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OCTOBER 2019 | VOL. 32 NO. 2

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

MAJ SUPER LAWYERS STILL SUPER AFTER ALL THESE YEARS

We have had the honor for many years running now to report that Messing Adam & Jasmine attorneys are listed—again—on the Northern California Super Lawyers list published in July. **Gary Messing** celebrates fifteen years on the list, **Gregg Adam** five years, and **Jason Jasmine** now has four Super Lawyer years after six years as a Rising Star. **James Henderson** has earned the distinction nine 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 attorneys continue to be selected over the years for this prestigious list, and we could not be prouder. Congratulations to Gary, Jason, Gregg, and Jim! Stay super (i.e., just the way you are)!

GARY MESSING AND JASON JASMINE HONORED AS AMONG SACRAMENTO'S BEST LAWYERS

Gary Messing and **Jason Jasmine** were selected "Best of the Bar" for 2019 by their peers and the Sacramento Business Journal. Gary and Jason were two of only a small handful of public sector Labor and Employment attorneys selected for the Business Journal honor. This follows closely on the heels of Gary and Jason being named as two of the best lawyers in Sacramento by Sactown Magazine, as well as Gary's selection as one of the Lawdragon 500 Leading Plaintiff Employment Lawyers in the nation for 2019. MAJ is proud to share Gary and Jason's recognition by local and nationwide organizations.

Fighting The Good Fight

CalFIRE LOCAL 2881 REACHES OVER $460,000 POST ACADEMY SETTLEMENT

Over the past few months, Messing Adam & Jasmine partner **Gary Messing** and attorney **Teal Miller** have been working with CalFire Local 2881 President **Tim Edwards** and Local 2881 State Rank and File Director **Darren Dow** to negotiate a settlement with CalFire and CalHR regarding unpaid overtime for POST Academy cadets. The State estimates it will pay over $460,000 in backpay and interest under this settlement. 58 Post academy attendee-members will receive an average recovery of $8,052.49, with a low recovery of $2,478 and a high of $13,879.59. Local 2881 represents over 6,000 current and retired employees of CalFire in Bargaining Unit 8.

CalFire employs several hundred peace officers to investigate fire causes, interview witnesses, issue citations, and set up surveillance operations. California law requires that all peace officers in the state complete Peace Officer Standards and Training. CalFire runs its own POST Academy out of the training facility in Ione. This academy consists of a 22-week course. Before the settlement, cadets were on a 5-day per week, 16-hour per day schedule from 0800 to 0000. 0800 to 1600 was considered hard time and 1600 to 0000 was considered soft time. From 0000 to 0800 was off-duty unpaid time.

However, cadets were required to work during unpaid hours in the morning. The settlement both compensates past cadets for this unpaid work and shifts the schedule to ensure that current and future cadets are paid for the work they do.

The POST Academy settlement accomplishes two things. First, it compensates former POST Academy cadets, going back to February 16, 2015, for hours cadets were required to work but for which they were not paid. Cadets will receive backpay for time they attended POST Academy between February 16, 2015 and June 9, 2017. These cadets will receive 11 hours of unplanned overtime pay per week of attendance at POST academy within the settlement window, except the last week of the academy, for which they will receive 10 hours of unplanned overtime pay. The pay rate will be based on the top-step of the classification the employee was in at the time he or she attended the academy. Additionally, CalFire will also pay 7% interest on the backpay.

Second, the settlement addresses what hours future cadets are paid for and are required to work. Under the settlement, the hours of work for cadets at the POST Academy will be from 0700 to 2300 on Monday through Thursday, and 0700 to 1500 on Friday. This new schedule became effective on January 7, 2019. Academy cadets will not perform compensable work during their off-duty time (2300 to 0700) unless expressly directed by CalFire. If CalFire does authorize individuals to perform compensable work on their off-duty time, they will be compensated.

The agreement defines the following activities as non-compensable work, and therefore these limited activities may be performed in the off-duty hours without compensation: personal hygiene, breakfast, and raising the flag in the morning.

From Monday until Thursday, there will be one soft work hour between 0700 and 0800. Then, from 0800 until 1700 the time will be considered hard work time, except for lunch. Finally, the hours from 1700 to 2300 will be considered soft hours (standby time). On Friday, the hard hours will be from 0700 to 1500. There are no standby or soft hours on Fridays. The remaining time is considered off duty time, and any work during that time will be compensated.

Pursuant to the agreement, going forward and absent unusual circumstances, the following daily routine activities can be scheduled only between 0700 and 0800: (a) lineup [may occur at 0800], (b) morning briefings [may occur at 0800], (c) remediation, make-up tests and re-testing, (d) hydration set-up and filling ice chests, (e) preparing the grounds for drills to be conducted during the work day, (f) platoon/squad inspections, and (g) group physical training equipment set-up.

