MESSING ADAM & JASMINE

THE LABOR BEAT

Index

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On the Home Front

STILL SUPER AFTER ALL THESE YEARS

Messing Adam & Jasmine attorneys are proud to be listed – again – on the Northern California Super Lawyers list published in July. **Gary Messing** celebrates twelve consecutive years on the top list (thirteen total), first earning Super Lawyer status in 2004. **Gregg Adam** has been honored for the last four years running. **Jason Jasmine** now has two years under his belt as a Super Lawyer after six years as a Rising Star. And **James Henderson** has been on the list for the past six years, earning the distinction seven times.

After a rigorous selection process including peer nominations and evaluations combined with independent research – taking peer recognition and professional achievement into consideration – approximately 5% of lawyers in Northern California are selected as Super Lawyers. Rising Stars involves a similar process but limits its recipients to those attorneys who are under 40 years of age and/or have been practicing for less than 10 years. No more than 2.5% of the lawyers in the Northern California are selected for this honor.

MAJ is very proud of its Super Lawyers who continue to be selected over the years for this prestigious list.

JASON JASMINE PRESENTS UNION'S PERSPECTIVE AT NPELRA TRAINING CONFERENCE

Jason Jasmine recently spoke at the National Public Employer Labor Relations Association's annual training conference in Long Beach, to an audience of labor relations professionals and attorneys from around the country. The subject – bargaining perspectives from the management and union perspective – is one that he has presented to the California Public Employers Labor Relations Association annual training conference for the past three years. An expert management negotiator appeared to present the management perspective, while Jason was selected as the labor expert to present the union's perspective. The training was a fun and interactive point/counterpoint that (from the union perspective) had as its goal a greater understanding by management of the concerns and issues important to labor.

PETER JANIAK TEAMING UP WITH MAJ

By Janine Oliker

As one of the original editors of the treatise *California Public Sector Labor Relations*, **Peter Janiak**'s name has long been well known by MAJ attorneys, and we are now privileged to add his experience and expertise to our shop. The treatise constituted the first attempt by the California State Bar's Labor and Employment Law Section, including now-retired Ron Yank, to organize and digest California's public sector labor laws as they affected employee/employer rights and obligations.

Peter was born on the island of Maui, in the "up-country" of Kula. His family relocated to the bay area where he attended high school, Oakland Junior College, and San Francisco State. He obtained his law degree, with an emphasis in labor law, from King Hall at the University of California, Davis.

Peter's extra-curricular activities included service as a paratrooper and chaplain's assistant in Germany. After his military service, Peter entered a Trappist monastery in Northern California, but quickly realized that he was not suited for the contemplative life, particularly given its obligation of continual silence. However, as a result of his acquaintance with the monks, he assisted in the construction of a temporary monastery for twelve Trappist nuns from Belgium who settled in the redwoods west of Garberville in 1962 and who remain there today. Peter's love for the North Coast goes back to those early experiences, and he permanently relocated there with his wife in 2002 after retiring as a senior trial attorney with the US Equal Employment Opportunity Commission (EEOC).

Peter worked his way through college as a card-carrying member of the Teamsters. During his first summer at law school he joined several other law students as volunteer union organizers with Cesar Chavez and the United Farm Workers in Delano. Here, Peter observed the application of a labor organization structure as a tool for both improvement of workers' rights as well and political action and social development at a grass roots – or grape vine – level.

Upon graduation from King Hall, Peter was employed in the Appellate Section of the EEOC in Washington DC shortly after passage of Title VII (Civil Rights Act of 1964), where he continued the fight for workers' rights. In 1972 Congress expanded the EEOC's litigation authority, and Peter was assigned as a trial attorney to the EEOC's San Francisco litigation center where he enforced Title VII against private sector employers and unions. At that time EEOC had no court enforcement authority against public employers and labor organizations.

In 1980 Peter became chief counsel for the California School Employees Association where he served for ten years and during which he was a founding member of the Labor and Employment Law Section of the State Bar of California. He was a frequent contributor to the section's newsletter, and it was during this time that the initial development of the California Public Sector Labor Relations treatise took place.

Peter established a law office in San Jose in 1989, where he specialized in representation of public safety officer industrial disability and retirement cases.

In 1994 Peter returned to the EEOC serving as a senior trial attorney until his retirement in 2002. One of his most important cases while with the EEOC was *Arnett v. CalPERS*, filed on behalf of California patrol officers, peace officers, and firefighters, who were discriminated against on the basis of age when retiring from their jobs due to job-related injuries. The case worked its way up to the Supreme Court of the United States and was eventually remanded back to the Northern District of California where plaintiffs prevailed and CalPERS agreed to recalculate and pay benefit entitlements to all 1,700 class members in a settlement valued at two hundred million dollars.

After leaving the EEOC, Peter entered "quasi-retirement", including work with Sacramento based Cooperative Personnel Services as a consultant, conducting investigations, training and generating confidential reports involving state and local government entities.

Because of his experience as a neutral investigator and consultant, Peter has developed a perspective that bridges both sides of the labor divide and which he brings to his work with Messing Adam & Jasmine. We are delighted to work with him and introduce him to you now.

Fighting the Good Fight

A WIN FOR THE SFPOA: OFFICERS MUST BE ALLOWED TO USE CTO INSTEAD OF SICK LEAVE DURING FMLA LEAVE TO MAINTAIN RIGHTS UNDER MOU'S WELLNESS PROGRAM

On February 22, 2017, the City and County of San Francisco and the San Francisco Police Officers' Association (SFPOA) arbitrated issues under the MOU's Wellness Program. The Wellness Buy Back program allows members to cash in 50 hours of sick leave annually, at the end of the fiscal year, so long as the member has accrued 300 hours on the books and used less than 30 hours during the fiscal year. There are additional provisions in the program that allow a cash-out of sick leave hours at the time of retirement.

The SFPOA was represented by Union President **Marty Halloran** and MAJ Attorney **Kimberly Chapman**. Several SFPOA members testified regarding the impact of taking leave under the Family Medical Leave Act ("FMLA") on their ability to qualify for the Wellness Buy Back Program, including Sergeant Angus Chambers.

SFPOA challenged the City's requirement that officers exclusively use sick leave when taking FMLA leave. The City required employees who took leave for their own "serious health condition" and employees that took leave for an FMLA purpose other than their own "serious health condition" to use and exhaust their sick leave before using any other form of leave. SFPOA argued that the use of sick leave was not required under FMLA and that employees should be allowed to elect which form of leave they wished to use. Furthermore, under the Fair Labor Standards Act (FLSA), employees are entitled to use compensatory time off with sufficient notification subject to few limitations. The requirement that employees use sick leave, regardless of their leave banks and FMLA circumstances, meant that these employees would not qualify for the annual Wellness Buy Back program. Thus, employees that took leave under FMLA were deprived of the Wellness benefit that other employees would receive if they merely used vacation or another form of time off for the same purposes.

