MASTAGNI LAW BULLETIN

2010

INSIDE THIS ISSUE:

A LONG AND WINDING ROAD: *MOSSMAN V. CITY OF OAKDALE*

By Christopher W. Miller

Once upon a time, in the "Cowboy Capital of the World," the confidential secretary to the Oakdale police chief was refused her "bumping rights" after she was laid off as part of a department restructuring. Kimberly Mossman duly filed a grievance. Five years, three petitions, two arbitrations and one trip to the court of appeal later, her Wild West tale recently came to a happy conclusion at the expense of her former employer.

Mossman was fired September 15, 2005, when Oakdale eliminated her position as administrative secretary to the police chief. Both the city's personnel rules and the contract for Mossman's bargaining unit gave management employees "bumping rights" into lower positions when there was a work reduction. The right to displace another, lower-rated employee was based on seniority under the Oakdale personnel rules.

The police chief and the city manager, however, denied Mossman's request to bump other, less senior administrative secretaries and retain her job. Mossman grieved the decision and retained a Modesto-area attorney to represent her.

Arbitration Ruling Gives Non-Specific Remedy

The parties decided to forego the local grievance procedure, which included specific timelines by which the grievance was to be heard and an arbitration ruling issued, and instead agreed to binding arbitration before an outside neutral. Arbitrator Kathleen Kelly heard the case on May 8, 2006.

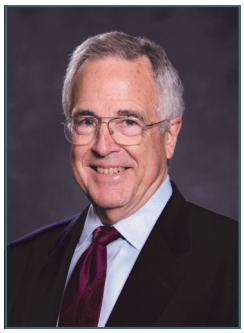
At the hearing, the city manager testified there were at least two other administrative secretary positions open in the city at the time Mossman was seeking to exercise her bumping rights. The city manager denied Mossman's grievance on the theory she was in a different class and bargaining unit than the other administrative secretaries.

(Continued on page 3)

DAVIS & RENO AFFILIATES WITH MASTAGNI LAW FIRM

Davis & Reno is our affiliate firm located in San Francisco. They have a 40-year history representing the public and private sectors in labor relations and employment law matters.

ALAN C. DAVIS



Alan Davis specializes in labor management relations with emphasis in the public sector. Alan has personally been involved in numerous cases that have reached the California Supreme Court, the Ninth Circuit Court of Appeals, and the California District Court of Appeals, including the landmark California Supreme Court case of *Fire Fighters* v. *City of Vallejo*. Mr. Davis was a co-author of California Public Sector Labor Relations, published by Matthew Bender.

DUANE W. RENO

Duane W. Reno's practice since 1975 has consisted primarily of labor and employment law in the public sector. He has represented labor organizations and employees throughout California in many significant cases that have resulted in published appellate decisions, including landmark rulings involving the Fair Labor Standards Act.

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 and John R. Holstedt were named "Northern California Super Lawyers" in 2010. The law firm was ranked sixth in Sacramento in 2010 by the *Sacramento Business Journal* and in 2009 was profiled in *Forbes* magazine.

Year Established

1976

Practice Areas

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

Bulletin Editors

Christopher W. Miller
Kathleen N. Mastagni Storm

Contributors

James B. Carr
Sean D. Currin
Jeffrey R.A. Edwards
Robert Jarvis
Jonathan W. A. Liff
David E. Mastagni
Daniel T. McNamara
Christopher W. Miller
B.J. Pierce
Isaac S. Stevens
Kathleen N. Mastagni Storm

Production Coordinator

Joani L. Nicholson

MOSSMAN v. CITY OF OAKDALE

(Continued from page 1)

Arbitrator Kelly issued an award on November 2, 2006, finding the city had denied Mossman's bumping rights in violation of the Merit System Rules and Regulations and the Memorandum of Understanding for the Management and Confidential Bargaining Unit.

The seeds of litigation were planted when Kelly ordered that "Mossman shall be made whole for losses sustained as the result of this violation," but gave no instructions on how that remedy should be accomplished. She wrote:

> The remedy in this case requires adaptation to present circumstances. The hearing in this case occurred almost one year after the relevant vacancies were filled. By that time, the new occupants had cultivated some degree of expertise. While this factor must not block Mossman from receiving appropriate relief, there is merit in allowing the parties time to assess present circumstances in the context of the findings set forth above, so that their mutual interests may be best served.

This invitation to the parties to resolve Kimberly Mossman's case went unheeded. Mossman's first attorney tried to settle the case with the city's Fresno-based lawyer, but to no avail. Neither party invoked the jurisdiction of the arbitrator. A day before the statute of limitations to file a petition to vacate was about to run, Mossman contacted the Mastagni firm for help.

Parties File Competing Arbitration Petitions

I discovered opposing counsel had already filed a petition to vacate the award, a fact unknown to Kim Mossman. I immediately filed a petition to confirm the arbitration award, hoping at least to preserve her entitlement to damages despite the non-specific award. The motions were consolidated and heard May 8, 2007, by Stanislaus County Superior Court Judge David G. Vander Wall.

Judge Vander Wall granted our petition to confirm the award and denied the city's petition to vacate. At the hearing, the judge defined the "make whole" award quite succinctly for the city's attorney: "Give her the money or give her another job."

But Oakdale declined to reinstate Mossman or to pay her back pay. The city's attorney again did not respond to settlement offers made over the next several weeks; instead, Oakdale appealed the superior court judgment to the Fifth District Court of Appeal in Fresno.

City Appeals Judgment to Fifth DCA

The city's basic argument on appeal was that the arbitrator's remedy -- "Mossman shall be made whole for losses sustained as the result of this violation" -- was too uncertain and indefinite to be enforced. The city wanted the entire award vacated and the matter placed before a new arbitrator to start over (at considerable expense to Mossman). The city also argued the arbitrator's award was invalid because it was not issued within the 30-day window provided for under the local grievance procedure.

Under the California Arbitration Act, petitions to vacate are limited to six grounds for vacating or correcting an arbitration award. (Code Civ. Proc. § 1286.2.) "Unless one of the enumerated grounds exists, a court may not vacate an award even if it contains a legal or factual error on its face which results in substantial injustice." (*Marsch* v. *Williams* (1994) 23 Cal.App.4th 238, 243-244.) The city's argument as to the "uncertainty" of the award is not one of the statutory grounds for vacating an arbitration award.

I argued the court should uphold the superior court's order confirming the arbitration award because the award, while not ideal, nonetheless addressed every question the parties had put to the arbitrator. The arbitrator in a contractual arbitration decides both "what issues are 'necessary' to the ultimate decision" and what remedy is appropriate for relief. (Code Civ. Proc. § 1283.4; *Advanced Micro Devices, Inc.* v. *Intel Corp.* (1994) 9 Cal.4th 362, 381; *Hightower* v. *Superior Court* (2001) 86 Cal.App.4th 1415, 1434-1435.)

The original attorneys in the case had not asked the arbitrator to determine what money damages Mossman was entitled to receive, nor had they put on evidence of such damages. Nonetheless, I argued, the arbitrator's "make-whole remedy" was within her authority and should be enforced.

A LONG AND WINDING ROAD: *MOSSMAN v. CITY OF OAKDALE*

Published Decision Remands Case for Hearing on Back Pay

In its published decision, the court of appeal described the arbitration award as, "[a]t the very least, . . . contemplat[ing] reinstatement of Mossman to one of the positions that had been vacant in the summer of 2005 and the payment of lost wages and other lost benefits attributable to Oakdale's conduct." (*Mossman* v. *City of Oakdale* (2009) 170 Cal.App.4th 83, 90.) The award, the court said, decided the remedy without providing for an enforceable judgment. "There is no question, however, that the arbitrator awarded Mossman all lost wages and benefits."

The court rejected the city's arguments the arbitrator had not decided the issues presented to her. Instead, said the court, Mossman was entitled to a second arbitration hearing to decide the remedy available to her: what position she was denied, whether she wished to be reinstated, and what her damages were. The court also rejected the city's claim the arbitrator was bound by the grievance procedure, since the parties waived that procedure.

Arbitrator Awards Mossman Back Pay and Other Compensation

Arbitrator Kelly convened a second hearing in June, 2009 to determine the amount of the award necessary to "make Mrs. Mossman whole"; i.e., to treat her as though she had never lost her employment as an administrative secretary for the City of Oakdale. At that hearing, the city changed horses to an argument that its own witness in the first hearing -- the now-former city manager -- had testified falsely when he said there had been vacant positions when Mossman was fired. The arbitrator rejected that claim as dubious, to say the least.

Thanks to Kimberly Mossman's detailed records, we were able to provide evidence showing what her gross salary would have been had she remained employed by Oakdale. The salary calculations were adjusted for increases provided for in the collective bargaining agreement as well as a reclassification that had taken place since her termination.

