the county's retirement plan to 2.7 percent at age 57 ("2.7% @ 57").

The association claimed that the application of the 2.7% @ 57 formula to new members hired after the effective date of the Act but before the expiration of the MOU violates the state constitution's contract clause. The contract clause prohibits the passage of "law impairing the obligation of contracts." Art. I §9. This limits the state's power to modify its own contracts with other parties, as well as contracts between other parties.

Once a pension right is vested, it cannot be destroyed without impairing a contractual obligation. However, there is no contract clause protection for unvested contractual pension rights and the new members, though covered by the MOU, did not have a vested right to pension benefits prior to the effective date of the Act. Accordingly, the Court concluded that because new members did not have a vested right to pension benefits under the MOU prior to the Act's effective date, the 2.7% @ 57 formula does not violate the contract clause.

However, the Court also found that the Act's requirement that the county pay 3 percent of the employees' required retirement contribution rather than the 6 percent set forth in the MOU did violate a statutory requirement against impairment of a contract and that the 6 percent contribution must remain in place until the expiration of the MOU.

BROAD DIRECTIVES NOT TO CONTACT OTHER EMPLOYEES DURING AN INVESTIGATION MAY BE UNLAWFUL

By Jennifer Stoughton

Anyone involved with internal investigations has heard the familiar refrain that the investigation is confidential and that they are forbidden to discuss it with anyone. Often, employers go so far as to forbid employees under investigation from contacting anyone connected to the investigation while it is ongoing. Recent case law from the Public Employment Relations Board ("PERB") and the National Labor Relations Board ("NLRB") may change whether employers can give such broad, boilerplate directives.

in *Perez v. Los Angeles Community College District*, PERB Decision No. 2404 (December 24, 2014), PERB determined that an instruction to an employee "not to contact any members of the faculty, staff or students" while on administrative leave pending a fitness-for-duty evaluation

violated the Educational Employment Relations Act ("EERA") because it interfered with the employee's exercise of protected rights. In so holding, PERB noted that it is a fundamental principle that employees have the right to discuss their working conditions amongst themselves.

The District's actions infringed on that right by forbidding all contact between Perez and District employees in connection with the actions taken against Perez. PERB found that, as drafted, the scope of the directive to Perez was overbroad and failed to specify the conduct that it sought to prohibit. PERB noted, however, that in other circumstances, an employer may be able to demand confidentiality of an investigation but that the burden is on the employer to demonstrate a legitimate justification that outweighs employees' protected rights.

This decision follows, and is consistent with, a similar decision issued by the NLRB last year in *Banner Health System dba Banner Estrella Medical Center and James A. Navarro* (2012) NLRB Case 28-CA-023438. In that case, the witnesses to an internal workplace investigation were given an instruction to maintain confidentiality. The NLRB held that such a blanket instruction violates the rights of employees to engage in "concerted activity" regarding their working conditions. A more detailed discussion of that case can be found in the January 2013 Labor Beat available here (see page 6).

Comment: The practical impact of these decisions remains to be seen. Under PERB's ruling, employers can still require confidentiality during an investigation, but must demonstrate that it is necessary for some reason (i.e., avoiding fabricated or collusive testimony, destroying evidence, etc.). At the very least, this decision precludes the employer from issuing blanket confidentiality orders in every case and requires them to tailor all confidentiality orders to the specific case.

If you encounter a blanket confidentiality instruction, we recommend asking for the basis of the instruction. Remember, however, the mantra "obey and grieve"—comply with the order to avoid insubordination charges and grieve the issue later.

CONTRACTS TO REPAY TRAINING COSTS MAY BE UNLAWFUL

By Gary M. Messing

In a recent case entitled In re Acknowledgement Cases, 2015 WL 3537239 (Cal.App. 2015), the practices of the Los Angeles Police Department in seeking reimbursement from new hires for training came under fire.

The decision resulted from a lawsuit filed by the LAPD against 43 former officers of the Department, seeking reimbursement for training costs based on days of service of employees leaving prior to serving 60 months in the Department. The employees had agreed to reimburse the City for the direct and indirect costs of training if they left within five years of employment. The officers were required to repay costs of training within one year after departure.

