



THE LABOR BEAT

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The Labor Beat is prepared for the general information of our clients and friends. The summaries of recent court opinions and other legal developments may be pertinent to you or your association. However, please be aware that The Labor Beat is not necessarily inclusive of all the recent authority of which you should be aware when making your legal decisions. Thus, while every effort has been made to ensure accuracy, you should not act on the information contained herein without seeking more specific legal advice on the application of these developments to any particular situation.

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On the Home Front

THE LABOR BEAT IS GOING [MOSTLY] PAPERLESS

Messing Adam & Jasmine wants to hear from you! We are mailing out hundreds of paper copies of each issue of The Labor Beat and also emailing to many of the same recipients. In an effort to reduce our ecological footprint, we ask that you *opt in* if you wish to receive—or continue to receive—a paper copy of The Labor Beat. To our associations who receive multiple copies, we will continue to print and mail the newsletter in paper. *However, this issue will be the last issue mailed individually unless you let us know you want to continue to receive it in paper.* Please contact us to opt in! Contact information is available on the back page of this newsletter.

INTRODUCING ...!

Monique Alonso joined MAJ in December after practicing with her own firm for the past 14 years and bringing with her decades of experience in the legal field. She is a tenacious and instinctive general practice trial lawyer with extensive experience litigating employment matters, including wrongful termination, employment discrimination and sexual harassment matters in state and federal courts, and also provides general employment counseling, including hiring, firing and severance issues. Monique particularly enjoys the client relations aspect of her practice and making the type of connections that build trust and yield results.

Monique has received public recognition for her pro bono activities, including the State Bar's Wiley W. Manuel Award for Pro Bono Legal Services. She has been named an Outstanding Pro Bono Lawyer by the Volunteer Legal Services Program as well as receiving repeated commendations from that program.

When not fighting the good fight, Monique can be found playing with her Aussiedoodle, trying to interest her teenagers in hanging out, practicing yoga, traveling, and indulging her long-time love for theater and great food.

Laurie Burgess, the latest addition to MAJ, joined the firm in February. Laurie has spent her entire 23-year legal career representing public and private sector unions and litigating employment discrimination claims. She spent most of her career in Chicago – starting out at a boutique labor firm and later opening her own shop. Five years ago Laurie decided to abandon the freezing Chicago winters to accept a job as in-house counsel to the California Teachers Association where she handled cutting-edge PERB cases and worked on legislation impacting teachers. Missing the broader practice of law, Laurie was delighted to find a new “home” working at MAJ where she can call upon her full skill set as a devoted union advocate, creative problem-solver and fierce

litigator to keep fighting the good fight. When “off-duty” Laurie enjoys walking and hiking with her beloved French Bulldog, Stella, going to art galleries and museums, gardening, and visiting her two sons who live in LA. And having finally settled into San Francisco life, she is thinking about returning to an old hobby – flying planes.

Fighting the Good Fight

MAJ SECURES CAL FIRE FIREFIGHTERS' RIGHT TO OWN THEIR SHIFTS

In December 2018, Messing Adam & Jasmine attorney **Gary Messing** won an important arbitration on behalf of CAL FIRE, Local 2881, protecting Local 2881 members' rights to “own their shifts.” Local 2881 President **Tim Edwards** provided critical testimony, institutional knowledge, and support throughout the effort.

As background, when Local 2881 firefighters are not committed to an emergency, they have regularly scheduled shifts (for example, 72 hours straight is a common shift). What limited predictability these firefighters have in their lives is based on their understanding that these shifts remain relatively stable.

CAL FIRE has tried to eat away at this stability by claiming the ability to assign individuals to new shifts essentially at its whim.

In her December decision, Arbitrator Andrea Dooley held that Local 2881 members “own” their shifts once they are placed on them, and that therefore CAL FIRE has only limited ability to require firefighters to cover other shifts. Specifically, CAL FIRE had violated the Memorandum of Understanding (“MOU”) by forcing field Battalion Chiefs onto a rotating schedule without their consent. MAJ and Local 2881 President Edwards mustered the language of the MOU, comprehensive evidence of past practice, and CAL FIRE's own policy pronouncements to point the arbitrator towards this conclusion. The MOU's provision at issue permit CAL FIRE to move firefighters off of those shifts (without mutual agreement) only if: 1) there are a maximum of two shift changes per 28 day period, and 2) the second change is back to the firefighters original shift.

The rotation that was the subject of the arbitration in Sonoma-Lake-Napa Unit was one example of a shift change that did not put people back to their original shift within 28 days. The Decision and Award therefore held that CAL FIRE was required to get the agreement of the affected firefighters before implementing the new change.

In securing this win, MAJ and President Edwards protected a much broader right than the right not to be forced onto a shift rotation. A shift rotation is just one way in

which management has attempted to make firefighters work shifts in violation of the MOU. But now, managers throughout CAL FIRE have been formally put on notice that firefighters categorically own their shifts, and that the only ways to schedule someone to cover a shift that was not their original shift are within the strict limits of the MOU: a) two or fewer changes – one out and one back – in any 28 day period, or b) with the union’s permission.

Local 2881 members, as with many firefighters throughout the state, already must work long and unpredictable hours. And with the lengthening fire season and increasingly intense fire activity, this has only been getting worse. This is therefore an important win by Local 2881 and MAJ – ensuring Local 2881 firefighters have the right to get the benefit of the bargain they struck, and not to be forced to hand over the remaining control they have without being consulted or compensated.

MAJ, in coordination with Local 2881’s new executive team, has vigilantly pursued the promised remedy in the Award in the face of delay by CAL FIRE, and will continue to protect Local 2881 firefighters’ rights statewide.

FRESNO COUNTY PUBLIC SAFETY ASSOCIATION’S FIRST MOU SCORES BIG GAINS

The Fresno County Public Safety Association (“FCPSA”) fought for many years to represent a variety of predominantly safety classifications within Fresno County. Although they reached that goal a couple of years ago, it was not until recently that the contract negotiated by the previous representative expired, and the FCPSA could negotiate a new contract on behalf of their members. The FCPSA bargaining team was made up of President **Eulalio Gomez, Vic Prado, Jeri Nowak, Meng Thao, Monica Diaz, and Julie Jimenez**. **Jason Jasmine** served as the Chief Negotiator. Due in large part to the rapidly growing need for Correctional Officers in the jail, the bargaining unit is expanding rapidly, and now includes over 1,000 Fresno County employees.

Ultimately, FCPSA’s first contract was one of the most lucrative in the County of Fresno in recent memory. In a contract with a term of a little less than two years, salary increases were between 2% and 2.5% upon Board ratification, and an additional 2% one year after Board ratification. Correctional Officers received an additional 1% equity adjustment in January of 2019. Non-Correctional Officers who were already at top step also received a \$1,000 bonus.

Critically, due in part to difficulties in recruiting enough new Correctional Officers to fill many vacancies, the salary steps (for all classifications represented by FCPSA) were adjusted from 9 down to 5 steps, which increased the amounts between steps from 3.125% to 5%. Addi-

tionally, due to the conversion, many individuals received immediate additional increases as they were transferred into their new steps. Due to the step conversion, many employees are guaranteed larger increases every year for the next 5 years even though this is only a 2-year contract. For many employees, those additional increases are well into the double digits.

FCPSA was also able to secure additional contributions from the County toward health care (an additional \$650 per year in 2019, and an additional \$650 per year on top of that in 2020). CTO caps for those who are eligible increased, as did Bilingual Pay and Training Officer Differentials. Finally, the language and requirements regarding shift premiums and holiday pay eligibility were improved.