Kim Mossman had in the meantime become employed by the City of Riverbank, which limited the damages to be awarded. Arbitrator Kelly issued a second opinion and award in December, 2009 ordering Oakdale within 30 days to pay Mossman over $40,000 in back pay and medical expenses, as well as to make payments to her CalPERS account.

Second Mossman Petition Adds Interest to Back Pay Award

The city, apparently on the instruction of its embittered attorney, did not comply with the award within 30 days. As the arbitrator had not awarded interest on the back pay, as required by statute, we returned to Stanislaus County Superior Court yet again to compel Oakdale to pay Kim Mossman what she was owed. Judge Vander Wall came out of retirement to hear a petition to correct the arbitration award.

After hearing the city attorney's arguments by telephone in court, the judge granted my petition to add interest to the back pay award. Kim Mossman had won again, even though she had yet to receive a check from the city.

Kimberly Mossman finally received her full judgment after the local newspapers printed stories based on our press release describing Oakdale's unbelievable delays in complying with the arbitrator's awards. It truly was a long and winding road to vindicate the rights of a courageous, "never-say-die" administrative secretary to the "Cowboy Capital" chief of police.

Kim Mossman and Christopher W. Miller

Christopher W. Miller is managing partner of the Labor Department at Mastagni, Holstedt, Amick, Miller & Johnsen.

LINCOLN POLICE OFFICERS' ASSOCIATION VINDICATED IN UNFAIR PRACTICE CHARGE AGAINST CHIEF AND THE CITY OF LINCOLN

By David E. Mastagni and Kathleen N. M. Storm

The Lincoln Police Officers' Association ("LPOA") vindicated important associational rights to control the content of their postings on the LPOA bulletin board by initiating an unfair labor practice charge and grievance against Chief Brian Vizzusi and the City of Lincoln. Based on the LPOA's Charge, the Public Employment Relations Board ("PERB") issued a Complaint finding unfair labor practices. PERB facilitated a mediated settlement in which the LPOA obtained the right to install a lockable glass case enclosing the LPOA bulletin board within the police department, wherein only the city manager and the executive board of the LPOA would maintain a key to the glass case. David E. Mastagni and Kathleen N. M. Storm represented the LPOA and President Brett Schneider in the case.

Lincoln Police Chief Removed Documents from Union Bulletin Board

The LPOA had long maintained an association-designated bulletin board at the Lincoln Police Substation as a means for the LPOA executive board to communicate association-related news and information to its members. The Meyers-Milias-Brown Act ("MMBA") provides for use of official bulletin boards subject to reasonable regulations. (Gov. Code § 3507(a)(7).) The LPOA's MOU also provides a contractual right to maintain the bulletin board.

Around July 31, 2009, the LPOA posted a non-confidential email to Chief Vizzusi confirming a list of agenda items for the next meeting between the LPOA and city representatives. Lieutenant David Ibarra, acting under Vizzusi's order, removed the email from the bulletin board. When the LPOA protested, Vizzusi allegedly stated the Lincoln Police Department was "his department" and he could, and would, remove anything from the bulletin board as he felt necessary.

In August, in response to members' requests for the information, the LPOA posted a copy of a labor agreement involving concessions between the Lincoln Professional Fire Suppression Officers and the city. Lieutenant Ibarra told an LPOA executive board member to remove both the Side Letter and a sign atop the bulletin board stating only LPOA members could add or remove materials from the bulletin board.

In September 2009, an LPOA member posted two documents on the LPOA bulletin board. One was a copy of an article published in the Placer Herald newspaper describing cash-saving efforts by the City of Rocklin, including the Rocklin City Council's decision that Rocklin's Police and Fire Department dispatch units would merge with the City of Lincoln's Police and Fire Department dispatch units. The other document was a copy of an article published by Peace Officers Research Association of California (PORAC) describing a Los Angeles case wherein the Superior Court dismissed a discipline case against a police officer.

Both documents were last seen prominently displayed on October 1, 2009. By the following morning, the documents were no longer visible on the bulletin board. In its PERB charge, the LPOA alleged Vizzusi, at the station the evening of October 1, 2009, purposefully pinned the two documents underneath other documents posted on the bulletin board, effectively hiding them from view.

POA Files Grievance and Unfair Practice Charge

LPOA President Brett Schneider filed a grievance against the City of Lincoln and the chief, alleging Vizzusi had violated the MOU by interfering with the LPOA's right to use the bulletin board. Vizzusi issued a memorandum to all police department personnel unapologetically admitting he ordered documents to be removed and explaining his purported justifications for his actions.

The LPOA filed an Unfair Practice Charge with the Public Employment Relations Board, alleging the City of Lincoln, through the acts of Brian Vizzusi, committed unfair labor practices in violation of the MMBA and PERB Regulations by interfering with and restraining public employees from the exercise of protected association rights, including using the bulletin board, denying the association the opportunity to dutifully represent its members, and related charges. The charge also alleged Vizzusi threatened to eliminate

LINCOLN POA

the Police Department's equipment and training fund if the LPOA continued to pursue or file grievances.

PERB issued a complaint against the City of Lincoln, charging the City of Lincoln failed and refused to meet and confer in good faith prior to changing the department's bulletin board policy, interfered with the rights of LPOA bargaining unit employees, and denied the LPOA its right to represent its unit members. These practices constituted unfair practices in violation of Government Code sections 3503, 3505, 3506, 3509(b) and PERB Regulations 32603(a)-(c). Sometime prior to PERB's issuance of the complaint, Vizzusi separated from his position as chief of police for the City of Lincoln.

The LPOA and City of Lincoln Agree to New Bulletin Board Procedures

Shortly after PERB issued its complaint, the parties entered into settlement negotiations to resolve the PERB matter and the LPOA grievance. The LPOA and the city participated in mediation facilitated by PERB, and on April 14, 2010, reached a global settlement. The agreement gives the LPOA the right to install a locking glass case enclosing an association-designated bulletin board, wherein only LPOA executive board members can post documents on the bulletin board. Per the agreement, the city manager is the only city representative who will maintain a key, and he must meet and confer with the LPOA before removing any objectionable postings. In addition, any disagreement over the appropriateness of any posting is subject to the MOU's grievance process. Finally, the police chief may not remove any documents from the bulletin board unless directed to do so by the city manager. After removing a document, the police chief must promptly return the key to the city manager.

David E. Mastagni and Kathleen N. Mastagni Storm represent the Lincoln Police Officers' Association and its members in all labor and employment matters.

CONTRACT NEGOTIATIONS: "NO PAIN, NO GAIN" FORMULA

By Bob Jarvis, Senior Labor Consultant/Negotiator

Some would compare recent contract negotiations to going to a dentist who doesn't use Novocaine. Negotiations in these times are challenging and not a lot of fun. But we know you still have to go to the dentist even if it hurts a little, and we know that even in these tough economic times, we still have to go to negotiations. When we get there, we just have to work a little harder and be a whole lot smarter.

The key to successful negotiations in poor economic times is the same as in good economic times: good preparation. We know the tactics the employers use, and we know the tactics we used in good economic times will not work now, so we adjust, and go in prepared.

If at all possible, concessions given should be temporary in nature, ending or sunsetting with the MOU. If permanent concessions must be made, try tiering them for new employees only. This will give some time, perhaps years, to make adjustments or corrections. In negotiations, nothing is really temporary or permanent, and everything is always negotiable. It is just a matter of timing.

The following are summaries of four recent contracts that were successfully (and collaboratively) negotiated with the employer. In each agency, some tough and even painful decisions had to be made by both sides.

Sonoma County Law Enforcement Association

- Two year term
- Positive changes to comparable agencies used
- Increase in bargaining team members
- Reopener on 2nd tier retirement for new employees (Current 3%@50)
- Agree to voluntary time off language
- Mandatory time off- furlough of 64 hours in first year/40 hours in second year
- No layoffs

(Continued on page 12)

ARBITRATOR OVERTURNS 160-HOUR SUSPENSION

By David E. Mastagni

Arbitrator Thomas Angelo has cleared Sacramento Police Officer Craig Wetterer of accusations he had actual knowledge or reasonable suspicion of abuse of a juvenile and failed to report it. In overturning the 160-hour suspension, the arbitrator ruled the Sacramento Police Department failed to establish any cause to discipline Wetterer, a 22-year veteran officer. The arbitrator admonished the department that "[j]ust cause requires legitimate, persuasive proof of wrongdoing, not a presentation of investigatory surmise and speculation."

Officer Charged with Failure to Report

The department charged Wetterer knew or suspected an acquaintance had engaged in an inappropriate relationship with the minor victim, Mr. M, but failed to report the abuse in violation of departmental policies and Penal Code 11166, requiring mandated reporters to report reasonable suspicion of abuse. The department asserted Wetterer made statements evidencing knowledge of the abuse and should have suspected abuse from his limited interactions with Mr. M and Mr. H, the suspected abuser.