The following daily routine activities can only be scheduled between 0700 and 1900: housekeeping assignments and cleaning and maintenance of issued personal protective equipment and law enforcement equipment. Group physical training may be conducted during that time. CalFire and CalHR agreed to include an additional self-study day – a day where cadets are considered on duty but are not assigned specific tasks – to the POST Academy schedule.

Cadets at the POST Academy will still be allowed to continue to practice their skills and study during their off-duty time voluntarily. For example, many cadets choose to stay and practice skills on weekends. There will be no compensation for the voluntary practice of skills. However, cadets are still covered by workers' compensation should they be injured while voluntarily practicing.

Needless to the say, the Union and its peace officers were extremely happy with the resolution.

SFPOA WINS ARBITRATION AGAINST THE CITY REGARDING POLICE OFFICERS BEING ASSIGNED TO PROLONGED ADMINISTRATIVE ASSIGNMENTS AFTER AN OFFICER-INVOLVED SHOOTING

On March 17, 2019, Arbitrator Chris Burdick granted a 2016 grievance of the San Francisco Police Officers' Association finding that the City and County of San Francisco ("City") violated binding past practice by failing to return five police officers who were involved in the shooting of an armed suspect to full duty within a reasonable time. With the full support of POA President **Tony Montoya** and the POA's Executive Board, **Rick Andreotti, Sean Perdomo, Matt Lobre, Sean Perdomo,** and **Tracy McCray**, the POA fought a long, hard battle to return these officers to full duty and prevent the Department from treating other officers involved in a shooting in the same shameful manner. These determined efforts included various negotiations between the City and the POA, a grievance filed under the MOU, and two arbitration proceedings. Throughout these battles, the POA was represented by MAJ attorneys **Gregg Adam** and **Matthew Taylor**.

The shooting incident occurred on December 2, 2015. Per Department procedure, the five officers were immediately put on administrative assignment, and within days after the shooting, the Department convened a "Return to Duty" panel comprised of members of the Department's Command Staff. The various chiefs and other high-ranking officers found that none of the officers violated policy and recommended that all officers return to full duty.

If the Department had followed past practice, these officers would have returned to full duty within a month of the shooting. The Department appeared more concerned by fears of a public backlash as a result of the shooting, however. It ignored the panel's recommendation—not to mention a subsequent Internal Affairs investigation clearing the officers of wrongdoing—and took the extraordinary step of keeping these officers off the streets in administrative assignments for 2 years and 8 months.

Throughout this time, the officers' careers languished as they lost opportunities to participate in special assignments, work overtime, and gain vital experience on the job to improve their law enforcement skills and enhance their chances for promotion.

In his arbitration award in favor of the POA, Arbitrator Burdick reasoned that while management has authority to set use of force policy, management must adhere to such policy once it is adopted. The Department issued the general order governing police shootings, and a past practice developed governing how long an officer should remain in an administrative assignment after a shooting once the "Return to Duty" panel recommended that the officer return to full duty. As determined by the arbitrator, the Department's failure to follow such past practice violated the parties' memorandum of understanding.

Arbitrator Burdick addressed the City's justification for the delay in returning these officers to full duty, which was based on "the public perception of peace officer

conduct and the nation-wide rejection of traditional use of force policies and practices by the general public." He concluded that "public opinion, standing alone, cannot justify a breach of contract."

Arbitrator Burdick also reasoned that any discretion that the Chief of Police has in extending the time police officers should remain off the streets after a shooting is subject to "the classical 'arbitrary and capricious' standard" under which courts and arbitrators "have traditionally placed limits upon the exercise of discretion where discretion is granted or implied." Arbitrator Burdick ruled that the Chief of Police's (actually three different chiefs) decision (or lack of decision) resulting in keeping these officers on administrative assignment for two years and eight months was unreasonable and therefore clearly arbitrary and capricious. Arbitrator Burdick left open the possibility that the Department could keep officers in administrative assignment for a period longer than two to three weeks (as established by past practice), but such delay must be reasonable based on the circumstances of the shooting and the subsequent investigation. It clearly cannot be based on a political decision by the Department to wait for public scrutiny to die down.

As a remedy, Arbitrator Burdick determined that the parties must meet and confer over the proper damages owed to these officers.

COURT OF APPEAL UPHOLDS AWARD OF ATTORNEYS' FEES UNDER PRIVATE ATTORNEY GENERAL STATUTE

MAJ's **Lina Balciunas Cockrell** represented a CAL FIRE firefighter who was improperly denied the representative of his choice at the evidentiary hearing to appeal the revocation of his emergency medical technician ("EMT") certificate. After the Court ruled that the Riverside County Emergency Medical Services Agency ("REMSA") denied the EMT due process and a fair hearing, the EMT sought recovery of his attorneys' fees under what is known as the "private attorney general" statute, that allows recovery of fees for successful parties who vindicate public rights with little to no financial benefit for themselves. The Court granted the EMT an award of more than $30,000, finding the litigation resulted in the enforcement of an important right affecting the public interest. REMSA appealed, contending that the EMT could not have vindicated an important right if the underlying ruling was wrong and, regardless, REMSA should not be liable for attorneys' fees when it was the administrative law judge from the Office of Administrative Hearings ("OAH") who had prohibited the EMT from being represented at the hearing by a non-attorney representative.