The Department's training cost reimbursement requirement could not be applied to Basic POST certification training because it was not

employer-mandated and therefore not an expense required to be reimbursed by the Department under California Labor Code section 2802.

Labor Code section 2802 requires an employer indemnify an employee for "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties."

However, the City was unable to track the separate costs of POST certification training versus other Department-mandated training, so absent sufficient evidence in the record, the Court was unable to rule in favor of the Department to permit it to seek reimbursement of any of the costs it had expended for training.

Certainly, this issue is likely to be revisited once the City is able to account for and track different costs as mandated, as opposed to non-Department required training.

DISCIPLINE IS NOT TIMELY UNDER POBRA UNLESS PEACE OFFICER RECEIVES ACTUAL NOTICE OF INTENT TO DISCIPLINE WITHIN ONE YEAR FROM KNOWLEDGE OF MISCONDUCT

By Janice Shaw, Senior Attorney, California Correctional Peace Officers' Association

Before settling a disciplinary action at a Skelly hearing, first determine whether CDCR timely noticed the officer of proposed discipline. The officer must receive notice of proposed discipline within one year of the date CDCR knew or with reasonable diligence should have known of the alleged misconduct, or the discipline can be challenged as untimely. The one year limitations period starts when a person with the authority to initiate an investigation learns of the allegation of misconduct. CDCR must complete the investigation and provide the officer actual notice of proposed discipline within that year.

The California Correctional Peace Officers Association ("CCPOA") represented one of its members in an appeal of a disciplinary matter to the Court of Appeal and obtained a favorable decision benefitting all California peace officers. In *Earl v. State Personnel Board* (2014) 231 Cal.App.4th 459, the Third Appellate District interpreted the notice requirement of Government Code section 3304(d), a section of the Public Safety Officers Procedural Bill of Rights Act ("POBRA"), and held that an employing agency may not discipline a peace officer unless the officer is provided actual notice of proposed discipline within one year of the agency's knowledge of the misconduct.

Government Code section 3304(d) precludes an employing agency from disciplining a peace officer unless the agency completes its investigation and notifies the peace officer of its proposed discipline by a Letter of Intent or Notice of Adverse Action articulating the discipline within one year of the agency's knowledge of the misconduct, with exceptions delineated in the statute. On May 27, 2009, CDCR learned that Parole Agent Baron Earl had participated in a warrantless search of a residence. It completed an investigation, concluded the search was unlawful, and determined to discipline Agent Earl. On May 27, 2010, the last day of the one-year limitations period under POBRA, CDCR served Agent Earl by certified mail a Letter of Intent notifying

him of proposed discipline. The post office duly processed the letter and first attempted to deliver it the next day, May 28, 2010. Agent Earl did not receive the letter until several days later. CDCR then served Agent Earl with a Notice of Adverse Action on June 25, 2010.

An appeal was filed with the State Personnel Board ("SPB"). A Motion to Dismiss the adverse action due to CDCR's failure to provide timely notification pursuant to POBRA was filed and denied. After an evidentiary hearing, the SPB sustained the discipline. Agent Earl petitioned the Superior Court for a Writ of Administrative Mandamus in appeal of the SPB's decision. The petition alleged the SPB erred in denying the motion to dismiss, in finding the search was not within an exception to the warrant requirement, and in its determination that discipline was appropriate. The Superior Court denied the petition.

The decision was then appealed to the Court of Appeal. The Court of Appeal reversed the decision of the Superior Court, finding that CDCR's notice of proposed discipline was untimely and that SPB erred in denying the motion to dismiss. (Because the procedural issue resolved the appeal, the court did not consider or decide the legality of the search or the appropriateness of the discipline.)

CDCR contended that the Letter of Intent was timely served because the state civil service statutes provide for service of a notice of disciplinary action by personal service or by mail, and service is deemed complete upon mailing. Therefore, CDCR argued, service was complete on May 27, 2010, the last day of the limitations period. The Court rejected CDCR's argument. It determined that POBRA does not incorporate provisions of the state civil service statutes because POBRA "applies to both a narrower class (public safety officers) and a broader class (state and local employees) than do the state civil service laws."