A week prior to the arbitration, the City recognized that it was acting unlawfully when it required individuals who take FMLA leave for reasons other than their own "serious health condition" to use sick leave as opposed to other types of leave. It agreed to allow individuals to use any type of leave they have on the books (vacation, CTO, etc.) when they take FMLA leave for a purpose other than their own serious health condition—e.g., the birth of their child or to care for an ailing family member. If an employee runs out of other forms of leave and/or elects to use sick leave, the amount of sick leave used will have an impact on the member's ability to qualify for the Wellness Buy Back Program.

The SFPOA continued to arbitrate the issue of whether or not an individual should be allowed to use other forms of leave when taking FMLA for one's own serious health condition, rather than being required by the City to use only sick leave. The SFPOA prevailed on the use of CTO (Compensatory Time Off). Because the FLSA allows individuals with sufficient notice to use CTO at their discretion, the arbitrator ruled that this applies to the taking of FMLA leave for one's own serious health condition. Thus, members are allowed to use CTO prior to using sick leave when taking FMLA leave for their own condition, and should consider doing so when evaluating their ability to qualify for the Wellness Buy Back Program.

When taking FMLA-protected leave, employees should evaluate what type of leave they are using, if any, and whether or not that leave may impact a bonus program provided by their employer. If the employer requires that the employee use a specific type of leave first, there may be an argument that such a requirement violates Federal or State Laws. Please contact Kimberly Chapman

at kimberly@majlabor.com should you have any questions.

MERCED DSA GETS 10% MID-CONTRACT BUMP

We previously reported that the Merced County Deputy Sheriff's Association ratified a three-year MOU. The sworn unit of deputy sheriffs received in excess of 10% over the three years of the contract extending from July 2016 through June 2019.

The Board of Supervisors has agreed to provide the sworn unit of deputy sheriffs an additional 10% pay raise, effective September 2017. The additional 10% addresses issues of retention and recruitment that have been raised in bargaining. **Gary Messing** was the Chief Negotiator of the bargaining team that was chaired by DSA President **Phillip Brooks**. The bargaining team also consisted of **Deputy Jesse Aguilar, Deputy Raul Garcia, Deputy-Coroner Mark Morton,** and **Dispatcher Lori Lucas.**

While the hard work of the bargaining team was certainly a factor in the advances and compensation, the efforts of the DSA and Phillip Brooks in working with the County Administration and Board of Supervisors cannot be overstated. Brooks indicated that he was pleased with the increase, which demonstrates the support the Board of Supervisors has for its deputy sheriffs.

HANFORD POA SIGNS OFF ON NEW MOU

The Hanford Police Officers Association (POA) recently executed a three-year agreement dating back to July 1, 2016, when their prior MOU expired, and extending through June 30, 2019. Negotiations dragged on and were complicated by a combination of bad news and good news. The good news was that, for the most part, the bargaining unit members were at or above the average of total compensation of comparable agencies traditionally surveyed by the City and the POA. The bad news is the same; that increases in prior MOUs created a situation where there was little space to move to improve the total compensation of POA members.

Salary for the entire bargaining unit increased by 2.5%, effective July 2018. Additional pay increases also include 5% for corporals in July 2017, an 8.43% increase for captains in July 2017, and a 4.34% increase for lieutenants in July 2017. Other changes to the MOU include standby pay for detectives at $2.80 per hour, and language clarification covering schedules and performance evaluations. The MOU requires a total compensation survey to be completed before the expiration of the MOU.

The bargaining team was led by Detective **Rich Pontecorvo**, the POA President, and included the rest of the Executive Board of the POA, including Vice President **Justin Vallin**, POA Secretary **Chris Barker**, and Treasurer **James Edlund**. Captain Karl Anderson assisted in the negotiations on behalf of the lieutenants and captains. **Gary Messing** was the Chief Negotiator for the POA.

LOCAL 2881 SETTLES THREE RIVERSIDE ARBITRATIONS

Recently, Local 2881 was able to resolve three cases that were on the verge of arbitration. The matters were settled with the cooperation of CAL FIRE and CalHR. Local 2881 Chief Counsel **Gary Messing** conducted the negotiations on behalf of the Union, together with State and Rank and File Director **Tim Edwards**, and with the active involvement of President **Mike Lopez**. All three grievances arose from unilateral actions by the Riverside Unit management involving matters within the course and scope of negotiations, affecting nearly 1,000 firefighters of the over 6,000 members of Local 2881.

Medic Rotation Arbitration

In the Riverside Unit of CAL FIRE, bargaining unit members apply for their assignments by battalion, station, and by the type of apparatus. As a result of previous grievance settlements, assignments in Riverside cannot be changed (absent certain defined circumstances) without notice and a meet and confer with the Union. In September 2014, Riverside management unilaterally implemented a rotation of medics between the engine and the ambulance, without notice and without meeting and conferring with Local 2881. The two assignments are quite different, since the ambulance and the station at issue are involved in round-the-clock calls for medical service; whereas, the medics assigned to the engine have less frequent medic responsibilities, but are given the opportunity to have more engine experience, which could impact their promotional opportunities. A grievance was filed when CAL FIRE Riverside management made it clear that it believed that this change was not negotiable.

Three Choices Arbitration

Historically, when there have been displacements in the Riverside Unit, displaced employees (employees who need to be reassigned because of a reduction in positions) have been reassigned based upon their selection of open positions on the basis of seniority. In January 2015, Riverside management unilaterally implemented a new process for the displacement of firefighters in Riverside Stations 17 and 59. Under the newly-adopted process, firefighters had to provide their top three choices of assignments, and management would then choose from the three as to where the individual would be placed. The change was made with minimal notice and therefore without the opportunity to meet and confer,

but was also inconsistent with a Sideletter to the Memorandum of Understanding between the parties, resulting in a grievance.

Overtime Cancellation Arbitration

Past practice in the CAL FIRE Riverside Unit requires individuals signing up for voluntary overtime to cancel that overtime shift more than 80 hours prior to the scheduled shift. The policy established that individuals cancelling within 80 hours prior to the shift would accrue a "strike." The accumulation of three strikes within a 12-month period resulted in an employee being removed from the voluntary overtime list until the next calendar year.

The Department unilaterally changed this policy in December 2014, by requiring cancellations to occur at least 168 hours prior to the shift. The change essentially amounted to going from approximately three days' notice of cancellation to seven days' notice, which created a large additional burden on employees. This increased the likelihood of employees being denied the right to voluntary overtime for lengthy periods of time. CAL FIRE took the position that this change was not negotiable. The Union asserted that not only was it negotiable, but it was a violation of the Entire Agreement Clause of the MOU (Section 16.1.2.3) because it resulted in a diminution of existing "substantial monetary or employee benefits" without agreement of the Union. A grievance was immediately filed.

Settlement Agreement

Negotiations resulted in an omnibus settlement agreement of all three of these grievances.

