MASTAGNI LAW BULLETIN

Summer 2012

INSIDE THIS ISSUE:

MANTECA COURT ISSUES RARE RESTRAINING ORDER TO PROTECT OFFICERS FROM PROTESTER'S VENDETTA

By Christopher W. Miller

In a rare and significant case involving limitations on speech directed at police, a Manteca judge has issued permanent restraining orders prohibiting the brother of a parolee shot last June from harassing the involved officer. The orders also prohibit him from having any contact with another officer he harassed over a parking citation.

Officers Harassed after Shooting

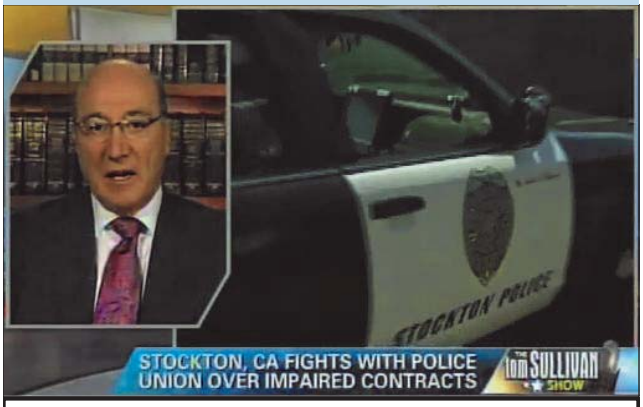
On June 8, 2011, Manteca police officer John Moody shot and killed Ernest Duenez, Jr., after Duenez, a parolee, appeared to be pointing a weapon at the officer. In October, after Officer Moody's name became public, Duenez's brother, Gabriel, began appearing outside the Manteca Police Department every week to protest the shooting. He began distributing flyers calling Moody a "murderer" and demanded the officer's prosecution.

Duenez went beyond these protests, however, and began yelling threats and profanities at Moody at the police department. He repeatedly called Moody a "murderer", told him he was "going to be prosecuted, guaranteed", and was even depicted in a cell phone video yelling at Moody outside the police department. Duenez's activities escalated last November when officers cited him for posting his flyers in violation of the Manteca Municipal Code. At the same time, Officer Armen Avakian cited Duenez for not having a front license plate on his car. Avakian took photographs of the car, which was occupied by Duenez's children. Duenez called Avakian a "pedophile" and later threatened to go to Avakian's house to have the officer sign a "fix it" ticket.

In early December, nearly three weeks later, Duenez confronted Avakian at the Great America amusement park in Santa Clara, where the officer was off-duty with his family. Duenez yelled at Avakian and told him he had taken a picture of the

(Continued on page 6)

FOX NEWS INTERVIEWS DAVID P. MASTAGNI ABOUT STOCKTON POA VICTORY



Mastagni Law Founding Partner David P. Mastagni was recently interviewed by Fox News Commentator Tom Sullivan about the Stockton Police Officers' Association legal victory regarding a contract dispute. (See page 8 for complete story.)

1912 I Street Sacramento, CA 95811 • Phone: 916.446.4692 • Fax: 916.447.4614 • www.mastagni.com

MASTAGNI LAW FIRM — A COMPREHENSIVE REPRESENTATION: One Industrial Injury Leads to Recovery in Five Separate Cases

By Ian M. Roche & Anthony P. Donoghue

As a full-service law firm serving public employees statewide, Mastagni, Holstedt, Amick, Miller & Johnsen recently obtained compensation for a client on five separate claims based on a single on-duty motor vehicle accident. Four years ago, the client was violently rear-ended in his work vehicle by a car traveling 50 miles per hour. The case, which resulted in a net recovery for the client of over $530,000, is a classic example of how the firm's practice areas combine to handle all of a client's needs when unfortunate losses occur.

Workers' Compensation Benefits

The law firm first obtained recovery for the client in his claim for workers' compensation benefits. Injured workers in California are entitled to compensation for injuries that occur during the course and scope of employment.

Third Party Claim

A personal injury, or "third-party", claim arising from a work-related injury may be prosecuted concurrent with a workers' compensation claim when someone other than an employer causes an industrial injury. We

(Continued on page 15)

MASTAGNI, HOLSTEDT, AMICK, MILLER & JOHNSEN
A PROFESSIONAL CORPORATION

About the Law Firm

Mastagni, Holstedt, Amick, Miller & Johnsen is listed in the Martindale-Hubbell Bar Register of Preeminent Lawyers and carries the "AV" rating in the Martindale-Hubbell Law Directory. The "A" signifies the highest level of legal ability, while the "V" denotes "very high" adherence to the professional standards of conduct, ethics, reliability, and diligence.

David P. Mastagni, John R. Holstedt and Michael D. Amick were named "Northern California Super Lawyers" in 2011. David E. Mastagni was named a "Rising Star" in 2011. The law firm is ranked among the top 10 in Sacramento since 1984 by the *Sacramento Business Journal.*

Year Established

1976

Practice Areas

Labor & Employment Law
Public Employee Discipline
Fair Labor Standards Act
Civil Litigation & Personal Injury
Workers' Compensation
Labor Negotiations
Disability Retirement
Social Security
Peace Officer Criminal Defense

Production Coordinator

Nicole L. Silverman

Contributors

Navruz A. Avloni
Anthony P. Donoghue
Jeffrey R.A. Edwards
Sean D. Howell
David E. Mastagni
Christopher W. Miller
B.J. Pierce
Ian M. Roche
Jeffrey M. Schaff
Isaac S. Stevens
Stuart K. Tubis

Bulletin Editors

Angela M. Mastagni
Kathleen N. Mastagni Storm
Christopher W. Miller

CHP DISPATCHER ACQUITTED OF ALL CHARGES IN ALLEGED THEFT

By Jeffrey M. Schaff

When a California Highway Patrol dispatcher faced criminal prosecution for the alleged theft of gift cards and cash from a co-worker, the California Statewide Law Enforcement Association turned to the experienced public safety criminal defense team at Mastagni, Holstedt, Amick, Miller & Johnsen. Represented by Jeffrey M. Schaff, dispatcher Markisha Cotton was acquitted of all charges by a Sacramento jury.

In late 2010, Cotton was accused of stealing two Target gift cards and cash from another dispatcher at the Sacramento Communications Center. A criminal investigation paralleled the internal investigation, and misdemeanor charges were brought against Cotton in March, 2011.

From the start, the Sacramento County District Attorney's Office made it clear Cotton would be treated differently. In most cases, a person with no prior criminal record facing petty theft charges is eligible for deferred entry of judgment, which does not result in a conviction. In Cotton's case, however, prosecutors denied that option to her because she was employed by a law enforcement agency.

Defense Investigation Key to Victory

The defense team launched an investigation following leads previously unexplored by CHP. We were able to find sufficient evidence to go to trial by interviewing witnesses and digging deep into materials provided during the internal investigation. In October, 2011, Cotton's case was set for trial.

The deputy district attorney continued to pressure Cotton for a plea by adding two additional charges. Now, Cotton faced five misdemeanor counts with a maximum sentence of three years. The defense did not waver. The case continued to trial and a jury was sworn on December 19, 2011.

Our preparation made it clear from the outset the District Attorney's Office had overestimated its case. When the prosecution's case finished, the court granted my motion to dismiss Count 1 of the complaint, ruling no reasonable jury could find Cotton had committed the charged offense.

Acquittal Follows Dispatcher's Testimony

During the defense case-in-chief, Cotton testified in her own defense and reiterated her innocence. We rested and the case was submitted to the jury. After just 90 minutes, the jury of six men and six women returned with a verdict of "not guilty" on all four remaining counts.

Unfortunately, however, the road is not yet clear for Markisha Cotton. Her State Personnel Board hearing was held in February, and we are currently waiting on the decision. Cotton's acquittal surely will assist in reversing her termination.

Few public safety employees face the nightmare of both criminal prosecution and administrative termination. Markisha Cotton and her attorneys extend a special "thank you" to CSLEA attorney Andrea Perez and General Counsel Kasey Clark for their unwavering support and encouragement throughout this difficult journey.

Jeffrey M. Schaff is an associate attorney in the Labor Department of Mastagni, Holstedt, Amick, Miller & Johnsen. He represents public safety employees in criminal and administrative matters and is an adjunct professor at the University of the Pacific McGeorge School of Law.

BART POA GIVES EMPLOYER AN "EARLY WARNING" OVER POBRA

By B.J. Pierce

On August 22, 2011, the Bay Area Rapid Transit Authority conceded electronic files its police department maintained as an "Early Warning System" or "IA Profile" database constituted personnel files subject to the protections of the Public Safety Officers Procedural Bill of Rights Act ("POBRA"). BART agreed to remove adverse information which had been entered and maintained in the electronic files in violation of the POBRA.

Similarly, on October 28, 2011, BART agreed to remove letters of discussion and a negative performance evaluation which relied on the letters of discussion from an officer's personnel file. The letters of discussion had been entered into the officers' personnel file without providing notice or an opportunity to respond in violation of the POBRA. BART agreed to re-issue the affected officer a performance evaluation which did not rely on the letters of discussion and to provide remedial training to its line supervisors on the POBRA's requirements of notice and an opportunity to respond.