All told, the value of the new increases in this 2-year contract averaged well over 10% for the majority of the bargaining unit.

These were excellent first steps in moving forward on behalf of a group of employees that had been woefully neglected by the previous representatives. FCPSA returns to the bargaining table in a little over a year.

FRESNO CORRECTIONAL SERGEANTS SETTLE FOR TWO-YEAR DEAL

The Fresno Correctional Sergeants bargaining team headed by President **Tom Mendoza** and bargaining team members **Jeff Penry** and **Hector Lara** came to an agreement with the County after six months of bargaining. **Gary Messing** served as the Chief Negotiator.

Salaries will increase by 3% in January 2019, with an additional 1.25% equity increase effective July 15, 2019, and a 2% increase in January 2020 with a 1.25% equity increase effective in July 2020. The raises, compounded, add up to just under 8%.

Additionally, various bargaining unit members benefited from an increase between salary steps from 3.125% intervals to 5% intervals. This implements an adjustment from nine steps to five.

Also, County contributions to health insurance increased into the Fresno Deputy Sheriffs Association medical insurance trust. Contributions increase \$10 per pay period for individuals and an additional \$30 increase per pay period for those with dependent coverage. The parties’ agreement reopens for health insurance, for increases only, in the second year of the MOU. This amounts to a total increase for an employee with dependents of \$40 per pay period.

Various other issues were addressed with improvements in language on standby pay, holidays and the like. For

example, bilingual skill pay increased from \$23.08 per pay period to \$50.00 per pay period.

The Association was pleased with the communication established between the DSA and the County's bargaining team and appreciated the responsiveness of the Board of Supervisors to issues raised by the Association in bargaining.

WAGE REOPENER FOR PEACE OFFICERS' ASSOCIATION OF PETALUMA RESULTS IN 12.5% RAISE

MAJ attorney **Gary Messing** represented the Police Officers' Association of Petaluma ("POAP") in a limited reopener of its existing Memorandum of Understanding to negotiate a salary increase. At the table with Gary was **Garrett Glaviano**, POAP President, **Ryan McGreevy**, and **Mario Giomi** (another POAP member, **Mike Page**, was also deeply involved in these negotiations but recently left the team due to his pre-scheduled retirement). The bargaining unit consists of sworn members, including police officers, detectives, and sergeants, as well as non-sworn employees, such as evidence technicians, dispatchers, and Parking Enforcement Officers.

The parties recently reached an agreement for a salary increase over three years retroactive to January 1, 2018 equal to 12.5% compounded. The breakdown is as follows: 4% increase as of January 1, 2018, 4% increase as of January 1, 2019, 2% as of July 1, 2019, and 2% as of January 1, 2020.

Similar to many other police departments, the Petaluma Police Department has been suffering from a staff shortage caused in no small part by the extremely competitive environment for police salaries. Heading into the negotiations, POAP employees were facing a substantial compensation gap relative to similarly situated employees in comparable police departments, which resulted from a decade of sluggish wage growth as the recession severely affected City finances. Between 2008 and 2018, while POAP was able to counter City proposals to reduce wages during the throes of the downturn, it obtained only a single wage increase of 4%. The City's relatively low salaries have led to retention and recruitment problems as veteran officers have quit to join higher paying jurisdictions, while job openings announced by the City have gone unanswered.

Despite the acute shortage and its demoralizing effect on the Department's hard-working officers, during negotiations for the reopener spanning over a year and a half, the City stubbornly refused sound offers from the union to make employee salaries competitive. It maintained that City finances were still on shaky ground from the recession and thus it could not afford any significant raises. Consistent with this position, the City initially of-

fered a one-time bonus of 2%, which was non-pensionable.

After one and a half years at the bargaining table, the City raised its offer to a mere 3.5% non-pensionable bonus. POAP declared impasse to trigger interest arbitration, which is mandatory under Petaluma's Charter. In response, the City threw up arbitrary, administrative roadblocks to avoid, or at least significantly delay, arbitration. The City argued that a local ordinance required the parties to submit their dispute to a dispute-resolution mechanism effectively controlled by the City prior to interest arbitration. However, the ordinance, enacted in 1971, expressly provided that the City use these "suggested" administrative procedures merely as "guidelines."

After the City insisted that these "guidelines" must apply before interest arbitration, the union immediately sued the City in Superior Court to compel interest arbitration, arguing that the City Charter's interest arbitration provisions, which were approved directly by the voters in a referendum, and mandated immediate interest arbitration after impasse is declared, trumped the "suggested" procedures provided in the 1971 City Council ordinance.

Ultimately, the City relented to the pressure. It agreed to first mediate the dispute, and if there were no resolution at that stage, the parties would immediately head to interest arbitration. The mediation was conducted by Arbitrator Christopher D. Burdick resulting in an agreement to salary increases over three years equal to 12.5% compounded. The parties specifically chose the three-year term to delay the next round of negotiations while the City pursues the passage of a tax measure to enhance the City's finances. Mediation was successful due to the excellent job performed by Arbitrator Burdick as well as the cooperation of the City's representatives.

San Francisco MAJ attorney **Matthew Taylor** assisted in filing the lawsuit and preparing for the mediation.

We believe that this agreement sets a solid foundation for the Petaluma Police Department to replenish its ranks and rebuild its once flagging morale.

AFTER FACTFINDING HEARING, SCPSA ENTERS INTO NEW MOU

Messing Adam & Jasmine partner **Gary Messing** and associate **Teal Miller** of the Sacramento MAJ office recently assisted the Sacramento County Probation Supervisors' Association (SCPSA) through the factfinding process after negotiations with the County for a new MOU reached impasse. SCPSA President **Adam Dubey** acted as the primary witness for the hearing and **Kevin Davis** was the SCPSA panel member. The factfinding process and recommendation from the panel chair, Andrea

Dooley, ultimately resulted in an offer from the County SCPSA was willing to accept.

The post-hearing offer included a 4% increase in fiscal year 2018-2019 and a 3% increase in fiscal year 2019-2020, and 2020-2021. This was an improvement from the County's final offer before impasse of 3% in 2018-2019, 2% in 2019-2020, and 2020-2021. Further, at the factfinding hearing, SCPSA argued for an equity adjustment to address a compaction issue with the subordinate class: Senior Probation Officers. As a result, SCPSA members will receive a 3% total equity increase over the term of the MOU.

SCPSA was also able to secure a one-time opportunity to cash out an additional 40 hours of vacation time in 2020. This 40 hours is in addition to the 40 hours SCPSA members are allowed to cash out annually.

Additionally, the new MOU includes an increase to life insurance from \$18,000 to \$50,000 with no charge to the employee and various other language improvements. In addition to other improvements on leave language, the new MOU expands the covered relationships for sick leave to include "any other close relative or child who resides with the employee" and includes the death of a great grandparent or great grandchild as reasons for bereavement leave.

YOLO DSA GETS MIDTERM BUMP

The Yolo Deputy Sheriffs Association received a midterm salary increase based on the adoption of a Total Compensation Survey that is implemented annually. The MOU expires in 2020.

The bargaining unit consists of DA Investigators and Deputy Sheriffs. Deputy Sheriffs received a 4% salary increase and the Investigators received 3.34% increase in December 2018 retroactive to July. Overtime was also adjusted and compensated for that time period.