The Fourth District Court of Appeal resoundingly rejected REMSA's appeal, finding that REMSA could not get review of the Superior Court's judgment on the due process issues when REMSA only appealed the fee award. The Court of Appeal further concluded that OAH was not a necessary party to the litigation because its role was limited to facilitating the hearing on behalf of REMSA. REMSA, as the certifying agency, is ultimately responsible for upholding the appellant's due process rights and protecting the integrity of the resulting decision.

As soon as the Court of Appeal's opinion is remitted to the Superior Court, the EMT will be seeking recovery of his appellate attorneys' fees, as collateral to the original fee award.

FAVORABLE NEW CONTRACT FOR SAN FRANCISCO MUNICIPAL EXECUTIVES ASSOCIATION

Gregg Adam recently represented the San Francisco Municipal Executives' Association in negotiations for a new collective bargaining agreement. The MEA team was led by its Executive Director **Raquel Silva**, Deputy Director **Christina Fong,** Labor Relations Representative **Camaguey Corvinelli**, and Senior Labor Relations Representative **Criss Romero**. The team met with the City from early January until an agreement was reached in early May 2019, with the assistance of Arbitrator Bill Riker. The decision came in just before San Francisco's May 15 Charter Deadline for any new contract, and after three days of interest arbitration.

Under the terms of the new three-year agreement, MEA's 1,100 represented City and County of San Francisco managers will receive pay increases of 4% in fiscal year 2019-2020, broken down at 3% effective July 1 and 1% January 1. In year two they will receive 3.5% – broken down at 3% July 1, 2020 and 0.5% on January 1, 2020. And in year three they will receive a further 3.5% – again broken down at 3% in July 1, 2020 and 0.5% on January 1, 2022.

Years two and three of the Agreement contain clauses which delay increases in those years by six months if the City's anticipated budget deficit exceeds $200 million when measured at the March joint budget analysis prior to those two contract years. Ultimately, even if delayed, the increases will take effect.

In addition, MEA negotiated increases to life insurance benefits, greater reimbursements for safety equipment for peace officers, guaranteed management leave for all bargaining unit employees, an increase to Management Training Funds, an increase in discretionary salary increase funds, an increase in floating holidays and clarifi-

cations to the grievance procedure, amongst numerous changes to the memorandum of understanding.

SAN FRANCISCO DEPUTY PROBATION OFFICERS' ASSOCIATION SECURES SIGNIFICANT WAGE IMPROVEMENT THROUGH SAN FRANCISCO BARGAINING PROCESS

Gregg Adam recently represented the San Francisco Deputy Probation Officers' Association in negotiations for a new collective bargaining agreement. The DPOA team was led by its President, **Nixon Lazaro**, and Board members **Azar Alwahhab**, **Jessica Bishop**, **Danielle Fluker**, **Stephanie Speech**, and **Moe Tamasese**. The team met with the City from early January until reaching an agreement with the City on May 6, 2019, with the assistance of mediator and arbitrator Judge John True.

The partial agreement/partial award came on the final day of three days of interest arbitration.

During arbitration, DPOA presented numerous economic and revenue experts highlighting the strong financial health enjoyed by the City and County of San Francisco. In addition, DPOA members **Nicole Caruso**, **Purnell Copland**, **Victor Williams**, **Danielle Fluker**, and **Azar Alwahhab** testified extensively about the cutting edge training and programs being implemented by San Francisco Adult and Juvenile Probation Departments.

Under the terms of the new agreement, DPOA's 130 members will receive pay increases of 4% in fiscal year 2019-2020, broken down at 3% effective July 1 and 1% January 1. In year two they will receive 3.5%, broken down at 3% July 1, 2020 and .5% on January 1, 2020. And in year three they will receive a further 3.5%, again broken down at 3% in July 1, 2020 and .5% on January 1, 2022.

Years two and three of the Agreement contain clauses which delay increases in those years by six months if the City's anticipated budget deficit exceeds $200 million when measured at the March joint budget analysis prior to those two contract years. Ultimately, even if delayed, the increases will take effect.

While DPOA's push to be recognized as the highest paid Bay Area probation department came up short, the increases will maintain DPOA's position among the top three agencies in the Bay Area.

The one contested item was the term of the agreement. The Union pushed for a two-year MOU – motivated by a desire to align its negotiations with other city safety units, where public safety issues receive higher priority. The City pressed to keep DPOA bargaining with dozens of non-safety units on a three-year cycle. Weighing up the evidence and arguments presented by the parties, Judge True ruled in favor of the City.

In addition, DPOA negotiated increases to life insurance benefits, improved union officer release time provisions, increased bilingual pay, an increase in floating holidays, an amnesty clause on uncollected pension contributions, and clarifications to the grievance procedure.

