MASTAGNI LAW BULLETIN

2009

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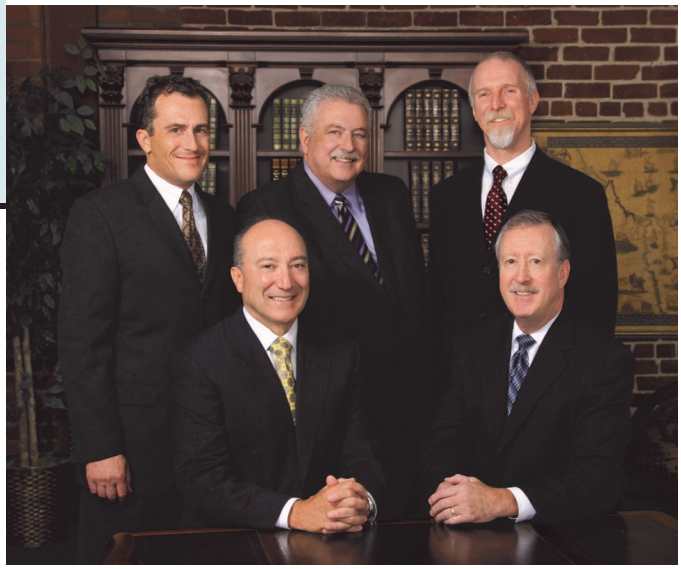
FIRM OBTAINS $1.75 MILLION SETTLEMENT IN WAGE AND HOUR CASE FOR WACKENHUT SECURITY OFFICERS

By David E. Mastagni



Mastagni, Holstedt, Amick, Miller & Johnsen has obtained a $1.75 million settlement in a lawsuit brought under state wage laws on behalf of 203 current and former Wackenhut Corporation security officers employed at the Oracle facility in Redwood City.

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STOCKTON POA LABOR DISPUTE ENDS WITH PAY INCREASES AND CONTRACT EXTENSION

By David E. Mastagni

The Stockton Police Officers' Association (SPOA) has resolved a yearlong labor dispute by entering into a global agreement that extends the association's contract through June 30, 2012 and avoids layoffs.

The agreement settles a grievance over total compensation and provides SPOA members with a 15 percent salary increase retroactive to July 1, 2008; a three percent raise on January 1, 2011; rescission of layoff notices sent to nearly 70 police officers and sergeants; a two-year extension on the MOU; and a guarantee there will not be any demotions.

As part of the settlement, SPOA agreed to temporary concessions intended to provide cost savings to the City of Stockton without adversely impacting the members' final compensation for purposes of retirement, overtime rates of pay, and long term total compensation packages. We agreed to accept a portion of the retro back pay in paid time off; a three percent furlough going forward from July 1, 2009, which sunsets prior to the expiration of the contract; temporary suspension of payments to deferred compensation in retiree medical which resume at different points over the life of the contract; minor modifications to the medical plan including a $100 co-payment to offset

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The settlement in *Fay et al. v. The Wackenhut Corporation et al.* was approved February 23, 2009 by San Mateo County Superior Court Judge Carol L. Mittlesteadt.

The class-action lawsuit was filed May 3, 2006, over claims the security officers were not properly compensated for time spent in pre- and post-shift briefing and were denied rest breaks and meal periods. The litigation featured a lengthy and contentious motion and discovery process, including a motion by Wackenhut's counsel to decertify the class, cross-motions for summary judgment, and several motions to compel Wackenhut to produce discovery. Expert witnesses providing deposition testimony included forensic accountants and human factors experts who examined payroll data and prepared detailed time estimates.

The parties were able to reach a tentative settlement agreement at a mandatory settlement conference with San Mateo County Superior Court Judge Steven L. Dylina on June 19, 2008. A key feature of the northern California settlement was a non-reversionary clause providing that any monies designated for a class member who did not to participate in the settlement would revert back to the settlement fund to be paid out to participating plaintiffs.

Class members participating in the settlement received an average individual recovery of $11,076.55.

The successful resolution of this case provided a substantial recovery for all affected class members. Mastagni, Holstedt, Amick, Miller & Johnsen is privileged to have represented these individuals and proud

WE HAVE FFBOR BOOKLETS!

We have a limited supply of pocket-size guides to the new Firefighters Procedural Bill of Rights.

The booklets are red with gold lettering and summarize the key provisions of this new statute affecting employment rights for all California firefighters. Please contact the law firm if you would like these handy booklets for the members of your firefighter labor association.

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 2008. The law firm was ranked fifth in Sacramento in 2008 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

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the cost of 100 percent family medical coverage; and a 25 percent reduction in uniform allowance for this fiscal year, which doesn't apply to those who retire and increases to $1900 over the following two fiscal years. At the end of the contract, all concessions will be restored and members of the association will realize an 18 percent increase in the salary rates that existed as of June 30, 2008.

City Reneges on Equity Adjustment

On July 1, 2008, the City of Stockton was required to provide the SPOA an equity adjustment based upon a contractual total compensation survey of the six comparator cities. The MOU required the City provide SPOA members a salary increase sufficient to match the members' total compensation to the agency whose compensation was the lowest of the top six. The SPOA membership overwhelmingly ratified the settlement and contract extension.

In this case, the City of Glendale in southern California was the comparator agency. The City of Stockton contended it was only required to provide an increase in base salary equal to the percentage difference in total compensation between Glendale and Stockton. We were able to show, however, that applying the percentage difference in total compensation to the base salary would only increase base salary, not total compensation. Therefore, the contract actually required a larger increase in base salary in order to achieve equity in total compensation.

In addition to the dispute over the methodology for computing the compensation increase owed, the SPOA and the City disputed the proper valuation of three other terms of the comparator agency, Glendale, in the total compensation survey. The first was whether the City could use an actuarial estimate, rather than the traditional composite rate, of its costs under the city-funded "employee plus family" health plan option. The City historically had charged its departments, not its employees, for the costs of the benefit.

The second disputed term involved whether the City could include the value of "City contributions to PERS" payments on principal and/or interest to a pension obligation bond the City had implemented prior to the survey window. The SPOA contended the pension obligation bond was required by PERS to pay down contribution rates approaching 35 percent due to the City's failure to properly pay pension obligations as they became due. The final disputed term concerned the proper valuation of SPOA's holiday benefit under the total compensation survey.

On July 1, 2008, the City of Stockton unilaterally implemented a salary increase of 9.5 percent based upon its valuation of the disputed terms. The SPOA contended the true value of the equity raise required a range from 14.1 percent to 22 percent, depending upon the outcome of each diluted comparator.

SPOA Files Grievance over Total Compensation and Appeals to Arbitration

As efforts to meet and confer over the disputes failed, the law firm filed a grievance against the City of Stockton on July 25, 2008, alleging the City failed to provide the requisite salary increase and violated other provisions relating to pay incentives driven by base salary, overtime, and compensation to PERS.

After the Step 3 hearing, the City issued a written position statement on the grievance denying the damages requested by SPOA but admitting the City had not paid the full compensation owed. The City Manager's Step 3 response asserted the SPOA was due an 11.5 percent raise. Nevertheless, the City refused to pay the additional, undisputed two percent owed unless the SPOA agreed to drop the grievance.

Instead of settling the grievance, we appealed to the next step, an adjustment board. In lieu of an adjustment board, the parties agreed to have the matter mediated by arbitrator Norman Brand. Despite the SPOA's best efforts, attempts at mediation failed and the SPOA appealed to final and binding arbitration.

City Settles Grievance to Avoid Layoffs

In the late spring and early summer of 2009, the City of Stockton issued layoff notices to about 70 sergeants and officers. Previously, the City had issued notices to 29 members, but the SPOA was able to avoid those lay-

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offs by agreeing that any back pay owed or awarded via the arbitration would not be due and payable until the fiscal year beginning in July 2009. The SPOA engaged in an aggressive PR campaign to combat the proposed layoffs. The campaign was funded by SPOA members with a $50 dues assessment for one year.

Faced with imminent layoffs and arbitration over the grievance, the City approached the SPOA about resolving the grievance in June 2009. After a number of late night settlement negotiations, we were able to reach a tentative agreement. In exchange for the concessions offered to the City, we demanded a contract extension to guarantee the officers' pay and benefits, including "3% at 50" retirement, would be protected throughout the economic downturn. We also insisted the layoff notices be rescinded, and the City agree not to impose demotions for at least one year. The City agreed.

