

# THE LABOR BEAT

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## **CBM Public Sector Group Attorneys Once Again Receive Multiple Honors**

For the sixth year in a row, **CBM Labor Partner Gary Messing** has been named a Northern California Super Lawyer, a distinction reserved for approximately the top 5% of the lawyers in Northern California.

**CBM Labor Partners Jason Jasmine and Jonathan Yank** were also once again named Northern California Super Lawyer Rising Stars, a distinction which is typically reserved for approximately the top 2.5% of lawyers who are under 40 years of age and/or have been practicing for less than 10 years.

Additionally, **Gary Messing** was also again named to the Best Lawyers in America and Best of the U.S. lists for approximately the top 2% of lawyers in the nation.



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

### **Sacramento County Administrative Professionals Association Becomes Exclusive Bargaining Representative**

Earlier this year, **CBM Labor Partner Jason Jasmine** assisted the Sacramento County Administrative Professionals Association (“SCAPA”) in becoming the Recognized Employee Organization (“REO”) for the approximately 350 employees in a number of different administrative classifications. The overwhelmingly supportive vote vindicated the efforts of **SCAPA President Mark Burstiner**, and a number of other individuals who devoted substantial time and energy to get SCAPA off the ground.

**Jason Jasmine**, selected as the SCAPA chief negotiator, along with **Mark Burstiner, Kathy Seatrix, Yelena Lipskaya, and David Hall** (who collectively make up the SCAPA bargaining team), have been meeting with the County to negotiate SCAPA’s first ever MOU. As this issue goes to press, the parties have reached a total tentative agreement on a new MOU and a ratification meeting is being scheduled.



### **CBM Convinces the California Supreme Court to Depublish and Review a Troubling Appellate Court Decision Limiting a Union’s Right to Arbitrate Disputes Over Furloughs**

On behalf of the Engineers and Architects Association, CBM recently convinced the California Supreme Court to depublish and review a terrible decision by the Second District Court of Appeal that has caused significant concern among public sector labor unions and union-side labor lawyers throughout California. The case is *City of Los Angeles v. Superior Court (Real Party in Interest Engineers and*

*Architects Association)*, previously published at 193 Cal.App.4th 1159. In that case, which involved a dispute over furloughs, the Court of Appeal departed from decades of court precedent under the Meyers-Milias-Brown Act (“MMBA”) by refusing to enforce the grievance arbitration provision of the parties’ memorandum of understanding (“MOU”). According to the Court of Appeal, arbitration over the dispute would have resulted in an unlawful delegation of the City’s authority to control its employees’ salaries and work schedules to an arbitrator.

The case arose as a result of Los Angeles Mayor Villaraigosa’s decision in May of 2009 to ask the City Council to declare a fiscal emergency and adopt an urgency ordinance permitting him to furlough all non-safety employees. When the City Council passed such an ordinance and the furloughs were implemented, hundreds of members of the Engineers and Architects Association filed grievances, asserting that the furlough program violated the workweek provisions in their MOU.

The City refused to recognize the grievances as arbitrable, arguing that the decision of the City Council to furlough was a non-delegable legislative function. The union brought a petition to compel arbitration on behalf of all of the grievants, and the Superior Court ordered the matter to arbitration.

The City then asked the Court of Appeal to intervene and, in a broadly-worded but poorly-reasoned decision, the Court of Appeal reversed the trial court, ruling that the grievances could not be decided by an arbitrator. In doing so, the court relied on prior cases finding unconstitutional a portion of the MMBA that previously required interest arbitration when a bargaining impasse was reached between a municipality and an association

representing police or firefighters. (*See, e.g., County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322.)

The Court of Appeal's reasoning raised grave concerns about the impact of the decision. For example, following the reasoning of the court, whenever a public entity has agreed in an MOU to some limitation upon its legislative powers (e.g., to set salaries), if the MOU provision is violated, that violation cannot be grieved to arbitration. The decision also disregarded the well established legal distinction between "interest arbitration" and "grievance arbitration" and runs counter to the strong public policy in California of encouraging arbitration for the resolution of labor disputes.

CBM, led by **Labor Partner Jonathan Yank** and **Appellate Associate Gonzalo Martinez**, and backed by **Labor Partners Gregg Adam** and **Gary Messing**, was retained in April by the Engineers and Architects Association to prepare a Petition for Review to the California Supreme Court. On July 13, 2011, the California Supreme Court granted review, effectively depublishing the lower court's decision.

If your association is interested in supporting the Engineers and Architects Association in this extremely important matter, please contact **CBM Labor Partner Jonathan Yank at (415) 989-5900**.



### **Four Fresno Contracts Ratified**

**CBM Labor Partner Gary Messing** served as the chief negotiator for four bargaining units in Fresno County that each came to agreements recently. The MOU's were negotiated in the face of enormous cutbacks in the County budget.