PEACE OFFICERS ASSOCIATION OF PETALUMA SETTLES HIL/OT ISSUE

As you may recall from the prior Labor Beat, the Peace Officers Association of Petaluma (POAP) settled a three-year MOU (with a 12.5% increase in salary) with the City after lengthy and contentious negotiations. The agreement was reached only after a demand was made for interest arbitration and a lawsuit compelling arbitration had been filed. Since the resolution of the MOU in the above matter, the City and the POAP have endeavored to work together to resolve outstanding issues.

For example, the POAP and the City have just settled a dispute concerning the inclusion of holiday in lieu pay in the regular rate of pay to calculate overtime pursuant to the Fair Labor Standards Act. The parties were able to achieve an agreement without the necessity of filing a lawsuit. The City agreed to pay over $58,000 to forty-six POAP members covering three years of backpay. The $58,000 is slightly more than double the back pay of each employee.

POAP President **Ryan McGreevy** expressed that he was pleased that added compensation due to the members was made available to them after brief and collegial discussions, and that the City and the POAP worked together well to finalize the settlement. The resolution was negotiated by **Gary Messing** in the Sacramento office of Messing Adam and Jasmine. Lisa Charbonneau represented the City in this matter.

MERCED POA AND MAPS AGREED TO A ONE YEAR MOU

The Merced Police Officers' Association (POA) and the Merced Association of Police Sergeants (MAPS) have agreed upon one-year contracts with the City of Merced. The MOUs will expire on December 31, 2019.

The agreements provide for a 2.5% pay increase effective immediately upon ratification. The City is also performing a survey, which will be used to bargain for a new MOU.

The POA and MAPS view the contract as an interim

agreement pending the results of the survey. However, there were other important changes that were agreed upon for the current MOU. For example, the hours of all paid leave taken in a pay period will count towards those hours employees need to work before beginning to earn overtime. That means that any hours worked beyond the scheduled hours of bargaining unit employees shall be compensated at the overtime rate. Additionally, a vacation tier was added at the 15-year level. Previously, after 9 years, bargaining unit employees earned 160 hours of vacation per year. This amount did not increase until 20 years of employment, at which point employees earn 200 hours of vacation per year (ultimately tapping out at 240 hours at 25 years of employment). The MOU now includes a new level of 180 hours at 15 years of employment. Additionally, employees may now cash out 20 hours of vacation once, annually.

The parties also agreed upon a variety of language changes and improvements, including sick leave verification, and clean up attributable to the *Janus* decision regarding the collection of dues and fees by the associations.

The POA and MAPS met jointly with the City. **Gary Messing** served as the chief negotiator for both bargaining units. The POA team included POA **President Nate McKinnon**, Officer **Tim Gaches**, and Dispatcher **Cortney Bohannan**. The Sergeants bargaining team was represented by Sergeants **Robert Solis, Rey Alverez, Eddie Drum,** and **Joe Perez.** Officer **Emily Foster** played a key role on the POA bargaining team until she promoted to Sergeant.

CITY OF FREMONT EMPLOYEES ASSOCIATION NEGOTIATES TWO YEAR CONTRACT WITH 8% INCREASE

CFEA's negotiating team and **Gregg Adam** recently negotiated a successor collective bargaining agreement for the City of Fremont Employees Association. CFEA represents about 250 City employees working in multiple classifications for the City of Fremont. The negotiation team was led by CFEA President **Monica Gloria**, and made up of CFEA Vice President **Terry Wong**, **Yanneth Contrada**, and **Andrew Mayes**.

The parties began negotiating in February 2019 over a series of issues. An agreement was reached on or about June 21. The contract was overwhelmingly ratified by CFEA members. The Agreement provides 4% increases to bargaining unit members from July 1, 2019 to July 1, 2020. The contract runs until June 30, 2021. Any classifications in the bargaining unit that were 5% or more behind the market survey were given an equity adjustment. In addition, the parties agreed to post-*Janus* dues deductions provisions, increased union release time, expanded professional license stipends, and increased health benefit allowances.

CFEA's members showed strong support for their Association, repeatedly, showing up in great numbers at City Council meetings as the bargaining process came to a head.

MAKING SENSE OF MULTIPLE RESTRAINING ORDERS OR WHEN IS A CONFLICT NOT A CONFLICT?

By James Henderson

One of the many (and frequent) tasks law enforcement personnel must deal with is domestic disturbance calls. Frequently in these situations, one or more of the individuals involved will have obtained a criminal protective order or a civil order of protection against the other individual(s). However, what happens when one of the individuals involved in the incident has obtained both a civil order of protection and a criminal protective order which contain conflicting provisions regarding certain conduct? This situation can create a dilemma for the responding officers as one police officer in a Central Valley community recently found out.