Other benefits, like health insurance, also increase during the term of the MOU, since the insurance contributions are paid based on a formula.

Evan Alder, President of the DSA, was involved in ensuring that the Total Compensation Survey was up to date and accurate. **Gary Messing** is the Chief Negotiator for the Deputy Sheriffs Association.

DON'T GIVE UP!

By Steve Kaiser

A note to ALL of our public sector clients: you probably have a public pension with CalPERS, CCCERA, SFERA or another of the several local retirement agencies. They are all very fond of telling you to plan ahead for retirement, and they are right! But here's something they

probably didn't tell you: you may try to get a disability pension and lose out because you didn't file in time!

Disability retirement laws are special; they are governed by rules all their own, just like Workers' Compensation benefits. But don't think that the two systems automatically trigger each other, because they don't. If you read your PERS booklet you'll see this but it's easy to miss. Here's the scenario:

After a long career as a firefighter or cop, you're about 50 years old and pretty beat up. Maybe you have arthritis or you carried out so many distressed and injured people from dangerous situations that your back and nervous systems are both shot, so you retire while you still feel pretty much ok, and your doctor says your problems are just temporary.

A year later, you are talking to your GP, and she tells you that you might have congenital degradation of your nerves and you should see a specialist, so off you go. But first you call your retirement system and ask what you should do if it turns out that you have a previously undiagnosed work-related problem that led you to retire a year earlier, and they say that if you find out it's work related you should inform them.

Off you go to the specialist, who says you have a degenerative problem that could have been caused, or at least aggravated, by your past work. You contact your Workers' Comp attorney who files a Worker's Comp claim for you and you are scheduled to see an Agreed Medical Examiner.

Five months later, the report comes out and, indeed, your cumulative trauma injury is found to have been caused by your job. so you collect together your Retirement forms and file them a couple of months later. But lo and behold, the Retirement System denies your application because it was filed more than six months after you retired! You haven't even started and it's already over!

DON'T STOP NOW! When you retired, your doctor told you that you were ok, and you could go back to work, right? And you didn't know that you had work related problems aggravating your congenital problems. Retirement laws are set up for this situation if you know how to tell the Retirement System properly, and even then they might be very skeptical. (Many people make a claim like yours and try to hide the fact that their application is late.) For example, Government Code section 20160 permits you to file a disability claim after you have retired, *if you find out later that you had been disabled when you retired, but you must file within six months of learning that.* This sounds screwy, doesn't it: you were disabled when you retired but didn't know it!

We successfully handled a case like this recently before CalPERS, and our 52 year old client now is looking forward to a substantially increased retirement for the rest of his life. Do the math: do you think it was worth his while?

Instructions: be sure to file your Disability Retirement Claim promptly after you learn that you are disabled. Don't count on Workers' Compensation to cover your Disability Retirement application, and retirement laws are *really* confusing! If you need it, we're here to help!

In the News

ANTI-LABOR FORCES BACK PETITIONS TO THE U.S. SUPREME COURT TO END EXCLUSIVE REPRESENTATION OF UNIONS

By Gregg McLean Adam and Matthew Taylor

We have previously reported on the U.S. Supreme Court's June 2018 decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*. There, a 5-4 majority of the conservative justices on the Court, led by Justice Samuel Alito and joined by Trump appointees Neil Gorsuch and Brett Kavanaugh, overturned 40 years of precedent in ruling that no members of a union can free ride on the coattails of dues paying members. The decision was cloaked in First Amendment rationale—but just 7 years after the Court's *Citizen's United* decision permitted unlimited expenditures by corporations in elections, it reeked of a political smack down of labor unions and their engagement in the political process.

By some estimates, *Janus* reduced public employee unions' coffers by almost \$3 billion.

Now, anti-union advocates are doubling down. Petitioning the U.S. Supreme Court to hear post-*Janus* actions, they seek to use the ruling in *Janus* to prohibit states from designating "exclusive bargaining representatives" under collective bargaining laws.

What does this mean? It means that, for example, just because Myhometown POA was the preferred bargaining agent for a majority of the cops who worked for that police department, a different group of employees would not be stopped from having a different bargaining agent at the table. In other words, if these new judicial challenges are successful, multiple unions and perhaps even individual employees could demand a seat at the bargaining table. Rather than the workable bilateral process that we have all become accustomed to, collective bargaining could descend into some unglorified free for all.

All of this is, by design, intended to undermine organized labor in the public sector.

In one of these post-*Janus* suits, *Kathleen Uradnik v. Inter Faculty Organization*, Uradnik, a Minnesota state college professor, argues that state law forcing her—a non-member of the union—to be bound by the actions of the exclusive bargaining agent as it negotiates on her behalf is a form of compelled speech and association that violates the First Amendment.

A federal district court and the Eighth Circuit Court of Appeals rejected her argument and upheld the legality of exclusive representation. But with the perceived tailwind of *Janus*, she is petitioning the U.S. Supreme Court to take on her case. The same is true in *Theresa Bierman, et al. v. Tim Waltz, Governor of Minnesota*, where the arguments are virtually identical to those in *Uradnik*. The union's response in *Uradnik* and the State of Minnesota's response in *Bierman* to the petitions are due in March, after which the High Court will decide whether to grant review. If review is granted, start worrying.

By pulling the plug on exclusive representation, the conservative advocacy groups funding *Uradnik*, *Bierman*, and similar cases aim to put organized labor on life support.

Required exclusive representation is a cornerstone of the labor movement. One union speaking for all employees in the bargaining unit, whether it be to negotiate a new contract or to influence policy through meet and confer and the grievance process, fosters unity among employees and strengthens their collective voice. The repeal of laws protecting exclusive representation would cause this singular voice to be drowned out by a cacophony of voices as multiple employee groups would represent different factions within a bargaining unit and ultimately compete for concessions from their employer. Employers would naturally take advantage of these differences and play these different groups against each other to secure anti-labor terms in contracts.

The plaintiffs in *Uradnik* and *Bierman* rely on *Janus* to make their case. In *Janus*, the Supreme Court ruled that unions' collection of "fair share fees" or "agency fees" from non-members violate these employees' First Amendment rights. The Court reasoned that the First Amendment protects individual employees from being required to "subsidize" any union activity whatsoever because such activity is inherently political. This principle provides the framework to attack exclusive representation in *Bierman* and *Uradnik*. In *Bierman*, the plaintiffs in their petition to the Court analogize a union's function as an exclusive representative to "lobbying" and asserts, "Bluntly stated, Minnesota is forcing certain citizens to accept a government-appointed lobbyist." *Uradnik* states in her petition that it would be a "striking anomaly" if public workers are no longer compelled to pay "agency

fees” (and thus subsidize union speech) but are still forced to accept that union speech, which they may not support or may even oppose, shall serve as their own. She further emphasizes that “... if *Janus* stands for anything, it is that there is no labor-relations exception to the First Amendment.”

These arguments are short-sighted. It is lost on these plaintiffs that exclusive representation of groups is a fundamental component of our democracy. Congressional representatives exclusively represent their districts even though a multitude voted against them. And government employers sitting on the opposite side of the bargaining table from unions enjoy uncontested exclusive representation of management.