Case One: "Early Warning System" Created New Records on Peace Officers

In June 2011, an officer with the Bay Area Rapid Transit Police Department learned her agency was maintaining adverse material, including a list of internal affairs investigations in which she had been the subject or was implicated, in an electronic file created pursuant to a new "Lexipol" policy. The material dated from the year 2000 through the present. The officer learned the file was being maintained by the police chief as an "early warning system" to identify and address "problem employees".

Under the new system, employees were monitored for performance and disciplinary issues and an electronic file was maintained in the employee's name. Some of the areas monitored and documented in the files included (1) attendance and use of sick leave; (2) sustained and un-sustained complaints; (3) civilian complaints or comments about officers; (4) the number of use of force incidents in which the officer was involved; (5) the number of obstructing or resisting arrest incidents in which the officer was involved; (6) the number of vehicle collisions in which the officer was involved; (7) peer referrals; and (8) substandard conduct or performance concerns of supervisors.

The policy directed supervisors to "monitor the activity of subordinate employees to identify actual or perceived unprofessional behavior and/or substandard performance" and to "communicate such information to the Chief of Police" for inclusion in the Early Warning System (EWS) file. Similarly, the policy directed personnel assigned to Internal Affairs to "monitor all formal and informal allegations of employee misconduct received by their office" and "communicate such information to the Chief of Police" for inclusion in the EWS file. The Office of the Chief of Police prepared quarterly reports using these records and officers were evaluated, counseled and subjected to "corrective training" based on the EWS reports.

The new policy required officers be "granted access to EWS records that pertain to that employee" after giving a "reasonable amount of notice" to the Office of the Chief. However, there was no requirement the employee be advised an EWS file had been created or was being maintained or that comments adverse to the officer had been entered into the EWS file. It also did not require officers be given an opportunity to respond in writing to any adverse comments or that their response be entered into the file with the adverse comment. Thus, on its face, the EWS policy violated POBRA requirements for notice, an opportunity to respond and entry of written rebuttal into their files. (Gov. Code §§ 3505, 3506.)

BART POA Grieves "Early Warning System" Policy

On June 24, 2011, Mastagni, Holstedt, Amick, Miller & Johnsen, acting on behalf of the BART Police Officers' Association, filed a grievance asserting the new policy violated the POBRA and the MOU between the BPOA and the BART Authority and demanded removal of all adverse material not entered or maintained in compliance with the POBRA and the MOU.

The Public Safety Officers Procedural Bill of Rights Act broadly prohibits employers from entering any comment adverse to the officer's interest into his or her

PROTECTION FOR ELECTRONIC PEACE OFFICER PERSONNEL FILES

personnel file, or any other file, without proper notice to the employee:

> No public safety officer shall have any comment adverse to his interest entered in his personnel file, or any other file used for any personnel purposes by his employer, without the public safety officer having first read and signed the instrument containing the adverse comment indicating he is aware of such comment, except that such entry may be made if after reading such instrument the public safety officer refuses to sign it. Should a public safety officer refuse to sign, that fact shall be noted on that document, and signed or initialed by such officer. (Gov. Code § 3305.)

Agency's Electronic Files were Personnel Files under POBRA

In response to the grievance, BART asserted it could avoid POBRA by maintaining material in electronic form which, if it were maintained in a "paper" form, would unambiguously violate POBRA. This distinction has no basis in the law. Under POBRA, the label placed on a file is irrelevant; what matters is whether the materials in the file "*may* serve as a basis for affecting the status of the employee's employment . . ." (*Aguilar v. Johnson* (1988) 202 Cal.App.3d 241, 251; *County of Riverside v. Superior Court* (2002) 27 Cal.4th 793, 801 –802 (emphasis added).)

Any file, whether maintained as a paper copy, on an electronic storage device, or on a computer network, hard drive or database, is subject to the same rules regarding maintenance and disclosure. (Gov. Code §§ 3305, 3306; Pen. Code § 832.8). The California courts have dismissed semantic attempts to circumvent POBRA protections by designating or maintaining separate files. *(*See *Aguilar* at 247*; Miller v. Chico Unified School District* (1979) 24 Cal.3d 703, 712–713 [employer "may not avoid the requirements of the statute by maintaining a 'personnel file' for certain documents relating to an employee, segregating elsewhere under a different label materials which may serve as a basis for affecting the status of the employee's employment"]; *Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278, 292 ("CPOST") [officers entitled to review adverse material whether placed in a personnel file or maintained in a separate file].)

The courts expressly have held internal affairs files, such as those maintained in the EWS database, are subject to POBRA. *(See Sacramento Police Officers Assn. v. Venegas* (2002) 101 Cal.App.4th 916, 928-929 [rejecting department's claim POBRA did not require it to disclose information in internal affairs files that did not result in discipline and holding sections 3305 and 3306 "readily apply to an adverse comment" in an internal affairs file].) Material used in evaluating an employee or the employee's performance are personnel records, regardless of how the material is named or where it is maintained. (Pen. Code § 832.8(d)-(e); *Aguilar*, 202 Cal.App.3d at 247; *Chico Unified School Dist*., 24 Cal.3d at 712-713; *CPOST*, 42 Cal.4th at 292; *Seligsohn v. Day* (2004) 121 Cal.App.4th 518.)

Further, any records of complaints and or investigations of complaints are personnel records under POBRA, regardless of what they are named or how they are used or where they are maintained. Penal Code sections 832.8(d)-(e) define a personnel record as:

> any file maintained under that individual's name by his or her employing agency and containing records relating to . . . employee advancement, appraisal or discipline . . . [and] [c]omplaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.

Under POBRA, "officers are entitled to review reports of complaints or similar matters that could affect the status

(Continued on page 18)

MANTECA TRO (CONT'D)

(continued from page 1)

officer's son "like you've got a picture of mine." Duenez's behavior was threatening enough to cause the officer to notify park security.

POA Seeks Restraining Orders

When the Manteca Police Officers' Association turned to counsel for assistance, we filed requests for temporary restraining orders on behalf of the two officers. Judge Phillip Urie issued those orders, prohibiting Duenez from coming within 100 yards of the officers or having any other contact with them pending a hearing. Duenez retained John Burris, a Bay Area civil rights lawyer who was representing Duenez's family in a lawsuit against the Manteca Police Department and Officer Moody.

California's anti-harassment laws exempt constitutionally-protected activity. Speech on matters of public concern – including police actions such as officer-involved shootings – is protected First Amendment activity that is not subject to restraint. The courts have made clear, however, that "harassment" is not protected by the state constitution. Thus, the court was squarely confronted with deciding the novel issue of whether a restraining order prohibiting a person from harassing individual police officers over a matter of public concern is constitutionally valid.

Court Rejects Claim of "Protected Activity"

Duenez and his attorneys attempted to excuse his conduct as "constitutionally protected activity". He claimed he had an unlimited right to target the officers on- and off-duty because he had "legitimate grievances" against them over his brother's death and the alleged photographing of his children. Duenez likened his activity to situations where the courts have dismissed prosecutions for profane speech directed at officers making an arrest.

In those cases, the courts have held words shouted at police officers engaged in law enforcement activity are constitutionally protected unless they are "fighting words" intended to provoke the officer. Duenez argued he could curse, accost, harangue and harass Moody and Avakian so long as he did not attempt to provoke a fight with them. But the court agreed with us that while a police officer's actions on duty may be matters of public concern, threats, intimidation, unwanted contact and harassment directed at a specific officer who is not engaged in an enforcement action are not protected by the First Amendment. Duenez's conduct was not protected speech because its apparent purpose was to promote a private vendetta against the officers, not to comment on matters of public concern.

Judge Urie reasoned Duenez was not using speech to protest the shooting or to challenge a current enforcement action – both of which are protected by the First Amendment – but instead was harassing the officers about past police actions. Duenez's conduct was therefore harassment of the type "that would place a reasonable person in fear for his or her health and safety and for the health and safety of his or her immediate family," as required by the restraining order statute.

Permanent Orders Issued

The final order prohibits Duenez from harassing, intimidating, striking, stalking, assaulting, or disturbing the peace of Officers Moody and Avakian. The court also ordered Duenez not to come within 25 yards of the officers near the Manteca Police Department and not within 100 yards anywhere else. He was ordered to have no contact with them through third persons. Judge Urie was careful to exclude from restraint the lawful protest activity in which Duenez and other family members continued to engage away from the police department.

This case is unusual because police officers generally are subjected to, and expected to take, a greater degree of verbal abuse than the average citizen. First Amendment activity in our democratic society, particularly when directed at the police, is deemed to outweigh the risk to the police from harassing conduct. But, as the court determined in this case, even police officers deserve the protection of the anti-harassment statute when someone's actions become a private vendetta instead of a public protest.

Christopher W. Miller is a former prosecutor and is the supervising partner of the Labor Department at Mastagni, Holstedt, Amick, Miller & Johnsen. He is general counsel to the Manteca Police Officers Association and represented the officers in this case.