Here is the scenario: A woman called the police department to report that her ex-husband was at her residence in violation of the protective order that she had obtained against him. Upon responding to the scene an officer found that the ex-husband was in fact at the ex-wife's residence. Earlier in the day while the ex-wife was away from the residence, he had gone to the house to visit his 18 year old teenage daughter and had left her his car to use during the day. The ex-wife, upon returning to the house after he had left, discovered his car parked in the driveway. She then proceeded to let the air out of the tires. The daughter called her father to advise him that his tires were deflated, and the father responded to the residence to assess the situation. The ex-wife, who had parked in her car up the street, waited for her ex-husband to arrive and then called the police to report an alleged violation of a protective order she had obtained.

After gathering the facts, the officer ascertained that there was in fact a criminal protective order that the ex-wife had obtained approximately six (6) months earlier. The order did in fact list the ex-wife as the protected person (and only protected person) and provided that the ex-husband was to have no personal contact with her and to remain 100 yards away from her at all times. However, the order did not provide that he had to stay away from the ex-wife's residence if she was not present

nor did it address the question of his visiting his children. The officer thus concluded that the husband was not in violation of the criminal protective order and so advised the wife.

However, the wife indicated that two years prior to obtaining the criminal protective order, she had obtained a civil restraining order for protection that was still in effect. That order did identify the couple's children as additional protected persons and provided that the ex-husband was to stay away from the home and the children as well as the ex-wife, subject to certain conditions not applicable here. The officer concluded that the criminal protective order controlled the situation, and since there was no violation of that order, declined to arrest the ex-husband. The ex-wife subsequently filed a complaint with the officer's department and, based on her complaint, the officer was subjected to an internal affairs investigation over his handling of the situation. To date no decision has been made by the department as to whether to discipline the officer.

The situation confronting the officer raises several questions regarding what, if any, conduct was in violation of a restraining order, either civil or criminal. It is clear that, under either order the ex-husband was precluded from having any contact with the ex-wife, and he was not in violation of that provision. It does not appear that the ex-husband was in violation of any of the provisions of the criminal protective order.

With respect to the earlier civil order, there are two components of the husband's activities which, in the absence of the criminal order, could have been in violation of the civil order: 1) the contact with his teenage daughter; and 2) the fact that he had visited the daughter at the ex-wife's home, although the wife was not present at the time. Both of these types of conduct were expressly prohibited by the civil order issued 2 ½ years earlier and which was not scheduled to terminate until 2021. However, an argument can be made that, given the existence of the criminal order, neither of these two provisions subjected the ex-husband to arrest. In the first place, the daughter was not named as a protected person in the criminal order and since the earlier civil order had identified the children as well as the wife as protected individuals, the failure to include the daughter could create a reasonable presumption that the no-contact provisions no longer applied to the daughter. Second, at the time the civil order was obtained, the daughter was 16 years old and in the custody of her mother. However, at the time of the incident, the daughter, although still living with her mother, was 18 years old and thus legally an adult. This raises the question: Is the civil order still in effect as to a minor who is now an adult and desires to have contact with her father?

Unfortunately, neither the criminal nor the civil order provided much assistance in resolving the situation that confronted that officer. The criminal order made no reference to the prior civil order although there was a specific place in that order where the civil order could have been identified. The criminal order did contain the following provision on the second page of the order:

> **CONFLICTING ORDERS-PRIORITIES FOR ENFORCEMENT**
>
> **If more than one restraining order has been issued, the orders must be enforced according to the following priorities:**
>
> a *Emergency Protective Order*: If one of the orders is an Emergency Protective Order (form EPO-001) and is more restrictive than other restraining or protective orders, it has precedence in enforcement over all other orders. (Pen. Code, section 136.2(c)(1)(A).)
>
> b. *No-Contact Order:* If there is no EPO, a no-contact order that is included in a restraining or protective order has precedence in enforcement over any other restraining or protective order.
>
> c. *Criminal Order:* If none of the orders include a no-contact order, a domestic violence protective order issued in a criminal case takes precedence in enforcement over any conflicting civil court order. (Pen. Code, section 136.29(e)(2).) *Any nonconflicting terms of* the *civil* restraining *order remain in effect and enforceable.* [Emphasis added.]
>
> d. *Family, Juvenile, or Civil Order:* If more than one family, juvenile, or other civil restraining or protective order has been issued, the one that was issued last must be enforced.

Unfortunately, that provision contains little to assist the officer in the subject situation. Virtually all of the discussion is on the priorities of various orders and neither "conflicting" nor "nonconflicting" are defined. Thus, no guidance is offered as to a variety of questions regarding which order to enforce and to what extent, including the following: 1) If a subsequent order no longer identifies an individual as a protected person, is that person still subject to a no-contact provision of an earlier order? 2) What effect does a minor reaching majority have on that individual's continued status as a protected person under a civil order obtained when the individual was a minor if the individual does not want to be regarded as a protected person? 3) If a current order no longer references certain conduct that was prohibited in a prior order does the prior order control or must the subsequent order specifically state that prior terms remain in effect?