Shortly after implementation of the settlement agreement, the federal Department of Justice announced that Stockton would receive approximately $7.8 million in federal police grants to fund police officer positions and prevent layoffs. The grant requires the City to retain the employees for not less than four years. Because the officers funded under the grant are the least senior, the City cannot lay off any more senior officers in unfunded positions without violating the layoff procedures in the MOU and civil service rules.

Lessons Learned

The results the association was able to achieve in this case illustrate some important concepts for police labor associations to consider when extending or negotiating a contract in the current economic environment. First, it is important to maintain public confidence and public support for your actions. Therefore, it is important for your association to make good faith efforts to assist your agency in surviving this economic downturn.

Any concessions you make, however, should be considered carefully and calculated to minimize the adverse impact on both your final compensation and your members' pocketbooks. Under California law, if you are unable to extend your contract once it expires, the terms and effects on the last day of the contract remain in place until a new contract is enacted. Therefore, concessions must expire or they will continue in the event you go off contract. We were careful to ensure the majority of the concessions we offered, e.g., suspension of deferred compensation payments and retiree medical payments, would not be felt in our members' take home checks and that the concessions would sunset prior to the expiration of the contract. Even with pay reductions through furloughs, the City agreed to two guarantees: furloughs would not affect final compensation for purposes of retirement and SPOA members would receive an equal amount of time off corresponding to the furloughs.

Lastly, the SPOA was able to strengthen its bargaining position with an effective PR campaign and the aggressive prosecution of our legal causes of action. Through a coordinated and integrated effort, we were able to achieve positive results.

David E. Mastagni, a senior associate with the law firm of Mastagni, Holstedt, Amick, Miller & Johnsen, represents public safety members with an emphasis in labor and wage and hour cases. He is general counsel to the Stockton Police Officers' Association and coordinated the multi-front litigation and negotiations in this case.

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ALAMEDA DEPUTY WINS DISPUTE OVER HEALTH INSURANCE FOR NEWBORN

By Kristina T. Jansen

An Alameda County deputy sheriff has reached a settlement with the county that includes reimbursement for the costs of enrolling in private insurance after his newborn daughter was wrongly denied health insurance coverage.

Lea Giammalvo was born to Deputy Michael Giammalvo and his wife last October. As he had done for their other children, Michael Giammalvo gathered the paperwork to enroll Lea into the County's health insurance plan. Unfortunately, there was a clerical error on Lea's birth certificate, so it was not available when he submitted the enrollment form. October was also the open enrollment period for the health insurance plan, so Giammalvo also enrolled his daughter online.

On November 7, 2008, prior to the expiration of the 31 day grace period from the date of Lea's birth, Deputy Giammalvo submitted Lea's birth certificate to the County and watched as it was date-stamped. Shortly thereafter, the County denied Lea's enrollment into the health insurance plan, stating the paperwork had not been submitted. The County lost the enrollment form and birth certificate.

County Denies Coverage

The County denied health insurance coverage to Lea, claiming Giammalvo did not submit the forms. The deputy filed an appeal stating the specific dates and places he submitted the forms, but the County ignored the information he provided and continued to deny benefits. Giammalvo turned to his union, the Deputy Sheriffs' Association of Alameda County, which authorized the law firm to represent him in legal action against the County.

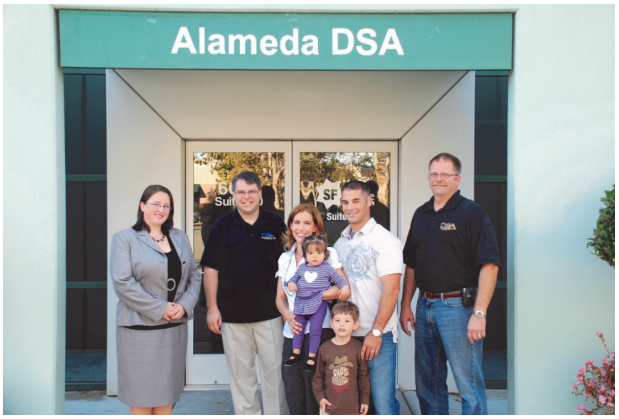
Deputy Giammalvo fortunately was able to obtain health insurance for Lea through his wife's employment; however, this insurance cost more than the County health plan. When I filed an appeal and contacted the County, I was told "people lie, even deputies." With Deputy Giammalvo's word as the only form of evidence, the appeal would continue to be denied.

Through telephone calls, letters and appeals, we discovered the county had yet to file reams of paperwork employees had submitted during the October open enrollment period. An employee at the county's Employee Services Center (ESC) assigned to Deputy Giammalvo's case finally agreed, under the threat of litigation, to search the unfiled paperwork before denying the appeal a second time. After a lengthy search, she discovered Lea's birth certificate in the file, dated the same date Deputy Giammalvo recalled submitting the form.

The key to our strategy in the case was to file a tort claim against the county for the Giammalvo's costs in enrolling in the alternative health insurance as well as other damages. Settlement of the claim included the county reimbursing Giammalvo for those costs and enrolling Lea into the county's health insurance program.

The fundamental lesson from this case is simple: keep copies of everything you submit to your employer. Copies of the date-stamped birth certificate and the enrollment form might have avoided the problems caused when Alameda County lost the Giammalvos' paperwork.

Kristina T. Jansen is an associate attorney with Mastagni, Holstedt, Amick, Miller & Johnsen. She represented Michael Giammalvo in his dispute with Alameda County.



Left to right: **Kristina T. Jansen, DSA Vice President Jon Rudolph, Renee Giammalvo, Lea Giammalvo, Kyle Giammalvo, Michael Giammalvo, DSA President David Harris.**

The Fair Labor Standards Act

Mastagni, Holstedt, Amick, Miller & Johnsen has been representing public safety and private sector employees in litigation under the Fair Labor Standards Act (FLSA) for many years. Our litigation team has been successful in several recent cases in obtaining back pay, liquidated damages, costs, and other remedies for police officers, deputy sheriffs, firefighters and private sector employees throughout northern California. We have litigation ongoing in several jurisdictions involving FLSA issues such as equine pay, K-9 pay, miscalculations of overtime and the "7(k) exemption."

DISTRICT COURT APPROVES $1.425 MILLION SETTLEMENT OF FLSA ACTION BY SOLANO COUNTY CORRECTIONAL OFFICERS

By David D. King

A wage and hour lawsuit filed by Mastagni, Holstedt, Amick, Miller & Johnsen on behalf of over 170 Solano County correctional officers has concluded with an approved settlement of $1.425 million in back pay and liquidated damages.

The collective action under the Fair Labor Standards Act, entitled *Abubakar, et al. v. County of Solano*, Case No. 6-CV-2268-LKK-EFB, alleged the County of Solano failed to pay Solano County correctional officers for time spent working prior to the start of a scheduled shift at Solano County correctional facilities and failed to include premium pays and other remunerations in the officers' regular rate of pay for purposes of calculating overtime compensation.

Over 170 individual plaintiffs received back pay and liquidated damages under the terms of the settlement, and the County agreed to install a "card swipe" system to more efficiently and accurately record employees' time spent working. The $1.425 million settlement concluded litigation first filed on October 12, 2006.

County Failed to Pay for Pre-Shift Duties

Solano County correctional officers work non-overlapping eight-hour shifts. Under this schedule, no post is left unattended at any time during a 24-hour day. The department's post orders required officers to be prepared to work at the start of the scheduled shift.

The County did not, however, pay its officers for the time spent preparing to start a shift, such as donning safety equipment, sorting mail, conducting officer to officer turnover briefings, conducting inmate headcounts, or completing paperwork and exchanging safety equipment, including radios, radio batteries and noose cutters. We established through discovery in the case that these uncompensated "pre-shift" activities lasted, on average, between 10 and 30 minutes for each officer.

Under the FLSA, time spent working is compensable if it is "controlled or required" by an employer, if it benefits the employer, or if it is "suffered or permitted" by the employer. An activity is compensable if it is "integral and indispensable" to the performance of the employee's work duties. The correctional officers' pre-shift activities were compensable because donning safety equipment, conducting officer to officer shift briefings, conducting inmate headcounts, completing paperwork and exchanging equipment were integral to the safe and productive performance of the correctional officers' job duties.

County Did Not Pay Correct Overtime Rate

The Fair Labor Standards Act requires public employers to pay overtime compensation at one and one half times the "regular rate of pay". The "regular rate" is not merely a base hourly rate. Solano County correctional officers received premium pays in addition to their base pay, including premiums for working certain shifts, or for being bilingual. These additional remunerations must be included in the regular rate when calculating overtime compensation. The County failed to include these additional remunerations in the correctional officers' regular rate of pay.