Wetterer had known Mr. H since 1997, but rarely interacted with him. In fact, they had no communication from 2000 until 2006, when Wetterer brokered a real-estate purchase. They communicated primarily through phone calls initiated by Mr. H.

In 2007, Mr. H asked to meet with Wetterer to provide Mr. M a positive role model. Mr. H explained to Wetterer the juvenile was having problems at home and his parents allowed him to assist Mr. H putting up movie posters at theaters.

On a few occasions over eight months in 2007, Mr. H and Mr. M met with Wetterer while he was on duty. The interactions were brief, lasting 5 to 10 minutes, and Wetterer, an FTO, was usually accompanied by a trainee. Wetterer and his trainees testified they never observed any inappropriate behavior or indication of abuse. Wetterer and a friend also accompanied Mr. H and Mr. M to the State Fair on Law Enforcement Day where Mr. M met several other law enforcement officers.

The arbitrator rejected the department's contention these meetings created a reasonable suspicion of abuse.

The department based its allegations in substantial part on contested hearsay statements from Mr. M asserting Wetterer made comments indicating knowledge of the abuse. The SPD IA investigator coaxed Mr. M to agree with the investigator's interpretation of Mr. M's statement summaries contained in a report that had been made earlier by Mr. M's parents to the Roseville Police Department (RPD) regarding the abuse. Although Mr. M gave inconsistent statements in different interviews, the SPD IA investigator failed to have him provide a statement of the material issues in his own words.

After discipline was proposed, Mr. M provided Wetterer a declaration admitting he never heard Wetterer make the comments attributed to him, stating his belief Wetterer was unaware of the abuse, and explaining he felt pressured to simply agree with the IA investigator's leading questions. After reviewing the declaration, the chief proceeded with the discipline using the reports instead of calling Mr. M to testify. Mr. M's father also provided a declaration in support of Wetterer's innocence and even admonished the IA investigators, "I'm his dad. If I didn't know it, how the hell is some Sac P.D. Officer going to know it?"

An additional charge alleged Wetterer failed to report information he received from Mr. H about possible abuse by a third party. During an off-duty telephone call, Mr. H informed Wetterer that Mr. M had received inappropriate email communications through *www.myspace.com*, and that Mr. H had reported the communications to Fairfield police, who had jurisdiction. The Roseville police detective investigating Mr. H testified Mr. H in fact reported the incident to law enforcement and CPS. The SPD nevertheless insisted Wetterer had a duty to make an additional report based on his limited, second-hand information about the incident. The arbitrator held Wetterer did not possess information triggering a reporting requirement and agreed with the Roseville detective that no duty existed to re-report the information.

ARBITRATOR OVERTURNS 160-HOUR SUSPENSION

Finally, SPD disciplined Wetterer for not initiating contact with RPD when he discovered Mr. H was a suspect. In December of 2007, Mr. H advised Wetterer that Mr. H's house had been searched by the RPD and that Wetterer's name had "come up" in the investigation. Mr. H never made any incriminating statements to Wetterer. Wetterer did not provide any assistance to Mr. H and, instead, deliberately distanced himself from Mr. H. Wetterer did not immediately initiate contact with RPD because he did not have any relevant information and assumed RPD would contact him if his name had truly "come up."

Although contacted by RPD to obtain a statement from Wetterer, SPD IA investigators declined to facilitate an interview and instructed the RPD officers to contact Wetterer directly. RPD did so weeks later and Wetterer voluntarily provided a statement. The Roseville investigator confirmed Wetterer had no relevant information. Because Wetterer is a licensed attorney and bound by the confidentiality rules of the State Bar and the ABA, he contacted an ethics attorney to ensure Mr. H could not claim confidentiality with regard to their conversations, even though he was never a client. SPD unsuccessfully argued the consultation was evidence of culpability.

At the conclusion of the criminal investigation of Mr. H, SPD initiated an internal affairs investigation relying primarily on "retracing" the RPD investigation. Wetterer consistently denied any knowledge or suspicion of abuse and explained the limited nature of his interactions with Mr. H.

On December 4, 2008, SPD served Wetterer a proposed suspension of 160 hours alleging violations of Penal Code Section 11166 and SPD Orders regarding reporting, inefficiency, neglect of duty, disobedience and impairment, disruption and discredit to employment and the public service. After a *Skelly* hearing, SPD imposed the 160-hour suspension with no changes.

An arbitration hearing was held last November and December. In addition to the factual disputes, this appeal presented hotly contested legal issues involving: (1) the agency's burden of proof; (2) consideration of hearsay statements in reports to prove disputed facts; (3) the late amendment of new charges; and (4) an officer's right to management's analysis and recommendations of the case.

Burden of Proof

The City claimed the "preponderance of the evidence" standard applied to these charges, but that the Chief's penalty should be reviewed only for abuse of discretion, a deferential standard which is rarely met. The Sacramento Police Officers Association (SPOA) argued a tougher "clear and convincing" standard should be applied to the charges, considering the social "stigma" of allegedly condoning abuse of a minor. The arbitrator agreed with the SPOA, explaining that if the department prevailed, the outcome would taint Wetterer's entire career and the consequence would be too great to justify application of a lower standard of review. The arbitrator also confirmed Wetterer was entitled to a de novo proceeding on all issues.

Hearsay Evidence

"'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Although hearsay is generally admissible in administrative appeals, hearsay alone cannot establish a disputed fact. SPD attempted to establish the disputed facts in this case by submitting witness statement summaries in reports, rather than calling the declarants as witnesses. Although SPD claimed the multi-layered hearsay statements were admissible as official or business records, the contents of non-public employee witness statements contained in police reports are hearsay and inadmissible in court proceedings. (*Nissel* v. *Certain Underwriters at Lloyd's* of *London* (1998) 62 Cal.App.4th 1103.) The arbitrator concluded "[t]he reliability of these statements for the truth of matters asserted therein is minimal." The arbitrator noted the reports were problematic on several fronts: multiple layers of hearsay existed, Wetterer was denied the ability to cross-examine the witnesses, and "a majority of the police reports were mere summaries of purported interview[s]."

Late Amendment of New Charges

In addition, the department attempted to add serious new charges at the end of the last business day before the hearing. At hearing, we sought to strike the new charges based on Government Code section 3304(d),

(Continued on page 12)

MODOC DSA: TERMINATION REDUCED TO LETTER OF REPRIMAND

By Sean D. Currin

A Modoc County dispatcher will remain fully employed after being served with her Notice of Proposed Termination. In October 2009, Kelee Rees of the Modoc County Sheriff's Department was alleged to have engaged in excessive internet use while on duty as a dispatcher.

In early October, a county employee notified Undersheriff Gary Palmer that Kelee Rees was using the internet in the dispatch center in violation of policy. Upon further investigation the Department alleged Ms. Rees had 59,667 hits in a single 8-hour period. This equated to 10,000 web page searches or 124 clicks of the mouse per minute. Even the most savvy internet user would be unable to accomplish what the department was alleging. Ms. Rees received no complaints or delays in her service for the day and denied she used the internet as alleged.

The most important allegation was that when using the internet, Ms. Rees was unable to view an entire screen of security cameras, thus causing an officer safety concern. This charge was untrue. Even a cursory investigation into this allegation showed that when the internet screen was accessed, it did not block any cameras that were already on. More importantly, it did not block the monitor to the left. Thus, there were no officer safety issues.

Without even an interview, Ms. Rees received a Notice of Proposed Termination from the undersheriff. Rees was allowed an opportunity to discuss the proposed discipline with him. Ms. Rees and her union representative pled her case stressing the undersheriff conducted an inconclusive and incomplete investigation, as well as proposed excessive discipline for minor internet use. The undersheriff nevertheless upheld his recommendation of termination and the case went to the sheriff to make the final determination.

Ms. Rees then contacted our office and informed me of her proposed termination. I quickly requested a *Skelly* hearing and all documents relied upon in proposing the discipline.

In December 2009, Kelee Rees and I attended a *Skelly* hearing with Sheriff Mark Gentry. I successfully argued the impossibility of the alleged internet use and the nonexistence of a potential officer safety issue, as no security cameras were blocked at any time. The sheriff seemed receptive to our argument and likely believed the internet usage was not as excessive as was alleged. The main issue for the sheriff was whether or not the internet use blocked any cameras. Sheriff Gentry, Ms. Rees and I spent several minutes in the dispatch room during which Ms. Rees showed the sheriff exactly how she would access the internet when she would use it. This demonstration proved no security cameras were blocked and there was no officer safety issue. Fortunately, the sheriff was able to keep an open mind about the allegations and investigated the alleged misconduct appropriately.

Kelee Rees' termination was reduced to a letter of reprimand for accessing the internet outside of department policy. She will continue her successful career as a member of the Modoc County Sheriff's Department.

Sean D. Currin is an associate attorney. He represented Kelee Rees in her successful pre-disciplinary appeal.