We wish we could point to a specific court decision that has addressed issues such as this, but we are not aware of any. What we can do is to offer some suggestions as to how to handle these situations when they arise. First, determine all the possible restraining or protective orders that pertain to the participants. Don't take their word for it, get dispatch to provide electronic copies. Second, read all of the pertinent orders and don't forget the priority language referenced above. Third, if in doubt, run the situation by a shift supervisor and get his/her input. Finally and perhaps the most beneficial suggestion is to talk to department management and ask if they can have an attorney from the appropriate law agency (District Attorney's Office, State Attorney General's Office) address the issue of how to deal with multiple restraining orders with all appropriate law enforcement personnel in the department.

Responding to domestic disputes is all too frequent an occurrence in the performance of law enforcement personnel duties and can have tragic consequences if not handled properly. Resolving those situations is even more difficult when an officer has to figure out on the spot what to do when multiple civil or criminal restraining orders are involved. While we can't be prepared in advance to deal with every circumstance that could arise, recognizing the situation when it does occur and having a game plan for responding can help to handle it effectively.

YOUR RIGHT TO REPRESENTATION EXTENDS TO WRITTEN STATEMENTS RELATING TO AN INVESTIGATION

By Matthew Taylor

It is well-known that public sector employees have the right to union representation during an investigatory interview. But does this right also apply when an employer, rather than asking questions to illicit a verbal response from an employee, directs the employee to draft a written statement that could be used for disciplinary purposes? Does providing such a written statement carry similar risks for an employee as answering questions verbally in a person-to-person investigatory interview? According to the California Public Employee Relations Board (PERB), a quasi-judicial agency which oversees public sector collective bargaining in California, the answer to both questions is yes. See *California School Employees Association v. San Bernardino Community College District*, PERB Decision No. 2599, December 5, 2018.

As background, the U.S. Supreme Court ruled that an employee has the right to union representation in investigatory interviews. This right and its associated rules are collectively referred to as Weingarten Rights after the name of the case, *NLRB v. J. Weingarten, Inc.* (1975) 420 U.S. 251. The burden is on the employee to make a clear request for union representation either before or during the interview; the employer, on the other hand, has no obligation to inform the officer of this right. Once the employee invokes the right, the employer must respect the officer's decision, by either granting the request, discontinuing the interview, or offering the employee the choice of proceeding with the interview without representation or ending the interview. The employer who denies the request for union representation and continues to ask questions commits an unfair labor practice. The employee has a right to refuse to answer, and he or she may not be disciplined for such a refusal (though you should always consult with your representative who in many cases would advise you to follow the "obey now, grieve later" approach).

In the facts at issue in the above PERB case, the San Bernardino Community College District Police Department attempted to circumvent an employee's Weingarten Rights through an artful dodge: a request for a written statement. Adam Lasad, a community services officer, was the subject of an investigatory interview regarding his whereabouts during his work shift. Being questioned by his supervisor, Sergeant Chris Tamayo, Lasad initially answered several questions, then requested union representation. Acting on orders from the police chief, Sergeant Tamayo responded by stating, "[W]e're not going to question you anymore," but "I just need a memo explaining where you were." PERB Decision No. 2599, p. 3. Sergeant Tamayo then proceeded to leave Lasad alone in an office to draft the written statement. Though Lasad had access to his personal cell phone and a landline, he did not try to contact the representative and obtain representation before completing the statement.

Faced with an unfair labor practice charge, the San Bernardino Community College District argued that its police department did not commit a violation because the right to representation arises only when an employee is required to provide a verbal response.

PERB disagreed. Ruling that the District violated Lasad's rights, PERB adhered to the U.S. Supreme Court's rationale in the *Weingarten* decision, quoting the Court as follows:

> A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production

> time by getting to the bottom of the incident occasioning the interview.

PERB Decision No. 2599, p, 3 quoting *NLRB v. J. Weingarten, Inc.* (1975) 420 U.S. 251, 262-263.

PERB further determined that requiring the employee to draft a written statement implicates similar concerns as "direct face-to-face questioning and verbal responses," as employees "may be more or less precise in their written statements than in their oral ones, depending, among other things, on their facility with the written language." *Id*. at p. 4.

PERB also found Lasad's willingness to draft the written statement inconsequential as to whether the police department infringed on his right to union representation. A police officer is not required to disobey his superiors to invoke successfully his or her Weingarten Rights. As stated by PERB,

> Although the refusal to obey a rule or directive that unlawfully infringes on employee or union rights is generally protected … we do not require employees to risk discipline in order to preserve their rights to challenge unlawful action.

Id. at p. 6 citing *Long Beach Unified School District* (1987) PERB Decision No. 608, p. 12.