CAL FIRE agreed to rescind its change regarding the seven days' notice prior to cancelling overtime shifts in order to avoid incurring a strike, and replaced it with a policy requiring five days' notice. CAL FIRE further agreed that it will maintain this five-day notice period until July 1, 2021, unless mutually agreed upon otherwise with Local 2881. After July 1, 2021, the practice can be changed if it complies with the requirements of the MOU and the requirements to negotiate under the Dills Act. Additionally, CAL FIRE agreed that it will erase all strikes accumulated by employees in 2017 until the date that CAL FIRE rescinds the seven-day notice and replaces it with the five-day notice policy.

With respect to the Three Choices grievance, CAL FIRE agreed that any assignment selections by displaced Bargaining Unit 8 members within the Riverside Unit shall henceforth be made by seniority rather than by the three choices method. CAL FIRE agreed that it will maintain this reassignment policy until July 2021, unless mutually agreed upon otherwise with Local 2881. After July 1, 2021, CAL FIRE may attempt to change the reassignment method if it is consistent with the MOU and the obligations to negotiate under the Dills Act.

As part of the settlement agreement, Local 2881 agreed to withdraw its paramedic rotation grievance, but without prejudice to its ability to refile such a grievance if similar changes are made in the Riverside Unit in the future. This was an acceptable resolution, since there have been no additional efforts by the Riverside Unit management to institute a paramedic rotation in any other stations, and the rotation had already been withdrawn at Station 33.

Tim Edwards noted that while these grievances took several years to resolve and required time and attention over that period of time, it was still gratifying to resolve these cases. Tim pointed out that the results would not have been achieved without the cooperation of the current team from CAL FIRE and Assistant Director of CalHR, **Pam Manwiller**.

MAJ OVERTURNS TERMINATION OF CORRECTIONAL OFFICER

The State Personnel Board ("SPB") ordered that Lou "Mark" Evon be reinstated to his position as a Correctional Officer assigned to Folsom State Prison after Messing Adam & Jasmine LLP successfully overturned Evon's termination from the California Department of Corrections and Rehabilitation ("CDCR").

CDCR terminated Evon after learning that, in 2014, he had registered his two dogs to vote as part of a political discussion on a local radio talk show. Evon, who has an avid interest in politics, had called in to Phil Cowan's program, "The Answer" on AM1380, when Cowan was discussing the lack of identity verification in the voting process. Evon and Cowan mused that the system was so broken, one could probably even obtain voting rights for his dog. So as an experiment, Evon completed registration forms in the names of his two dogs and received confirmations that they had been successfully registered to vote. On the day of the general election in November 2014, when Evon went to vote in his own name and saw the dogs' names on the voting register, he requested a ballot in one of the dog's names and was given it. Evon repeatedly asked if he needed to show identification and was told no. Evon did not vote on behalf of the dog, nor did he hold himself out as a CDCR Correctional Officer. Evon reported his experiment to AM1380, which was publicly broadcast on Cowan's show.

Evon's actions in registering his dogs to vote and obtaining a ballot in one dog's name technically violated certain election laws and the law against perjury, so CDCR terminated him, essentially for dishonesty. Evon appealed to the SPB, and the parties participated in an evidentiary

hearing, where Evon contended that the penalty of termination was excessive and violated his right to political speech under the First Amendment. Unfortunately, the administrative law judge rejected both arguments, misinterpreting the seminal United States Supreme Court case analyzing the First Amendment rights of public employees.

However, the SPB rejected the administrative law judge's proposed decision. Following further briefing and oral argument before the Board itself, the SPB returned a final order imposing a one-year suspension on Evon (which essentially worked out to be time served) and reinstating him to his Correctional Officer position.

Evon was represented through the SPB appeal proceedings by **Lina Balciunas Cockrell**.

LOCAL 2881 AND MAJ SAVE BATTALION CHIEF ELIGIBLE LIST AND PROMOTIONS

As reported in our June 2, 2017 Labor Beat Alert, on June 1, 2017, the State Personnel Board ("SPB") denied CAL FIRE's request to abolish the entire 2017 Battalion Chief eligible list and force the nearly 300 candidates on the list to re-take the promotional exam during the peak fire season. The SPB also upheld the six appointments that had already been made off the list to the Battalion Chief classification and voided the termination of a seventh Battalion Chief's limited term appointment.

CAL FIRE and the California Department of Human Resources had taken the drastic step of freezing all promotions and requesting that the SPB abolish the entire Battalion Chief eligible list based on allegations that one candidate may have improperly received exam information. However, CAL FIRE admitted that it had conducted a thorough investigation and could not find any other even potential irregularities in the exam. The six appointees faced losing their positions and having to undergo the entire promotional process again. One appointee had already begun relocating his family to his new unit and the others faced similar hardships through the upheaval.

Re-taking the Battalion Chief exam, particularly during fire season, would have not only been completely unfair to those who had competed on their own merits in the original process but would have also strained the applicants with a new examination process, a different pool of competitors and significantly less time to study and interview for positions (all while perhaps coming off a fire line).

During the month that followed CAL FIRE's announcement of its intent to abolish the Battalion Chief list, CAL FIRE Local 2881 engaged in an "all-hands-on-deck" effort to uphold the appointments and the list. The campaign was spearheaded by Local 2881 President **Mike Lopez** and State Rank and File Director **Tim Edwards**, union counsel **Gary Messing** and **Lina Balciunas Cockrell** of Messing Adam & Jasmine LLP and the union's lobbyists, **Aaron Read** and **Terry McHale** of Aaron Read and Associates. Efforts included a direct appeal to the Governor, a written brief to the SPB, impact statements from the Battalion Chief appointees and list candidates and testimony at the SPB hearing. Needless to say, MAJ is thrilled with the results and proud to have been part of the united front.

SACRAMENTO HOUSING AND REDEVELOPMENT AGENCY SAVED FROM THE CHOPPING BLOCK

In an era with the homeless population exploding, affordable housing being a pipe dream, and jobs for those without a formal education harder and harder to come by, the Sacramento Housing and Redevelopment Agency ("SHRA") has managed to do its part in helping to tackle all of these issues. SHRA is a Joint Powers Authority, created by the Sacramento City Council and Sacramento County Board of Supervisors to represent both jurisdictions for affordable housing and community development needs.

In spite of having to deal with a massive reorganization and budget reduction as a result of the State stripping away portions of its redevelopment authority (and budget) just a few years ago, the SHRA continues to be in the forefront of community revitalization, providing affordable housing, and even providing some of the tenants of affordable housing with jobs and training. SHRA had its future called into question when the County of Sacramento proposed considering (among other things) whether to eliminate the Joint Powers Authority under which the SHRA exists.