POST PROPOSES RULE CHANGE

By Jeffrey R.A. Edwards

The Commission on Peace Officer Standards and Training (POST) has proposed changes to its regulations about requalification and minimum standards for training. Among other things, the new regulations would eliminate some training waivers for reserve officers and require reserve officers seeking requalification to receive a criminal history clearance from the Department of Justice even when their lapse is less than 180 days. The new regulations would also change administration and evaluation of some training programs.

Penal Code Section 13510 requires POST to develop guidelines and a course of instruction and training for law enforcement officers who are employed as peace officers, or who are not yet employed as a peace officer but are enrolled in a training academy for law enforcement officers. The full text of the proposed regulations is available upon request from POST. All public comments on the changes must be received by November 1, 2010 at 5:00 p.m.

INTO THE GREAT WIDE OPEN – OR MAYBE NOT: THE *ALMARAZ-GUZMAN* SAGA

By Jonathan W.A. Liff

On February 3, 2009, the Workers' Compensation Appeals Board issued two en banc decisions that would have a great impact on how permanent disability ratings are calculated for injured workers in California. Both of these decisions, *Ogilvie* v. *City & County of San Francisco* and a combined decision of *Almaraz* v. *Environmental Recovery Services* and *Guzman* v. *Milpitas Unified School District*, radically altered the 2005 permanent disability rating schedule created in SB 899, the 2004 legislation that overhauled California's workers' compensation system. Seven months later, on September 3, 2009, the Board issued revised decisions in both of these cases, the latter of which will be examined here.

Before the passage of SB 899, an injured worker's permanent disability rating was based primarily on work restrictions and other factors of disability as determined by a treating or evaluating physician. When the workers' compensation system was reformed in 2004, this method was eliminated in favor of what was believed to be a more fair and uniform method provided by the *American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition*, more commonly referred to as the "AMA Guides." Under this new system, disability ratings were indeed more uniform, but few would argue they were more fair, at least to the injured worker.

It is no small irony that the AMA Guides itself states it is not designed to be used as a method of rating work disabilities, but this did not prevent California's legislature from implementing it for precisely that purpose. As a whole, disability ratings are far lower under the AMA Guides than they had been under the previous system. According to studies, ratings on average were reduced by 40-50% under the AMA Guides and in many cases, the injured worker received no rating at all.

This allegedly unintended result was addressed by the Workers' Compensation Appeals Board when it issued its decision in the case now referred to as *Almaraz-Guzman I*. In that decision, the Appeals Board determined that when the AMA Guides did not provide an impairment rating that would be a "fair and accurate measure" of the injured worker's permanent disability, a physician could essentially create a new rating that did not necessarily have to be based on the AMA Guides. In other words, the evaluating physician could create his or her own impairment rating out of thin air, as long as it could be shown that the rating provided by the AMA Guides was inequitable or disproportionate. As one might expect, this decision caused an immense uproar from within the workers' compensation community, as the consistency and rigidity of the AMA Guides had essentially been cast aside and replaced with an open-ended and entirely unpredictable rating system.

The chaos that ensued after this decision issued was immediate. Every pending case to which the 2005 rating schedule was applicable was suddenly in doubt. Unfortunately, the appeals board's decision provided very little in the way of direction as to how to implement this new rating scheme. If the AMA Guides were no longer the sole method of determining an impairment rating, any physician presumably could create a new rating system at his or her discretion. The only clear limitation placed by the appeals board was that the "new" impairment rating could not be borrowed from the previous (1997) rating schedule. But this caveat did little more than instruct physicians to *not* merely create an impairment rating based on ratings previously assigned to work restrictions.

Not surprisingly, the decision issued in *Almaraz-Guzman I* was appealed. On September 3, 2009, the Workers' Compensation Appeals Board amended its decision in what is now referred to as *Almaraz-Guzman II*. In the new decision, the appeals board stood by its original holding that while the AMA Guides remained prima facie evidence of an injured worker's impairment rating, this could be rebutted.

However, rather than allow a physician to unilaterally fashion a more "fair and accurate" rating when the AMA Guides did not provide one, the court severely limited the physician's discretion in this regard. Under the new decision, the physician could provide any impairment rating as long as it was taken from within the "four corners" of the AMA Guides, 5th Edition. This rating could be derived from "any chapter, table, or method" from

(Continued on page 14)

LOCAL 522 WINS DISMISSAL OF MEMBER'S LAWSUIT AGAINST UNION AND ITS OFFICERS

By James B. Carr, Isaac S. Stevens and David E. Mastagni

On October 20, 2009, U.S. District Court Judge Frank C. Damrell dismissed a federal lawsuit filed by 522 member Mark Thomsen against the Local, former President Brian Rice, and former Vice-President Patrick Monahan. The dismissal was a victory of principle over politics and marks the end of an unfortunate attempt by a member to pursue his own agenda at the expense of Local 522's other members.

Thomsen alleged in *Thomsen, et al. v. Sacramento Metropolitan Fire District, et al.*, that Local 522 breached its duty of fair representation, was negligent, and violated his constitutional rights by assigning him conflict counsel. He also claimed wrongful termination, loss of consortium, and emotional distress, on the grounds the Local somehow was responsible for a disciplinary action taken against him by the Sacramento Metropolitan Fire District.

Fired for Falsifying Report, Thomsen Hires Outside Attorney

Mark Thomsen was fired by the Sacramento Metropolitan Fire District in 2007 for altering a report. The Local provided conflict counsel to Mr. Thomsen because he was a named defendant in another lawsuit filed against the Local and the District. Thomsen fired his conflict counsel and another attorney and hired Bay Area lawyer Michael Rains to represent him.

As part of his "scorched earth" defense, Mr. Rains obtained other Local 522 members' disciplinary records and wrote a letter to the District's Board of Directors referencing other members' discipline and asking that the letter be publicized. Much of the same disciplinary information about other Local 522 members was later published in the *Sacramento Bee*, although the source of the information is unclear.

While litigation was pending against the District, Thomsen and Local 522 involving the District's former deputy chief for human resources, Rains filed a claim against the District on Thomsen's behalf naming the District, Local 522, former union President Brian Rice, former union Vice-President Monahan and several other individuals as persons somehow responsible for Thomsen's wrongful termination from the District. Thomsen then filed suit in state court. Thomsen's complaint contained several federal claims; accordingly, we removed the case from state to federal court.

Thomsen's Suit Against Local 522 and its Officers is Summarily Dismissed

Thomsen's lawsuit alleged numerous groundless claims against Local 522 and its officers, including wrongful termination, civil conspiracy, denial of his 6th Amendment right to counsel (which only applies against government entities and in criminal proceedings), loss of consortium by his wife, and violation of the duty of fair representation. Thomsen brought these claims against the union and its officers despite the fact Local 522 was not his employer.

In response, our office moved to dismiss the claims against Local 522, Rice and Monahan under federal rules of civil procedure. Judge Damrell dismissed Thomsen's case against Local 522, Rice and Monahan in its entirety, finding Thomsen could not state any viable claims for relief as a matter of law. The court also found Thomsen was required to bring his claims against the union to the Public Employment Relations Board and had failed to do so.

Thomsen Files Amended Complaint While Trying to Win Election

Despite having his entire case dismissed, Thomsen and his lawyers filed an amended complaint repeating all of his claims and alleging whistleblower retaliation. Thomsen filed the amended complaint against Local 522 and its officers while campaigning to be elected president of Local 522. When his lawsuit against the union and its dismissal became a campaign issue, Thomsen

(Continued on page 13)

ARBITRATOR OVERTURNS 160 HOUR SUSPENSION

(Continued from page 8)

which precludes agencies from bringing charges against peace officers more than one year after discovery. Further, post-disciplinary additions to the charges violate Constitutional due process rights. Ultimately, the new charges were dropped.

Refusal to Disclose All Documents Relied Upon

Finally, at hearing Wetterer discovered SPD had concealed disciplinary recommendations and analysis relied upon by the *Skelly* hearing officer. Despite the disclosure requirements of Government Code Sections 3303 (g), 3305, 3306.5, Penal Code Section 135.5, and *Skelly* v. *State Personnel Board* (1975) 15 Cal.3d 194, this discovery was particularly troubling because the SPOA has fought over access to these documents for years. SPD tried to conceal its investigation summaries weighing the investigatory evidence and disciplinary recommendations, which have historically conflicted with many of the disciplinary actions imposed.

In *Aaron Wyley* v. *City of Sacramento*, the Sacramento Superior Court ruled the city must provide officers' personnel records relating to disciplinary investigations, including "opinions and analysis" and disciplinary "recommendations." In response, the police chief at the time claimed to disband the creation of the recommendations rather than disclose them. With the support of the PORAC Legal Defense Fund, the SPOA and Wetterer filed a separate Superior Court lawsuit seeking punitive damages based on the willful violations in light of the *Wyley* decision.