Exclusive representation at the bargaining table also serves a vital government interest that outweighs any impingement on non-union members’ rights to free speech and free association. Collective bargaining fosters “labor peace.” Business interests understood that labor laws which enable collective bargaining were preferable to workers’ continuously striking and taking to the streets, which often resulted in violence in the past. Even Supreme Court Justice Alito, the author of the *Janus* opinion, gave credence to “labor peace” in his opinion on behalf of the Court’s majority. Speaking in regard to the pre-*Janus* world before the Court struck down “agency fees” as unconstitutional, he noted that in those jurisdictions where “fair share” fees were not required, there were few breaches of “labor peace” as unions were still serving well as the effective exclusive representatives for workers. He therefore pointed to the continued existence of exclusive representation, without the collection of “agency fees,” as a constitutionally sound means to further the government’s interest in “labor peace.”

While the Supreme Court has yet to decide whether it will even consider these cases, we are certain that the fight from anti-union activists will continue, be it against exclusive representation or other facets of organized labor. We urge all union leaders to be in contact with their counsel and their membership to remain vigilant and prepare to press forward in the face of any eventuality. The result in *Janus* has yet to break the back of labor. On the contrary, signs point to a renewed vigor among labor forces to strengthen their solidarity and adapt to changing conditions. We need to show the same fortitude if the Supreme Court takes on *Uradnik*, *Bierman*, or a similar case.

[Also published in PORAC Law Enforcement News.]

CALIFORNIA SENATE BILL 1421—PEACE OFFICERS: RELEASE OF RECORDS

By Monique Alonso

Effective January 1, 2019, Senate Bill 1421 significantly amended California Penal Code §§ 832.7 and 832.8 by expressly making certain categories of peace officer personnel files available to the public under the Public Records Act (“PRA”). Until Governor Brown signed SB 1421 in September 2018, the contents of peace officer personnel files were confidential, and information in them could only be accessed in the course of litigation and then only after compliance with the statutory *Pitchess* process. Pen. Code § 832.7(a). SB 1421 dramatically altered that long-established statutory confidentiality, by allowing public access to four particular categories of records kept in peace officer personnel files, comprising broad information relating to incidents involving (1) the discharge of a firearm at a person; (2) use of force resulting in death or great bodily injury; (3) sustained findings by a law enforcement agency or “oversight agency” of “sexual assault involving a member of the public,” and; (4) sustained findings by a law enforcement agency or “oversight agency” of specified instances of dishonesty. Pen. Code § 832.7(b)(1)-(2).

Predictably, city and county agencies have been awash in PRA requests since even before SB 1421 took effect. For the time being, however, SB 1421 and its scope is in the province of the courts. Even before January 1, 2019, attorneys for law enforcement unions sought the California Supreme Court’s guidance on whether compliance with the statute required that records created prior to January 1, 2019, when they were expressly deemed confidential, be disclosed where the statute itself was silent on whether it reached back in time to strip that decades-long protection from peace officer personnel records.

While the Supreme Court declined to take on the question before the statute took effect, it may yet entertain the issue in the near future. Almost immediately after January 1, 2019, unions statewide filed a series of actions requesting restraining orders precluding cities and counties from producing files requested under the PRA seeking information pre-dating January 1, 2019. In many cases, those cities and counties did not oppose the actions, taking the position that their interest was not in the legitimacy of the statute but rather in following the law, which at this point is uncertain. Instead, in many cases media and civil rights organizations – the same organizations responsible for the voluminous PRA requests throughout California – intervened in the actions as interested parties seeking enforcement of the statute.

While the beginning months of this year saw some conflicting rulings, with one Southern California court granting an unopposed preliminary injunction, the tide among lawsuits that have gone past the restraining order stage

is favoring a release of records. Only one action is currently before a California Court of Appeal, while in several other lawsuits law enforcement unions declined to bring appeals following denials of motions for preliminary injunction. The matter on appeal to the First District arises from collective motions for preliminary injunction filed in the Contra Costa Superior Court by six Northern California law enforcement unions. Only two of the six agencies opposed; the ACLU and certain media organizations intervened and opposed. The court issued a single opinion on the merits, finding that SB 1421 was meant to include content created prior to January 1, 2019. In so finding, the court denied the unions' motions but also delayed implementation of its decision for ten days to allow the unions to file an appeal with and seek a stay from the First District Court of Appeals. The First District denied the stay and set March 19 as the date that document production in response to relevant PRA requests could resume.

Whether the California Supreme Court does take the question on remains to be seen. In addition to the request for review sought before the statute's implementation, it has already twice denied requests for stay in connection with potential appeals of lower court actions in Southern California. The initial flurry of lawsuit activity appears to have calmed recently with the consistent rulings coming from lower courts denying injunctions. With review pending before the First District and no appeals presently on any other lower court rulings, legislative action, in the form of an amendment clarifying the reach of the statute may moot the matter or we may yet see further appeals.

FUTURE OF CALIFORNIA PENSION LAW HANGS IN THE BALANCE BEFORE THE CALIFORNIA SUPREME COURT

By Gregg Adam

The following article was originally written before March 4, 2019, when the California Supreme Court issued its decision in CAL FIRE, Local 2881 v. CalPERS. The Court ruled against Local 2881, finding that "the opportunity to purchase [additional retirement service credit] was not a right protected by the contract clause." Having made this initial finding, the Supreme Court concluded: "we have no occasion to address the second issue raised by the parties: whether the elimination of the opportunity to purchase ARS credit was an unconstitutional impairment of public employees' vested rights." Eyes are now turned towards the next chapter – Alameda County Deputy Sheriffs' Association v. Alameda County Employees Retirement System [discussed below].

On December 5, 2018, the California Supreme Court heard arguments in *CAL FIRE, Local 2881 et al. v. CalPERS et al.* ("CAL FIRE"), the first of six cases pending before the state supreme court, which will collectively go a long way towards deciding what protection public pensions re-

ceive under California law going forward. CalPERS declined to take a position on the merits of the case. In addition, unusually, Governor Brown's Legal Affairs Office, rather than the state Attorney General, argued the State's position. Your columnist argued on behalf of our state firefighters.

All of these cases involve legal challenges brought against the Public Employee Pension Reform Act of 2012 ("PEPRA"). All of these cases attack PEPRA on its fringes. The central tenets of PEPRA—increased contributions by current employees and lower tiers of benefits for new employees—have largely been embraced by unions and employees. What is before the Court are attacks on existing benefits promised to employees who began working *before* PEPRA took effect. Each of the cases, which are at different stages before the Court, raise complex legal questions. But central to them all is: What does the California Rule stand for, and to which pension promises should it apply?

The California Rule is an interpretation of the "Contract Clause" in Article 1 section 9 of the California Constitution. California's Contract Clause is modeled on the federal Constitution's Contract Clause, and both generally prohibit the government from passing laws that infringe on contract rights (with certain limitations). The California Rule is a special interpretation of these clauses that developed over many public employee pension rights cases. The rule prevents public employers from changing pension promises made to current employees unless the government can meet a very stringent test. Beginning with *Allen v. City of Long Beach* in 1955, the California Supreme Court has required the employer, among other things, to show that the change to pension rights is 1) reasonable, 2) "bear[s] some material relation to the theory of a pension system and its successful operation," and 3) provides "comparable new advantages" to offset any change that has a detrimental impact on a particular employee's pension. Notably, the California Rule is followed, in one form or another, in approximately a dozen other states.

The six cases before the California Supreme Court all turn, to one degree or another, on the continuing validity of this rule.