In a packed Board of Supervisors meeting, representatives from the Agency, various community groups, concerned citizens, and representatives from the SHRA Employees Association ("SHRAEA") made passionate but educational pleas to the Board of Supervisors to step back from even considering elimination of the SHRA. SHRAEA President **Jackie Ciamarro** and SHRAEA attorney **Jason Jasmine** were among those addressing the Board. By coordinating the Association's efforts with those of the Agency and various community groups, the impact was significant and immediate. By the end of the meeting, the Board of Supervisors had reversed course and was no longer considering dissolving the Joint Powers Authority. As a result, the SHRA and its employees represented by the SHRAEA, can continue to do the great work they are doing for the community.

ROSEVILLE FIREFIGHTERS FIGHT TO SAVE SAFE STAFFING LEVELS

Recently, Roseville City leaders proposed reducing staffing from 4 to 3 individuals on fire ladder trucks. The Roseville Firefighters Association, IAFF Local 1592, vigorously opposes this change, as all of the research (including the City's own) shows that it will have a negative impact on call response times and safety. In some cases, due to the need to send more fire apparatus to certain types of calls due to the reduced staffing per truck, there will be fewer apparatus to respond to other calls – meaning fire trucks and engines will need to be pulled from further away in order to respond. In some cases, estimates are that response times will be several minutes slower. In many instances, several minutes is literally the difference between life and death.

At a recent City Council meeting, citizens packed the City Council chambers (as well as an overflow room that was observing via closed circuit cameras), supporting the Roseville Firefighters' position, and opposing the staffing cuts. In fact, speakers opposing the staffing cuts outnumbered those supporting the cuts by approximately a 10-to-1 margin. **Jason Jasmine**, the Roseville Firefighters' attorney (and a Roseville resident) spoke in opposition to the staffing cuts, along with numerous Roseville citizens, firefighters and a representative from the Firefighters Burn Institute. While the City has not officially shelved the proposal, it has agreed to more critically analyze the negative impacts on safety and response times. We are confident that once the City has familiarized itself with the data, and the negative repercussions associated with its staffing proposal, that it will officially be withdrawn. For more information about the proposal and the Roseville Firefighters' response, please visit the Roseville Firefighters' website at: https://rosevillefirefighters.org.

In the News

SUPREME COURT REVIEW GRANTED IN CAL FIRE LOCAL 2881 "AIR TIME"

By Gary Messing

As reported in our April 13, 2017 Labor Beat Alert, the California Supreme Court granted Messing Adam & Jasmine's Petition for Review on behalf of CAL FIRE Local 2881 (*CAL FIRE Local 2881, et al. v. CalPERS (State of California)*, California Supreme Court, Case No. S239958). 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. MAJ filed the Petition on February 8, 2017, following the First District Court of Appeal's December 20, 2016 decision rejecting 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.

Review is called for in this case, and MAJ is gratified the Supreme Court has agreed to consider another decision that tears away at the fabric of the vested pension rights California employees have counted on for decades.

Briefing has begun, and CAL FIRE Local 2881 filed its Opening Brief on the Merits in June. While the State intervener has requested two extensions of time to file its Reply Brief (now due September 1), CalPERS is relying on its Reply Brief filed in the Court of Appeal. For copies of the briefs and other filings as this case progresses, please visit the *Local 2881 v. CalPERS* link at our website.

For more information about the underlying case, please see *Court of Appeal Finds No Vested Right to Purchase Additional Service Credit - Another Court of Appeal Decision Perpetuating the Marin Pension Case* in the March 2017 issue of The Labor Beat.

For more information about this case, please contact Gary Messing or Gregg Adam.

AB 119 REQUIRES AGENCIES TO PROVIDE EXCLUSIVE REPRESENTATIVES ACCESS TO ORIENTATION OF NEW EMPLOYEES AS WELL AS THE PERSONAL INFORMATION OF BOTH NEW AND CURRENT EMPLOYEES

By Paul Bird

Assembly Bill 119 (AB 119), recently signed into law by Governor Brown, requires public agencies to give an employee's exclusive representative (e.g., employee associations or public employee unions) notice of a new employee's orientation as well as personal information of both new and current employees. Unlike most bills, AB 119 became effective upon its signing in July, so the affected public agencies (which include cities, counties, special districts, trial courts, state civil service agencies, California State Universities, Universities of California, and school districts) must currently be complying with its requirements.

Access to New Employee Orientation

AB 119 requires public agencies to provide to an employee's exclusive representative at least ten days' ad-

vance notice of any new employee orientation, unless a shorter notice is necessary because of an urgent need critical to the employer's operation that was not reasonably foreseeable. (California Government Code sections 3555 - 3557.) It covers any new employees regardless of whether they are being hired to a permanent, temporary, full time, part time, or seasonal position.

The bill requires notice of the orientation where employees are advised of their employment rights, benefits, etc., no matter the medium in which it occurs (in person, online, or by other means). This notice period gives the representative and employer an opportunity to negotiate over the "structure, time, and manner" of the representative's access to the new employee's orientation. These issues may include (1) when during orientation the representative has access to new employees, (2) how long access will be given, and (3) what will be discussed. But negotiation over these issues is not automatic: either the representative or the agency must affirmatively request it.

If negotiations are unsuccessful in resolving all disputes, any remaining issues must be resolved through compulsory interest arbitration. (In "interest" arbitration the arbitrator considers the issues and decides what the contract's language should be. This differs from "grievance" arbitration, where the arbitrator interprets a term (or terms) already in an existing contract.) If both parties agree to it, arbitration can occur at any time. But if only one side wants to arbitrate, the earliest it can occur is (1) 45 days after the first meeting of the parties, or (2) 60 days after the initial request to negotiate, whichever comes first. The parties share all costs of the arbitration unless a city or county objects to the State Mediation and Conciliation Service appointing the arbitrator. If, instead, a city or county objects and requests the Public Employment Relations Board appoint an arbitrator, then the city or county pays for the cost of that arbitrator.

The arbitrator must issue a ruling within 10 days of the close of the hearing, and the decision is binding and final. The ruling can approve either party's final proposal in its entirety or use elements of either party's proposal (which suggests arbitration on an "issue-by-issue" basis). The parties must execute a side letter or reopen their contract to incorporate either their agreement about access to orientation or the arbitrator's decision.

Provision of New and Current Employee Information

AB 119 also requires public agencies to give the exclusive representative information of both new employees (adding personal e-mail addresses to the list) and current employees, though the confidential information of peace officers is still exempt. It requires the agency provide (1) the name, job title, department, work location, work, home, personal cellular telephone number, personal email address, and home address of any new employee within 30 days of hire or by the first pay period of the month following hire; and (2) the same information every 120 days for all employees in the bargaining unit (unless more frequent or more detailed lists are required by an agreement between the agency and representative). (Govt. Code sections 3558 - 3559.)