The Fresno DSA, representing rank-and-file Deputy Sheriffs, entered into an MOU stretching from June 13, 2011 through December 8, 2013. Given that the prior MOU expired in December of 2010, the contract was effectively rolled over for six months before the commencement of the two-and-a-half year period of the MOU.

Initially the County proposed a 10% salary reduction, the elimination of virtually all incentive pays, take home cars, uniform allowances, etc., and reduction in other types of leave and pay including court standby, holiday pay, shift premium, and the like. The MOU resulted in an agreement to a 6% salary reduction for the term of the MOU. The 6% pay reduction was accompanied by a reduction of shift differential from 8% to 4%, reduction in bilingual pay from \$50 per pay period to \$23.08 per pay period, reduction of court standby from 37.5% of regular pay to 25%, and the reduction in court callout from 4.5 hours per callout to 2.5 hours. However, all of these take-aways sunset at the expiration of the MOU. Additionally, health insurance remained untouched, and changes in retirement adding a third tier only affects new hires.

**FDSA President Eric Schmidt** expressed satisfaction with the outcome considering the draconian cuts to the County budget and the Sheriff's Department budget. The membership overwhelmingly approved the MOU, particularly given the provision that there will be no furloughs, office closures, or other types of reductions in work time during the term of the MOU and given the sunseting of all of the take-aways.

The Fresno Sheriff's Sergeants Association approved a similar package, preserving the status quo with the health insurance and also prohibiting furloughs,

temporary office closures or other reductions in work time through the course of the MOU. Sheriff's Sergeants President, **Shawn Erwin**, indicated that the sunseting of all of the take-away provisions was critical to the thinking of the membership in ratifying the two-and-a-half year MOU.

The Fresno Sheriff's and Correctional Lieutenants Association bargaining unit also ratified a similar deal, although the temporary reduction in pay for that unit is 7% with a sunset at the same time that the other MOU's sunset. The County indicated that it needed a greater salary concession from this bargaining unit in order to equate to the total package agreed to by the Sergeant's and Deputy's bargaining units. President of the bargaining unit, **Lieutenant Neil Dadian**, reflected that his bargaining unit had no choice but to ratify the MOU. He also accentuated that the promise not to utilize furloughs, temporary office closures and the like, and the sunseting of the financial take-aways was critical in the Association's decision to ratify the MOU.

The Fresno Correctional Sergeant's bargaining unit also entered into an agreement that mirrors that of the other bargaining units. However, because of an extreme compaction issue created by the lack of any meaningful differential between the Sergeant's and the CO IV's that they supervise, the term of the MOU extends only through April 1, 2012 (9 ½ months). Not only do all of the take-aways sunset at that time, but a series of re-openers, commencing with the issue of salary compaction, begin in December of 2011 to address this significant concern. The President of the Fresno Correctional Sergeant's Association, **Betty Moreno**, indicated that these provisions taken together with the moratorium on furloughs or office closures through

December of 2013 made it a no brainer for the Association to ratify the contract.



### **Sacramento County Management Association Negotiates Its First MOU**

In April of 2010, the Sacramento County Management Association ("SCMA") became the Recognized Employee Organization ("REO") for almost 900 managers in Sacramento County. **CBM Labor Partner Jason Jasmine** assisted SCMA in its organization efforts. Soon after the election, SCMA elected a negotiating team, and shortly thereafter **RoseMary Vaske, Sue Elliott, Kelsey Johnson, Craig Rader, and Al Mateer** began meeting with **Jason Jasmine** – selected to be their Chief Negotiator – to begin the long process of negotiating its first-ever MOU.

Given the trying economic times, and the fact that even the most basic concepts had to be negotiated from scratch, the negotiations took a huge commitment of time and energy. As an unrepresented group, the managers now represented by SCMA had faced unilateral elimination of COLA's and equity increases, unilaterally imposed furloughs, and the loss of certain benefits. Upon becoming the REO, SCMA was able to guarantee the then-scheduled COLA's and equity increases for the 2010/2011 fiscal year. The negotiating team was then able to lock down existing pay and benefits and prevent furloughs for all current employees.

The team also obtained a number of non-economic benefits, such as strong employee-friendly discipline and grievance procedures that end in arbitration. SCMA and its members were quite pleased with their new MOU.



## Hanford POA Reaches Two Year Deal On a New MOU

Hanford POA recently entered into a two year deal that extends through the end of December of 2012. For the most part, the prior MOU was rolled over. However, in the course of the contract, the 9% employer paid member contributions was eliminated but replaced with a 9% salary increase. The 9% that employees will now pay for their retirements is deferred under Internal Revenue Code 414(h)(2). Other minor agreements were reached on such matters as shortening the time for the city to complete travel reimbursements, integrating long-term disability insurance with the PORAC plan provided through Meyers Stevens, providing a credit card for official travel expenses, and the like.