Three of these cases are on appeal from the First District Court of Appeal in San Francisco and involve changes made by some county retirement boards under the County Employees' Retirement Law to what compensation elements count towards calculation of an employee's pension: *Marin Association of Public Employees et al. v. Marin County Employees' Retirement Association et al.* ("MAPE"); the *CAL FIRE* case; and *Alameda County Deputy Sheriffs' Association v. Alameda County Employees Retirement System* ("ACDSA").

Another case, *Hipsher v. Los Angeles County Employees' Retirement Association et al.* (brought by a former firefighter), involves whether a new felony forfeiture rule enacted under PEPRA can be applied to an employee who began work before PEPRA was passed. Disregarding the *Allen* line of cases and the California Rule, the Court of Appeal in *Hipsher* ruled that the county retirement board could significantly reduce the pension benefits earned by the employee after he pled guilty to federal felony gambling charges. The Court of Appeal declined to follow a prior Supreme Court case, *Wallace v. Fresno*, from 1954, which invalidated an effort to similarly deprive a retired employee of previously earned pension benefits after a felony conviction.

The fifth case, *McGlynn v. State of California*, involves a group of judges who were elected in the primary election of June 2012, before PEPRA was enacted, but who did not take their judicial office until January 2013, after PEPRA took effect. The judges were expressly promised pension benefits that existed at that time they were elected (i.e., pre-PEPRA). Subsequently, however, in 2014, more than a year after taking office, they were advised that they would receive a lower PEPRA pension formula.

The sixth case, *Wilmot v. Contra Costa County Employees' Retirement Association*, is discussed in an article that appears at page 12 of this issue. See "Commit a Felony On the Job and Risk Forfeiture of Accrued Pension Benefits When You Retire."

The first decision will likely be issued in *CAL FIRE*. That case involves Government Code section 20909, which was enacted by the Legislature in 2003. The statute expressly provided that an employee who performed five years of state service could purchase up to five years of additional retirement service credit ("ARSC"). The service credit would not reduce the minimum age or service requirements for retirement and the employee had to pay the entire cost of the benefit (including both the employer and the employee share). Critically, the statute provided that the employee could make the purchase of ARSC "at any time prior to retirement." PEPRA eliminated the benefit, even though many employees were still performing the five years of requisite service in order to be eligible to make the purchase. One employee who sued was only 16 days short of securing five years of service when the benefit was withdrawn. Each plaintiff argued that they had relied on the existence of the benefit in continuing to work for the state.

Both the trial court and the Court of Appeal upheld PEPRA against the challenge.

In the parties' briefs, the union argued that the elimination of section 20909 violated the California Rule, and a near-unbroken line of case law going back to 1955, because a benefit was eliminated and no comparable off-

setting benefit was offered in return. Unusually, once the case arrived in the Supreme Court, the Governor himself took over the defense of PEPRA from the Attorney General Xavier Becerra (perhaps because the latter faced reelection in November 2018). Governor Brown has taken an aggressive posture: arguing, in spite of existing case law, that California law only protects pension benefits already earned and gives the legislature free reign to reduce pension benefits prospectively.

Multiple amici groups (friends of the court) filed briefs on both sides of the case. Multiple peace officer associations advocated to maintain the California Rule.

This set the stage for oral argument on December 5 in Los Angeles. The seven justices (six permanent members of the court and one justice sitting in a temporary capacity while Governor Brown's final appointment, Josh Grobin, awaits confirmation) were vigorous in their questioning of the advocates for each side. (Video of the argument is available at the Supreme Court website (<https://www.courts.ca.gov/35333.htm>); click on the link at Supreme Court Oral Argument 2018-12-5.) Some justices questioned why ARSC could not be freely withdrawn before an employee made the purchase of the service credit. Others seemed dubious about the Governor's argument that pension benefits may be freely changed going forward. Most of all, the Justices seemed to be seeking some help in drawing a line over what benefits are protected by the Contracts Clause and what are not. Justice Goodwin Liu pointed out that employees rely on many benefits, such as continuing healthcare benefits, in agreeing to begin or keep working for a public employer.

In rebutting the Governor's argument that pensions could be changed freely by employers prospectively, your columnist drew from the benefit structure of San Jose police officers in Tier 1. The issue was reliance and how much employees rely on promised future benefits. San Jose's system of course provides police officers with 2.5% for their first twenty years and an accelerated 4% formula beginning in year 21, for a cumulative 90% benefit. As I pointed out, if the Governor's argument is accepted, the City could freely withdraw the 4% benefit on the cusp of a San Jose officer reaching year 21 and after they had passed over other opportunities (such as moving to a 3% at 50 jurisdiction). Let's hope our Supreme Court does not permit those shenanigans.

Many believe that the Court could reach a narrow decision in *CAL FIRE* and simply determine that right to purchase ARSC was not a pension benefit at all but simply an option and therefore not subject to the more dynamic protections of the California Rule. This would defer termination of the broader challenges raised in the *Alameda* case or another case. It is doubtful that the Court will ultimately decide all five of these cases on their mer-

its. What is more likely is that it will decide two or three of the cases and remand the others back to the lower courts for determination consistent with any rulings it does issue.

Much remains speculative, but it is fair to say that 2019 is shaping up as the year of pension decisions in California.

Speaking of pensions, whereas now former Governor Brown drove an unprecedented attack on public employee pensions in the case described above, it was good to see that in its first proposed budget, the new administration is calling for \$7.8 billion in payments above what is required by law to CalPERS and CalSTRS.

Around the State

SANTA CLARA FIRE FIGHTERS JOIN IN THE FIGHT TO RESTORE NET NEUTRALITY

By Teal Miller

California experienced one of its worst fire seasons in history in 2018, including the largest recorded fire, the Mendocino Fire Complex. Santa Clara County Central Fire Protection District, like many other departments around the state, deployed resources to help battle the Mendocino Fire Complex. Santa Clara County Fire sent a specialty vehicle equipped to track, organize, and prioritize routing of resources from around the state and country to sites where they are most needed. This function relies heavily on wireless internet access.

In the middle of the fire, Santa Clara County Fire discovered that its wireless service had been throttled by Verizon. Verizon slowed data speeds to next to nothing. This meant that firefighters couldn't communicate with each other in critical moments fighting the fire. Santa Clara County Fire immediately contacted Verizon and demanded that their data speeds be returned to normal. Instead of solving the problem, Verizon insisted that Santa Clara County Fire upgrade their data plan for substantially more money. Given no choice, Santa Clara County Fire purchased the more expensive plan so that it could continue helping control the fire.

In June 2018 the Federal Communications Commission (FCC) repealed net neutrality, the federal rules that kept internet companies from artificially slowing internet speeds for its customers. In other words, net neutrality is the principle that Internet Service Providers (ISPs) must treat all data on the internet equally and cannot discriminate against certain services, users, content, applications, or methods of communications. With the repeal of net neutrality, ISPs now have broad authority to slow down certain websites or service for certain users unless users pay more.

This is what Verizon did to Santa Clara County Fire. Because Santa Clara County Fire was using data so heavily, Verizon slowed service speeds to next to nothing, making it functionally impossible to communicate. When Santa Clara County Fire demanded Verizon return the services to normal, Verizon refused unless Santa Clara County Fire paid a much higher fee.

After the issue in the Mendocino Fire Complex, Santa Clara County Fire has joined in a lawsuit filed by more than three dozen entities, including state attorneys general, consumer advocacy groups, and tech companies. This lawsuit seeks to reverse the FCC's decision to repeal net neutrality rules and ensure that consumers, public safety entities not least among them, have access to the open internet.