The bill states that the privacy requirements set out by the California Supreme Court in *County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, still apply. In that case the Court held that, under the Meyers-Milias-Brown Act, a union has a presumptive right to employee contact information such as home addresses and telephone numbers. (Notably, personal email addresses and personal cell phone numbers were not identified in the case as information to be provided.) The Court held that the balancing of interests favors disclosure to the union but, in some cases, tipped in favor of the individual employee who objects and demands that home contact information be withheld.

UPDATE ON FAIR SHARE FEE CHALLENGES

By Janine Oliker

The *Janus*[1] challenge has already made its way to the Supreme Court of the United States (SCOTUS), having filed its petition for a writ of *certiorari* on June 6, 2017. Because a case cannot, as a matter of right, be appealed to SCOTUS, a party seeking to appeal from a lower court decision must first file a petition seeking a formal order granting review. Briefing on *certiorari* should be concluded this fall. If SCOTUS grants review – and we anticipate that it will given the current climate and sentiment surrounding the decision in *Friedrichs*[2] – MAJ is prepared to assemble a coalition to file an *amicus curiae* brief and weigh in on this very real threat to fare share.

Plaintiffs in *Hamidi*[3] timely filed an appeal to Ninth Circuit Court of Appeal[4], and briefing is underway. It is likely – and hoped for – that the Ninth Circuit will uphold the lower court's ruling, making *Hamidi* ripe for another petition of *certiorari* to SCOTUS.

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[1] *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

[2] *Friedrichs, et al. v. California Teachers Association, et al.*, SCOTUS No. 14-915

[3] *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

[4] *Hamidi, et al v. SEIU, Local 1000, et al.*, Ninth Circuit Court of Appeal, Case No. 17-15434.

Plaintiffs in *Yohn*[5] lost on a motion for judgment on the pleadings in June, and the case is still pending in the District Court.

For more information on these cases, please see *Further Challenges to Fair Share Fees in the Pipeline* in the last issue of The Labor Beat. The consequences of these cases are potentially huge. If you have any questions about preparing yourself and your association for a negative outcome in one or all of these cases, please contact Gary Messing, Gregg Adam, or Jason Jasmine.

Around the State

FLORES STANDS—AMOUNTS PAID IN LIEU OF HEALTH BENEFITS MUST BE INCLUDED IN THE REGULAR RATE OF PAY

By Paul Bird

Recently the U.S. Supreme Court refused to hear a challenge to the Ninth Circuit's ruling in the case of *Flores v. City of San Gabriel*, binding the ruling on all employers in California.

As a recap, in June 2016 the Ninth Circuit ruled in favor of a group of police officers who had sued their City employer for three years of unpaid overtime and liquidated damages under the Fair Labor Standards Act (FLSA). (*Danny Flores, et al. v. City of San Gabriel* (2016) 824 F.3d 890.) The officers argued that the City's cash in lieu of medical benefits payments should be included in the City's calculation of their regular rate of pay to compensate them for overtime hours worked. The City argued that the cash in lieu payments were not payments made as compensation for hours of employment and were not tied to the amount of work performed for the employer: therefore, the payments were excludable from the regular rate of pay as are payments for leave used and expenses. The Ninth Circuit disagreed, finding the payments were "compensation for work" even if the payments were not specifically tied to time worked for the employer.

The U.S. Supreme Court denied the City's petition for writ of *certiorari* which sought to reverse the Ninth Circuit's ruling with respect to two issues: 1) the inclusion of cash paid to employees in lieu of health benefits contributions from the regular rate for purposes of calculating overtime under the FLSA, and 2) the standard for finding a "willful" violation of the FLSA, which increases the statute of limitations from two years to three years. The Court provided no explanation in denying the petition.

[5] *Yohn, et al. v. California Teachers Association, et al.,* Central District, California, United States District Court, Case No. 8:17-cv-00202.

CALIFORNIA COURT OF APPEAL EXPANDS OFFICERS' RIGHT TO DISCOVERY UNDER POBR

By Lina Balciunas Cockrell

As reported in our July 17, 2017 Labor Beat Alert, in the case of *Santa Ana Police Officers Association v. City of Santa Ana,* 13 Cal.App.5th 317 (2017), the Court of Appeal concluded that the Public Safety Officers Procedural Bill of Rights Act ("POBR") (Gov. Code 3300 *et seq*.) gives a peace officer who is interrogated in an administrative investigation the right to obtain discovery prior to being required to submit to a second interrogation. This appears to be an expansion of an officer's discovery rights under POBR.

In the underlying case, the officers were surreptitiously recorded during an undercover raid of a marijuana dispensary and were investigated for allegedly inappropriate comments made while collecting and logging evidence. After the initial interviews of two officers, the Department wanted to interview them a second time, and the POA claimed that the Department, pursuant to Government Code section 3303(g), was required to give the officers "a transcribed copy of any notes made by a stenographer or … any reports or complaints made by investigators or other persons except those which are deemed by the investigating agency to be confidential," in addition to the recording of the first interview prior to the second interview. The Department refused to hand over the materials before the second interview, and the POA brought suit.

The trial court sustained the City's demurrer without leave to amend. On appeal, the Court of Appeal concluded that both the plain language of Section 3303(g) and the decision in *Pasadena Police Officers Association v. City of Pasadena,* 51 Cal.3d 564, 572 (1990) required reversal of the trial court's decision. The *Pasadena* decision has historically stood for the proposition that an officer has no pre-interrogation discovery rights and that Section 3303(g) only requires a department to give an officer a recording of the first interview prior to the second interview. However, the *Santa Ana* Court concluded, interpreting the *Pasadena* decision and Section 3303(g) together, that if an officer is entitled to the recording, the statutory language renders the right to notes/reports/complaints coextensive with the right to the audio. This means that the officer is entitled to both the audio and the writings prior to any subsequent interview.

At first glance, the *Santa Ana* decision seems inconsistent with the *Pasadena* decision. However, the *Pasadena* decision really only says that an officer is not entitled to the notes/reports/complaints until after an interrogation.

The *Santa Ana* court appears to reconcile *Pasadena* by interpreting it as meaning after the FIRST interrogation.

The *Santa Ana* decision has major implications for administrative interrogations of peace officers, because usually a department does not conduct a second interview unless the officer is suspected of being dishonest in the first. Now, the officer (and his or her representative) may be able to see the investigator's analysis and other witness statements before giving the second interview – which will significantly assist in a more meaningful defense for the officer. The decision will also impact investigations of firefighters under the Firefighter Bill of Rights Act, which has the same language as POBR in this regard.

OFFICER RETAINS PRIVACY RIGHTS IN PERSONAL CELL PHONE, EVEN WHEN USED FOR ON-DUTY PURPOSES

In an important 2016 case dealing with the public sector analogue to the landmark privacy ruling in *Riley v. California* (the 2014 case in which the U.S. Supreme Court unanimously held that the warrantless search and seizure of digital contents of a cell phone during an arrest is unconstitutional), the U.S. District Court for the Eastern District of California held for the first time that government employees possess a reasonable expectation of privacy to their personal cell phones, even when those devices are sometimes used for work-related tasks, and excessively intrusive or compelled government searches are likely in violation of the Fourth Amendment.