WELCOME NEW CLIENTS!

TULARE POLICE OFFICERS UNION

The **Tulare Police Officers Union** are now represented by Mastagni, Holstedt, Amick, Miller & Johnsen for representation in labor negotiations, legal defense, and corporate counsel. The 70-member Union voted unanimously to hire our firm upon approval of their new by-laws, written by the firm's lead negotiator, Michael W. Jarvis. The firm will provide representation through the PORAC Legal Defense Fund, Plan 1 and Labor Negotiator David E. Topaz will serve as the lead consultant for the union in upcoming negotiations over a successor MOU. Our firm is very excited to be working with **President James Kelly** and looks forward to a rewarding relationship with the Police Officers Union.

IMPERIAL COUNTY DISTRICT ATTORNEY INVESTIGATORS' ASSOCIATION

The **Imperial County District Attorney Investigators' Association** has retained Mastagni, Holstedt, Amick, Miller & Johnsen for contract negotiations, legal defense, grievance procedures, and collective bargaining. We are very pleased to be working with **President Luis Verdugo** and the ICDAIA on such matters and look forward to many successful negotiations in the future. Labor Consultant Dennis Wallach will be working with President Verdugo and the association in upcoming contract negotiations.

SANTA CRUZ COUNTY SHERIFF'S CORRECTIONAL OFFICER ASSOCIATION

The **Santa Cruz County Sheriff's Correctional Officer Association**, representing 106 correctional officers working in facilities operated by the Corrections Bureau, has retained Mastagni, Holstedt, Amick, Miller & Johnsen for representation. In working with **President Geoffrey Karty,** the firm will be provide the Correctional Officer Association with all services, including: labor negotiations, corporate counsel, and legal defense. Labor Negotiator David E. Topaz looks forward to negotiating a collective bargaining agreement with the County in upcoming months.

MERCED FIRE FIGHTERS ASSOCIATION, LOCAL 1479

The **Merced Fire Fighters Association, Local 1479**, led by **President Chad Englert**, has signed on with Mastagni, Holstedt, Amick, Miller & Johnsen for representation in labor negotiations, corporate counsel matters, discipline and grievance issues. Labor Negotiator David E. Topaz is navigating the Association through negotiations with the City and Kathleen Mastagni-Storm serves as their primary labor attorney. We look forward to negotiating an MOU and assisting the City with implementing discipline policies and procedures consistent with the Fire Fighters Procedural Bill of Rights Act.

ALPINE COUNTY DEPUTY SHERIFFS' ASSOCIATION & ALPINE COUNTY LAW ENFORCEMENT MANAGERS' ASSOCIATION

In July of 2011, the Alpine County DSA, led by **Chris Harootunian** and with the Alpine County LEMA, led by **Ron Michitarian**, retained the services of the Mastagni Law Firm. A successor Memorandum of Understanding was entered into as a result of six months of bargaining led by Labor Negotiator Mark Salvo.

The 22-month contract included the following changes:

1. 6.5% salary increase over the term of the contract.
2. A change in medical plans, going from an 80/20 plan to a 90/10 plan.
3. Reduction in out-of-pocket medical premiums of $50.00 per month in the first year and an additional $25.00 in the second year.
4. Re-opener regarding a reduction in the vesting requirement for retiree medical.
5. Elimination of State Disability Insurance due to a previously negotiated Long Term Disability plan resulting in a 1.1% savings in salary.
6. Moving the classification of Sergeant from LEMA to the DSA, resulting in a 5% salary increase.
7. Agreement to pay the employee share of PERS retirement.

STOCKTON POLICE OFFICERS OVERTURN CITY'S 'EMERGENCY' POWER GRAB

By David E. Mastagni & Isaac S. Stevens

The men and women of the Stockton Police Department recently won a nationally significant ruling dismissing the City of Stockton's lawsuit to force them to renegotiate their labor contract based on a purported fiscal emergency. Fox Business News recorded the proceedings, and Tom Sullivan sided with the police on his show. The court's ruling involved important national issues regarding the ability of public employers to walk away from their financial obligations through a majority vote of their governing body to declare an emergency.

Contracts Clause

The Contract Clause in the U.S. and California Constitution protects property rights by constraining public entities from "impairing the obligation of contracts." Historically, impairments were limited to enactments for policing the public good and morale. The City of Stockton wants the ability to balance its budgets by impairing the financial terms of its own contracts, despite U.S. Supreme Court rulings that the government "cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money" for public purposes rather than pay its creditors. Moreover, in over the last 35 years, no Ninth Circuit or Supreme Court case has upheld an impairment of "a financial term of an agreement to which a state entity was a party."

Background

In early 2010, months after executing a police labor contract, Stockton declared a "fiscal emergency" and refused to honor its agreement. After rejecting offered concessions, in 2011 Stockton imposed severe impairments that totaled about 30 percent and drove officers into foreclosure, bankruptcy, and a mass exodus. The Police Officers' Association has offered the City equivalent concessions, but demanded conditions the City refused. The objectionable conditions would have prevented the City from further impairments and restored the concessions in the event the City declared bankruptcy.

Stockton expects to save over $10 million from its emergency actions but has already spent $2 million on outside attorneys and budgeted $1.5 million more. Through its emergency declaration, Stockton claims inherent self-help debt-relief powers without the judicial oversight of bankruptcy or having to negotiate with creditors. Rather than satisfying its obligations, the city funded management raises and luxuries such as the marina, arena, ballpark, and many redevelopment projects. As public safety suffered – murder rates reached new highs and police staffing dwindled – the big-spending city manager responded by hiring a $150,000 consultant to oversee a committee to issue safety recommendations for the next year.

The police sued to enforce their contract. Stockton counter-sued, seeking to validate its contract impairment and compel renegotiation, which would allow it to declare an impasse and impose changes without agreement. This attempt to establish a right to force contract modifications by declaring an emergency would bar the police from enforcing the original agreement or challenging Stockton's actions. To distract from its novel power grab, the City claimed the officers' purchase of rental property near the city manager amounted to bad-faith bargaining.

Court's Ruling

The police filed motions to dismiss Stockton's cross-claims, asserting the claims were unavailable under the law. The police also asked the court for protection from the City's attempt to obtain abusive pre-trial discovery into internal association communications and finances.

On January 5, 2012, the court tossed Stockton's claim to establish emergency powers and impair its financial obligations, but granted the City permission to amend its claim. It also ruled the police had no obligation "to discuss or renegotiate terms of a closed contract, notwithstanding Stockton's declaration of fiscal emergency" and were "within [their] rights to refuse." The court denied the City any opportunity to amend its unfair labor practice claim seeking to compel SPOA to renegotiate its closed contract. Over the City's objections, the court also appointed a referee to resolve the discovery issues. It also allowed Stockton to try to

SPOA VICTORY (CONTINUED)

prove harassment relative to the house purchase – a moot point, as the property has long been rented.

Recent Developments

On February 24, 2012, Stockton announced that it would not cash out accrued vacation and sick leave for employees separating from employment after February 16, 2012. Four days later, the City Council affirmed the suspension of leave cash outs and voted to enter the A.B. 506 pre-bankruptcy mediation process. The Police Officers' Association asked the court for a preliminary injunction requiring Stockton to continue cashing out paid leave during the A.B. 506 mediation process. The court held that the case was stayed based on appeals of prior rulings. In ruling on this matter, the court opined that the Police Officers' Association was likely to succeed on the merits of its claim, but the City should be allowed to complete the A.B. 506 mediation process based on the court's belief bankruptcy is a near certainty. The court stated, "if it turns out that bankruptcy does not happen, then I'm going to invite SPOA to refile your motion."

Conclusion

By preventing Stockton from tearing up its contract, the court's January 5, 2012 ruling represents an important first step in constraining Stockton to the rule of law. Given that local governments will always spend beyond their means, the Contract Clause remains an important Constitutional safeguard of property rights.

A version of this article was published on February 27, 2012 in the "California Employment Law Letter."

David E. Mastagni is corporate counsel for the Stockton Police Officers' Association and a partner with Mastagni, Holstedt, Amick, Miller & Johnsen.

Isaac S. Stevens is co-counsel in the lawsuit and an associate with Mastagni, Holstedt, Amick, Miller & Johnsen who concentrates on complex civil litigation.

AB 506: PRE-BANKRUPTCY MEDIATION

By Isaac S. Stevens

In September 2011, the Legislature passed A.B. 506, which prohibits a local public entity in California from petitioning for Chapter 9 bankruptcy unless the entity participates in a neutral evaluation process or declares a fiscal emergency with findings that its financial state jeopardizes the health and safety of residents in its jurisdiction and that it is or will be unable to pay its obligations within the next 60 days. Similarly, under Chapter 9, a public entity must negotiate with creditors before petitioning for bankruptcy. Although promoted as an alternative to a bankruptcy filing, A.B. 506 actually provides for the filing of a preapproved bankruptcy petition and readjustment plan upon the successful completion of the neutral evaluation process.