Oral arguments were held on February 1, 2019 in front of a panel of judges in the US Court of Appeals for the District of Columbia Circuit. Santa Clara County Fire's involvement laid the foundation for an important argument in this case: that the FCC failed to address the potential impact that blocking and throttling could have on public safety when it made its decision to repeal net neutrality. This failure could mean that the FCC's decision to repeal net neutrality was arbitrary and capricious, requiring that it be overturned.

ALWAYS ASSERT ATTORNEY-CLIENT PRIVILEGE OVER COMMUNICATIONS WITH YOUR ATTORNEY REGARDING LEGAL ADVICE

By Wendi Berkowitz

A new decision from the Fourth Appellate District (San Diego), *City of San Diego v. Superior Court*, re-emphasizes the importance of asserting the attorney-client privilege over confidential communications between clients and their lawyers in which clients ask for and/or attorneys provide legal advice. At issue in *San Diego* were questions of whether the attorney-client privilege had been improperly compromised and ethical rules breached by an attorney questioning a person represented by another attorney, and if so, whether the questioning attorney should be disqualified from the lawsuit. The Court of Appeal determined that a privileged conversation *had* occurred and the lawyer conducting the questioning into the privileged conversation had done so improperly. The Court also ruled, however, that there was no "genuine likelihood" that the misconduct would have a "substantial continuing effect on the judicial proceedings" and therefore, disqualification of the lawyer was not an appropriate remedy.

This case is interesting for law enforcement in significant part because of who was involved and how the issue arose. The client was a San Diego police homicide detective named Hoover. Hoover, represented by lawyer Gil-lean, had filed an employment lawsuit against the City of

San Diego for harassment and retaliation in connection with complaints she made about perceived investigative failures by the SDPD's homicide unit. Two years later, Gilleon filed a separate lawsuit against the City of San Diego on behalf of a sexual assault victim, alleging in part that the SDPD failed to investigate the assault properly. Hoover had nothing to do with this second lawsuit. However, a published article on the sexual assault case referenced a "police report." The SDPD began an internal affairs investigation to determine if a police report had indeed been released to the press and if so, who was the source. Hoover was identified for questioning.

At Hoover's first interview, she was represented by her union rep. She was ordered to respond to questioning under pain of an insubordination charge and related discipline. Although she had no involvement in the sexual assault case, she admitted that she accessed and reviewed the report, although she did not turn it over to or discuss it with anyone. She was asked about her communications with Gilleon and her rep objected on the basis of attorney-client privilege. Ultimately, she appears not to have revealed attorney-client communications that day.

The City Attorney's office decided later that day that Hoover could properly be asked about communications between herself and her lawyer Gilleon insofar as the questions related to the sexual assault case and the leaked police report. A second interview was set for one week later. The City Attorney did not seek any court guidance on the issue before engaging Hoover in the second interview. Before the second interview, Gilleon objected on the grounds of attorney-client privilege to any questioning of Hoover on the subject of his communications with her.

At the second interview, Hoover was represented by Pinckard, an attorney hired by her POA. A Deputy City Attorney was present and ended up asking Hoover some questions during the interview. In this second interview, Hoover spoke about receiving a group text message from Gilleon regarding the sexual assault case, and stated that she called him about a different issue; during that conversation, the topic of the sexual assault investigation arose. After her conversation with Gilleon, Hoover decided to look at the police report regarding the sexual assault investigation but she did not share or discuss it with Gilleon or with anyone else. When the investigators asked her about her conversation with Gilleon before she accessed the report, Pinckard, her POA attorney, re-asserted the attorney-client privilege. The Deputy City Attorney (who was supposed to be an observer only) asked a clarifying question, to which Hoover responded that her own lawsuit dealt with claims of negligent investigation and failure to properly investigate (which, recall, were also subjects of the sexual assault lawsuit brought on behalf of Gilleon's other client). The Deputy City At-

torney asked another follow-up question, whether the sexual assault investigation was "encompassed" in Hoover's case. Pinckard objected again that this was the subject of attorney-client privilege. The investigators further questioned Hoover, who was not able to differentiate what she had learned from Gilleon from what she had learned from media reports, about her conversation with Gilleon.

Hoover's motion to disqualify the entire City Attorney's office from Hoover's harassment and retaliation case followed. The trial court determined that the IA interview violated the attorney-client privilege and the ethical rule against an attorney communicating with a litigant whom the attorney knows to be represented by counsel. Consequently, the trial court ruled that the appropriate remedy was disqualification of the City Attorney.

The Court of Appeal ruled:

- (1) Forcing Hoover to reveal the contents of her confidential communications with her lawyer violated the attorney-client privilege.
 - a. The Court of Appeal instructed that when presented with an objection of attorney-client privilege by Hoover's rep, the City should have applied to the Court to rule on the question of privilege before resuming any questioning. It was improper for the City Attorney to decide this issue on its own and subsequently for the City (either the investigators or the City Attorney) to question Hoover about these communications without court approval.
 - b. Although it was unclear to the Court of Appeal whether and how the sexual assault investigation was connected to Hoover's own employment case, once it became clear that there was a plausible connection between the two, the burden fell on the City to establish that no attorney-client privilege applied.
 - c. "It is not for the opposing party to compel disclosure of the attorney-client communications in order to determine whether it believes the privilege properly applies."
- (2) The City Attorney violated ethical rules by asking Hoover questions about her communications with Gilleon, without Gilleon's approval (or even Pinckard's). Gilleon was Hoover's attorney in the harassment/retaliation lawsuit; therefore, it was Gilleon whom the Deputy City Attorney should have consulted, and from whom she should have received permission, before questioning Hoover about the scope of Hoover's claims in that lawsuit.

(3) The City Attorney's Office should not be disqualified. There is a balancing test to be applied, and "we do not disqualify a lawyer from representing a client to punish the lawyer's mistakes or even bad behavior." Rather, lawyer discipline is a function of the State Bar. Disqualification is an appropriate remedy when failure to do so would result in an "unfair advantage a party might otherwise obtain" if the lawyer continued in his/her role. The key test is whether there will be a "substantial continuing effect on the judicial proceedings to occur in the future." The Court determined that nothing Hoover said during the interview (which was recorded) could be used to her unfair disadvantage in her own lawsuit. She said she gave Gilleon no information about the sexual assault case and although she admitted that Gilleon gave her some information, she could not distinguish what he told her from what she learned independently.

The most important lessons to draw from *City of San Diego* are these: When you are questioned about communications between yourself and your attorney, do not hesitate to assert the attorney-client privilege. If you have questions about whether you should answer a question because the answer might contain privileged information, consult your attorney before answering the question. Once you reveal attorney-client privileged information, there is almost always no going back, and it will be up to a court to determine whether and how and by whom that information can be used from that point forward.

PERB AFFIRMS STRONG *JOHNNIE'S POULTRY* SAFEGUARDS AGAINST COERCIVE WITNESS INTERVIEWS

By Laurie Burgess

During a termination hearing AFSCME Local 773 requested the Arbitrator to issue subpoenas to two members of the bargaining unit to testify at the final day of hearing. When the Arbitrator granted the request, counsel for the City of Commerce announced his intention to interview both witnesses. AFSCME objected, and the City's attorney responded that unless the Association provided case law in support of its objection within two days he would proceed with the witness interviews. The Association did not respond, and the City proceeded with the witness interviews.