The plaintiff in *Larios v. Lunardi,* Timothy Larios, was an officer with the California Highway Patrol ("CHP"). In 2013, Larios was assigned to an Interagency Narcotics Taskforce. While assigned to the unit, Larios was issued a department-owned cellphone, which he used in addition to his own personal cell phone.

In September 2014, Larios was removed from his position and advised that he was subject to an internal affairs investigation. During the investigation, Larios was ordered to relinquish his department-issued phone and scheduled to appear and answer questions related to his conduct.

Unbeknownst to Larios, the purpose of the meeting was to confiscate his personal cell phone. When confronted, Larios refused on the grounds that it contained purely personal information. In response, the lead investigator, Lunardi, produced a memo ordering Larios' to turn over his phone so that investigators could "conduct a data extraction to retrieve *all work product*" Larios offered to show the investigators all work product stored on his personal phone, but when the investigators rejected this proposal and threatened further disciplinary action and/or criminal prosecution, he eventually relinquished the device.

However, more than eight hours passed before Larios received his cell phone back, and on review, Larios discovered that several personal calls had been made after the phone was turned over to investigators. Moreover *all data stored on the phone* – not merely work product – had been searched and downloaded. Investigators subsequently used the information gained from the download to accuse Larios of violating several sections of the California Penal Code. During later interrogations, investigators questioned Larios about personal information discovered on his cellphone and admitted that Larios' phone had been searched to gather the personal information in question. As a result of the expanded investigation, Larios was terminated.

On November 11, 2015, Larios filed suit against Lunardi and the CHP, claiming various violations under California and Federal law, including a Fourth Amendment violation of his reasonable expectation of privacy in his cellphone data. The defendants moved to dismiss the case as groundless, but in a surprise result, the United States District Court held that the defendants' actions were unconstitutionally overbroad and thus unreasonable.

In dismissing the defendants' arguments, the Court held that Larios "maintain[ed] a reasonable expectation of privacy in his *password-protected* personal cellphone*, despite having used it at times for work with the permission of the government employer, and even in the face of notice that any work product would have to be turned over to the state*." Even more striking, the Court held that "knowing that work product would remain open to inspection *in no way puts the employee on notice that the government will also have carte blanche* to review everything and employee keeps on his or her phone." The Court reasoned that, carried to its logical conclusion, the defendants' position would permit the government to search an employee's house anytime that employee took work files home. In relation to the clearly recognized privacy expectations in one's home, the Court held:

> ...In fact, a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.

Relying on the analysis in *City of Ontario, Cal. v. Quon* (2010) 560 U.S. 746, the Court held that the CHP and Lunardi were unreasonable in their search of Larios' cellphone, because the inspection was excessively intrusive from its inception and the measures used to gain com-

pliance were surreptitious. The Court therefore held that if Larios' allegations prove correct at trial, then the CHP and Lunardi "clearly overstepped the bounds of the Fourth Amendment."

"[W]hen conducted for a "non-investigatory, work-related purpos[e] or for the investigatio[n] of work-related misconduct, a government employer's warrantless search is reasonable *if it is justified at its* inception *and if the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search*." (*Quon*, 560 U.S. at 761[emphasis added].)

Moreover, the Court held in *Larios* that the defendants were not entitled to qualified immunity because the investigators' search was neither focused on work-related misconduct, nor was it "tailored to find only evidence of work-related misconduct."

As with any object that contains information or evidence, the protection afforded a cell phone is dependent upon the expectation of privacy an officer outwardly exhibits in the device. Police officer employers may intrude upon their officers' expectations of privacy for non-investigatory reasons or for investigations of work-related misconduct, so long as the search is "reasonable." As such, it is clear that although an officer's cell phone and its contents are constitutionally protected, that protection can be diminished both by an officer's conduct and the interests of the officer's employer.

LOYALTON EMPLOYEES LOSE PENSION BENEFITS

By Gary M. Messing

The City of Loyalton recently declared bankruptcy. During bankruptcy proceedings, the City ceased making contributions to CalPERS for the retirement benefits of its employees. Five of the City's retirees ended up with a reduction in their retirement compensation by 60%.

CalPERS was reluctant to make the reductions. However, the Board noted that it was the City that had the obligation to fulfill the retirement promise to the employees, and not CalPERS.

It appears that there are a variety of other agencies who may take a similar path. It is reported that in the past several years, four agencies have expressed an intent to terminate their relationship with CalPERS, including the Alhambra Redevelopment Agency, California Redevelopment Agency Foundation, Exposition Metro Line Construction Authority, and the Herald Fire Protection District.

Niland Sanitary District and Trinity County Water Works District have already adopted resolutions to terminate contracts with CalPERS. Additionally, there are at least three other agencies that are now delinquent in making their payments to CalPERS to cover the required level of contributions for its employees.

Additionally, a Joint Power Authority (JPA) in four cities in Southern California (Covina, West Covina, Glendora and Azusa) terminated all of its employees several years ago when it lost its funding, and a year later became delinquent in its payments to CalPERS. That JPA will inevitably become in default of its payments to CalPERS, resulting in a benefit reduction of 63% for approximately 200 employees.

The fear is that there are even more JPAs that could end up with the same problem.

OFFICER'S DISABILITY RETIREMENT IS DEEMED HONORABLE

By Jill Menning

In *Camillo Bonome, Jr. v City of Riverside,* the Court of Appeal for the Fourth District had to determine 1) whether an officer was "honorably retired" if he retired on disability in lieu of termination and thus was eligible to receive his concealed carry weapon endorsement and 2) if the Department still denied his endorsement for good cause whether he was entitled to a hearing. The Court of Appeal held that disability retirement does not exclude an officer from being honorably retired and if nonetheless a Department denies a retiree of a his/her concealed carry weapon endorsement, the retiree is entitled to a good cause hearing.

Bonome was a peace officer with the City of Riverside. In June 2012, he failed to make an incident report of an investigation involving sexual abuse. In October that same year, Bonome was injured on the job. The following May, the Department sustained a charge against Bonome for his June conduct. Prior to his Skelly hearing, however, Bonome applied for and officially retired due to his injury. Subsequently, he tried to get an endorsement for his concealed carry weapon, however the Department refused and held that he was not "honorably retired" arguing that he retired in order to avoid termination. Bonome argued he was "honorably retired" and therefore entitled to the concealed carry weapon endorsement, and even if he was not considered "honorably retired," he was entitled to a good cause hearing on the Department's denial.

The Court first held that under Penal Code section 16690, officers are not "honorably retired" if they accept service retirement in lieu of termination. However, officers who retire with a disability "are honorably retired under any circumstances." Nonetheless, the Court noted that the Department "still had discretion to deny Bo-

nome his…endorsement upon a showing of good cause." The Court did not rule on whether such cause existed but stated "the issue would have to be resolved at a good cause hearing."