In a last ditch effort to avoid a complete loss before PERB, the San Bernardino Community College District claimed that Lasad's request for representation, coming after he had already answered several questions, prevented the District only from seeking additional information beyond what Lasad had already provided. PERB once again disagreed stating that the right to representation applies "regardless of whether the employer is seeking additional information or merely attempting to confirm information the employee has already provided." It reasoned that a subsequent statement may ultimately contradict an employee's earlier statement opening him or her up to impeachment for inconsistency, or it may confirm an earlier statement and thereby make it more difficult for the employee to change or explain those answers later. Accordingly, "the assistance of a union representative would be no less valuable than if the employer were seeking only new information." *Id*. at pp. 4-5.

It should be noted that PERB currently does not have jurisdiction over unions that exclusively represent peace officers (there is a limited exception for unions representing both peace officers and non-peace officers).[1] PERB was able to hear Lasad's case because his union represents police department employees that, like him, are not peace officers. Unfortunately, former Governor Brown vetoed proposed legislation that would have repealed this jurisdictional limitation based on the rationales that PERB has limited funding, which would be insufficient to handle peace officer issues, and that peace officer unions are the only employee organizations that may petition the courts for injunctive relief related to labor issues. Thus, he argued that peace officer unions should not be able to benefit from having access to both PERB and the courts.

Nevertheless, our firm is fighting to change PERB's limited jurisdiction so that unions representing police officers may bring claims before this important tribunal specializing in labor law. We recently filed a case before PERB on behalf of a union that represents peace officers exclusively against a local municipality, and we are defending against that city's motion to dismiss the case before PERB.

Regardless of whether access to PERB will remain closed to peace officer unions, PERB's decision against the San Bernardino Community College District upholding Weingarten Rights carries significant weight, as California courts and arbitrators have recognized PERB's expertise in labor matters and often look to PERB precedents to inform their decisions. Furthermore, these tribunals also take guidance from the National Labor Relations Board (NLRB), a federal agency that enforces federal labor law in relation to collective bargaining and unfair labor practices. It has also held that employees have a right to representation before submitting written statements as part of an investigatory interview.

Lasad's treatment by his supervisors reflect the pitfalls facing both sworn and non-sworn members of law enforcement organizations who are subject to discipline investigations. We therefore urge you to be vigilant in knowing your rights. Request union representation when your employer seeks either a verbal or written statement from you that could be used for disciplinary purposes.

[Originally published in PORAC Law Enforcement News, May 2019.]

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[1] PERB's jurisdiction over peace officer associations was subsequently affirmed in July 2019—*see "PERB Affirms Jurisdiction Over Employee Organizations Composed Exclusively of Peace Officers"* at page 10 of this issue of The Labor Beat.

In the News

PERB AFFIRMS JURISDICTION OVER EMPLOYEE ORGANIZATIONS COMPOSED EXCLUSIVELY OF PEACE OFFICERS

By Laurie Burgess

The Orange County Deputy Sheriffs Association filed an unfair labor practice charge (*Association of Orange County Deputy Sheriffs v. County of* Orange, PERB Decision No. 2657, July 15, 2019) with the Public Employment Relations Board ("PERB") claiming that the County violated the Meyers-Milias-Brown Act ("MMBA") by unilaterally changing the involvement of the County's legal counsel with regard to "critical incidents" and investigations of "employee misconduct." Upon receipt of the Charge, the County sought to dismiss the case on the basis that PERB lacks jurisdiction over bargaining units composed exclusively of "peace officers" within the meaning of Penal Code Section 830.1.

The Administrative Law Judge did not grant the Motion to Dismiss and instead proceeded to hear the case on the merits. At the close of the litigation the ALJ concluded that PERB does have jurisdiction over units composed exclusively of peace officers, and on the merits of the case found that the employer's conduct did not violate the Act.

Both parties appealed the decision to the full PERB Board. The Board affirmed the ALJ's proposed decision.

Regarding the underlying charge, PERB concluded that the employer's unilateral action did not violate the act because "[f]undamental managerial decisions regarding the merits, necessity, or organization of public services [ ] are outside the scope of representation and therefore are not subject to the MMBA's meet-and-confer requirement." Finding that the conduct here, namely, "the directions an employer gives its legal counsel about how to provide it with legal advice is so attenuated from the employment relationship that its outside the scope of representation," and therefore was a matter that the employer was entitled to unilaterally change.

More importantly, regarding the jurisdiction issue, PERB noted that when its jurisdiction was expanded in 2000 to include public officers, the legislature excluded "persons who are peace officers defined in Section 830.1 of the Penal Code." Thus, PERB reasoned, while the legislature removed individual "peace officers" from its jurisdiction, it did not exclude employee organizations composed of peace officers from the Act. This decision finally puts to rest management's argument that PERB lacks jurisdiction over employee organizations composed exclusively of peace officers.

UPDATE ON *URADNIK:* POST-*JANUS* CHALLENGE TO EXCLUSIVE REPRESENTATION FAILS

By Matthew Taylor

In our previous April 2019 issue, we reported on anti-union forces petitioning the U.S. Supreme Court to hear the lawsuit, *Kathleen Uradnik v. Inter Faculty Organization*. We are gratified to report that the U.S. Supreme Court denied this petition; therefore, the decisions of the federal district court and the Eighth Circuit Court of Appeals, upholding the legality of unions' "exclusive representation" of its members in collective bargaining, will stand.