During the interview City counsel asked each of the witnesses whether they knew why the Association was calling them to testify – i.e. implicitly seeking information regarding the union's case strategy. Each answered that they did not know.

At the last day of hearing the union did not call either of the witnesses to testify, but renewed its objection to the interviews that the City's counsel had undertaken. AFSCME lost the grievance.

Thereafter the union filed an "interference" charge with PERB asserting that the City's counsel violated the MMBA by (1) failing to advise the union witnesses that the interview was voluntary and that if they chose to participate, the City would not take disciplinary action against them based upon their answers or refusal to answer questions, and (2) questioning the witnesses about the union's legal strategy.

Drawing upon *Johnnie's Poultry* – a 1964 NLRB decision – the ALJ held that employers must advise bargaining unit members of their right to refuse to be questioned in pre-arbitration interviews and must provide "no reprisals" assurances to such witnesses if they agree to be interviewed. The ALJ also concluded that the City's attempt to acquire information from the witnesses regarding the union's arbitration strategy "tends to or does result in harm to employees' rights" in violation of the MMBA.

On appeal, the City urged PERB to reject *Johnnie's Poultry* and adopt a more recent NLRB decision, *Cook Paint*, which permitted employers to engage in pre-arbitration questioning of union witnesses under threat of discipline. PERB affirmed the ALJ's analysis and reliance upon *Johnnie's Poultry*, noting that it had implicitly adopted the same approach in its 1995 *Dept. of Corrections* decision.

In explaining its rationale for continuing to adhere to this rule, PERB noted that allowing employers to interview union members under threat of discipline has a "self-evident tendency to deter employee participation in the grievance process" – a process that it characterized to be "perhaps the most important" activity that unions play in their day-to-day representation of bargaining unit members. PERB reasoned that because the MMBA includes greater protections than the NLRB – including an explicit right to represent members in their employment relations with public agencies – it was appropriate to maintain *Johnnie's Poultry* robust safeguards for public sector union witnesses. PERB noted that this approach also served to "place[] the parties on more equal footing and encourage[] good faith bargaining over mutual pre-arbitration discovery rights."

The City was ordered to post a notice and send electronic notice to its employees regarding its unlawful conduct.

COMMIT A FELONY ON THE JOB AND RISK FORFEITURE OF ACCRUED PENSION BENEFITS WHEN YOU RETIRE

By Steve Kaiser

On December 12, 2012 Jon Wilmot, a Fire Captain who had started in 1985, submitted an application for retirement benefits to the Contra Costa County Employees Retirement Association. The application was granted four months later.

Meanwhile, in February 2013 the Contra Costa County District Attorney filed felony charges against Wilmot, which included charges of felony embezzlement of District funds. Two years later Wilmot pled guilty to one of the counts charged.

The Contra Costa County Employees' Retirement Association (CCCERA) learned of this and instituted proceedings under newly enacted Government Code section 7522.72 to adjust Wilmot's pension allowance drastically downward due to his criminal conviction for a work related felony. After a hearing before the CCCERA Board, Wilmot's allowance was reduced from \$8,758.61 to \$2,858.56 per month. Wilmot challenged in Court, claiming that the reduced pension violated his Constitutional rights by interfering with his vested right to his pension. See *Wilmot v. Contra Costa County Employees' Retirement Assn.* (2018) 29 Cal.App.5th 846.

In ruling against him, the Court's ruling rested on whether Wilmot had a vested right in the higher pension, and this depended on the date of Wilmot's retirement: was it December 12, when he stopped working; or April, when the CCCERA Board accepted his retirement application? The difference between these two determined whether section 7522.72 was effective before or after the date Wilmot "retired", and that statute's effective date was January 1, 2013. The Court determined that, notwithstanding that Wilmot had ceased his employment on December 12, the controlling date for his retirement was the date upon which the CCCERA *accepted* his application for retirement. Thus, the new forfeiture provision applied and the reduction was proper.

The Court explained that a public employee who has submitted an application for retirement and is no longer actually working, is in a state of limbo until the application is approved by the retirement board. It is only with the approval of the application that the employee can be considered "a retired member" for purposes of the retirement laws. Thus, although Wilmot stopped working on December 12 and his retirement application had been submitted to CCCERA, it was not approved until April, and he was subject to the new forfeiture provision.

This case is currently under review by the California Supreme Court pending its decision in *Alameda County Deputy Sheriffs' Assn. v. Alameda County Employees' Retirement Assn.*, in which **Gregg Adam** of this firm participated in the oral argument before the high court; and is therefore not currently in force.

ORANGE COUNTY VIOLATED WORKERS' PROTECTED RIGHTS BY DENYING UNION ACCESS TO EMPLOYEES DURING WORK HOURS

By Matthew Taylor

In its recent decision, *County of Orange*, PERB Decision No. 2611-M (December 19, 2018), PERB reaffirmed its earlier decisions barring employers from discriminating against union activities in the work place. While "an employer may restrict non-business activities during work time...it may not single out union activities for special restriction or enforce general restrictions more strictly with respect to union activities." (*Id.* at p. 3 quoting *Regents of the University of California (Irvine)* (2018) PERB Decision No. 2593-M, p. 8.) In *County of Orange*, County employees who were union representatives spent approximately 30 minutes during work hours distributing union surveys to employees at their work stations. A supervisor directed them to leave, and the County's Human Resources manager later directed the union to stop distributing surveys during work hours.

PERB concluded that this interference violated the union's protected rights. A key fact in its decision was that the County permitted other non-work activities to occur during work hours. These included "employee-run social committees to fundraise for office parties, birthday celebrations, and other social events or team-building activities;" "social committees to have unmanned food shops;" "staff to purchase shop items in support of committee activities," and "committee members to sell items from cubicle to cubicle." (*Id.* at p. 4.)

PERB rejected the County's arguments that these activities were sufficiently dissimilar from union activities and thus should be allowed. The County argued that the union activities were more disruptive than these social activities because "eight to ten other employees ... could have heard the individual conversations" between union representatives and union members. PERB noted, however, that "the County failed to present any other evidence demonstrating that employees actually listened to and were distracted by the individual conversations." (*Id.* at p. 6.)

Despite this outcome, there is a hint of caution in the PERB's ruling which suggests that if the County were to present additional evidence that employees were distracted by the union's activities, PERB might rule in the reverse finding that the union's activities were sufficiently disruptive in the work place and thus not protected.

The County also argued that the social committees' activities served a "vital business and operational interest—increasing morale, team building, and generating a productive workforce." (*Ibid.*) PERB rejected this argument as well emphasizing that management may not determine workplace access "based on which non-business

activities, in its view, promote workforce morale.” (*Ibid.*) PERB pointed to its earlier decisions where it refused to treat work emails announcing employee bicycle rides, cookie sales, births, and/or birthday parties differently from similarly brief union emails. (*Id.* at pp. 6-7.)

Following its earlier rulings, PERB also held that the County violated the union’s rights when it removed the union’s bulletin board postings regarding two workload grievances. The County asserted that these postings were “derogatory” and thus unprotected based on the Board’s long-time, applicable standard that employee speech is not protected when it is sufficiently insulting or defamatory. Yet, PERB concluded that the postings at issue, which alleged that managers “‘blatant[ly] disregarded’ employee safety, use[d] ‘intimidation’ to discourage employees from raising workplace issues with [the union], and ‘intimidate[d] and threaten[ed]’ discipline for failing to satisfy unclear productivity standards,” were not sufficiently offensive to lose statutory protection. (*Id.* at p. 9.) PERB reasoned that though they were uncomplimentary to management, “they were within the realm of rhetoric typically employed in labor disputes and which management is ‘likely to encounter at least occasionally in the routine course of business.’” (*Ibid.*) PERB was also influenced by the fact that the grievances described working conditions that were commonly known to the employees. In PERB’s view, this common knowledge allows the reader to make his or her own judgement about the events.