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The Fair Labor Standards Act

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We retained the forensic accounting firm of Perry-Smith LLP to examine the paystubs and timesheets of about 171 plaintiffs. Review of timesheets, paystub records, Sheriff's Department policies and procedures, and records from the Sheriff's Department's proprietary computer system, the Inmate Management System, was critical to establishing that correctional officers often arrived to work early to perform job duties and that the time spent conducting such activities was not properly compensated.

Our aggressive litigation plan yielded a mediated settlement in this case after hundreds of hours of discovery, depositions, expert analysis and law and motion. On March 3 and March 5, 2009, the parties appeared before retired federal Judge Raul Ramirez for mediation discussions. Over the course of the two-day settlement negotiations, the parties agreed the County of Solano would pay a lump sum of $1.425 million to the correctional officers and the law firm. The County also agreed to install a "card swipe" system at the correctional facilities so the officers' hours could be recorded accurately.

Judge Lawrence Karlton approved the settlement on May 21, 2009. The successful outcome to this litigation represents a substantial recovery for all affected class members. The law firm of Mastagni, Holstedt, Amick, Miller & Johnsen is privileged to have represented these individuals and is proud to have successfully provided them significant compensation.

Legal Updates

LAPD "Sick Check" Triggers POBR Protections Despite Officer's Exoneration

In a case involving the application of POBR rights where the subject officer is exonerated, the Second District Court of Appeal has held a sergeant's tape-recorded contacts with an officer she suspected of abusing sick leave triggered the protections of the Public Safety Officers Procedural Bill of Rights Act. (*Paterson v. City of Los Angeles* (2009) 174 Cal.App.4th 1393.) The court made this finding despite an argument by the City of Los Angeles that the officer's eventual exoneration of any wrongdoing made the POBR inapplicable.

The City claimed any punitive action taken against the officer was not actionable, since it had been "nullified" by the officer's exoneration. The court found this theory untenable, since under the City's view, the POBR protections would only apply once an investigation has concluded and resulted in punishment. Thus, the City could choose to violate an officer's procedural rights if it was confident it would not prevail in its eventual attempt to impose discipline. The Court of Appeal reversed a trial court decision, emphasizing that the Act applies to any investigation or interrogation that can potentially lead to punitive action.

Mischaracterizing Termination as Involuntary Retirement Violates Due Process Rights

The Fourth District Court of Appeal has held an officer's involuntary retirement for disability does not foreclose her separate right to appeal her termination based on a disciplinary action. The court held the employer's decision to retire a district attorney investigator involuntarily while her appeal from discipline was pending gave her the right to challenge both adverse actions.

In *Riverside Sheriffs' Association v. County of Riverside* (2009) 173 Cal. App. 4th 1410, Riverside County fired a senior investigator after a fitness for duty evaluation determined she was not psychologically fit for duty and unable to carry a gun. She challenged her termination through the appeal process in the association's MOU with the county. Over eight months later,

THE DO's AND DON'TS OF SOCIAL NETWORKING SITES FOR LAW ENFORCEMENT OFFICERS

By Dawniell Zavala

It seems like just about everyone has a profile on Facebook, MySpace, or Twitter. The "blogosphere" has become an accepted source of public information. Even respected news sources permit readers to post comments and letters in response to articles online, and countless other websites provide electronic forums on every topic imaginable.

As interpersonal interaction increasingly takes place in a virtual society, it is easy to blur the lines between behaviors we immediately recognize as questionable or inappropriate in the real world and those we feel comfortable with engaging in online. The detachment and semi-anonymity inherent in online interaction tend to empower our us to the point where we feel comfortable taking risks on the internet that we wouldn't dream of taking in real life.

While it's tempting to use the Internet to create a bolder, edgier, more exciting persona or to publicize our exploits to a select group of friends, it is extremely important for law enforcement officers to consider the impact their online activities – and even the online activities of others – may have on an officer's professional reputation and on the public's perception of his or her agency and fellow officers. Although officers, just as civilians, are entitled to First Amendment protections, officers must strive to maintain an aura of professionalism online to a greater extent than the average citizen. Moreover, while many online forums and social networking sites are password protected or require users to be "friends" with an individual before a profile may be accessed, these protections are insufficient to ensure an officer's online information will remain private.

So with this in mind, what types of activities on social networking sites should officers refrain from? And what should an officer do if they know or suspect that someone else has publicized unflattering information about them online? Here are some suggestions:

DON'T

- expect that anything you post online will remain private, even if the site provides some privacy measures.
- post photographs of yourself in uniform or allow others to post them.
- identify yourself as a law enforcement officer in your online profile.
- post information regarding activities you or others have engaged in that are likely to degrade public opinion of your agency or fellow officer even if they occurred off-duty .
- join networks or groups on social networking sites that may be perceived as racist, sexist, or suggest improper bias against specific members of the public or protected groups.
- badmouth your agency, superiors, or peers online. Although criticism against certain employment *policies* are constitutionally protected, it is best to refrain from mentioning your employer altogether, since such comments can easily be taken out of context or misconstrued.
- allow other individuals to post offensive content to your profile, blog, or website.
- discuss or post photos of sensitive matters that you know of or have access to because of your position (e.g., ongoing investigations, crime scene photos, etc.).

DO

- think twice about the activity you engage in online!
- act as though everything you post can be seen by your employer or coworkers and may potentially form the basis of a disciplinary action against you.
- use common sense! Items or comments that may embarrass you, your fellow officers or your department, or that can later be used to impeach your character should not be posted online.
- maximize your profile's privacy settings on social networking sites.
- be conscientious about who you "friend" or allow to access your profile, blog, website, etc. Remember that some social networking sites permit "friends of friends" to view and access information their contacts have commented on or have been tagged in. This means your content may be viewed by unintended parties, even if you did not personally grant them access.
- "untag" yourself in unflattering photos posted by others, or ask posters to remove the photos altogether.
- delete entries or comments posted to your profile, blog or website by others that are inappropriate or that you would not want your employer or members of the general public to read.

In summary, bear in mind that postings by or about you on the Internet will not remain off-limits to your employer for disciplinary purposes. While law enforcement officers do have free speech protections, these protections are somewhat limited because officers hold a powerful public position. Any activity, whether it takes place on-duty or off-, can justify discipline if it undermines the perceived integrity of an officer or his or her employer. Even private activities seemingly unrelated to law enforcement can provide a basis for discipline if they undermine the mission of the employer or bring the professionalism of its officers into serious dispute.

Dawniell Zavala is an associate attorney with Mastagni, Holstedt, Amick, Miller & Johnsen.

THE *EZZY* TEST FOR COMPENSABILITY OF OFF-DUTY ATHLETIC INJURIES FOR POLICE OFFICERS

In *Tomlin v. WCAB* (2008) 73 CCC 593, the Second Appellate District Court of Appeal held that a police officer assigned to a SWAT unit who was injured while running off-duty had a compensable injury because there was a nexus between the employer's expectations or requirements and the specific off-duty activity the police office was engaged in when he was injured.

Officer Tomlin was a police officer employed by the Beverly Hills Police Department and a seven -year veteran of BHPD's SWAT team. Although assignment to the department's SWAT team was voluntary, all officers on the SWAT team were required to pass an annual physical fitness test involving a half-mile run, climbing a wall, and dragging 150 pounds. BHPD paid Officer Tomlin to train four days each month and had even sent him to train out of state on occasion. Tomlin also maintained his physical fitness by running, bicycle riding, and weightlifting with other SWAT team members outside of work , but he was not paid for the activity.

In preparation for his annual test in January 2006, Officer Tomlin began a course of fitness training that he expected to continue during a two week vacation. On December 30, 2005,while on vacation in Wyoming, he broke his left ankle during a three-mile run.

Tomlin filed a workers' compensation claim. The employer denied his claim, alleging the injury occurred while Tomlin was participating voluntarily in an off-duty recreational or athletic activity.

Under Labor Code § 3600, injuries incurred while participating in off-duty recreational, social, or athletic activity are not compensable unless the activity is a reasonable expectation of employment. The test to establish compensability of such off-duty injuries consists of two elements: (1) whether the employee personally believes his or her participation in an activity is expected by the employer, and (2) whether that belief is objectively reasonable. (*Ezzy v. WCAB* (1983) 48 CCC 611.)

In Tomlin's case, the workers' compensation judge found Tomlin's belief his employer expected him to jog during vacation was not objectively reasonable. Officer Tomlin petitioned for reconsideration but his petition was denied. He then filed a petition for writ of review, which was granted.