Arbitrator's Decision

Citing the improperly withheld recommendations, the arbitrator noted "police officers are inherently suspicious creatures; apparently sometimes their suspicions lead them to the perpetrator, and sometimes it leads them astray." Finding Wetterer candid and credible, he found no basis to suspect abuse given the available information. The city failed to prove any of the allegations set forth in the discipline letter, and Angelo ordered Wetterer made whole and all references to the case removed from his personnel files. The arbitrator summarized:

> The City's case rests on a nest of suspicions that were supported only by hearsay entitled to little, if any, weight. Not only did the City fail to bear its burden, but the Grievant's denials were persuasive. Suffice to say, the City's investigation was comprised of hearsay, surmise, and subjective analysis. That approach may be appropriate for investigative purposes, but it has no place in an evidentiary proceeding. Here the allegations against the Grievant lack support, and the Grievant is entitled to be made whole.

The SPOA is confident the arbitrator's award will be adopted and enforced, ending Wetterer's long and arduous journey to vindication. The SPOA and Wetterer thank PORAC LDF for its unwavering support throughout this process.

David E. Mastagni represents the Sacramento Police Officers' Association and its members in all labor and employment matters.

CONTRACT NEGOTIATIONS

(Continued from page 6)

Tulare County Deputy Sheriffs' Association

- One year term
- Agree to 207K overtime provision to sunset at end of one year term. "Grants" funded by time and one-half are exempted.
- Sick leave buy back program frozen for the term of MOU
- Employees who waive health coverage receive decrease in benefit from $229.88 to $38.46.
- Positive change in disciplinary appeal language
- Vacation accrual temporarily reduced for the term of MOU by 16 hours
- Vacation cap temporarily increased by 20 hours for the term of the MOU
- Uniform allowance suspended for the term of the MOU
- Compensation bank increased by 20 hours
- No layoffs

CONTRACT NEGOTIATIONS: "NO PAIN, NO GAIN" FORMULA

Yolo County Investigators' Association

- Two year term
- Pay 6% of PERS only for the term of the contract (sunset)
- Furlough of 60 hours in first year / 60 hours of furlough in second year (Sunset)
- Personal time off (PTO) bank- increased from 104 hours (13 days) to 156 hours (19.5 days) per year for each year of two year term depending on vacation balance.
- Vacation bank cap increased 100 hours
- Compensation bank cap increased 40 hours
- No layoffs
- Layoff language changed to seniority within classification

Cotati Police Officers' Association

- Three year term
- Year one: city pays 5% to employees for benefits
- Year two: city pays 5% to employees for benefits
- Year three: city pays 4% to employees for benefits
- Year three: 3% COLA
- Year three: employees pay 3% of employee's PERS
- Year three: employees pay 10% of Health Premium, city pays 90%. City currently pays 100%.
- Tier retirement for new employees: 2%@50, current 3%@50
- First year: flat dollar health insurance rate for new employees. Family $1161.52
- Annual leave bank reduced by 15 hours each year of MOU
- Total compensation survey in year three
- No layoffs

When reviewing Cotati's impressive increases over the next three years, keep in mind that in previous contracts they gave up 14 percent in concessions.

Robert Jarvis is a retired captain from the Sonoma County Sheriff's Department and is the firm's supervising negotiator.

LOCAL 522 WINS DISMISSAL

(Continued from page 11)

distributed a letter from his attorney regarding the dismissal and his ability to file an amended complaint. On behalf of Local 522, Rice and Monahan, we moved to dismiss Thomsen's amended complaint. Thomsen lost the election.

On January 5, 2010, before the hearing on that motion, we sent Thomsen's attorney notice the union intended to seek sanctions, along with a copy of the motion for sanctions. Attorneys and parties to a lawsuit are prohibited from signing frivolous or false documents, or filing documents for an improper purpose. If they have, a court may impose Rule 11 sanctions or other punishments against the offending party. The motion asserted the amended complaint was frivolous in light of the court's prior dismissal and filed for the improper purpose of affecting the election for president of the union. After receiving our proposed motion for sanctions, Thomsen voluntarily dismissed his amended complaint.

Because Thomsen dismissed the amended complaint, Local 522, Rice and Monahan prevailed in the case, and were therefore entitled to an award of costs. The federal district court awarded Local 522, Rice, and Monahan costs in the amount of $3,480.15.

As a result of our aggressive litigation strategy, Local 522, Rice and Monahan completely prevailed against Thomsen and his various attorneys. The litigation illustrates why union members should not take lightly decisions to sue their own union or union officials. Unions like Local 522 work hard to protect their members' rights and have the duty to fairly represent *all* members, not just a disgruntled few.

James B. Carr, David E. Mastagni (not shown), and Isaac S. Stevens represented Local 522 and its officers in the Thomsen litigation.

ALMARAZ-GUZMAN SAGA

(Continued from page 10)

within the AMA Guides as long as it "most accurately reflects the injured employee's impairment." In doing so, the court specifically rejected its prior holding in *Almaraz-Guzman I* that the AMA Guides could be disregarded if its ratings were "inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability." In other words, the 2005 rating schedule was still rebuttable, but only "sort of."

While the decision in *Almaraz-Guzman II* was more narrow and limiting on disability ratings than that of *Almaraz-Guzman I*, it was not surprising that a writ was filed with the Court of Appeal due to its widespread effect (and potential cost to employers and insurance carriers). Then, in August 2010, the 6th District Court of Appeal issued a decision in the *Guzman* portion of the case and upheld the Workers' Compensation Appeals Board's en banc decision. In its opinion, the court clarified that while a physician can still use "any chapter, table or method" from within the AMA Guides, the physician's opinions would still need to constitute substantial medical evidence. The decision also suggested there would be a higher degree of scrutiny applied to ratings taken from outside the chapter under which the injury would traditionally be evaluated.

But there is certainly language in the decision that both injured workers and employers will point to as supporting their respective arguments about how the AMA Guides should be used in determining permanent disability ratings. It will be very interesting to see whether the 5th District Court of Appeals grants a writ of review in the *Almaraz* portion of the case. Should that happen, a conflicting interpretation of the en banc decision would certainly push the case before the California Supreme Court. There is much yet to come in the *Almaraz -Guzman* saga.

Jonathan W.A. Liff is a senior associate attorney with the Workers' Compensation Department of Mastagni, Holstedt, Amick, Miller & Johnsen

LEGAL UPDATES

SUPREME COURT STRIKES DOWN RESTRICTIONS ON UNION AND CORPORATE POLITICAL CONTRIBUTIONS

By Jeffrey R.A. Edwards

On January 21, 2010 the United States Supreme Court invalidated key restrictions on political contributions by labor unions and corporations. Before the ruling, central parts of the McCain-Feingold Bipartisan Campaign Reform Act and other federal laws prohibited labor unions and corporations from making "electioneering communications" and "independent expenditures." The legislation coupled unions and corporations as a bipartisan compromise because of the perception donations by unions generally favored Democrats while donations from corporations generally favored Republicans.

Electioneering communications happen when a message is communicated within a few weeks of a federal election. For example, if a union pays for a radio ad about public safety spending to be played within 30 days of a primary election, it could be considered an "electioneering communication." This is true even if it does not mention a candidate by name. An independent expenditure is when a contribution is made independently of a candidate, but calls for the election of, or defeat of, a particular candidate. For example, when Sen. Joseph Lieberman was running for reelection, some independent expenditures were made calling for his defeat, but the organizations spending that money were not coordinating with his opponents. Federal law has restricted independent expenditures going back to 1947 and some state laws have limited this kind of political activity since at least 1912.

In *Citizen's United v. Federal Election Commission*, the Court held restrictions on electioneering communications and independent expenditures violated the free speech protections of the First Amendment to the Constitution. *Citizen's United* affects both California and federal laws. As a result, labor unions may now pay for electioneering communications and make independent expenditures on behalf of, or against, candidates for California and federal office. However, unions and corporations may not make direct contributions to candidates, nor coordinate with candidates about how to spend the money. The Supreme Court acknowledged

the government has a legitimate "interest in preventing quid pro quo corruption," and therefore direct contributions by corporations and unions could still be prohibited. The case does not change federal rules about corporate and labor union donations made directly to political parties and candidates themselves nor special rules about political action committees (PACs).

Jeffrey R. A. Edwards is an associate attorney in the Labor & Employment Department of Mastagni, Holstedt, Amick, Miller and Johnsen.

STATE APPEALS COURT RULES CCPOA MEMBERS NOT ENTITLED TO MEAL BREAKS

By B. J. Pierce

The First District Court of Appeal recently held Labor Code Section 512 and Industrial Welfare Commission ("IWC") Wage Order 17 do not apply to state correctional officers.