A public entity may start the neutral evaluation process if it likely will become unable to meet its financial obligations as they are due. Upon initiating the process, the entity must provide notice to all "interested parties" within ten days of requesting neutral evaluation. Interested parties include bondholders, pension funds, creditors, trustees, and unions. The entity may also invite persons holding certain contingent claims (e.g. lawsuits) against the entity. The interested parties must notify the public entity within 10 days if they wish to participate. A.B. 506 requires the entity to promptly provide interested parties complete and accurate information to allow them to negotiate the readjustment of the entity's debt.

During the neutral evaluation process, the evaluator must inform the parties of the provisions of Chapter 9 of the bankruptcy code and help the parties to reach a settlement that treats all creditors equally. The evaluator cannot force the parties to accept a settlement, but he or she can make recommendations. The neutral evaluation process is confidential. All parties must agree to keep confidential all statements, information, and documents exchanged during the process.

The A.B. 506 process may last no longer than 60 days, unless the entity or a majority of interested parties vote for a 30-day extension. Additional extensions are permitted by agreement. The cost of the evaluation process is split between the creditors and public entity. The process ends when the time expires, the parties reach an agreement or proposed plan of readjustment, or the entity declares a fiscal emergency and determines that it must file for bankruptcy immediately.

The City of Stockton was the first public entity in California to initiate the A.B. 506 process. Our office represents the Stockton Police Officers' Association as an interested party.

U.S. SUPREME COURT APPROVES STRIP-SEARCHES FOR SUSPECTS ARRESTED FOR MINOR OFFENSES

By Jeffrey R.A. Edwards

On April 2, 2012, the United States Supreme Court held that the Constitution permits correctional facilities to conduct blanket strip searches on all arrestees entering general population, even those arrested only for minor offenses. *Florence v. Bd. of Chosen Freeholders of County of Burlington et al.* (2012) No. 10-945, slip. op., settles a division among lower courts about whether public safety professionals needed "reasonable suspicion" before strip-searching nonindictable offenders.

The case arose after Albert Florence was arrested in 2003 on a bench warrant related to his failure to pay a fine or appear at an enforcement hearing. Arresting officers took Florence to a county correctional facility. At the correctional facility he was required to shower with a delousing agent while officers checked him for scars, marks, gang tattoos, and contraband. Officers also visually inspected his body openings, including private areas.

After six days, Florence was transferred to a second facility with a similar procedure. The procedure was the same for all arrestees and no one touched Florence during the process. Florence later filed a federal civil rights lawsuit claiming the search was unconstitutional under the 4th Amendment prohibition of "unreasonable searches and seizures" because he was arrested for a minor crime.

The Court rejected Florence's argument. Instead, the Court decided the county search policy was justified because it both detected and deterred contraband, identified gang affiliations, identified inmates needing medical attention, and ensured compliance with health procedures.

The Court's decision emphasized that "Correctional officials have a legitimate interest, indeed a responsibility, to ensure that jails are not made less secure byreason of what detainees may carry on their bodies."

The Court found ample evidence that suspects arrested for even minor crimes carry contraband into facilities, citing evidence from California where "San Francisco Officers have discovered contraband hidden in body cavities of people arrested for trespassing, public nuisance, and shoplifting."

Accordingly, the Court concluded the reasons a person is arrested has little bearing on whether intake procedures are constitutional. Instead, the Court found the policy at issue was reasonable and that courts should defer to public safety professionals to make the decision about when and how to search inmates. The Court stressed it was not deciding the constitutionality of searches that involved touching or instances where inmates were not assigned to general population.

Jeffrey R. A. Edwards is an associate attorney with Mastagni, Holstedt, Amick, Miller & Johnsen, who concentrates on complex civil litigation and the Fair Labor Standards Act.

Mastagni, Holstedt, Amick, Miller & Johnsen is in the Blogosphere!

Please check out our Public Safety Law Blog at http://mastagnilaw.blogspot.com/

You'll find news about recent cases, articles about our ongoing litigation, and occasional commentary on decisions by the Public Employment Relations Board and the California and federal courts.

Also, check out our newest blog — *Your Rights to Recovery: Personal Injury, Workers' Compensation & Civil Rights in California* at http://mastagni-california-lawyers.blogspot.com/

You can subscribe to the blogs by e-mail or RSS feed. There is also a link to our blogs at our website, www.mastagni.com.

SACRAMENTO COUNTY LEMA VINDICATES RIGHT TO INVESTIGATE AND FILE GRIEVANCES WITHOUT FEAR OF RETALIATION

By David E. Mastagni & Isaac S. Stevens

Sacramento County Law Enforcement Managers Association (LEMA) President Michael Zeigler obtained a settlement protecting the right of union officers to investigate and pursue unpopular grievances in his lawsuit against former-Sheriff John McGinness and the County of Sacramento.

In March 2010, Ziegler filed a grievance on behalf of himself, LEMA, and LEMA's members alleging violations of Sheriff's Department policies relating to the handling of Fair Employment Office (FEO) files of a LEMA member running for sheriff. On the same day Ziegler appealed the denial of the grievance, the Sheriff's Department served Ziegler with a notice of interrogation. The notice said Ziegler was "suspected of misconduct" and indicated the interrogation was related to Ziegler's communications with a witness during his investigation of LEMA's grievance. Between April 2010 and August 2010, Ziegler received three more notices of interrogation. Ziegler objected to the investigation.

All four notices told Ziegler he was prohibited from discussing the matter with anyone other than his representative. As a result, Ziegler was prohibited from discussing the substance of the investigation with LEMA's board of director or members. Ziegler submitted to interrogation on August 18, 2010 under threat of discipline for insubordination.

Ziegler filed a petition for writ of mandate against the County of Sacramento and then-Sheriff John McGinness on August 10, 2010. Ziegler's petition alleged the County violated the Meyers-Milias-Brown Act by opening a retaliatory investigation against Ziegler for his efforts to investigate the improper handling of LEMA member's personnel records. Ziegler also claimed the Sheriff's actions impermissibly interfered with his representation of his members. The petition sought, among other things, a writ compelling the County to cease and desist from retaliating against Ziegler, expungement of all County records of its investigation of Ziegler, and a determination the County willfully and maliciously violated the MMBA.

With encouragement from the Court, the parties participated in mediation and reached a global resolution of the suit. Under the settlement all references to the disciplinary investigation of Ziegler were removed from his files and the County paid all mediation costs and Ziegler's attorney fees for the mediation. The County is also required to e-mail every member of LEMA a copy of the agreement, which includes the County's acknowledgment that (1) "The investigation of an employee representative over engaging in concerted labor activity, including but not limited to the investigation of a potential grievance or the filing of a grievance is unlawful" and (2) "Employee representatives shall not be subject to the threat of discipline for exercising rights under the MMBA or any grievance process."

Mastagni Law attorneys David E. Mastagni and Isaac S. Stevens represented LEMA President Mike Ziegler in the matter.

David E. Mastagni is a partner with Mastagni, Holstedt, Amick, Miller & Johnsen, where he emphasizes in labor and employment law representation.

Isaac S. Stevens is an associate attorney in the Labor Department. His practice focuses on complex litigation, including wage and hour litigation under the Fair Labor Standards Act.

DOJ SPECIAL AGENTS FIGHT BACK AGAINST BUDGET CUTS

By Stuart K. Tubis

The Mastagni Law Firm represents the Association of Special Agents - Department of Justice (ASA-DOJ) in a lawsuit over targeted funding cuts that have forced the Department of Justice to lay off nearly 200 Special Agents and effectively to eliminate two Bureaus within its Division of Law Enforcement. The number of special agents has been reduced to about 200, down from over 500 such agents in 2006.

The elimination includes the Bureau of Narcotic Enforcement (BNE), responsible for investigating drug cartels, street gangs, and other violent offenders, as well as the Bureau of Investigation and Intelligence (BII), responsible for investigating exploiters of children, homicides, organized crime, major fraud, terrorism and public corruption.

The budget cuts caused Attorney General Kamala Harris to remove her special agents from two-thirds of the DOJ gang and drug task forces and close regional offices in Redding, Orange County, Sacramento, and San Jose. Moreover, the Attorney General removed special agents and supervisors from all Sexual Assault and Felony Enforcement (SAFE) Teams throughout California.

The suit names Governor Jerry Brown and Department of Finance Director Ana Matosantos in their official capacities as defendants. In the lawsuit, the Association reveals Governor Brown specifically targeted the budget cuts to the DOJ's Division of Law Enforcement (DLE) as political retaliation for the Special Agents' endorsement of Meg Whitman in the 2010 gubernatorial race. The California Statewide Law Enforcement Association (CSLEA), which represents the Special Agents in collective bargaining, endorsed Whitman in September 2010.

The lawsuit further alleges the Governor violated both the state Constitution and the California Government Code by abolishing programs managed by the Attorney General. The Association believes the spending cuts proposed and supported by Brown unlawfully eliminated many DLE functions without the required statutory authority and infringed on the Attorney General's constitutional authority to investigate and prosecute crimes.