Because Officer Tomlin testified he believed he was expected to train and this testimony was uncontroverted, the first prong of the *Ezzy* test was established. The Court of Appeal found the second prong was established because the officer's training was for an impending employment-related physical fitness test. Citing *Wilson v. WCAB* (1987) 196 Cal.App.3d 902, where a police officer who was a member of the department's Special Emergency Response Team sustained an off-work injury at a junior college track, the court reasoned that to cease training while on vacation would be inconsistent with his employer's requirement that Officer Tomlin remain fit enough to pass a physical fitness test.

The key component in *Tomlin* and *Wilson* is that the officers' physical fitness was a reasonable expectation of employment. Such is not the case with just a general assertion that an officer's good physical condition would simply benefit the employer. (See *City of Stockton* (2006) 135 Cal.App.4th 1513). Thus, the injured employee must show he or she is required to maintain a level of physical agility not generally required of other officers to establish the necessary nexus for compensability of off-duty athletic injuries.

Andy Kirk is an associate attorney with Mastagni, Holstedt, Amick, Miller & Johnsen.

LEGAL UPDATES (Cont'd)

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after denying the investigator the right to any appeal, the county filed for the investigator's disability retirement on the basis she was mentally unfit.

The Court determined the investigator was entitled to both an appeal hearing regarding her termination under the MOU and an appeal of her involuntary retirement determination and found the County's refusal to provide the investigator with a pre-termination hearing and appeal constituted a violation of the Public Safety Officers Procedural Bill of Rights Act.

PUBLIC SAFETY PRESUMPTIONS IN WORKER'S COMPENSATION

by Jonathan W.A. Liff

The rights of most public safety workers under California's Workers' Compensation laws are often significantly different than those of other employees. The most obvious of these are the benefits received during periods of temporary disability where public safety workers are entitled to receive their full salary for up to one year per injury. This is commonly referred to as "4850 time."

But there are other special provisions created by the state legislature to protect public safety workers in the event of certain types of injuries. These are known as legal presumptions, which act to give additional weight or significance to these specified conditions when brought before a judge at trial. A presumption requires the judge to find in favor of a party even if that party cannot otherwise prove its position. In addition, the presumption shifts the burden of proof on the issue to the opposing party, who then carries the responsibility to prove that the presumed fact is not true in order to overcome the presumption.

The following are the significant presumptions that have been created by the Legislature in favor of public safety employees:

Heart Trouble: This is perhaps the most important of all presumptions for public safety workers. Under this presumption, essentially any form of "heart trouble" may be presumed industrial (work-related). While insurance carriers will seek to rebut this presumption by showing some other non-industrial disease process or event caused the heart attack or condition, this will be difficult to achieve because the employer must show the non-industrial factor, such as obesity, family history, or diet, was the *immediate cause* of the injury.

This presumption does not only apply to actual heart attacks – heart disease or a stroke can also be presumed industrial. Furthermore, a heart condition that becomes symptomatic even after retirement can be compensable and may be claimed if discovered within a scaled time period. This time period is equal to three months for each year of service, at a maximum of 5 years (60 months).

One of the most important aspects of the heart presumption is the "anti-attribution"clause it contains. This means that in addition to the presumption that the heart injury is industrially caused, the permanent disability that results from the injury cannot be apportioned. This is especially important in light of recent laws enacted in Workers' Compensation that now allow employers to reduce permanent disability awards based on degenerative changes, prior injuries and other non-industrial factors. Employers and insurance carriers have been trying to litigate around the anti-attribution clause, but so far it has been upheld in appellate courts.

Cancer: Obviously, many public safety workers are exposed to a multitude of potentially carcinogenic materials. Not surprisingly, the Legislature has acknowledged these exposures by enacting a presumption for public safety workers who develop cancer. The injured worker must show he or she was exposed at work to a known carcinogen. Employees should collect and keep a record, including MSDS forms whenever possible, of each such chemical he or she is exposed to during their employment. As with heart conditions, cancer claims may be brought after retirement within the same time periods.

Hepatitis: While this may be an unusual condition for some public safety workers to encounter on an industrial basis, it is indeed presumed work-related in many situations. For rather obvious reasons, absent this presumption, it would be very difficult to prove industrial hepatitis. As such, this can be a very valuable and useful provision and applies to all three forms of hepatitis.

Hernia: This is yet another presumed industrial injury for certain public safety workers. As with cancer and heart conditions, these injuries may be claimed post-retirement. The same time restrictions apply to post-retirement hernia claims as to heart and cancer conditions.

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COURT UPHOLDS REINSTATEMENT OF SOUTH LAKE TAHOE POLICE OFFICER

By Steven W. Welty

Veteran South Lake Tahoe Police Officer Johnny Poland is back to work after the Placer County Superior Court upheld a civil service decision reinstating him after he was fired for allegedly mishandling a weapons call at a local high school. Officer Poland was ordered reinstated over two years after the department dismissed him.

Officer Poland's troubles began November 20, 2006 when he and several other officers responded to South Lake Tahoe High School on a report that a student had a gun during a fight. At the school, Officer Poland interviewed more than 25 students, made eight arrests, and seized a pair of brass knuckles. None of the students he interviewed, including the students involved in the fight, said they had seen a gun or a knife during the fight.

At issue was an inoperable "BB" gun pistol found in a student's car. Poland did not seize the item because he did not believe it had been used in the fight. Officer Poland made numerous statements to co-workers and school staff that no guns or knives were involved in the fight. During the next few days Officer Poland received information the student brandished the "BB" gun during the fight. Officer Poland cited the student for the offense and he was successfully prosecuted.

Hearing Panel Reduces Discipline

Over six months later, the South Lake Tahoe Police Department fired Officer Poland, alleging 18 rule violations arising from his alleged failure to seize and book a firearm and other potential weapons from a juvenile. The charges included dishonesty, failure to seize evidence and failure to properly investigate.

The *Skelly* hearing officer upheld the discipline. We appealed the termination to an evidentiary hearing before a hearing board consisting of the retired mayor, the retired chief of police, and a mutually selected arbitrator. The City was represented by a Bay Area employer-side law firm.

At the hearing, the City was unable to establish Poland was aware while he was at the school that a gun had been brandished during the fight. He did not learn that information until days later. The evidence established Officer Poland had discretion not to seize and report the inoperable pistol.

The hearing testimony also showed that as a former school resource officer, Officer Poland had received high praise from school officials, parents, students, and the community for developing great rapport with students, solving juvenile crimes and helping curtail juvenile gang activity. His judgment mistakes in the incident had been in attempting to de-escalate the situation at the school.

City Challenges Ruling

In December, 2008, the hearing panel issued a 31-page decision unanimously overturning the termination and reducing Officer Poland's discipline to a six week suspension without pay. The suspension was based on findings Officer Poland had violated procedure in his original handling and documenting of the "BB" gun. The decision required the City to reinstate Poland and make him whole regarding back pay and benefits.

The City appealed to the El Dorado Superior Court, claiming the hearing board had abused its discretion in reducing the discipline from termination to a suspension. However, case law requires an "arbitrary, capricious, or patently abusive" exercise of discretion before a court will intervene regarding an administrative board's decision. The City's argument focused on cases where the courts have found an abuse of discretion because the underlying facts involved intentional and deliberate dishonesty.

I successfully argued these cases were distinguishable from Officer Poland's circumstances. In Officer Po-

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LAW FIRM OBTAINS ACCIDENT SETTLEMENT FOR POLICE OFFICER'S WIDOW

By David P. Mastagni & John P. Tribuiano III

The law firm of Mastagni, Holstedt, Amick, Miller & Johnsen recently obtained a seven-figure recovery for the widow of a police officer killed in a traffic accident on his way home from work. The settlement came in a wrongful death action in which the driver's insurance company attempted to limit the recovery to $15,000.

The 25 year old police officer was driving his personal vehicle on his way home from work when he collided with the driver of a SUV attempting to pass a semi-truck on State Route 12 in Solano County. He left behind his sister and parents, and his wife of just five weeks. The officer's wife had come to the United States from Poland on a student visa. She retained the services of David P. Mastagni and John P. Tribuiano III to represent her interests. The officer's parents retained separate counsel.

The four occupants of the SUV were on their way home from a high school football game. The owner's son was the front seat passenger and had allowed a friend with a provisional license to drive the vehicle. The owner's son was killed in the crash.