The California Correctional Peace Officers' Association ("CCPOA") claimed the Department of Corrections and Rehabilitation failed to provide meal periods to state employees as required under State Labor Code provisions and Wage Order 17. (*California Correctional Peace Officers' Assoc. v. State of California* (2010) Cal. App. --, 2010 WL 3248794). In response, the State argued it was exempt from the Wage Order and Labor Code provisions at issue.

The trial court agreed with the State, ruling Labor Code Sections 226.7 and 512 did not apply to public employers and Wage Order No. 17 did not apply to state correctional employees. Relying on interpretations of legislative history, the First District Court of Appeal affirmed the lower court's decision.

Although the express terms of the Labor Code and the Wage Order do not provide for an exemption, the court nevertheless found the legislature did not intend for the Labor Code provisions or Wage Order to apply to public employers. Instead, Labor Code provisions apply *only* to employees in the private sector unless they are specifically made applicable to public employees.

CCPOA argued the Legislature specifically excluded public sector employees from other provisions of the Labor Code. Therefore, failure to expressly exempt public employees from the provisions requiring meal periods indicated the Legislature intended the provisions to apply to public employers. The court disagreed, reasoning a term or phrase should not be implied where excluded.

CCPOA also argued the Labor Code provides the Industrial Welfare Commission with the power to exempt public agency employees. This power to exempt would only be necessary if the provisions applied to public employees. Therefore, it was logical to infer the Legislature intended to include public employees. The court classified this power somewhat opaquely as a "potential limited...exception to the general public employee exemption." Under the double negative "exception to an exemption," the IWC's power to exempt public employees was really the power to include them where they otherwise would be exempt.

Finally, the court found the public-sector correctional employees were not covered under Wage Order No. 17, which by its terms did not apply to employees who were exempt from the IWC Wage Orders in 1997. Public employees were expressly exempted from all but two of the IWC Wage Orders in 1997 and the two they were not exempt from, household employees and agricultural employees, did not apply to the plaintiffs.

The court described meal breaks as "generally beneficial to all employees" but declined to find a public policy of using meal breaks to ensure employee health and safety. Instead, the court passed responsibility to the Legislature to modify current law, as interpreted by the court, if it wants to provide public employees with the meal breaks their private counterparts currently enjoy.

B.J. Pierce works in the Labor & Employment Department of Mastagni, Holstedt, Amick, Miller and Johnsen.

LAW FIRM OBTAINS APOLOGY TO SANTA CRUZ COUNTY COA FOR COUNTY'S UNFAIR LABOR PRACTICE

By David E. Mastagni and Kathleen N. Mastagni Storm

The Santa Cruz County Sheriffs' Correctional Officers Association ("SCOA") has resolved a labor dispute by entering into a settlement agreement with the County of Santa Cruz that provides for mutually negotiated policies to replace policies the county had previously unilaterally imposed.

The agreement settles an unfair labor practice charge over the county's unilateral imposition of retaliatory changes to members working hours, wages, and right of access to the workplace in response to a collective Fair Labor Standards Act ("FLSA") action by SCOA members. As part of the settlement, the county agreed to immediately rescind the unilaterally imposed policies and issue an apology to the SCOA and its members.

Association Files FLSA Wage and Hour Claim

On March 25, 2008, members of SCOA, through their counsel at Mastagni, Holstedt, Amick, Miller & Johnsen, filed a collective action against the county alleging violations of the FLSA for the county's failure to compensate them for time spent working before and after their regularly scheduled shifts. The county had a long-standing practice of requiring plaintiffs to perform "off the clock" work, such as donning and doffing safety equipment, exchanging keys, radios and other equipment with officers being relieved, conducting officer-to-officer shift briefings, and traveling to and from assigned work stations.

On December 8, 2008, the plaintiffs and the county settled the FLSA collective action. Under the settlement agreement, 89 current and former employees received lump sum payments as compensation for back pay and liquidated damages for any work-related, uncompensated pre-shift and post-shift activities. In addition, current employees received an immediate two percent pay increase intended to compensate them for "off the clock" work duties moving forward. The two percent pay increase was subsequently incorporated into the MOU between the county and SCOA. On December 16, 2008, Judge Ware approved the settlement and dismissed the FLSA case with prejudice.

County Retaliates With New Restrictions

Three days later, on December 19, 2008, the county retaliated for the successful FLSA action by unilaterally implementing a policy change extending officers' work days by ten minutes. By memorandum, the county directed corrections personnel to be dressed and equipped for work ten minutes earlier than the scheduled start time of their shift; forbade them to enter the secure area of the jail until ten minutes prior to the start of their shift; and required them to proceed directly to their work station after entry. This shift in start time and the requirement officers complete pre-shift activities before the new start time effectively forced officers to complete compensable work off the clock again. In an effort to justify extending officers' work hours, the county's memorandum noted the agreement reached "via MOU negotiations regarding the donning/doffing issue" and the two percent wage increase.

On January 5, 2009, the county issued a second memorandum to corrections personnel purporting to clarify the earlier memorandum. The second memorandum reaffirmed the prohibition against entering the secure portion of the jail facility more than ten minutes before the start of their scheduled shifts. After the settlement, the commander of the jail engaged in various apparent intimidation tactics while standing at the entrance to the facility at shift change. The access and time restrictions were not warranted because the MOU provided full FLSA compensation for compensable pre- and post-shift activities

Notably, the new policies only applied to correctional employees represented by the SCOA. Deputies working in court transport, medical staff, and other employee classifications at the correctional facilities who were not represented by the SCOA were exempt from the punitive policy changes.

SCOA Fights Back With Grievance and Unfair Labor Practice Charge

On February 20, 2009, James Bates, president of SCOA, initiated a grievance as a result of the policy changes. In, addition, our firm filed a charge with the Public Employ-

(Continued on page 18)

ARBITRATOR RESTORES TRACY OFFICER TO K-9 HANDLER POSITION

By Daniel T. McNamara

A City of Tracy police officer who was abruptly removed from his canine handler position as part of a disciplinary action won reinstatement to the assignment after an arbitrator found the action was unwarranted and outside the chief's authority. The arbitrator ordered Officer Erik Speaks and his dog, Lord, reinstated to the K-9 position from which Speaks had been reassigned last May.

In March, 2009 Officer Speaks was arrested for driving under the influence. He accepted responsibility for his lapse in judgment, pleaded guilty to the offense, and acknowledged his mistake to the new Police Chief, Janet Thiessen. In response, the chief and city manager first attempted to impose a 90-day suspension on Speaks for his first offense, then reduced the discipline but removed Speaks from his canine position.

City Takes Dog from Officer's Home

Speaks, a former U.S. Air Force dog handler, had been a K-9 handler for the Tracy Police Department since 2002. His German Shepherd canine, Lord, had been his partner and a member of his family for nearly four years. The department gave Speaks less than 24 hours' notice before taking Lord from his home and reassigning him to a new, untrained handler.

While Officer Speaks stood ready to accept a suspension for his actions, any handler can sympathize with the impact Lord's removal had on Speaks and his family. Speaks is a dedicated K-9 officer who testified eloquently at his arbitration about the bond canine handlers form with their partners:

> I'm sure any canine handler, including myself, would tell anyone that there is a special bond between a handler and his dog. Obviously the dog is not a pet, but when a handler spends as much time with the canine as I do, or any other handler would, which is essentially 24 hours a day, seven days a week, I've never experienced any kind of bond with an animal and with few people such as that. That dog would, without hesitation, willingly sacrifice himself to protect me or any other officer and I would certainly put myself in harm's way to protect that dog.

At arbitration, the city argued the chief had sole discretion to assign or remove officers from special assignments under the POA's MOU. However, the arbitrator, John Wormuth, agreed with the POA that removing Officer Speaks from his canine assignment was unlawful. He held the chief's discretion in determining an officer's special assignments did not extend to the disciplinary process. Lord was returned to Officer Speaks.

Officer Erik Speaks and his dog, Lord

City Raises "Brady" Spectre over DUI

The city's attorney also argued Officer Speaks's DUI conviction could impact the officer's ability to testify in court. The city argued prosecutors would have to disclose the officer's conviction to defense counsel as exculpatory evidence under *Brady v. Maryland* (1963) 373 U.S. 83.

Arbitrator Wormuth ruled *Brady* determinations are within the province of the superior court, not the police department, and found it was beyond the police chief's authority to speculate as to what, if any, *Brady* issues might arise in Officer Speaks' future.

Perhaps most importantly, Arbitrator Wormuth recognized that while Officer Speaks exercised poor judgment in driving under the influence, the true measure of his character was his candor and integrity in accepting responsibility for his actions.

Daniel T. McNamara is an associate attorney in the Labor and Employment Department. He represented Erik Speaks in his administrative appeal.

LAW FIRM OBTAINS APOLOGY

(Continued from page 16)

ment Relations Board ("PERB"). The charge alleged the county's actions constituted an unfair labor practice and that the county imposed the new policies in retaliation for SCOA members' collective FLSA action in violation of the Meyers-Milias-Brown Act (Government Code section 3500 et seq.).