The goal of the litigation is to restore the funding for the DOJ special agent positions. We are hopeful the courts will recognize the societal danger and unsound basis for the elimination of these Special Agent positions.

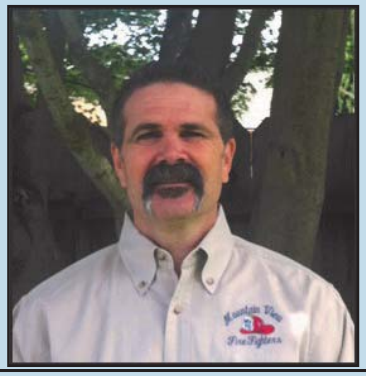
Stuart K. Tubis is co-counsel for the ASA-DOJ and an associate attorney in the Labor Department of Mastagni, Holstedt, Amick, Miller & Johnsen who concentrates on complex civil litigation.

Mastagni, Holstedt, Amick, Miller & Johnsen Receives "AV" Peer Review Rating from LexisNexis® Martindale-Hubbell®

LexisNexis Martindale-Hubbell has recognized Mastagni, Holstedt, Amick, Miller & Johnsen with a Martindale-Hubbell Peer Review Rating™. Mastagni, Holstedt, Amick, Miller & Johnsen was given an "AV" rating from its peers, which means the firm is deemed to have very high professional ethics and preeminent legal ability. Only lawyers with the highest ethical standards and professional ability receive a Martindale-Hubbell Peer Review Rating.

PRESIDENT PROFILE: JOHN MIGUEL, MOUNTAIN VIEW PROFESSIONAL FIREFIGHTERS

Mountain View Professional Firefighters President John Miguel has 33 years in the fire service, and is currently serving his 30th year in the Mountain View Fire Department. John has always been active in the Local, serving as Shift Vice President and Negotiator. He has spent the past 10 years as President of Local 1965. "I have had the pleasure to serve under past presidents who were great leaders and a tremendous influence on who I am and what I have tried to accomplish as Union President," says John.



Mountain View Professional Firefighters President, John Miguel

John has tried to teach the importance of being involved in the communities in which we work. Under John's leadership, the Mountain View Firefighters started a charity called *Create-A-Smile*. Under *Create-A-Smile*, members contribute bi-weekly from their pay checks and the money is used in the community for food, clothing, shelter, rebuilding of homes in the community, scholarships and any other assistance citizens may need.

John served four years in the United States Air Force. He was a camp counselor for "Champ Camp," a summer camp sponsored by the Alisa Ann Ruch Burn Foundation for burn survivors ages 5-18. He also helped to found the Bay Area Chapter of the Alisa Ann Ruch Burn Foundation and sat on the statewide executive board.

John is blessed with a wonderfully supportive wife, Kelly. John and Kelly have 5 children and 5 beautiful grandchildren. John says his wife is a great sounding board and credits her influence for the success of the Local over the past 10 years.

"I love my family, I love my profession, I love those I serve and those I serve with," says John. "I hope we are able to hold on to and build upon the benefits and efforts of those who served before me. I have been truly blessed by my career in the Fire Service and how, through the City of Mountain View, it has provided for my family. I hope to ensure those working for the City of Mountain View and in this profession 30 years from now can say the same."

MASTAGNI LAW REPRESENTS THE CALIFORNIA CHAPTER OF THE NATIONAL LATINO POLICE OFFICERS' ASSOCIATION

Mastagni, Holstedt, Amick, Miller & Johnsen recently has begun work for the California Chapter of the National Latino Police Officers' Association (NLPOA). The NLPOA was founded in 1972 by Vicente Calderon (California Highway Patrol) and John Parraz (Sacramento County Sheriff's Department). The NLPOA was chartered on August 14, 1974, with the purpose of eliminating prejudice and discrimination in the criminal justice system, particularly in law enforcement, reducing community juvenile delinquency, and lessening citizen tension in predominantly Latino communities.

Phillip R.A. Mastagni is welcomed to the NLPOA with a symbolic presentation of the NLPOA lapel star.

Today, the NLPOA is the largest Latino Law Enforcement Organization in the United States, with local chapters in many cities throughout the country. Its membership includes chiefs of police, sheriffs, police officers, parole agents, and federal officers, all of whom are employed at the local, state, and federal levels.

NLPOA is a public benefit association recognized as a non-profit organization, IRS 501(c)(3) number 94-3165929. NLPOA does not discriminate against any individual because of race, color, sex, or religion and membership is open to all.

THE MOST SIGNIFICANT TORT DAMAGES DECISION IN YEARS: *Howell v. Hamilton Meats & Provisions*

By Navruz A. Avloni

A recent decision by the California Supreme Court skews the civil justice system in favor of liability insurers and defendants by leaving prevailing plaintiffs with a smaller recovery and insurance companies with lower liability damages.

In *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, the state supreme court held an injured party is not entitled to recover as damages the full value of medical services provided to her through her private health insurance coverage. The Court opined a plaintiff's medical damages are limited to the significantly lower sum paid by the healthcare insurer pursuant to its contract with the medical providers. The Court explained the reduction in compensation for medical services based on a negotiated rate differential is not a benefit provided to the plaintiff in compensation for his or her injuries.

Under *Howell*, defendants are no longer liable for the total cost of a plaintiff's medical bill, but rather only for the substantially discounted negotiated rates that are paid by medical insurance companies. The Court's decision penalizes the injured plaintiff whose foresight and prudence resulted in maintaining private health insurance by assigning disparate values to the costs of medical treatment for plaintiffs with health insurance and those without health insurance.

Plaintiffs with medical insurance are entitled in damages only to what is paid by their medical insurance carrier; however, plaintiffs with no insurance are entitled to recover the entire reasonable value for identical medical treatment. The uninsured plaintiff is entitled to such a recovery even when the hospital reduces the costs of non-insured plaintiffs' bills. In *Sanchez v. Strickland* (2011) Cal.App.4th 758, the California Court of Appeals held that when a hospital willingly reduces the bill without the insurance carrier being involved, it is a benefit that may be recovered by the plaintiff under the collateral source rule. As a result, *Howell* puts insured plaintiffs in a worse position than those plaintiffs who do not carry medical insurance.

Bob Tyson, who argued for the defendants before the California Supreme Court, argues that letting plaintiffs recover the full bill is a "super windfall." Generally a windfall is defined as receipt of financial gain that was not expected or earned. Finding a $100 bill on the street is a windfall. In contrast, a marketplace gain by freely negotiating parties is not a windfall. It's anticipated, planned, and paid for with plaintiffs' medical insurance premiums. This "windfall" rhetoric, which has a negative connotation, has been used effectively by defense attorneys throughout the nation to limit the scope of the collateral source rule.

On February 24, 2012, California Senate President Pro Tem Darrel Steinberg brought a glimpse of hope when he introduced Senate Bill 1528 ("SB 1528"). The bill seeks to add Section 3284 to the California Civil Code, which would effectively overturn the decision in *Howell*. The bill would eliminate the cap set by the Court in *Howell* and instead allow plaintiffs with medical insurance to recover the reasonable cost of the medical services provided to the plaintiff without regard to the amount that was actually paid for the services.

Look out for a major battle this year over SB 1528!

The Civil Litigation Department at Mastagni, Holstedt, Amick, Miller and Johnsen represents parties in a range of litigation involving motor vehicle collisions, products liability, premises liability, uninsured and under-insured motorists claims, professional negligence, medical malpractice, and catastrophic injury.

Navruz Avloni is a first-year associate in the Civil Litigation Department of Mastagni, Holstedt, Amick, Miller & Johnsen.

MASTAGNI LAW FIRM — A COMPREHENSIVE REPRESENTATION: One Industrial Injury Leads to Recovery in Five Separate Cases

(continued from page 2)

represented this client in a third party claim against the driver who rear-ended him.

Underinsured Motorist Claim

The driver who struck our client was insured only with California's minimum insurance policy requirements of $15,000.00 per person or $30,000.00 per occurrence. Since that insurance was inadequate to compensate the client for his life-changing injuries, we recovered additional damages under the employer's underinsured motorist policy. Underinsured motorist policies allow further compensation for injuries when an adverse party is not adequately insured to fully satisfy an injured party's loss.

Medical Malpractice

As a result of the devastating collision, the client required a cervical fusion surgery to repair injuries to his neck. While he was on the operating table, however, his surgeon negligently fused the wrong cervical discs, causing fusion of more levels of the client's spine than was medically necessary. We obtained an additional recovery for the client in a claim against his doctor for providing treatment that fell below any acceptable standard of care.

Social Security Disability

Finally, the Mastagni Law Firm obtained recovery for this client in a claim for Social Security Disability benefits. He was unable to obtain medical clearance from his doctors to return to work due to the severity of his injuries. When his application for Social Security Disability benefits was denied, we appealed the decision and won much-needed benefits for the client.

All five cases were handled by the dedicated attorneys and staff at our law firm. Our joint efforts helped provide this client with financial security after his tragic injury.