CDCR also argued that a limitation on the investigation period, not notice to the employee, was the fundamental purpose of Government Code section 3304(d). Therefore, interpreting the statute to require actual notice within the one-year period would deprive the agency of the full year for its investigation. Again, the Court disagreed with CDCR. The plain language of the statute requires the notification to occur within the one-year. As the California Supreme Court stated in *Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 321-322, "[n]ot only completion of the investigation, but also the requisite notification to the officer, must be accomplished within a year of discovery of the misconduct."

The Court looked at a long line of decisions holding that where a statute is silent as to the manner of notice, the statute contemplates personal service or some other method equivalent to imparting actual notice. The Court concluded that "notify the public safety officer" means that actual notification to the officer must occur within the same year as the investigation. "Certified mail received after the outer limit of the relevant time period was not sufficient notification."

If a Letter of Intent is not received by the officer within one year of the date CDCR learned of the alleged misconduct, CDCR is precluded from taking disciplinary action. It is important to identify the relevant dates to determine whether

an adverse action is valid, or subject to a Motion to Dismiss. When the one year begins may be subject to argument, but the Earl decision makes clear that the statute of limitations in POBRA is not met until the officer receives notice.
This article was originally published in the March 2015 issue of the California Correctional Peace Officers' Association's publication, the Peacekeeper. We note that this rule applies equally to the statute of limitations under the Firefighter Procedural Bill of Rights Act.

CALIFORNIA SUPREME COURT REITERATES THAT CALIFORNIA LAW COMPENSABILITY STANDARDS ARE MORE PROTECTIVE OF EMPLOYEES THAN FEDERAL

By Gregg McLean Adam

Recently, the California Supreme Court unanimously ruled that on-call hours spent at an employee's worksite under the employer's control are compensable. The case, *Mendiola v. CPS Security Solutions, Inc*. (2015) 60 Cal.4th 833, concerned security guards and their sleep time. The security guards were required by agreement to reside in trailers owned by the employer. But the employer deducted compensation for "sleep time." The employees remained on-call during this time, but they received no compensation for on-call time unless circumstances required that they conduct a security-related investigation.

The plaintiffs argued that under California wage and hour law, sleep time was compensable under the "control test." The employer argued that because the IWC wage orders do not specifically speak to sleep time, the Court should import a federal regulation, 29 Code of Federal Regulation § 785.23, into California law. CFR § 785.23 provides that an employee who resides on his employer's premises is not considered working all of the time he is on the premises.

The California Supreme Court rejected the employer's argument that the federal standard should be imported into California law. It reiterated that the test for compensability under California law is the degree of control over the employee exercised by the employer. The Court concluded that the restrictions placed on the security guards while they were in the employer's trailers were sufficient to make all the time they spent there compensable.

Takeaway: This case is important because, coming on the heels of the U.S. Supreme Court decision in *Integral Staffing*, which determined that under federal law, time during which Amazon workers were subject to search by their employer was not compensable, the California High Court reiterates that California law is significantly more protective than federal law and requires compensation when employees are subject to their employer's control. Some employers have argued that sleep time for firefighters could be considered non-compensable, but this decision would put to rest those arguments, at least under California law.

COURT OF APPEAL HOLDS THAT REDUCTION IN SUPPLEMENTAL COST-OF-LIVING ADJUSTMENT VIOLATED VESTED RIGHTS

By Jonathan Yank

In 1996, the City and County of San Francisco ("the City") supported and passed a voter initiative to create a supplemental cost-of-living allowance ("supplemental COLA") for retirees in the City's retirement plan. The supplemental COLA would provide an additional pension allowance to retirees when the retirement fund's earnings from the prior year exceeded projected earnings.