Government Code section 3505 mandates a public agency "...meet and confer in good faith" regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations. The county's policy requiring corrections staff to begin working 10 minutes before the start of a scheduled shift was a change in wages, hours and other terms and conditions of employment. Yet, the county failed to provide SCOA notice of the new policy or an opportunity to meet and confer before implementing the change. Our firm argued the county's actions amounted to bad faith bargaining and an unfair labor practice.

To establish a prima facie case of retaliation against the Association in violation of the MMBA and PERB Regulations, the SCOA had to show (1) their members exercised rights under the MMBA; (2) the County had knowledge of this; and (3) the County imposed reprisals, discriminated, or otherwise interfered with, restrained, or coerced SCOA members because of their exercise of those rights. Our firm demonstrated that each of these criteria had been met.

The FLSA collective action and the corresponding MOU provision enacted in conjunction with the settlement both dealt with the matter of wages, which is a mandatory subject of bargaining. Furthermore, the SCOA president and members initiated the FLSA collective action. The county's subsequent unilateral changes were made in retaliation for SCOA members' exercising their right to engage in concerted activity under the MMBA. The county admitted in its memoranda the implemented policies were made in response to the FLSA settlement. Both memoranda made reference to the FLSA settlement, and the implemented changes applied only to SCOA members, not to other employees at the correctional facilities who were not represented by SCOA.

County Settles Unfair Labor Practice with Apology to SCOA and Members

After an investigation, PERB determined the charges stated a prima facie case of unfair labor practices and, on June 2, 2010, issued a complaint against the county. Faced with the PERB complaint and our aggressive efforts on behalf of the SCOA, the county retreated into a settlement agreement. Under the terms of the agreement, the county immediately rescinded the unilaterally imposed policies. Further, in a memorandum that was posted for 30 days in various job sites, the county acknowledged the memoranda should not have been issued and apologized to the affected employees and to the Association for issuance of the memoranda. In response, the Association withdrew the unfair labor practice charge.


David E. Mastagni and Kathleen N. Mastagni Storm represent the Santa Cruz Correctional Officers' Association in grievances, unfair labor practices and wage and hour litigation.

UPCOMING SUPREME COURT CASES

Chamber of Commerce v. *Whiting*

The Court will decide whether an Arizona law requiring state employers to check job applicants' immigration status using a federal computer database is pre-empted by federal immigration law.

(*Chicanos Por La Causa, Inc. v. Napolitano* (9th Cir. 2009) 558 F.3d 856, cert. granted sub nom. *Chamber of Commerce v. Whiting* June 28, 2010, No. 09-115, ___ U.S. ___ [130 S.Ct. 3498].)

Schwarzenegger v. *Plata*

The Court will consider whether a court order requiring California to reduce its prison population to remedy unconstitutional prison conditions violates the Prison Litigation Reform Act.

(*Coleman v. Schwarzenegger* (E.D. Cal and N.D. Cal 2010) Nos. CIV S-90-0520 LKK JFM P, C01-1351 THE, cert. granted sub nom. *Schwarzenegger v. Plata* June 14, 2010, No. 09-1233, ___ U.S. ___ [130 S.Ct. 3413, 177 L.Ed.2d 322].)

WELCOME NEW CLIENTS

AUBURN EMPLOYEES' ASSOCIATION

The **Auburn Employees' Association** has joined our client list of non-sworn municipal employee groups seeking professional negotiations support in a challenging economy. **President Dean Stalder** has retained Mastagni, Holstedt, Amick, Miller & Johnsen for contract negotiations and legal defense.

LASSEN COUNTY DEPUTY SHERIFFS' ASSOCIATION

The **Lassen Deputy Sheriffs' Association** has retained Mastagni, Holstedt, Amick, Miller & Johnsen for contract negotiations and legal defense. **President Dave Wogenrich** and the Board have retained our firm for all legal matters covering administrative, civil and criminal actions.

IMPERIAL COUNTY PROBATION AND CORRECTIONS PEACE OFFICERS' ASSOCIATION

President Armando Merino and the **Imperial County Probation and Corrections Peace Officers' Association** have retained Mastagni, Holstedt, Amick, Miller & Johnsen to represent the association in contract negotiations and legal defense.

LAKE COUNTY CORRECTIONAL OFFICERS' ASSOCIATION

The **Lake County Correctional Officers' Association** is now represented by Mastagni, Holstedt, Amick, Miller & Johnsen for legal defense and contract negotiations. **President Mike Silva** achieved an 18-month contract agreement with the County, assisted by Mastagni negotiator **Steve Roberts.**

SAN MATEO PROBATION DETENTION ASSOCIATION

The **San Mateo Probation Detention Association** has turned to Mastagni, Holstedt, Amick, Miller & Johnsen for labor representation. **President Melvin Parker** and the association board use the law firm for contract negotiations and legal defense.

ELK GROVE POLICE MANAGERS' ASSOCIATION

The Elk Grove Police Managers' Association has joined forces with the law firm for contract negotiations and legal defense. **President Martin Pilcher** and the Board, with the assistance of associate attorney **Isaac S. Stevens**, have completed formation of the association and are pursuing recognition by the City of Elk Grove.

DIAMOND SPRINGS-EL DORADO FIRE EMPLOYEE GROUP

The **Diamond Springs-El Dorado Fire Employee Group** and **President Sean Wilson** will use the law firm to represent the association and its members in contract negotiations, legal defense, and grievances.

IMPERIAL COUNTY FIREFIGHTERS' ASSOCIATION

The **Imperial County Firefighters' Association** will use the law firm to represent the association and its members. President **Angel Morales** and the board have been working with negotiator **Michael Jarvis** for an improved contract with the County.

RIO DELL POLICE OFFICERS' ASSOCIATION

President Joshua Wiener and the **Rio Dell Police Officers' Association** have been working with Mastagni, Holstedt, Amick, Miller & Johnsen and negotiator **Steve Roberts** to craft a successor MOU.

SEASIDE POLICE OFFICERS' ASSOCIATION

The **Seaside Police Officers' Association** and **President Frank Martin** have retained Mastagni, Holstedt, Amick, Miller & Johnsen for contract negotiations, legal defense, and grievances.

SOUTH LAKE TAHOE POLICE SUPERVISORS' ASSOCIATION

The **South Lake Tahoe Police Supervisors' Association** and **President Jeff Reagan** are now represented by Mastagni, Holstedt, Amick, Miller & Johnsen for PORAC LDF representation and contract negotiations.

PRESIDENTIAL PROFILE: BRENT MEYER

Officer Brent Meyer is the 14th President of the Board of Directors of the Sacramento Police Officers Association. At 32 years old, he was also the youngest police officer ever elected President of the SPOA Board of Directors in 2007.

Officer Meyer, who earned his Bachelor of Arts degree in Criminal Justice Management, has been with the Sacramento Police Department since 1992. He began his career as a student trainee and was a Community Service Officer until 1998, when he was sworn in as a police officer.

During his time with the department, Officer Meyer has worked in patrol and in the police department's federally grant-funded Community Oriented Policing and Problem Solving (COPPS) program at the Regional Community Policing Institute – Sacramento; and has been a traffic enforcement officer on a motorcycle and a bicycle patrol officer in the central core of downtown Sacramento. In those assignments, he has trained other police officers and community service officers and served in the capacity of an acting sergeant.

Since 2003, Officer Meyer has actively participated in the execution of the department's DUI Enforcement Grant. Officer Meyer received local recognition from Mothers Against Drunk Drivers (MADD) for his efforts in 2005, 2006, and 2007. He also received the MADD California Hero Award (statewide recognition) in 2007 for his dedication in removing impaired drivers from Sacramento's roadways.

Brent Meyer was elected to the Sacramento Police Officers Association Board of Directors in 2001. He was elected as the Board's Secretary in 2002 and as its Vice President in 2003. In August of 2006, he was assigned to establish the city's first Labor Management Committee with then-Deputy Chief of Police, Rick Braziel. In March 2007, he was appointed President by the Board of Directors to serve out the remainder of Sergeant Jerry Camous' term as President. President Meyer was subsequently re-elected to two-year terms as the Association's President in 2007 and 2009.

In addition, Brent Meyer represented the Association on the Sacramento Police/Sheriffs Memorial Foundation Board of Directors from 2002-2009, serving as its President from 2007-2009.

Currently, President Meyer is the SPOA representative to Sacramento's Community Racial Profiling Commission, having been appointed a Commissioner by the Sacramento City Council in August, 2007. In April, 2009, President Meyer presented a perspective on the issue of racial profiling to the "Big 50" Police Union leaders in the United States at Harvard University.

In 2008, Brent was elected to serve on the River District's Board of Directors, the organization representing the interests of business owner's in the area north of the downtown Railyards project. In 2009, he was selected by the Board of Directors to sit as its treasurer.