The driver was covered under his mother's automobile insurance and had a $300,000 bodily injury policy limit. There were a total of four competing claims being made against this policy, leaving little to the officer's widow. The vehicle owners' insurance company asserted the position that there was only $15,000 of insurance covering the vehicle based on a "step down provision" which reduces the underlying automobile policy limits to $15,000 when an insured vehicle is driven by a permissive user who is not the "agent" or employee of the owner.

We successfully argued, however, that there was no "step down" because an agency relationship existed between the driver and the deceased child of the vehicle owners. The driver was operating the SUV for the son's benefit, thereby creating an agency relationship.

We also discovered the driver's biological parents were divorced but had joint legal custody, and the driver resided at both residences. The driver's father maintained a separate $100,000 automobile policy that covered his son as a household resident. The result was a seven-figure recovery for the widow.

The Civil Litigation Department at Mastagni, Holstedt, Amick, Miller and Johnsen represents parties in a diverse range of litigation involving motor vehicle accidents, products liability, premises liability, uninsured and underinsured motorist claims, professional negligence, medical malpractice and catastrophic injury.

David P. Mastagni is the firm's founder and managing partner. John P. Tribuiano III is a senior associate in the Civil Litigation Department.

FIRM SUCCESSFULLY DEFENDS POLICE CHIEF IN CIVIL ACTION

By Christopher W. Miller & James B. Carr

When former Los Altos police chief Robert Lacey was sued for workplace harassment, he turned to the CPOA Legal Services Plan and Mastagni, Holstedt, Amick, Miller & Johnsen for representation. The Legal Services Plan provides attorney services to members who are sued over work-related conduct and are not defended by the employing agency. Our litigation experience and the LSP's emphasis on providing aggressive representation to its members led to the lawsuit's dismissal.

Internal Investigation

Chief Lacey's representation by CPOA LSP began in 2006 when allegations against him prompted Los Altos to hire an outside attorney to conduct an internal affairs investigation. The attorney was unfamiliar with the Public Safety Officers' Procedural Bill of Rights Act and its mandatory application to police chiefs. She refused at first to give the firm notice of the allegations against the chief, which did nothing to foster confidence in the investigation. The interrogation itself was a model of confrontation and bias with an obvious pre-determined outcome.

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Indeed, the City reprimanded Chief Lacey for his conduct despite evidence his actions were unintentional and not directed at the complaining employee. Nonetheless, we were able through the administrative process to mitigate the disciplinary action to limit its impact on the chief's ability to continue managing his police department.

Lawsuit Names City and Chief

Following Chief Lacey's retirement, his confidential secretary filed a lawsuit against both him and the City complaining of workplace harassment. The complaint made several bizarre allegations, including that Chief Lacey's alleged harassment of another employee had created a hostile work environment for the secretary, even though she had not been a witness to the other conduct. Her attorney, a criminal defense lawyer by trade, also failed to file a proper complaint with the Department of Fair Employment and Housing against Chief Lacey, an oversight which would become important later in the litigation.

The City of Los Altos offered to defend its former chief under a reservation of rights. Recognizing the potential conflict in the city's representation of a manager against whom it had previously levied disciplinary action, however, Mr. Lacey insisted the city allow him to use his CPOA LSP counsel as his representative. Having represented Chief Lacey during the earlier administrative process, we were thoroughly familiar with his excellent work history and with the nature of the allegations and the complainant, and were privileged to be called upon to defend him in the lawsuit.

Working with the City's outside counsel, we took the plaintiff's deposition, which lasted nearly three full days, involving very intense questioning. The plaintiff was unable to corroborate many of the *subjective* allegations contained in her lawsuit, and she could not establish any *objective* facts that there was a *prima facie* case of gender-based hostile work environment. She consistently testified Chief Lacey did not do any acts that constituted any type of sexual harassment under the law and that her true complaints were really over the job tasks she was assigned, which were a normal incidence of personnel management and the work place.

We invited the plaintiff and her attorney to mediate the lawsuit in an attempt to reach a settlement avoiding further costs to the parties. A day's mediation session in San Jose, however, failed to reach a settlement acceptable to the plaintiff, and the parties returned to the litigation front.

Chief Prevails in Motion for Summary Judgment

Our office and the City of Los Altos filed a jointly prepared Motion for Summary Judgment which was argued before the Santa Clara County Superior Court on May 7, 2009. Thereafter, on May 29, 2008, the Court entered Summary Judgment in favor of Chief Lacey and the City of Los Altos against the Plaintiff. The Court found there was no *prima facie* case of gender-based hostile work environment against Chief Lacey and found the plaintiff had failed to show there were any triable issues of material fact that existed as to her claims against the City of Los Altos because there were no sufficiently severe or pervasive acts that created any type of abusive working environment.

The court's decision caused the lawsuit to be dismissed. The appeal period expired without any further action by the plaintiff.

Chief Lacey's representation – from the administrative investigation through the dismissal of civil litigation – is just one of many cases in which the CPOA Legal Services Program has provided hard-hitting defense to a member in need. "I could not have survived this unfortunate experience without the help of the Legal Services Program," said Chief Lacey. "I am deeply grateful to the program's lawyers for their uncompromising, professional representation throughout my ordeal."

Christopher W. Miller is managing partner of the Labor Department at Mastagni, Holstedt, Amick, Miller & Johnsen. He is a former prosecutor who has represented CPOA LSP members for over ten years. James B. Carr is a senior litigation associate at Mastagni, Holstedt, Amick, Miller & Johnsen. He was the primary attorney defending Robert Lacey in the civil case.

ARBITRATOR OVERTURNS DISCIPLINE AND AWARDS BACK PAY FOR SACRAMENTO FIREFIGHTER/PARAMEDIC

By Kathleen N. Mastagni Storm

A City of Sacramento firefighter/paramedic accused of improperly administering the sedative Versed and failing to make patient contact on a call is back to work after an arbitrator overturned his 120-hour suspension and demotion and reinstated him with full back pay and no discipline. Sacramento Area Fire Fighters Local 522 and Kathleen Mastagni Storm represented Firefighter/Paramedic Jeff Klein before arbitrator Barry Winograd.

Discipline Levied for Two Calls

The City based its disciplinary action against Klein on his alleged misconduct during two medical aid calls that occurred in May, 2006. On the first call, the City alleged Klein improperly administered Versed to a possible overdose patient outside the established Sacramento County EMS Protocol and failed to ensure another paramedic completed an accurate patient care report. The second call involved Klein's decision not to insist on conducting a medical assessment of an elderly man whose family would not allow Klein and his partner into the patient's residence. The patients on both calls later died.

Accusing Klein of charges ranging from insubordination to dishonesty, the City demoted him to a firefighter and suspended Klein for 120 hours, or twelve shifts. Klein's union, Sacramento Area Fire Fighters Local 522, appealed the discipline to binding arbitration under the collective bargaining agreement and the new Firefighters' Procedural Bill of Rights Act.

Evidence Shows Klein Acted within Policy

On May 11, 2006 Klein was the first responder on a drug overdose call. Klein and two other paramedics suspected the patient had overdosed on beta-blockers and transported him to a hospital. In route, the paramedics attempted to electronically stimulate or "pace" the patient's heart, consistent with the Department's protocol for a severe cardiac condition. While the other paramedics recalled Versed being used during the pacing process, neither could recall who administered the drug. Testimony at the hearing showed Klein could not have administered the drug because he was occupied with intubating the patient throughout the transport.

Klein was also accused of failing, as the primary paramedic on the call, to insure that an accurate and complete Patient Care Report (PCR) was completed for the May 11 incident. Klein did not prepare the PCR, and hearing testimony established his actions were in accordance with department practice permitting a paramedic on the ambulance to complete the PCR paperwork so that the primary paramedic working on an engine can return to the field.

On May 25, 2006, the second call in question, Klein and his partner responded to a report that an older man had been drinking and vomiting. When they arrived, the man's granddaughter claimed to have overreacted by calling for assistance and explained her grandfather did not need medical attention. Klein and his partner requested entry to evaluate the man; the granddaughter refused them entry. Klein had no information justifying a forced entry into the apartment. Later that night, the granddaughter placed a second call requesting paramedics return to the apartment. The man died in the emergency room.

The City accused Klein of failing to make patient contact and failing to assess the patient's condition per County of Sacramento EMS protocol. The evidence showed, however, that the paramedics were under no obligation to perform an assessment despite the granddaughter's refusal to let them in because there was no patient with a complaint, just a third party caller. Klein acted within departmental policy.