Ian M. Roche is an associate attorney who works in the Civil Litigation Department at Mastagni, Holstedt, Amick, Miller & Johnsen.

Anthony P. Donoghue is a senior associate at Mastagni, Holstedt, Amick, Miller & Johnsen. His practice focuses on all aspects of civil litigation.

Mastagni Summer Thursdays are Back!

Please join us this summer for our Thursday night mixers!
Come meet our attorneys and agency members as we celebrate summer!

May 31st @ 5:30PM

June 28th @ 5:30PM

July 26th @ 5:30 P.M.

August 30th @ 5:30 P.M.

1901 I Street, Sacramento, California 95811

See you there!

IMPERIAL COUNTY PROBATION OFFICER HAS SUSPENSION OVERTURNED WITHOUT HAVING TO CALL A SINGLE WITNESS

By Sean D. Howell, Esq.

An Imperial County personnel board revoked a disciplinary suspension imposed on Deputy Probation Officer Jaime Duron over the shooting of a dog during a multi-jurisdictional task force operation. The Employment Appeals Board dismissed the 10-day suspension after Duron demonstrated the employer's case-in-chief was so flawed the discipline could not be sustained.

On May 30, 2010, while serving a restitution notice as part of the "Stonegarden" multi-jurisdictional task force, Duron and his partner were attacked by a dog. Duron shot the dog to protect himself and other officers. At the time, Duron was not wearing his department-issued body armor.

Department 'Flip-Flops' on Use of Force

An Imperial County Probation Department Shooting Inquiry Board determined the shooting was justified. The board issued findings Duron did not violate any laws or departmental policies during the shooting and justified his use of force.

But several minutes after the Shooting Inquiry Board adjourned, Chief Deputy Probation Officer Pete Salgado went back to his office and changed his mind. He provided a dissenting opinion which noted it would have been a "safer shooting" had Duron been wearing his body armor.

Chief Probation Officer Martin Krizay, who later resigned amidst allegations of committing unfair labor practices, concluded Duron should have worn his body armor pursuant to Department policy. Krizay's conclusion was based on improper findings by Gloria Munoz-Brunswick, the internal affairs investigator, who made those findings even though the department's own policy did not require the use of body armor during service of a restitution notice.

County Pursues Duron Despite Contradiction in Use of Force Policy

Chief Krizay imposed a 10-day suspension on Duron for failing to wear his body armor, allegedly in violation of the County's policy. Krizay was unavailable for the hearing, so Selgado and Munoz-Brunswick testified regarding the investigation and suspension. From the opening statements on, Duron's defense emphasized the weakness of the County's case.

The Imperial County Probation Department's Procedures Manual states:

> All officers are mandated to wear protective body armor (vest) and utility belt when doing any type of enforcement activity. (i.e., searching residences or making an arrest in the field.)

The service of a civil restitution notice is not a search of a residence or an arrest in the field. Therefore, on its face, the policy could not have been violated. Undeterred by the policy and the facts supporting Duron's exoneration, the department attempted to support a violation of the policy by arguing a different set of policies applied to the Stonegarden assignment.

The County's witnesses asserted the Stonegarden assignment required body armor because of an operations plan for the assignment indicating body armor would be required for all probation officers. However, the County failed to recall Duron was the supervisor who authored the operations plan. Duron explained probation officers asked him about the body armor requirement in the operations plan. He explained to the other probation officers this directive was intended to remind the officers of the County's body armor policy and was not an attempt to create a new policy which would require body armor at all times.

Faced with unfavorable facts, the County abandoned its initial position and argued service of restitution notices is per se an enforcement activity.

County's Case Collapses at Hearing

Witnesses from the Department's administration testified the service of restitution notices are enforcement activities and therefore require body armor. Witnesses for the Department went so far as to attempt to interpret the policy to read, "All officers are mandated to wear protective body armor (vest) and utility belt when *in the field*."

IMPERIAL COUNTY PROBATION OFFICER HAS SUSPENSION OVERTURNED WITHOUT HAVING TO CALL A SINGLE WITNESS

By changing "enforcement activity" to "in the field" in her testimony, administration representative Gloria Munoz-Brunswick attempted to mislead the Appeals Board to believe body armor is required any time the probation officers are in the field, not just when they are engaged in enforcement activities.

This argument backfired on the County when a Department witness testified, on cross-examination, that at the time of the investigation he regularly served restitution notices without body armor. Interestingly, this witness was not a probation officer and was not issued body armor, and his possession of body armor was possibly illegal because he is not a peace officer. Nonetheless, the Department regularly sent him "into the field" without body armor to serve restitution notices, just as Duron and his partner were doing at the time of the shooting.

One of the pages in the Stonegarden operations plan included a list of ten objectives. A county witness testified that with the exception of report writing, each of the ten items described in the plan was enforcement activity, including "Restitution contacts."

But on cross-examination, the witness was asked about a second list of items on the bottom of the same page. The list at the bottom of the page identifies, from the list of ten, which items are "Enforcement details." Warrants and Fourth Amendment waiver compliance checks were the only two activities from the list of ten possible Stonegarden activities identified as enforcement. Confronted with the obvious inconsistency between his own testimony and the evidence provided by the County, the witness was literally speechless.

This document was never made available to Duron or his attorney prior to the evidentiary hearing. However, Ms. Munoz-Brunswick and Chief Krizay's hubris in the belief they answer to no one and are permitted to fabricate policy, re-interpret the definitions of various provisions in the policy and practices of the department, and run roughshod over Duron, proved to be their downfall.

Before Duron had to put one witness on the stand in his case, the Employment Appeals Board agreed it had heard enough inconsistent statements, misapplication of the policies, proffered testimony from the County's witnesses and lack of any proof Duron violated the alleged policies.

The support provided by the Imperial County Probation and Corrections Peace Officers Association and PORAC LDF prevented the Imperial County Probation Department from succeeding in its attempt to impose excessive discipline with impunity.

A version of this article was published in the February 2012 issue of "PORAC Magazine."

Sean D. Howell, Esq. and Deputy Probation Officer Jaime Duron celebrate the Employment Appeals Board decision to dismiss Officer Duron's 10-day disciplinary suspension.

Sean D. Howell is an Associate with the Labor Department of Mastagni, Holstedt, Amick, Miller & Johnsen. Sean represents public sector employees in administrative investigations, hearings, and civil litigation.

BART POA GIVES "EARLY WARNING" IN POBRA CASE (CONT'D)

(Continued from page 5)

of their employment, regardless of whether the information at issue actually was placed in the officer's personnel files." *(CPOST*, *supra*, 42 Cal.4th at 292).

BART's Disclaimer of Any Punitive Purpose did Not Relieve its Obligations under POBRA

Notwithstanding these rules, BART attempted to avoid POBRA by claiming the EWS program did not have any punitive purpose; however, this disclaimer did not relieve BART of the notice requirements of the statute. BART's disclaimer the material was not a personnel file and would not be used for personnel reasons, including employee appraisal and/or disciplinary purposes, was insufficient to circumvent POBRA. The statute protects officers broadly against all adverse comments, not merely adverse comments used in disciplinary actions. (See Gov. Code 3305; *Riverside*, 27 Cal.4th at 801-802.)

The courts have construed the statutory language to include any document that "*may* serve as a basis for affecting the status of the employee's employment," including citizen complaints kept in a file separate from the officer's personnel file. (*Aguilar*, 202 Cal.App.3d 241.) The events that will trigger an officer's rights under sections 3305 and 3306 "are not limited to formal disciplinary actions, such as the issuance of letters of reproval or admonishment or specific findings of misconduct." (*Sacramento Police Officers*, *supra*, 101 Cal.App.4th at p. 925.)

> Rather, an officer's rights are triggered by the entry of any adverse comment in a personnel file or *any other file used for a personnel purpose*. [¶] . . . [T]he broad language employed by the Legislature in sections 3305 and 3306 *does not limit their reach to comments that have resulted in, or will result in, punitive action against an officer*. The Legislature appears to have been concerned with the potential unfairness that may result from an adverse comment that is not accompanied by punitive action and, thus, will escape the procedural protections available during administrative review of a punitive action." (*Sacramento Police Officers*, *supra*, 101 Cal.App.4th at pp. 925-926 (emphasis added.)

BART Concedes Grievance over Electronic Files

In BART's case, adverse comments, including complaints, were maintained in EWS files. Officers were, or could have been, subjected to evaluation, informal counseling and corrective training based on material impermissibly maintained in the EWS files. Moreover, even if the contents of the files had never been used for employee evaluation or disciplinary purposes, they could be used for those purposes and therefore were subject to POBRA protections.

On August 22, 2011, the Labor Relations Department for BART unequivocally granted BPOA's grievance, conceding "the IA Pro [EWS] Database is subject to the same provisions as traditional or paper IA Section Files." BART agreed to remove all material maintained in violation of the POBRA, to provide notice to affected employees, and to "keep all IA files, both paper and *electronic*, in accordance with" the POBRA and MOU.