The plaintiff in the lawsuit, Ms. Uradnik, is a Minnesota college state professor, who refused to join the labor union representing her bargaining union. Supported by anti-labor forces, she sued the union with the aim to stop states from designating labor unions as the "exclusive bargaining representatives" of employees under collective bargaining laws. In other words, these conservative advocacy groups sought to have the U.S. Supreme Court declare these laws unconstitutional and thus prevent employees from speaking with one voice in employment matters in negotiations with their employer. If her challenge had succeeded, multiple unions and perhaps even individual employees could have demanded a seat at the bargaining table. This scenario would have resulted in the end of the traditional, bilateral collective bargaining process, with representatives from the employer, on one side, and representatives from a single union, on the other. In its place, a disorderly process would occur where employers could take advantage of competition amongst a multitude of competing labor voices with different priorities.

Despite their loss in *Uradnik*, anti-union groups will likely continue to seek to undermine organized labor in the wake of the U.S. Supreme Court's decision *in Janus v. American Federation of State, County, and Municipal Employees, Council 31*. We will continue to keep you informed about these efforts to ensure your rights are protected.

Around the State

SERIOUSLY INJURED FIREFIGHTER GIVEN SECOND CHANCE AGAINST FIRE DISTRICTS

By Steven Kaiser

Rebecca Quigley was a US Forest Service firefighter who was sleeping at the temporary base camp run by the Chester Fire Protection District and the Garden Valley Fire Protection District near a large forest fire. She was run over by a water truck and severely and permanently injured as a result. She sued the Districts and three base camp managers employed by the Districts for having created a dangerous condition of public property by failing to rope off the sleeping areas or posting any warning signs. The defendants all claimed immunity based on a very general paragraph in their Answer that referred to the Governmental Claims Act but did not cite any of its specific provisions. Both the trial and appellate courts dismissed the case, finding that under Government Code section 850.4 (which forestalls liability of public entities or their employees for "injuries resulting from the condition of fire protection or firefighting equipment or facilities") the Courts lacked jurisdiction to proceed.

In a decision with potentially far-reaching consequences, the California Supreme Court, in *Quigley v. Garden Valley Fire Protection District*, Case No. S242250, has clarified this extraordinarily murky area of governmental immunity by holding that unless expressly stated otherwise in the Government Claims Act, immunity is not a jurisdictional question that can be raised at any time during the litigation (even on appeal), but is a matter that must be raised as an affirmative defense in the defendant's Answer to the Complaint. The consequence of failing to plead immunity is loss of the immunity by the governmental defendants.

The reversal by the Supreme Court means that the case can go forward after consideration by the trial court as to whether 1) the defense had been raised in the Answer, and 2) whether section 850.6 actually covers the area where Quigley was sleeping. Thus the fire districts can be held liable for the injuries incurred by Plaintiff Quigley.

As a result of this case, fire districts may be required to prove that they took safety precautions to prevent an injury such as Firefighter Quigley's. As part of that defense, firefighters may be required to show that they raised any safety concerns they became aware of, even in the context of active firefighting. Dangerous conditions must be reported!

RESIGNATION IN LIEU OF TERMINATION AND "NO-REINSTATEMENT" AGREEMENT RENDER PUBLIC EMPLOYEE INELIGIBLE FOR CALPERS DISABILITY RETIREMENT

By Wendi Berkowitz

Typically (and with some notable exceptions), public employees who are terminated for cause lose their right to claim disability benefits. A corollary question was only recently answered: What if a public employee is initially terminated for cause, but settles the subsequent grievance action by resigning in lieu of termination and agreeing not to reapply for work with the same agency? In April, the Court of Appeal held, in *Martinez v. Public Employees' Retirement System*, that a former state employee who settled her termination for cause action by resigning and agreeing to forego reapplying with the agency she was leaving was foreclosed from receiving disability retirement benefits. CalPERS ruled in a precedential decision that under these circumstances, the employee's resignation and agreement not to seek re-employment were "tantamount to a dismissal," thereby disqualifying her from receiving a disability retirement. The trial court denied the employee's petition for writ of mandate, despite discomfort with the underlying law on which the CalPERS decision was based. And the Court of Appeal upheld the CalPERS decision, despite evidence that both employee and employer expected that the employee would be applying for a disability retirement after the settlement was finalized (i.e., the settlement included a commitment by her former employer to "cooperate with any application for disability retirement filed by [employee] within the next six months"). It is notable that the Court of Appeal began its discussion of the facts and law by recognizing the strong deference courts give to CalPERS' interpretation of the law on California public employee retirements. The *Martinez* decision leaves intact an employee's ability to apply for a disability retirement if (1) the conduct of the employee which prompted the termination resulted from the employee's disability, and/or (2) the employee had a "matured right" to a disability retirement before the conduct which led to the termination.

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