EDDY MONEY WINS AN ANTI-SLAPP BATTLE

By Teal Miller

In 2016, the ex-drummer for Edward Joseph Mahoney’s, aka Eddy Money’s, band sued Eddy Money for discrimination based on age, disability, and medical condition, among other allegations. Specifically, Glenn Symmonds, the ex-drummer plaintiff, alleged that Eddy Money would joke on stage at concerts about Symmonds’ cancer diagnosis, calling Symmonds “Chemo the Drummer” and mocking Symmonds’ incontinence issues arising from his cancer treatment. Sometime in 2015, Eddy Money laid off his entire band, and then hired back everyone except Symmonds. According to Symmonds this amounted to an unlawful termination in violation of the California Fair Employment and Housing Act.

In response to the lawsuit, Eddy Money filed an anti-SLAPP motion. If successful, an anti-SLAPP motion strikes causes of action against a person based on acts of that person in furtherance of the person’s right to free speech. Here, Eddy Money argued that his decision not to hire Symmonds back was a decision made in furtherance of Eddy Money’s right to free speech in his performance of his songs and therefore, the discrimination claims against him should be dismissed.

The California Court of Appeal, Second District heard the case and focused on the two-step process of determining if an anti-SLAPP motion is successful. The first step requires the defendant to establish a *prima facie* showing that the plaintiff’s claims arise from the defendant’s constitutionally protected free speech in connection with a public issue or an issue of public interest. After the *prima facie* case is made, the plaintiff can still defeat the anti-SLAPP motion in the second step by establishing a probability of success in proving the underlying claim.

The Appellate Court found that the Trial Court erred when it denied Eddy Money’s motion based on the first step of the two-part process. The Trial Court found that Symmonds’ cause of action for discrimination arose not from the decision to terminate him, but from Eddy Money’s discriminatory conduct. The Appellate Court disagreed, finding that “[t]he discrimination cannot be considered separately from the adverse employment action [termination] for anti-SLAPP purposes.”

Because the cause of action was based on the termination, and because the termination or decision not to play music with Symmonds was in furtherance of Eddy Money’s right to free speech, the Appellate Court reversed the Trial Court’s decision and remanded the case for the Trial Court to complete the two-step process and determine if the plaintiff had established a probability of success in proving the underlying claim.

While this case stems from salacious details, it boils down to a nuanced clarification of how courts should analyze anti-SLAPP motions. It disapproves of the trend of denying these motions based on the first step and requires courts to take care in analyzing each step. The effect of this case may make it even harder for plaintiffs to defeat the dreaded anti-SLAPP motion.

Across the Country

GENERAL RIGHT TO “BE FREE FROM EXCESSIVE FORCE” NOT SPECIFIC ENOUGH TO DEFEAT QUALIFIED IMMUNITY

By Wendi Berkowitz

The United States Supreme Court issued a *per curiam* opinion on January 7, 2019, in *City of Escondido v. Emmons*, reiterating that denial of qualified immunity to a police officer in an excessive force case must be based on violation of a clearly established right that is defined *with specificity*. It is well-established that qualified immunity “attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *White v. Pauly*, 580 U.S. ___, 137 S.Ct. 548, 551 (2017) (*per curiam*). Following on its 2018 decision in *Kisela v. Hughes*, 584 U.S. ___, 138 S.Ct. 1148 (2018), in *Escondido v. Em-*

mons, the Supreme Court emphasized, in reversing the Ninth Circuit, that it meant what it said in instructing that a court must not define the “clearly established right” that is violated “at a high level of generality.” In doing so, the Court characterized as “quite puzzling” the Ninth Circuit’s one-line analysis denying qualified immunity.

The facts of the case go a long way towards explaining why the Supreme Court was puzzled by the Ninth Circuit’s decision. The events described were recorded on police body camera video, and were in the record.

The Escondido police responded to a 911 domestic violence call by Ms. Emmons, who lived with her husband, her children and a roommate, Ms. Douglas. The officers arrested Mr. Emmons in connection with the incident. A few weeks later, the police received another call for a possible “domestic disturbance,” this time from Ms. Douglas’ mother, who was on the phone with her daughter when Ms. Douglas screamed for help. When the police arrived and knocked, no one answered, but they communicated with Ms. Emmons through a window and asked her to open the door for a welfare check. An unidentified man in the apartment told Ms. Emmons to back away from the window, and the officers were not allowed in. A few minutes later, a man opened the apartment door and came outside. It turns out that this man was Ms. Emmons’ father, though this appears to have been unknown to the officers at the time.

Officer Craig told the man not to close the door, but he disobeyed and closed the door, trying to move past the officer. Officer Craig “stopped the man, took him quickly to the ground, and handcuffed him.” Officer Craig did not hit the man or take out his weapon, and the video does not offer any audible or visual indication that the man was in any pain. The officers helped the man up and arrested him for misdemeanor resisting and delaying a police officer. The man sued Officer Craig and Sgt. Toth, one of the officers who arrived as back-up, alleging excessive force.

The District Court held that the officers had probable cause for the arrest and rejected the excessive force claim, finding based on the video that the “officers acted professionally and respectfully in their encounter.” The District Court granted summary judgment to Sgt. Toth because he had used no force whatsoever. The District Court also granted summary judgment to Officer Craig, holding that the law did not clearly establish that the officer could not use a take-down to detain Mr. Emmons under the circumstances presented – where the officers were responding to a domestic dispute, the officers were not permitted to perform a welfare check, and the officers did not know when Mr. Emmons left the apartment (and was non-compliant) whether he was armed and/or had hurt anyone inside.

The Ninth Circuit reversed and remanded on the excessive force claims against both Officer Craig and Sgt. Toth. On the qualified immunity question, the “Ninth Circuit’s entire relevant analysis of the question consisted of the following: The right to be free of excessive force was clearly established at the time of the events in question.” The Supreme Court reversed as to Sgt. Toth, who had used no force at all against Mr. Emmons, criticizing the Ninth Circuit’s failure to offer any explanation for its decision in light of the District Court’s factual findings. As to Officer Craig, the Supreme Court vacated the Ninth Circuit ruling and remanded for further analysis consistent with “repeated” Supreme Court guidance on qualified immunity that specificity of the clearly established law is required. In doing so, the Court quoted from its recent *Kisela* opinion: “Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue An officer cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in the defendant’s shoes would have understood that he was violating it.”

On remand of the claim against Officer Craig, the Ninth Circuit was instructed to engage in the factual analysis it neglected earlier. If the Ninth Circuit is to deny qualified immunity, it must do so based on “identify[ing] a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment,” citing *District of Columbia v. Wesby*, 583 U.S. ___ (2018). And in the absence of a directly comparable case, “... existing precedent must place the lawfulness of the particular [action] beyond debate.” Although Officer Craig is not yet out of the woods, under the Supreme Court’s strict instructions, it is highly unlikely the case against him can continue.

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THE LABOR BEAT IS GOING [MOSTLY] PAPERLESS IN 2019

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Please send any inquiries, changes, requests, or comments to janine@majlabor.com, or

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