Case Two: The POBRA's Fairness Requirements of Notice and an Opportunity to Respond

In October 2011, an officer with the BART Police Department learned his agency was maintaining adverse material, including three disciplinary "Letters of Discussion" in his personnel file. The letters were entered in July of 2011 without notice to the officer and without giving the officer an opportunity to submit a written rebuttal. Further, the line supervisor relied on the illegally-entered letters in issuing the officer a negative performance evaluation.

BART POA Grieves Letters of Discipline and Negative Performance Evaluation

On October 5, 2011, Mastagni, Holstedt, Amick, Miller & Johnsen, acting on behalf of the BART Police Officers' Association, filed a grievance asserting the letters of discipline and negative performance evaluation violated

BART POA GIVES "EARLY WARNING" IN POBRA CASE (CONT'D)

the POBRA and the MOU between the BPOA and the BART Authority. The firm demanded removal of the adverse material not entered or maintained in compliance with the POBRA and the MOU.

The POBRA broadly prohibits employers from entering comments adverse to an officer's interest into his or her personnel file without providing notice to the employee, including the opportunity to read and sign the instrument containing the adverse material. (Gov. Code § 3305.). Additionally, the MOU required BART to provide officers "a copy of derogatory matters placed in their official personnel file" and an opportunity to "file a written response to any such material". (MOU, Article 3.2). The MOU mandated the written response be included with the adverse material in the officers' personnel file. (*Id.*) Finally, Department policy required that performance evaluations be discussed with the officer and the officer sign the evaluation prior to the evaluation being included in his or her personnel file. (BART Department Policy 1002.1-1002.7). Pursuant to department policy, the rated officer must also be given an opportunity to file a written response to any adverse comment contained in the evaluation, and the written response must be included with the evaluation in the affected officer's personnel file. (*Id.*)

Agency's Belated Notice of Adverse Material was Insufficient under POBRA

In this case, three derogatory "Letters of Counseling" were placed in the officer's personnel file in July 2011 without notifying him, obtaining his signature, or offering him an opportunity to respond. The letters were subsequently used in a negative performance evaluation of the officer in September 2011. Again, the officer was not notified of the letters or given an opportunity to respond. It was not until October 2011– three months after the letters were illegally placed in his personnel file –that the officer learned of the existence of the adverse "Letter of Counseling."

When the officer objected to the material, the Department belatedly withdrew the original letters and performance evaluation but attempted to re-issue the letters and performance evaluation verbatim with a new date of entry. The Department's belated, after-the-fact efforts to issue copies of the "Letters of Counseling" and the negative performance evaluation (with a new date added) to the Officer in October were ineffective. The violation of the MOU, Department policy and the officer's right under the POBRA occurred in July when the letters were entered into his file without his knowledge and without giving him the opportunity to respond on the merits. (Cal. Gov. Code §§ 3305-3506*; Sacramento Police Officers Assn. v. Venegas* (2002) 101 Cal. App. 4th 916, 925-26; *Comm'n On Peace Officer Standards And Training v. Superior Court* (2007) 42 Cal. 4th 278, 292). The violations of his contractual and statutory rights were compounded when the letters were used as a basis to adversely evaluate his job performance. It was an insufficient remedy for the Department to simply re-issue the derogatory letters and performance evaluation after the officer learned about the violations of his rights.

BART Concedes Grievance over Letters

On October 28, 2011, Deputy Chief Fairow granted BPOA's grievance, stating the letters of counseling "for which proper notice was not given, will be removed" from the affected officer's file and a "new performance evaluation" would be issued to the officer which would not rely on the letters of counseling. BART agreed to provide its line supervisors remedial training "to reinforce the need to provide proper notice . . . for any derogatory and/or adverse material entered into personnel files."

B.J. Pierce is an associate attorney with Mastagni, Holstedt, Amick, Miller & Johnsen. She is a former police officer who represents public safety officers and labor associations in civil litigation, contract grievances, and critical incident investigations.

WELCOME NEW ATTORNEYS!

NAVRUZ AVLONI

Navruz Avloni is an associate attorney in the firm's Civil Litigation Department. Her practice focuses on personal injury and employment law matters, including discrimination, harassment and wrongful termination. She is also an active member of the Sacramento County Bar Association Diversity Hiring and Retention Committee. During law school she served as an Articles Editor for the *UC Davis Business Law Journal* and the *UC Davis Journal of International Law & Policy*. She also clerked as a bar certified student attorney in the UC Davis Civil Rights Clinic and the Sacramento Superior Court, Department of Law and Motion.

BENJAMIN E. DOUGLAS

Benjamin is the newest addition to the team of Workers' Compensation attorneys. Benjamin was born and raised in Charleston, South Carolina. He pursued his undergraduate studies at the University of Texas at Austin, and his legal studies at Duke University. In his time at Duke, he served as an Articles Editor on the Duke Journal of Comparative and International Law. He has a long-standing interest in using law for the public interest. In the past he has worked at the East Bay Community Law Center and Legal Aid of North Carolina. He views his current efforts in workers' compensation as a continuation of this aim.

JARED D. RENFRO

Jared is an associate attorney in the Workers' Compensation department of Mastagni, Holstedt, Amick, Miller & Johnsen. Jared graduated from the University of California at Santa Barbara in 2005, where he earned the Vice Chancellor's Award for Scholarship, Citizenship and Leadership. Before attending law school, he worked at the Workers' Compensation Insurance Rating Bureau. During law school, Jared was on the Dean's List, earned a certificate in Taxation with distinction and wrote opinions as an extern for Judge Russell Pulver at the Department of Labor. He was also a law clerk at Ord and Norman, a boutique tax litigation firm in San Francisco, where he worked on pre-trial litigation in federal court.

AMY D. SUPER

Amy Super, a native of the San Francisco Bay Area, moved to Sacramento in 2012. She studied Contemporary International Relations at the University of California at Berkeley, which included a semester in Paris studying French politics and the European Union. Amy obtained her law degree from the University of Michigan Law School, where she was an Executive Editor on the Michigan Journal of Race and Law and served as Mentorship Chair for the Office of Public Interest Students. During her summers, Amy worked for the San Francisco City Attorney's Office and the law firm of Rosen, Bien & Galvan, also in San Francisco. She has also interned at Earthjustice, an international environmental law firm, and the City of Berkeley Government's Office of Disability Compliance.

STUART K. TUBIS

Stuart K. Tubis focuses on complex civil litigation, including class-action and collective action litigation under the Fair Labor Standards Act, California Labor Code, Meyers-Milias-Brown Act, and other statutes providing labor and employment rights to employees. He also regularly advises public and private-sector labor unions on legal issues. Stuart pursued his undergraduate studies at the University of California at Berkeley and his legal studies at Harvard Law. While attending Harvard, Stuart authored several articles for the Journal of Law and Technology. Stuart also established an outstanding record for Harvard Defenders, a pro bono criminal defense firm based at the law school.

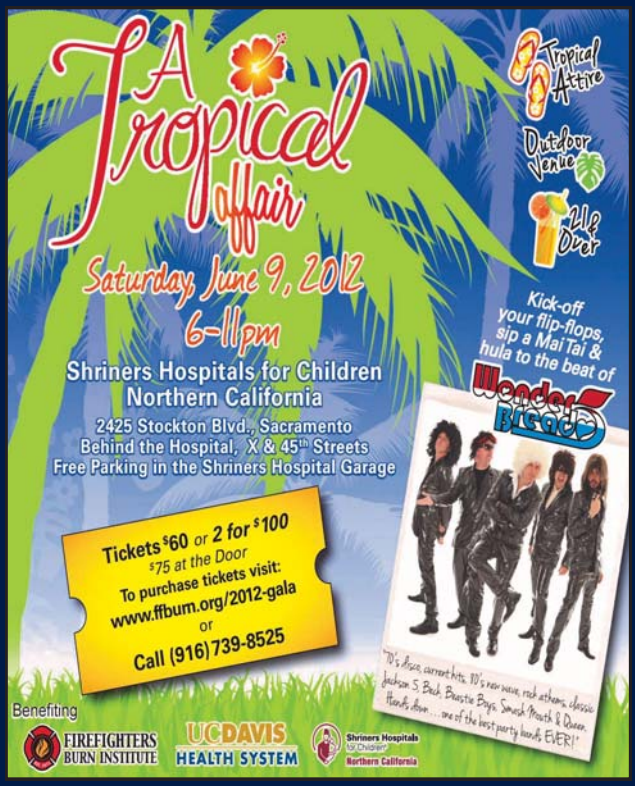
WELCOME NEW PROFESSIONAL STAFF!

CHANDLER SAXTON

Chandler Saxton is the newest addition to the Labor department as an assistant to the Labor Negotiators. Her primary responsibility is creating comparison compensation surveys to be utilized as tools in negotiations between employee bargaining groups and their respective employers. Along with surveys, Chandler fulfills the various administrative needs of the group. She graduated with a Bachelor's Degree in Geography from University of California, Los Angeles, and is looking for to utilizing the education in a challenging new position. Chandler is an invaluable asset in preparing for negotiations and we welcome her!