This case makes clear that although a disability retirement may not exclude an officer from obtaining his or her concealed carry weapon permit, the Department may nonetheless deny such permit after a showing of good cause at a hearing.

FEDERAL APPEALS COURT FINDS POLICE DEPARTMENT'S SOCIAL MEDIA POLICY UNCONSTITUTIONALLY OVERBROAD

Overview

In the December 2016 case, *Liverman v. City of Petersburg,* the Fourth Circuit Court of Appeals ruled on two police officers' First Amendment challenge to their Department's social media policy and subsequent disciplinary actions taken against them.

This case involved a series of off-duty Facebook posts between two Petersburg (VA) Police Department officers, Liverman and Richards, in which they aired grievances with the Department's decision to promote officers with, what the plaintiffs perceived as, insufficient experience and the lack of Department leadership that fostered these decisions. The Plaintiffs' postings were liked or commented on by more than thirty people, most of whom were current or former officers of the Department.

However, word of the comments spread to Liverman and Richards' supervisors, who notified the Chief. On the Chief's orders, the officers were disciplined for violating a provision of the Department's social media policy which stated: "Negative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the public's perception of the department is not protected by the First Amendment free speech clause…"

Liverman and Richards brought suit against the Department, claiming a First Amendment Free Speech violation. The trial court sided with the Department and held that the Department's restriction on speech was sufficiently tailored and necessary to maintain order and discipline in the force.

On appeal, the Fourth Circuit overturned the lower court's ruling, holding that this provision was an unconstitutionally overbroad prior restraint on protected speech – describing it as "a virtual blanket prohibition on all speech critical of the government." Such a prohibition, the Court held, could encompass protected speech about matters of "public concern," such as whether the Department enforced the law effectively and fairly or whether its procedures and tactics best protected and served the community. Accordingly, the social media policy could not be used as a management or disciplinary mechanism.

Implications for Departments

As discussed in *Liverman*, the legal test applied to a government employer's prior restraint on free speech – including blanket restrictions on social media communication – is stricter than the test applied to disciplinary action taken *after specific speech* has occurred. The U.S. Supreme Court has held that this increased burden stems from the fact that such prohibitions chill potential speech before it even occurs, instead of addressing isolated incidents on a case-by-case basis. The Fourth Circuit found that the plaintiffs were commenting on matters which were "manifestly significant" to interests of present and future officers and their potential audiences, because the posts addressed officer safety, legal liability, and the potential lack of public trust emanating from inconsistent Department leadership. The Court also held that, apart from generalized allegations of budding divisiveness, the Department presented no evidence of any material disruption arising from the plaintiffs' public comments.

Implications for Officers

If a department's social media policy is not patently unconstitutional, the *Liverman* decision does little to change the traditional test applied to post-speech disciplinary actions. The three-pronged analysis in those situations asks:

1) Does the speech address a matter of *public concern* (as opposed to a personal grievance)?

2) Did the officer speak as a *private citizen* rather than as part of his/her job duties or function? (An officer's on versus off-duty status at the time of the speech is not alone dispositive of this question.)

3) If the answers to questions one and two are yes, then the court will consider whether the officer's interest in the speech outweighs the department's critical need for order, discipline, unity, community trust and cooperation?

Since most department's social media policies aren't likely to be as restrictive as the social media policy in *Liverman*, courts will typically apply the above three-factor test. If the answer to all three questions is not a resounding yes, then courts will likely rule in favor of the government employer.

Officers need to think before they click, and ask themselves if it wouldn't be better to voice a particular thought or feeling in a private social or family setting for catharsis and empathy, or utilize established protocols within the department in pursuit of positive change, rather than publishing it on a global platform.

COURT RULES INCENTIVE OR LONGEVITY PAY ARE INCLUDED IN RETIREMENT BENEFITS BUT COMBINATION OF INCENTIVE AND LONGEVITY PAY IS NOT

By Jill Menning

The Memorandum of Understanding between the Monterey County Deputy Sheriffs' Association ("DSA") and the County of Monterey ("County") stated that a member who served for 20 years with the County and had a performance evaluation deemed "satisfactory" or "outstanding" could receive a performance stipend (4% for "satisfactory" and 8% for "outstanding"). This provision was in effect since 2001. The County never reported the stipends received by employees to CalPERS, and CalPERS, therefore, did not include them in its computation of retirement benefits.

Members of the DSA who did or had received stipends sought to compel the County to report this stipend as an item of special compensation to CalPERS and to compel CalPERS to include this stipend into its calculation of an employee's retirement benefits. In *John DiCarlo, et al. v. County of Monterey, et al.,* plaintiffs relied on California Code of Regulations, title 2, section 571 (a)(1), which defines the items that must be deemed as special compensation. These include: incentive pay which is "[c]ompensation to employees for superior performance" and longevity pay which is "[a]dditional compensation to employees who have been with an employer or in a specified job classification, for a certain minimum period of time exceeding five years." (Government Code section 20636 (c)(2).) Under this statute, Plaintiffs argued that the stipends must be reported by the County as incentive and longevity pay. The trial court ruled in favor of defendants and held that the stipend in the MOU was not reportable because section 571 does not identify a special compensation "that combines longevity and performance elements." The Court of Appeal agreed with the trial court: The stipend was not an item of special compensation reportable to CalPERS and therefore did not have to be included in calculating employees' retirement benefit calculations.

Taken more broadly, this decision will affect public employees with stipends that do not fall into the enumerated types of special compensation. Employers will not have to report such income to CalPERS, which in turn will not be included in the retirement benefits received by an employee. Further, because employer contributions are determined by the scope of compensation, this ruling will potentially decrease the retirement contributions an employer must make on behalf of employees who receive this stipend.

OUR MAYOR SUPPORTS THE BALLOT INITIATIVE, SO THE CITY HAS TO MEET AND CONFER, RIGHT? SUPREME COURT TO DECIDE...

By Paul Bird

If a mayor publicly supports a citizen's ballot initiative to reform his City's public employee pension system – including use of City resources and staff and making speeches in support of the initiative – does his action transform the ballot initiative into a City-sponsored measure that is subject to the meet and confer requirements of the Meyers-Milias-Brown Act (MMBA)?

In 2015 the Public Employment Relations Board ("PERB") ruled "yes." San Diego Mayor Jerry Sanders' use of his position and City resources and staff to support a citizens' ballot initiative to reform the City's pension system were sufficient to trigger the City's meet and confer obligation. But a recent ruling by the Fourth District Court of Appeal (Division One) annulled that decision and found that the City had no obligation to meet and confer over the initiative. *(City of San Diego v. Public Employment Relations Board* (Cal. Court of Appeal, 4th Appellate Dist., Div. 1, Case No. D069630, __ Cal. App. 5th __. Apr. 11, 2017.)