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Arbitrator Finds City Investigation Incompetent

The arbitrator found the employer's investigation was incompetent. Winograd identified several serious inadequacies, such as, the City's extensive delay in gathering relevant evidence. The City failed to timely gather initial investigation statements from witnesses, waiting months after the complaints were lodged. A formal internal affairs inquiry did not take place until early 2007, several months after the events in question. The arbitrator also found the discipline imposed on Klein was not supported by the record, given the many complex and conflicting details of the events.

Winograd rescinded Klein's suspension and demotion in their entirety. Klein was returned to his former paramedic position and awarded all lost wages and benefits.

A provision of the collective bargaining agreement between the union and the City requires the parties to reduce arbitration awards to a settlement agreement. In this case, the City's representatives attempted to modify the award in the agreement and even refused at one point to implement the award in full. The City complied with the award only after the union threatened further litigation.

Jeff Klein has been a member of Sacramento Area Fire Fighters, Local 522 for seven years.

Kathleen Mastagni Storm is an associate attorney with Mastagni, Holstedt, Amick, Miller & Johnsen. She represented Firefighter/Paramedic Jeff Klein in his appeal.

SUISUN CITY POLICE OFFICER REINSTATED AFTER COUNCIL REVERSES TERMINATION OVER VEHICLE PURSUIT

By Sean D. Howell

Suisun City Police Officer David Fong was returned to work on April 8, 2009 by a majority vote of his city council following two days of hearing over his termination for a vehicle pursuit that ended in a collision. Officer Fong, an Iraq war veteran popular in the community, won reinstatement despite lengthy testimony from the police chief and city manager that the officer's pursuit of the suspect for felony assault with a deadly weapon warranted termination because it was not justified.

On June 24, 2008, while Officer Fong was driving north on a city street in his patrol car, a speeding passenger car crossed into his lane and came straight toward him. Officer Fong stopped his vehicle. The suspect vehicle continued directly toward his car at a high rate of speed, then swerved around his patrol car at the last possible moment.

Believing the suspect to have attempted a felony violation of Penal Code section 245(a)(2), assault with a deadly weapon (car), Officer Fong gave pursuit. The pursuit ended when Officer Fong's police car struck a curb.

Chief Recommends Termination

Within a few days of the incident, both a commander and a sergeant recommended to Officer Fong that he resign. This same commander later selected the same sergeant to conduct the administrative interrogation of Officer Fong. Five sergeants were available to conduct the investigation; however, the commander chose the sergeant who had already determined Fong's guilt and had encouraged him to resign. During the following weeks, Officer Fong was encouraged several more times to resign.

Following the internal affairs investigation, Police Chief Ed Dadisho proposed to fire Officer Fong for violating the police department's pursuit policy, which restricts officer-initiated pursuits to felonies and misdemeanor DUIs. The chief contended Fong used poor judgment in deciding the suspect driver had intended to put him in apprehension of harm by driving straight toward him. Officer Fong also was alleged to have violated the department's policy on accident damage when he ended the pursuit with a single-vehicle traffic collision.

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The Suisun City Manager, Suzanne Bragdon, upheld the police chief's decision to terminate Officer Fong despite evidence of disparate treatment and excessive discipline. She did not appear to understand basic fundamentals of law enforcement and even testified at the later hearing that she did not understand how a car could be used as a deadly weapon.

Bias Issues Threaten Fair Hearing

Officer Fong's evidentiary appeal was scheduled before the Suisun City Council, sitting as a personnel board. Surprisingly, both opposing counsel and the attorney hired to advise the council during the hearing were employed by the same Bay Area employer-side law firm. When I challenged this apparent bias, the city hired yet another attorney from the same firm to evaluate my recusal motion. Not surprisingly, the council denied my motion and forced us to proceed despite the potential ethical issues posed by the City's use of the same law firm as prosecutor, advisor and judge.

Expert Testifies Pursuit was Justified

Kent Boots, an expert in accident reconstruction and Code 3 pursuits, supported Officer Fong's statements concerning the initiation of the Code 3 pursuit and his judgment the suspect had attempted a violation of Penal Code section 245(a)(2). A former Orange County Sheriff's Department traffic officer who now teaches accident reconstruction, Boots used diagrams and extensive calculations to show the suspect's speed and driving pattern suggested he intended to drive toward the police car and swerved away only at the last minute.

Following Officer Fong's testimony, several members of the council complimented him on his honesty and praised him for the way in which he conducted himself. Officer Fong's background investigator also testified regarding the officer's excellent reputation among those who had known and worked with him since childhood.

In the end, the city council heard the facts and, to their credit, made a decision which will likely make them unpopular with the chief of police and city manager. Fortunately, we were able to step in at the right time and avoid an ill-advised resignation which would have assuredly cost Officer Fong his career in law enforcement.

Sean D. Howell is an associate attorney with Mastagni, Holstedt, Amick, Miller & Johnsen. He represented David Fong in his administrative appeal.

MONTEREY COUNTY SHERIFF'S TERMINATION OF DEPUTY IS REVERSED BY OUTSIDE SKELLY OFFICER

By Sean D. Howell

Monterey County Deputy Sheriff Marie Evans returned to work July 21, 2009 on the recommendation of San Luis Obispo Sheriff Pat Hedges, following a second pre-disciplinary hearing to challenge her proposed termination. Sheriff Hedges reduced the proposed discipline to a ten-day suspension after Monterey County Sheriff Mike Kanalakis increased Evans' discipline from the suspension to termination in retaliation for the deputy's exercise of her due process rights.

Termination Recommended After Deputy Challenges Suspension

The Monterey County Sheriff's Department proposed a ten-day suspension without pay for Deputy Evans's alleged personal use of an office computer for her outside real estate business. At the *Skelly* hearing, Deputy Evans admitted to some of the conduct but mitigated or denied other allegations. The hearing was otherwise a "typical" pre-disciplinary hearing.

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Within days, however, Sheriff Kanalakis proposed to fire Deputy Evans for "failing to take responsibility or ownership" of the allegations against her. He proposed to terminate her employment because the ten-day suspension would not be sufficient to "correct her behavior." His entire reasoning for terminating Deputy Evans was that she did not come to the *Skelly* hearing prepared to admit responsibility for every allegation.

A "Skelly hearing" by definition is the employee's opportunity to offer mitigating evidence and to argue why the proposed discipline should not be imposed on her. The sheriff's unfortunate decision to punish Marie Evans for exercising her right to a pre-disciplinary hearing was nothing short of retaliation.

Outside Skelly Officer Sets Decision Aside

After modifying the proposed discipline to termination, Sheriff Kanalakis provided Deputy Evans with a second Skelly hearing. Sheriff Pat Hedges of the San Luis Obispo Sheriff's Department was the designated Skelly officer.

Sheriff Hedges agreed to reinstate the 10-day suspension based on a provision in the MOU which describes the final notice of discipline as "either the proposed disciplinary action or a lesser disciplinary action based on the same cause(s)". This language appears to uphold the usual practice preventing the appointing authority from increasing proposed discipline without new evidence.

Deputy Evans has appealed the suspension to arbitration. In the meantime, she has been returned to full duty.

Sean D. Howell is an PORAC LDF Panel attorney with Mastagni, Holstedt, Amick, Miller & Johnsen. He represented Deputy Marie Evans in her administrative appeal through the PORAC Legal Defense Fund.

REINSTATEMENT

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land's case, the hearing board did not make any findings that he was dishonest. The El Dorado Superior Court considered written arguments and allowed oral argument before making a decision. On October 28, 2009 the Honorable Steven C. Bailey issued a nine page decision agreeing with my arguments and denying the City's appeal.

I am currently assisting Officer Poland with his integration back into the Department. He is looking forward to continuing his service to the citizens of South Lake Tahoe. Officer Poland has expressed his profound appreciation to his association and the PORAC Legal Defense Fund for supporting him throughout his ordeal.

Steven W. Welty is a senior associate attorney in the Labor Department of Mastagni, Holstedt, Amick, Miller & Johnson. He has represented peace officers throughout California in disciplinary issues, employment law and disability retirement appeals for over 10 years.

WC PRESUMPTIONS

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Meningitis, Pneumonia, Blood-borne infectious disease/ MRSA & Tuberculosis: These conditions are most commonly contracted on an industrial basis through exposure to members of the public in rescue and first-aid situations.

Low Back impairment: For certain specified law enforcement officers (typically police and deputy sheriffs) who have worn a duty belt for at least five years, low back impairment also is presumed to be industrial.

While the above presumptions can be very helpful and even essential to getting an injured public safety worker the benefits and treatment he or she needs and deserves, it must be understood that a presumption does not guarantee victory at trial. Certainly, they are helpful and may provide the extra weight that tips the scales of justice in favor of the injured worker. But these presumptions are still rebuttable and employers have been contesting these cases more and more in recent years.