Brent Meyer is a life-long resident of Sacramento County, residing in Folsom with his wife and young daughter.

(L to R) *SPOA and its attorneys*: Jerry Camous, Don Gilbertson, Obed Magney, David E. Mastagni, Dustin Smith, David P. Mastagni, Corey Morgan, Mark Tyndale, and Sam Blackmon

David P. Mastagni and now, David E. Mastagni, have enjoyed a nearly 35-year relationship with the Sacramento Police Officers' Association, representing them in labor and employment matters, contract negotiations, and legal defense.

WELCOME NEW ATTORNEYS AND STAFF

Jeffrey R.A. Edwards is an associate attorney in the Labor and Employment Department of Mastagni, Holstedt, Amick, Miller and Johnsen. Jeff graduated from the University of California at Berkeley and obtained his law degree from the University of California, Davis School of Law (King Hall). While at King Hall, Jeff competed on the National Moot Court and National Mock Trial teams and was selected as a member of The Order of Barristers.

Natalie A. Powers is an associate in the Workers' Compensation Department, where she enforces injured workers' rights to medical and financial benefits. Natalie graduated from the University of California, Davis Law School. During law school Natalie received certificates in recognition of her commitment to public service, as well as a Witkin Award for Academic Excellence in Legal Writing. She also served as a Research Editor on the Journal of Juvenile Law and Policy and interned at the Yolo County District Attorney's Office.

Gabriel R. Ullrich is an associate attorney in the Workers' Compensation Department. Gabe manages workers' compensation cases from intake through settlement or trial award, and often through various appellate forums. Gabe aggressively litigates cases to ensure his clients receive the benefits they are entitled to under California's complex workers' compensation common law, statutory and regulatory schemes. Gabe completed his undergraduate degree at the University of California, Santa Barbara and earned his Juris Doctor at the University of California, Hastings College of Law. In law school, Gabe was a staff editor on Hastings Constitutional Law Quarterly and focused his studies on litigation and trial practice.

Jessica F. Young represents injured workers before the Workers' Compensation Appeals Board throughout California. She dedicates a large portion of her practice to asbestos-related workers' compensation litigation. Jessica graduated summa cum laude from the University of Miami School of Law. During law school, Jessica was a Mentschikoff Scholar and an Article and Comments Editor of the University of Miami Law Review. Jessica is a member of the Order of the Coif and the Society of Bar and Gavel. Jessica earned her Bachelors of Arts from Wesleyan University with departmental honors in sociology. Before law school Jessica worked as a union organizer and representative for UNITE HERE in New York and New Jersey.

Daniel L. Osier is an associate in the Civil Litigation Department. His practice focuses on all aspects of civil litigation. Before joining Mastagni, Holstedt, Amick, Miller & Johnsen, Daniel worked as an associate for a small law practice in San Francisco with an emphasis on employment discrimination and wrongful termination.

Justin K. Miyai is an associate in the Labor and Employment Department. Justin was a Deputy District Attorney in San Joaquin County prosecuting misdemeanor and felony offenses. During law school, Justin was a member of the Honors Moot Court Board and Pacific Regional Finalist Phillip C. Jessup International Law Moot Court Team. He also received an Emery Law Scholarship and the Harold R. McKinnon Prize awarded to the best brief submitted in the annual Honors Moot Court Competition. He served as a judicial clerk to the Honorable Socrates P. Manoukian of the Santa Clara County Superior Court.

Diane Schaumburg is an associate in our Civil Litigation Department, where she handles all types of litigation matters, including medical malpractice, motor vehicle and premises liability cases, and small business disputes. Before joining our firm, Dianne was a research attorney and sole practitioner. In law school, Dianne served on King Hall's Trial Practice Honors Board and was an executive editor of the environmental law journal. She was also a judicial extern to the Honorable Kimberly J. Mueller, Magistrate Judge of the U.S. District Court for the Eastern District of California and an environmental law intern with the California Attorney General's Public Rights Division. Dianne is a member of the Litigation Section of the California State Bar, the Bar Associations of Yolo and Sacramento Counties, the Milton L. Schwartz/David F. Levi Inn of Court, and the Women Lawyers of Sacramento.

Ian M. Roche is an associate in the Civil Litigation Department of Mastagni, Holstedt, Amick, Miller and Johnsen. His practice focuses on all aspects of civil litigation. Ian graduated from Case Western Reserve University School of Law in Cleveland, Ohio, where he was a three-time recipient of the Dean's Honor Roll. Ian is also a graduate of the University of California, Los Angeles, where he earned his Bachelor of Arts degree. Ian was a law clerk for the U.S. Attorney's Office, Northern District of Ohio, the Sacramento County Superior Court and the Cuyahoga County Prosecutor's Office in Cleveland, Ohio.

Sumaira H. Arastu is an associate in the Civil Litigation Department. Sumaira graduated from University of California, Los Angeles in 2005 with a degree in Anthropology. Sumaira earned her Juris Doctor from UC Davis, King Hall Law School in 2009 where she was on the Business Law Journal and competed in Jessup International Moot Court. Sumaira was a Judicial Extern to Hon. Lawrence K. Karlton of the United States District of California Eastern District.

Kevin C. Chau is an associate attorney in the Workers' Compensation Department. Kevin attended the University of California, Davis, for both undergraduate and law school. During law school, Kevin participated in moot court and was an editor for a law journal.

B.J. Pierce works in the Labor and Employment Department and is awaiting her bar results. BJ worked as a police officer in Erie, Pennsylvania for a decade, including positions in patrol, narcotics, crime and forensics units. During law school, BJ was the Senior Article Editor for the Berkeley Journal of Employment and Labor Law and Student Director of the East Bay Workers' Rights Clinic. She also co-founded the Campus Rights Project, a civil rights legal defense clinic, specializing in administrative and First Amendment litigation. BJ was the recipient of the Berkeley Law Dean's Fellowship and the Prosser award for excellence in scholarship.

ASSOCIATION EVENTS

David Swim, Mastagni negotiator, attending the Alameda County DSA Picnic

(L to R) Playing at the Stockton POA Golf Tournament are Sean D. Howell, Labor Associate; William P. Creger, Labor Associate; Mark Richmond (San Joaquin DSA), and Gabriel R. Ullrich, Workers' Compensation Associate

ASSOCIATION EVENTS

(L to R) Attending the Hook and Ladder crab feed are Rich Schmiedt, SAFF Local 522President; Philip R.A. Mastagni, and Jaymes Butler, Vice President of SAFF Local 522

(L to R) Attending the Valley Hero's BBQ Dinner on September 11, 2010, are Robert Jarvis, Mastagni Lead Negotiator; and Duane Cornett, Treasurer for Tulare County DSA

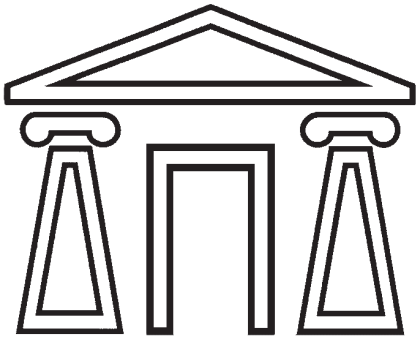
(L to R) Attending the Alameda DSA Picnic are David E. Mastagni, Senior Labor Associate; Adrianne Harrel, Jesse Harrel, Labor Negotiator; Angela Mastagni (with twins Collin and Christopher), and B.J. Pierce, Labor Associate

(L to R) Attending the Alameda DSA Picnic are Aerin Crews, DSA Office Manager; Sean D. Currin, Labor Associate; Jon Rudolph, VP; Stuart Woo, Workers' Comp Associate; Jonathan Liff, Workers' Comp Associate; and Justin K. Miyai, Labor Associate

(L to R) Attending the IAFF 2010 Convention Dinner are Adrianne Harrel, Jesse Harrel, Ryan Henry, Sacramento City Director; Mo Johnson, Sac Metro Vice President; and Chris Andrews, Sac City Director

(L to R) Attending the IAFF 2010 Convention Client Dinner are April Schmiedt, Ann Angell, Andy Angell, District Director; Brenda Cook, Pat Cook, Secretary/Treasurer for Local 522; and Rich Schmiedt, President of Local 522

MASTAGNI, HOLSTEDT, AMICK,
MILLER & JOHNSEN



A PROFESSIONAL CORPORATION
1912 I Street, Sacramento, CA 95811

MASTAGNI, HOLSTEDT, AMICK, MILLER & JOHNSEN

Protecting Your Rights Is Our Commitment

Serving Law Enforcement for Over Three Decades by Providing Representation in Labor Law, Workers' Compensation, Retirement, Social Security, Personal Injury, Criminal Defense of Peace Officers and Contract Negotiations

LDF Panel Attorneys and Air Fleet with Pilot Available 24 Hours

Managing Workers' Compensation Attorney John R. Holstedt

(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.