SHAYLEEN MASTAGNI

Shayleen Mastagni is a Certified Public Accountant who has joined the Mastagni, Holstedt, Amick, Miller & Johnsen firm. Shayleen was a Senior Vice President in the Forensic and Valuation Group at Perry-Smith, LLP, doing litigation consulting, business valuation and public accounting. She brings nine years of experience in the forensic accounting field after graduating from the University of the Pacific with a Masters in Business Administration with an Emphasis in Finance and an undergraduate degree in accounting from Cal Poly, San Luis Obispo. Shayleen is certified in Financial Forensics and Accredited in Business Valuation. She has expertise in economic damages for personal loss, commercial business, damages in wage and hour litigation and consulting on City and County financial information analysis. She is available to assist our clients with detailed City and County financial analysis for labor negotiations and wage and hour damage calculations. Shayleen also assists our personal injury department in preparing comprehensive wage loss analysis for individuals.



SACRAMENTO POLICE OFFICERS' ASSOCIATION MEMORIAL SCHOLARSHIP FUND

In 2006, the SPOA created the Sacramento Police Officers Association Memorial Scholarship Fund as a way of honoring fallen officers of the Sacramento police department by awarding scholarships in their name. This year, the 2nd annual poker tournament raised over $1,500.00 for the scholarship fund.

Visit http://www.spoa.org for more information.

MASTAGNI SPECIAL EVENTS & SPONSORSHIPS

2012 FIREFIGHTER BURN INSTITUTE CRABFEED

Bottom L - Angela Mastagni, Jeffrey Schaff, Adam Storm, Adrianne Harrel, Jesse Harrel; Top R- Jennifer Woo, Stuart C. Woo, Kathleen N. Storm, Merideth Schaff and David E. Mastagni.

SIERRA FOOTHILLS RUGBY CLUB

Mastagni, Holstedt, Amick, Miller & Johnsen proudly sponsors the Sierra Foothills Rugby Club. Jason Bosworth, a Rocklin police sergeant, serves as club captain.

SOUTH ASIAN BAR ASSOC. DINNER

Top L to R (standing): Jared Renfro and Navruz Avloni; Bottom L to R (seated): Eric Ledger, Jeffrey Schaff, Judie Odbert, Gabriel Quinnan and James Carr attended South Asian Bar Association's annual anniversary reception.

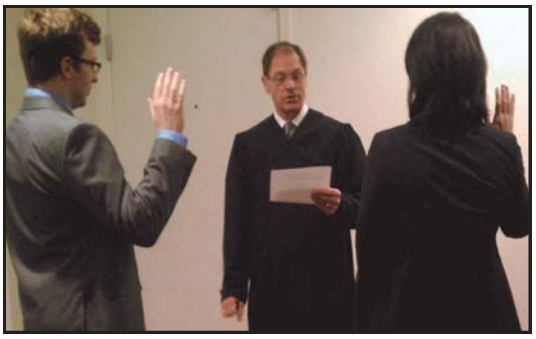
CALIFORNIA CHAPTER OF THE NATIONAL LATINO POA

L to R: Maria Oropeza (SFPD), Mercy Zamora Jr. (SF Parking and Traffic), Nelson Martinez (SFSD), Susan Annino (SJPD Ret.) Phillip R.A. Mastagni, Esq., Juan Garrido (SFSD), and Eric D. Ledger, Esq. at the 2012 NLPOA Conference in San Francisco.

MASTAGNI LABOR LAW TEAM

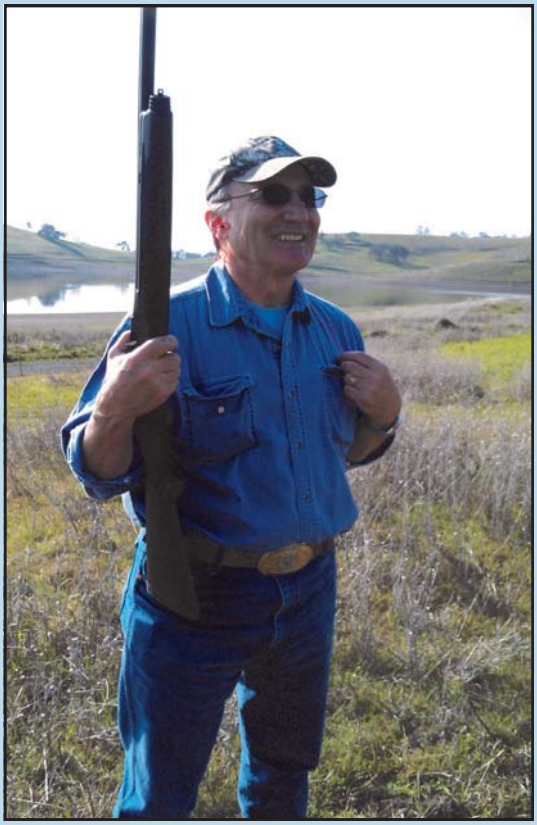
L to R: Negotiators Jesse Harrel, Mark Salvo, Robert Jarvis, Michael Jarvis, and Dennis Wallach with attorney Jeffrey Edwards at the Mastagni Law conference booth.

NEW MASTAGNI ATTORNEYS



New lawyers Stuart K. Tubis and Navruz A. Avloni are sworn in by the Honorable David W. Abbott.

MASTAGNI DUCK HUNT & DINNER



Founding Partner David P. Mastagni

L to R: Phillip R.A. Mastagni, David P. Mastagni, and David E. Mastagni enjoyed hosting another successful day of sport and camaraderie.

Nearly 100 representatives from law enforcement agencies and labor unions joined the firm for the annual Duck Hunt.

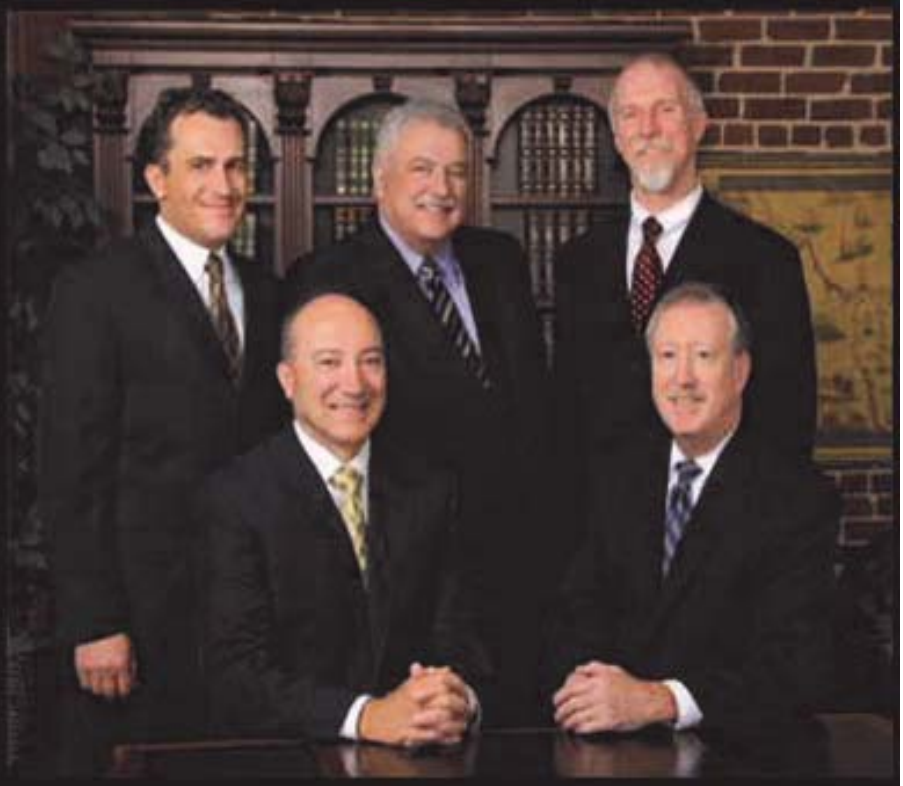
L to R: Chris, Cory and Workers' Compensation Managing Partner John R. Holstedt enjoy the 2012 Duck Hunt dinner at New Canton Restaurant.

A zealous four-legged hunter among the group.

MASTAGNI, HOLSTEDT, AMICK, MILLER & JOHNSEN

A PROFESSIONAL CORPORATION

Providing Comprehensive Legal Representation to Peace Officers and Their Families for 37 Years and Counting



Ranked Among "Top 10 Law Firms" in the Sacramento Business Journal

Personal Injury • Wage and Hour Law • Contract Negotiations
Catastrophic Injuries • Workers' Compensation • Social Security Disability
Employment Law • Negligence • Motor Vehicle and Aviation Accidents
Products Liability • Public Safety/Employee Labor Law

Air Fleet and 24-Hour Pilots Allow Immediate Availability

1912 I Street, Sacramento, CA 95811

916.446.4692 Toll Free 800.852.7581

www.mastagni.com

Making a false or fraudulent workers' compensation claim is a felony subject to up to five years in prison or a fine of up to $50,000 or double the value of the fraud, whichever is greater or by both imprisonment and fine.