In 2011, following several years of retirement fund losses, the City approached its labor unions seeking pension-related concessions. Following months of negotiations, the City and unions agreed on the terms of what would be put to the City's voters as Proposition C. Among other reforms, Proposition C would amend the Charter of the City to condition payment of the supplemental COLA on the retirement fund being "fully funded." Proposition C was passed by the voters on November 8, 2011. Protect Our Benefits (POB), an organization ostensibly representing retired City employees, appealed a superior court order denying its legal challenge to invalidate this amendment as an impairment of a vested contractual pension right under the contract clauses of the federal and state Constitutions.

The Court of Appeal ruled that amendments conditioning retirees supplemental COLA on the retirement fund being "fully funded" could not be constitutionally applied to employees who retired after effective date of the initiative establishing the supplemental COLA, where no comparable advantage was offered in return. This was because, when the supplemental COLA was offered, those individuals performed work in exchange for the benefit, thus obtaining a vested right to receiving it upon retirement On the other hand, the Court of Appeal found that the detrimental revisions to the supplemental COLA did not violate the constitutional rights of individuals who retired before the effective date of the initiative, even though no comparable advantage was offered to pensioners or employees in return. This was because individuals who retired earlier never performed work with the expectation of receiving the benefit in return.

Takeaway: This case is certainly a win for public employees' vested pension rights. However, this decision and the long line of cases it relied upon for its result are in jeopardy if Chuck Reed's pension "reform" measure passes. (See article in this issue.)

WITNESS IMMUNITY DOCTRINE DOES NOT NECESSARILY PROHIBIT FORMER INMATE'S CLAIM CHALLENGING LAW ENFORCEMENT'S PRE-TRIAL ACTIONS, INCLUDING CLAIMS THAT EVIDENCE IN DETECTIVE'S "MURDER BOOK" WAS FABRICATED

By Jason Jasmine

Witnesses, including police officers, are absolutely immune from liability for testimony at trial, including preparatory activities that are inextricably tied to testimony. So, for example, a police officer cannot be sued for false testimony or even for conspiring to provide false testimony.

The Ninth Circuit recently created a new limitation

on absolute witness immunity for law enforcement officers in *Lisker v. City of Los Angeles* (9th Cir. 2015) 780 F.3d 1237. In Lisker, the plaintiff was convicted of second-degree murder, served over twenty-six years in custody, and was released in 2009 after a federal judge determined falsified evidence had been introduced at trial. Mr. Lisker brought a Section 1983 civil rights lawsuit against the City of Los Angeles, the Los Angeles Police Department, and two individually named Los Angeles Police Department detectives, for allegedly fabricating reports, investigative notes, and photographs of a crime scene during a homicide investigation.

The detective defendants asked the district court to dismiss the falsification-of-evidence claim, asserting that they were immune from being sued based on the doctrine of absolute witness immunity. After that request was denied, the detectives filed an interlocutory appeal (which allows an aggrieved party to challenge a trial court's order in the middle of the litigation).

The Ninth Circuit Court of Appeals held that absolute witness immunity does not extend to law enforcements' pre-trial activities, in spite of the detective's argument that the notes and reports were inextricably tied to their testimony. They asserted that the documents were not produced at trial, but were designed to memorialize and assist with their eventual testimony.

The Ninth Circuit rejected that argument, finding that police investigative materials have evidentiary value apart from assisting trial testimony and that such materials substantively impact the criminal process well-beyond their testimonial value. Therefore, documentary and physical evidence, such as a falsified interviews or forensic reports—fall outside of the protections offered by absolute witness immunity.

The holding in *Lisker* makes it clear that law enforcement witnesses will not be afforded absolute witness immunity for the materials they generate over the course of an investigation. This limitation is significant and will result in defenses of this type being litigated under the less favorable qualified immunity doctrine – which has the potential to expose individual peace officers to liability for falsified reports or materials developed during their investigations.

RIGHT TO USE EMPLOYER E-MAIL SYSTEMS FOR UNION COMMUNICATION UPHELD

By Gary M. Messing

In *Purple Commc'ns, Inc.* (2014) 361 NLRB No. 126, the NLRB decided that employees who generally have access to e-mail systems for work purposes are assumed to be allowed to use those systems to send e-mails concerning particular activity during non-working time.