Jonathan W.A. Liff is a senior associate attorney with Mastagni, Holstedt, Amick, Miller & Johnsen.

WORKERS' COMPENSATION APPEALS BOARD AWARDS DEPENDENCY DEATH BENEFIT

By Craig Johnsen

The Workers' Compensation Appeals Board granted a deceased correctional officer's two children dependency death benefits pursuant to Labor Code Section 4704. After reviewing the applicant's Petition for Reconsideration, the board rescinded the April 6, 2009 decision to deny any dependency death benefits to petitioners and based on good cause substituted in its place dependency death benefits based on their respective percentages of annual support from the decedent.

The deceased correctional officer sustained an injury to his heart on November 4, 2007 resulting in his death. His widow was a total dependent entitled to death benefits. She had the option to receive either basic workers' compensation death benefits or elect the CALPERS special death benefit. The widow elected the special death benefit. Because she opted to receive the CALPERS special death benefit, the State Compensation Insurance Fund took the position that, consistent with Labor Code 4707, no benefits would be granted to the two partial dependents.

The deceased's two children were adults at the time of his death but were considered partial dependents because each child was a college student living outside the home and relying on their father for financial support in obtaining and continuing their education. The petitioners stipulated that the combined annual support the deceased provided his children was $13,463.66.

After the hearing, the Workers' Compensation Judge, the Honorable Robert Kutz, determined the widow was entitled to an un-apportioned award of her special death benefits in the amount of $290,000. Kutz ruled that in a situation involving total and partial dependents, the total dependent or dependents take the full allocation of benefits allowable and any balance is divided among partial dependents. Kutz asserted that because the special death benefit is payable at a set rate and the widow was a total dependent and the children were only partial dependents, the widow takes the full allocation of benefits.

On October 28, 2008 the applicant filed a Petition for Reconsideration arguing the partial dependents' claim and their entitlement to benefits was based on the unfortunate fact of their father's death and not derivative of the widow's claim. The applicants asserted they were entitled to death benefits consistent to Labor code 4702 (a)(2). In response to the petition, Judge Kutz issued a Report and Recommendation recommending the petition be denied. However, despite Judge Kutz's efforts to deny the petition, the Workers' Compensation Appeals Board (WCAB) issued an Opinion and Order Granting Reconsideration on December 24, 2008.

The Workers' Compensation Appeal Board advised there was no indication the Workers' Compensation Judge considered what may constitute "good cause." The matter was returned to the trial level where trial occurred on March, 25 2009.

At the second trial, both partial dependents testified as to the benefits provided to them by their father at the time of their father's death. The deceased's son testified his father provided funds for books and social expenses and paid insurance premiums for health, dental and vision insurance. The deceased's daughter had similar expenses covered by her father prior to his death. Despite this testimony, Judge Kutz filed an Opinion Decision on April 6, 2009 stating that he remained of the opinion that Labor Code 4707 (a) "forecloses an award of dependency benefits over and above the special death benefit provided by the Public Employees Retirement System."

On April 15, 2009 Craig Johnsen, attorney for the applicant and partner at Mastagni, Holstedt, Amick, Miller & Johnsen submitted a Petition for Reconsideration to the Workers' Compensation Appeal Board. On September 1, 2009 the Workers' Compensation Appeal Board rescinded the April 6, 2009 decision stating both children had demonstrated good cause and awarding both children dependency death benefits.

Craig Johnsen is a partner with Mastagni, Holstedt, Amick, Miller & Johnsen.

NEW CLIENTS

STANISLAUS SWORN DEPUTIES ASSOCIATION (SSDA)

The **Stanislaus Sworn Deputies Association** has retained Mastagni, Holstedt, Amick, Miller & Johnsen for contract negotiations and legal defense. President Vince Bizzini and Vice President Ryan Killian brought the SSDA through a difficult decertification process that finally ended this June in recognition by Stanislaus County of the new association consisting solely of deputy sheriffs and a successful vote for agency shop.

COLUSA COUNTY MANAGEMENT COALITION

The **Colusa County Management Coalition** has retained the law firm to represent the association and its members in collective bargaining. **President Renee McCormick** and her board have been working with the firm on ratification of a new collective bargaining agreement as well as a number of unfair practice issues.

MENLO PARK POLICE OFFICERS' ASSOCIATION

President Jeff Keegan and the executive board of the **Menlo Park Police Officers' Association** have retained Mastagni, Holstedt, Amick, Miller & Johnsen to represent the POA in contract negotiations and legal defense. We also have provided representation to several Menlo Park officers in defending against a civil rights lawsuit.

SACRAMENTO COUNTY LAW ENFORCEMENT MANAGEMENT ASSOCIATION

The **Sacramento County Law Enforcement Management Association** and **President Phil Brelje** are now represented by Mastagni, Holstedt, Amick, Miller & Johnsen for legal defense and contract negotiations services. **LEMA** represents public safety managers in the Sacramento County Sheriff's Department and Probation Department, as well as in other countywide public safety agencies.

INTERNATIONAL LONGSHORE WORKERS UNION LOCAL 17

International Longshore Workers Union Local 17, one of California's largest private unions, has retained the firm to represent its members in grievance arbitration and federal labor proceedings. The firm's longstanding relationships with many private labor unions in northern California has helped unions such as **Local 17** maintain contract benefits and increase membership while providing aggressive representation on contract grievance and discipline issues.

MONTEREY COUNTY DEPUTY SHERIFFS' ASSOCIATION

The **Monterey County Deputy Sheriffs' Association** is now represented by Mastagni, Holstedt, Amick, Miller & Johnsen for labor negotiations and legal defense. We have been working with **President Dan Mitchell** and his executive board on discipline matters, grievances, and Fair Labor Standards Act litigation.

TRUCKEE GENERAL EMPLOYEES ASSOCIATION

The **Truckee General Employees Association** has joined our client list of non-sworn municipal employee groups seeking professional negotiations support in a challenging economy. **President Debbie DeVenzio** and her board retained our firm to obtain an improved collective bargaining agreement with the Town of Truckee.

PACIFIC GROVE POLICE OFFICERS' ASSOCIATION

The **Pacific Grove Police Officers' Association** and **President Amy Lonsinger** retained our firm to assist in fighting several economic and political issues, including a contracting-out proposal. Our firm will also provide representation through the PORAC Legal Defense Fund. The POA remains strong after concluding a new memorandum of understanding that maintains employee compensation and other benefits despite the economic downturn.

NEW CLIENTS (CONTINUED)

OROVILLE CITY FIRE ASSOCIATION

The **Oroville City Fire Association** has returned to Mastagni, Holstedt, Amick, Miller & Johnsen for labor representation. **President Rob Buckhout** and the association board will use the law firm for contract negotiations and legal defense.

LAKE COUNTY DEPUTY SHERIFFS' ASSOCIATION

The **Lake County Deputy Sheriffs Association** is now represented by Mastagni, Holstedt, Amick, Miller & Johnsen for contract negotiations and legal defense. **President Gary Frace** and the association board have begun preparations with our negotiator, Michael Jarvis, for bargaining over a new MOU.

FRESNO COUNTY PROFESSIONAL ASSOCIATION OF EMPLOYEES

The **Fresno County Professional Association of Employees** has retained Mastagni, Holstedt, Amick, Miller & Johnsen for contract negotiations and legal defense. The association recently completed a difficult decertification process and successful vote to establish the PAE as the exclusive representative of County Bargaining Unit 19.

SUISUN CITY POLICE OFFICERS' ASSOCIATION

The **Suisun City Police Officers' Association** is now represented by Mastagni, Holstedt, Amick, Miller & Johnsen for PORAC LDF representation and contract negotiations. **President Eric Vera** and his executive board retained the firm while we represented Officer David Fong in his discipline appeal. (See "Suisun City Police Officer Reinstated," p. 15.)

PETALUMA PUBLIC SAFETY MID-MANAGERS' ASSOCIATION

President Mike Cook and the executive board of the **Petaluma Public Safety Mid-Managers' Association** have retained Mastagni, Holstedt, Amick, Miller & Johnsen for collective bargaining and contract enforcement. The association represents managers in the Petaluma police and fire departments.