On July 26, 2017, the California Supreme Court granted review of the matter to add to the important public sector labor law cases on its docket (Case No. S242034).

A Brief History Leading up to the PERB Decision

In November 2010, Sanders publicly announced he would pursue a ballot measure to amend San Diego's City Charter to provide 401(k)-style retirement benefits (instead of defined benefit pensions) to newly hired employees. In April 2011, citizen proponents of the measure (called the "Citizens Pension Reform Initiative" or "CPRI") began gathering signatures to place the measure on the ballot while Sanders simultaneously touted the measure in public speeches and interviews.

In July 2011, the City employees' labor unions demanded the City meet and confer before placing CPRI on the ballot, but the City declined. The initiative petition was certified and the City Council put CPRI on the June 2012 primary election ballot. In January 2012, the unions filed unfair practice charges with PERB alleging that the City violated its duty to meet and confer before placing CPRI on the ballot. Less than a month later, PERB issued a complaint, set an expedited hearing on the charges, and

(unsuccessfully) sought an injunction to keep the initiative off the ballot. In June 2012, a majority of the electorate voted in favor of CPRI.

After a hearing, a PERB administrative law judge ("ALJ") ruled that the City had violated the MMBA because Sanders was acting as an agent of the City when he supported the CPRI and, thus, the City had an obligation to meet and confer over the initiative. On appeal, PERB affirmed the ALJ's decision and ordered "make whole" relief that essentially required the City to ignore the City Charter provisions that resulted from the voters' approval of the CPRI.

The Recent Court Ruling

The Fourth District Court of Appeal's recent ruling overturns the PERB finding. First, the court held that a city need not meet and confer over a citizen's initiative that affects terms and conditions of employment for city employees. This issue was left open by the California Supreme Court in *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach*; see also Gov. Code §§ 3504.5(a) and 3505 (imposing the meet and confer obligation on the "governing body").

Next, the court looked to whether the CPRI was truly a citizens' initiative or, as PERB had found, a city council-initiated measure. (If the record had shown that the CPRI was a sham initiated by proponents acting as "straw men" for the mayor or the City, the legitimacy of the initiative would have been questionable.) But the court noted that PERB did not reach this conclusion because there was no evidence to support this theory. The court found the mayor's status as the City's designated labor negotiator was not enough to transform his conduct in support of the CPRI into conduct of the City. There was no evidence that (1) the City Council authorized Sanders to support the CPRI, (2) the City Council ever held out to City employees or the public that Sanders was supporting the initiative on the Council's behalf, (3) Sanders believed he was supporting the initiative on behalf of the Council, or (4) the City Council ratified Sanders' conduct by failing to stop him from supporting the initiative.

The Court concluded that Sanders was acting as a private citizen, not as an agent of the City Council, when he publicly supported the CPRI, and thus no meet and confer obligation arose. Further, the Court held that Sanders' conduct was consistent with his right as a citizen to engage in political activities.

Important Take-Aways

One of the most important aspects of the decision is the Court wholly rejected the long held understanding that courts would always honor PERB's legal analysis unless it is "clearly erroneous." (The Court agreed that is the appropriate standard when PERB is interpreting and applying the labor relations statutes under its jurisdiction; but it emphasized that PERB's interpretation or application of other statutes or common law principles is entitled to no deference.)

Another important facet of the decision is the Court's holding that citizens' initiatives are not subject to the MMBA's meet and confer requirements. This is especially important in that the Court found that though Sanders was mayor and some of his staff participated in efforts supporting the initiative, this involvement was not enough to make Sanders an agent of the City's "governing body" (the City Council). This potentially opens the door for future "citizens'" initiatives affecting public sector employees which are actively supported by elected officials.

But now the court of appeal's rationale will be revisited and the definitive answer provided by the California Supreme Court.

BACKGROUND CHECK LAW EXPANDED TO ENCOMPASS *ALL* LAW ENFORCEMENT APPLICANTS

By Janine Oliker

On July 21, 2017, Governor Brown signed into law AB 1339, which will require an employer to provide the full personnel records of any employee or former employee who applies *for any position* in a law enforcement agency. As of January 1, 2018, section 1031.1 of the Government Code will be revised to read as follows:

> (a) For purposes of performing a thorough background investigation for applicants not currently employed as a peace officer, as required by subdivision (d) of Section 1031, ***or in the case of an applicant for a position other than a sworn peace officer within a law enforcement agency,*** an employer shall disclose employment information relating to a current or former employee, upon request of a law enforcement agency, if all of the following conditions are met:
> ...

[New language emphasized.]

The revised language addresses a gap for positions such as a police dispatcher or evidence clerk, which are not peace officer positions, but nonetheless sensitive positions in a law enforcement agency.

Across the Country

FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT APPLIES TO ALL CALIFORNIA STATE AND LOCAL AGENCIES AND POLITICAL SUBDIVISIONS

By Jim Henderson

In a recent decision, the U.S. Ninth Circuit Court of Appeals, whose jurisdiction includes California, has held that the federal Age Discrimination in Employment Act (ADEA) applies to state and local public employees regardless of the size of the entity (i.e. the number of individuals employed by the entity).

In *Guido v. Mount Lemmon Fire District,* two individuals who had been employed as firefighter captains by a state fire district in Arizona, filed a lawsuit claiming that they had been terminated on the basis of their age and in violation of the ADEA, which prohibits discrimination on the basis of age. The fire district moved for summary judgment on the grounds that it was not an "employer" as defined by the ADEA, since it had fewer than 20 employees and the Act required that an employer employ a minimum of 20 employees. The district court agreed and granted summary judgment.

The plaintiffs appealed to the Ninth Circuit. Despite the fact that appellate courts in no fewer than four other circuits had held that the 20 employee requirement applied to state and political subdivisions of a state, the Ninth Circuit held that the ADEA applied to state and local public sector employees regardless of the number of individuals employed. The court found that the language of the ADEA defining "employer" clearly indicated that the 20 employee minimum applied only to private sector employers, and that the ADEA did not impose a minimum employee requirement for states or their political subdivisions. The court noted that the four other circuit courts that had found that the 20 employee minimum applied had done so on an erroneous analysis that the language of the ADEA was ambiguous. Because the Ninth Circuit held that the language was not ambiguous, it reversed the lower court's decision.

What is the significance of this decision? For most state and local public sector employees in California, this decision will have no significance if the employer employs 20 or more employees. However, for those individuals employed by smaller agencies or districts, this decision makes clear that "size doesn't matter" when it comes to asserting an age discrimination employment claim under the ADEA.

One final note-since there are now conflicting decisions among the U.S. Courts of Appeals, this decision could be granted review by the U.S. Supreme Court to resolve the issue. However, until that happens, this decision is the law in California. (The fact that the case involved a fire district in Arizona does not affect its applicability in California, since Ninth Circuit decisions on federal questions apply to all states within its jurisdiction.)

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