This decision overturned a prior NLRB decision called "Registered Guard" that was decided in 2007. The company had a strict policy that computers, internet access, voicemail, etc., could be used only for business purposes. The policy prohibited employees from using the system on behalf of any organization or for purposes that had no business affiliation with the employer, and also prohibited sending uninvited e-mails of "a personal nature." In a majority decision, the divided Board found that e-mail has become so

important a conduit for employee communications that it has effectively become a new "natural gathering place" and "forum" in which coworkers meet and discuss matters affecting the organization and other matters related to their status as employees. The NLRB decided that it is essentially faster and less disruptive to conduct communications through the e-mail system than to find ways to accomplish the task by other means.

The majority held that when employees are given access to an employer's e-mail system, they have a "presumptive right" to engage in protected activity on that system during non-working time. This presumption can be rebutted by an employer if there are special circumstances that justify a particular restriction, but the mere assertion of such an interest will not suffice.

California courts and the California Public Employment Relations Board tend to follow NLRB decisions as guidance when interpreting California public sector labor laws, which often track the provisions of the National Labor Relations Act.

NINTH CIRCUIT AFFIRMS LEGALITY OF FEMALE-ONLY CORRECTIONAL POSITIONS IN WASHINGTON STATE WOMEN'S PRISONS

By Lina Balciunas Cockrell

Rarely, if ever, would we at Messing Adam be inclined to side with a department over a union, but in the case of *Teamsters Local Union No. 117 v. Washington Department of Corrections* (2014) 789 F.3d 979, decided on June 12, 2015, the Ninth Circuit Court of Appeal correctly affirmed the district court's summary judgment, holding that the Washington Department of Corrections did not discriminate against male correctional officers on the basis of sex in violation of Title VII by designating a number of female-only correctional positions in women's prisons.

The Department, struggling with an "overwhelmingly" male workforce for its two women's prisons and widespread allegations of sexual abuse by male guards against female inmates, implemented an array of reforms, including 110 female-only guard post assignments at the two prisons. The union filed a federal Title VII lawsuit, alleging that the sex-based staffing policy violates the civil rights of male prison guards. The district court granted summary judgment, concluding, among other things, that the staffing policy was justified as a "bona fide occupational qualification" ("BFOQ").

The BFOQ provides a narrow exception to Title VII of the Civil Rights Act of 1964, which prohibits employment practices that discriminate on the basis of race, color, religion, sex or national origin. The employer must show that the job qualification justifying the discrimination is reasonably necessary to the essence of its business and that sex is a legitimate proxy for determining whether a correctional officer has the necessary qualifications. When justified under the circumstances, federal courts have upheld sex-based correctional assignment in women's prisons, however, the department must show a high correlation between sex and ability to perform job functions.

The union complained that the staffing policy resulted in the transfer of male guards and lost overtime opportunities, which allowed the union

to escape (but only barely) a challenge to its standing in the case for lack of concrete injury to any of its members.

The union then went on to take unreasonable positions in the case, including that the staffing policy was broad and overreaching, when the record demonstrated that the Department did not impose a blanket ban on male prison personnel but rather crafted the staffing needs to fit each specific facility and guard post, targeting only assignments that require day-to-day interaction with inmates and entail sensitive job responsibilities, such as conducting pat and strip searches and observing inmates while they shower and use the restroom.

A union expert witness even posited that female inmates must be taught as part of the rehabilitation process how to deal with abusive staff so they may better reintegrate into society, which contention incited a stern rebuke from the Ninth Circuit. Another union argument that the state policy is based on an impermissible stereotype that male guards are more likely to commit sexual misconduct than their female counterparts was rejected in the face of the Department's objective legal and operational justifications for why only women can perform particular job functions in women's prisons.

Finally, the Ninth Circuit concluded that the Department had appropriately considered reasonable alternatives, leaving no genuine dispute of material fact as to the Department's determination that "the realities of operating Washington's women's prisons necessitate designating these specific positions as female-only."

THE LABOR BEAT

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50