WELCOME NEW ATTORNEYS AND NEGOTIATORS

William M. Briggs is an associate in the Personal Injury Department of Mastagni, Holstedt, Amick, Miller and Johnsen. Bill represents plaintiffs in personal injury civil actions, as he has done since 1976. He is admitted to the U. S. District Courts for the Eastern, Northern, and Central Districts of California and to the United States Ninth Circuit Court of Appeal. Bill received his B.A.degree from the University of Wisconsin in 1966 and his J.D. law degree from the University of Chicago Law School in 1969. He was admitted to practice in California in 1970. He is a former president of the Board of Directors of Legal Services of Northern California. He is rated A-V in Martindale-Hubbell.

Sean D. Currin is an associate attorney in the Labor & Employment Department of Mastagni, Holstedt, Amick, Miller and Johnsen. Sean previously practiced in our workers' compensation area, representing plaintiffs in asbestos cases. Sean graduated from the University of California at Berkeley and obtained his law degree from Thomas Jefferson School of Law. While at the University of California, Sean was a four year letter winner in the football program, and was a starting scholarship wide receiver for the California Golden Bears.

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Paul T. Dolberg is an associate in the Workers' Compensation Department at Mastagni, Holstedt, Amick, Miller and Johnsen. He represents applicants in all aspects of workers' compensation litigation, including trial and appellate matters, Labor Code section 132a penalties, and "serious and willful misconduct" penalties against employers. Paul is a graduate of Brigham Young University and received his law degree from the University of the Pacific McGeorge School of Law. He previously represented employees in civil matters, including wrongful termination and wage and hour claims.

Ronak Daylami is an associate in the Workers' Compensation Department of the law firm of Mastagni, Holstedt, Amick, Miller & Johnsen. Ronak graduated from the University of California, Berkeley with degrees in political science and English, and earned her law degree from the University of California, Hastings College of the Law. She received an Honorable Mention for Best Moot Court Oral Argument as a first year student and was a Senior Articles Editor on the *Hastings Constitutional Law Quarterly*, the country's oldest law journal dedicated solely to constitutional law.

Anthony P. Donoghue is an associate in the Civil Litigation Department of Mastagni, Holstedt, Amick, Miller and Johnsen. His practice focuses on all aspects of civil litigation. Tony is admitted to the U. S. District Courts for the Eastern, Northern, and Central Districts of California. Before joining Mastagni, Holstedt, Amick, Miller and Johnsen, Tony was a law clerk for the U.S. Department of Labor, Office of Administrative Law Judges. During law school Tony clerked for the U.S. Environmental Protection Agency, the U.S. Attorney's Office, District of New Jersey, and for a Senior United States District Judge, District of New Jersey. Tony graduated with Honors from Rutgers University School of Law, Camden, where he emphasized environmental law and labor and employment law. Tony received the Dean's Academic Promise Scholarship throughout law school; upon graduation, he received the American Bar Association/Bureau of National Affairs Labor and Employment Law Award. Tony is a graduate of the University of California, Berkeley, where he earned his Bachelor of Arts in Anthropology.

Anthony S. Franceschi is an associate in the Social Security/Personal Injury Department at Mastagni, Holstedt, Amick, Miller and Johnsen. Tony is a graduate of Sacramento State University, where he received his B.A. in Philosophy. He received his law degree from Lincoln Law School of Sacramento. During law school, he worked for the Sacramento County District Attorney's Office conducting misdemeanor trials and Child Detention hearings.

Sean D. Howell is an associate with the Labor Department of Mastagni, Holstedt, Amick, Miller and Johnsen. Sean previously practiced in a variety of areas such as family, criminal and civil law. Sean obtained his Juris Doctorate from Lincoln Law School of Sacramento. While in law school, Sean worked in civil litigation directing defense counsel in high exposure personal injury claims. Sean also worked for the Placer County Facilitator's Office, assisting unrepresented litigants with various issues related to family law and civil matters. He mediated dozens of cases as part of the alternative dispute resolution program.

Kristina T. Jansen is an associate attorney in the Labor Department of Mastagni, Holstedt, Amick, Miller and Johnsen. Kristina practices mainly in Legal Defense Fund and other discipline matters and contract grievances as well as unfair labor practice litigation before the Public Employment Relations Board (PERB). Kristina graduated from the University of California, San Diego and received her law degree from Indiana University at Bloomington before returning to her native state to practice law. In Indiana, Kristina clerked with the District Attorney's office in Bloomington for a year and was able to prosecute (and win) her first felony trial while in her final year of school. Kristina is admitted to the state bar of Indiana as well as California.

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Michael W. Jarvis is a Labor Consultant in the Labor Department representing clients in negotiations, meet and confer obligations and other labor matters. He is the firm's expert in classification & compensation studies and health care systems. Michael spent 10 years in private sector management and human resources prior to joining the firm. He obtained his A.S. Degree in Criminal Justice from Santa Rosa Junior College, in addition to holding multiple advanced certificates in public administration and negotiations. He is currently finishing his B.A. in Political Science and Public Administration at the University of California at Davis.

David D. King is an associate attorney in the Labor Department, where he represents clients in wage and hour litigation in state and federal court, and in unfair labor practice litigation before the Public Employment Relations Board. David graduated from Amherst College with a B.A. in English Literature and Psychology. He obtained his M.B.A. from Georgetown University, and his J.D. from the University of California at Davis.

Andy Kirk is an associate in the Workers' Compensation Department of Mastagni, Holstedt, Amick, Miller and Johnsen. He represents injured workers in hearings and trials before Workers' Compensation Appeals Boards throughout California. Andy also represents applicants in asbestos-related workers' compensation litigation. Andy graduated cum laude from Empire School of Law. While in law school, he clerked at Sonoma County District Attorney's Office and participated in the Elder Law Clinic, Mediation Clinic, and Disability Law Clinic. Andy is licensed to practice in the State of California and in the U.S. District Court for the Northern District of California.

Daniel T. McNamara is an associate with the firm's Labor Department. Daniel is an experienced litigator who practiced law in Washington, D.C., prior to joining the firm. He has represented clients in state and federal courts and in administrative hearings regarding employment discrimination matters, personal injury actions and civil rights actions. Daniel is an experienced criminal defense attorney who has represented clients in state and federal prosecutions from arrest through trial. Daniel graduated from Cornell University in 1998 with a B.S. in Industrial and Labor Relations. In 2002 he received his law degree from Albany Law School of Union University. He is a member of the California State Bar and the Bars of the District of Columbia, Maryland and Virginia.

Steve Roberts is a Labor Consultant in the Labor Department representing clients in negotiations, meet and confer obligations, and other labor matters. Steve is a former deputy sheriff with the Sacramento Sheriff's Department and is now a Level I Reserve Deputy with SSD. Steve has a diverse history in the private sector as a life/health insurance agent, a risk and business analyst with Visa, a purchasing manager for a commercial kitchen subcontractor, and a field compliance auditor for the Western Conference of Teamsters' Trust Fund. Steve received his Bachelor of Science degree in Business Administration and Finance from California State University at San Bernardino.

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. Before joining Mastagni, Holstedt, Amick, Miller and Johnsen, Isaac was a litigation associate in a firm practicing real property and environmental law. Isaac received his B.A. in Political Science from Millikin University in Decatur, Illinois. He received his J.D. from Indiana University School of Law at Bloomington, where he earned the Glen R. Hillis scholarship for academic achievement. During law school, Isaac participated in the Sherman Minton Moot Court competition and served as the founding treasurer and second president of the school's Sports and Entertainment Law Society.

Dawniell A. Zavala is an associate in the Labor Department of Mastagni, Holstedt, Amick, Miller and Johnson. Her practice focuses on PORAC Legal Defense Fund matters and disciplinary issues. Before joining the firm, Dawniell was an associate at a mid-sized international law firm in San Francisco, where she worked primarily on intellectual property matters, including copyright litigation and trademark applications and prosecution. Dawniell also has experience in real

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estate matters, having authored two articles that appeared in publications for real estate professionals. Dawniell is a native of the San Francisco Bay Area. She earned her J.D. from the University of California at Berkeley, Boalt Hall School of Law., where she was the recipient of the Gerald Marcus Fellowship sponsored by Hanson Bridgett LLP and was a member of the Berkeley Journal of Gender, Law and Justice.

ASSOCIATION EVENTS

(L-r) Grace Mastagni, father David E. Mastagni, and Deputy Sheriffs' Association of Alameda County Vice President Jon Rudolph enjoy the DSA Annual Picnic.

(L-r) Attending the annual San Joaquin County DSA picnic are President Scott Steward, board members Rob Semillo (and son)and Robert Foppiano, Kathleen M. Storm and niece Grace, and board member Gary Yip.

(L-r) Brian Strom and Vice President Jon Rudolph at the Deputy Sheriffs' Association of Alameda County annual picnic.

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