The POA, lead by its President, **Justin Vallin**, and bargaining team members **Dean Hoover**, **Rich Pontecorvo**, and **Mitch Smith**, thought this agreement will preserve most of its substantial gains that it had achieved in the previous MOU. The POA was represented at the bargaining table by **CBM Labor Partner Gary Messing**.



## Yolo County Attorney's Association Extends Its MOU

The Yolo County Attorney's Association lead by its President **Bret Bandley** and bargaining team members Deputy District Attorney **Deana Hays** and Deputy Public Defender **Amber Poston** were able to extend their MOU through June 30, 2012. In the prior year, 208 hours of furloughs were adopted by agreement This was reduced to 184 hours for fiscal year 2011/2012. The time off, for the most part, is taken at the discretion of the members. The vacation accrual limits were

increased from 320 hours to 420 hours during the term of the MOU to counter-balance the impact of time off taken due to the furloughs. The rest of the MOU is rolled over in its entirety. The Association was represented by **CBM Labor Partner Gary Messing** as the Association's chief negotiator.



## Yolo Deputies get Damages from PTO Arbitration

You may recall a prior article (Volume 24, No. 1, p. 7 (May 2011)) of the Labor Beat concerning an arbitration won by the Yolo County Deputy Sheriffs Association (DSA). The DSA (represented by **CBM Labor Partner Gary Messing**) had entered into an agreement with the County which, among other things, required the accumulation of personal time off in return for a temporary reduction in compensation (the 7% employer pick-up of the employees' contribution to PERS which was reduced during the time employees were credited with 104 hours of personal time off).

The 7% PERS contribution negotiated by the DSA sunset in June 2011, at which time the bargaining unit also received a 4.6% pay raise as a result of a survey that was a part of the agreement.

The PTO, by agreement, would be available to deputies in the same way that CTO would be made available, "*...and shall not be denied based upon the cost of backfilling to maintain staffing levels.*" And PTO was to be available to use at "the discretion" of the deputy. Despite this language, the Department began to violate the agreement by ordering court deputies to exhaust their PTO balances before any other leave time was used. Thus, annual vacation sign-ups were completed with PTO instead of vacation.

The arbitrator previously ruled that the practices by the Department violated the MOU, but did not rule on the remedy, retaining jurisdiction over the damages but leaving it to the parties to attempt to negotiate an agreement.

The arbitrator finally issued an order embodying the agreement of the parties that each court deputy who was denied the right to take PTO would be fully reimbursed with time off in the amount of hours that the individual had been denied the right to take PTO. Additionally, the court deputies who were forced to use PTO instead of vacation, were compensated with 70% of the wage equivalent of the total number of PTO hours required to be taken in place of vacation or other leave.

The order of the arbitrator reaffirmed the rights of the court deputies to use whatever time they wish for their regular semi-annual sign-ups, time off and the right to use CTO or PTO within the discretion of the individual deputy.



### **Tuolumne Jail Sergeant Prevails in Excessive Force Case**

Tuolumne County Jail Sergeant **Kerry Carroll** spent time in the military and in other departments, before joining the Tuolumne County Sheriff's Department about a decade ago. Most of his time with the Department was as a Sergeant, and he had never been disciplined prior to two incidents during which he used force to subdue inmates who posed a threat to he and the deputies he supervises. The use of a taser in the jail setting is still somewhat rare, and the fact that these two incidents happened within a short period of time put Sgt. Carroll on the Department's radar screen.

In one incident, an unruly inmate who refused to follow multiple jail procedures and

threatened deputies on multiple occasions rushed the open door of his cell after being forced to turn over a loose item of clothing. In the second incident, an inmate who had already threatened to kill the arresting deputies initiated a physical struggle during an attempt to take his booking photograph. In both incidents, the use of taser and related force in subduing the inmates led to no significant injury to the inmates, and in fact the inmates did not even complain about the level of force used.

Initially, the Department proposed termination of Sgt. Carroll for excessive force and violations of the taser policy. **CBM Labor Partner Jason Jasmine** represented Sgt. Carroll at all stages of the investigation, Skelly hearing, and the eventual arbitration. At the Skelly hearing, the County reduced the discipline to a demotion. Because Sgt. Carroll and his representative believed the punishment was still too severe, the matter was appealed to arbitration. At arbitration, it was established that there was no policy that prohibited the force used by Sgt. Carroll. We also called an expert use-of-force witness (**Ray Arquilla**), who testified regarding the appropriate uses and levels of force in the custodial setting, as well as the broad leeway afforded under the existing Tuolumne County policies. Although the arbitrator felt that there were better choices in those situations than using a taser, the Department could not demonstrate a violation of any policy or procedure and could not show that the use of force was inherently unreasonable. The arbitrator therefore reinstated Sgt. Carroll to the rank of Sergeant.



## Peace Officer Entitled to Review Citizen's Complaint – Not Just the “Substance” of the Complaint

By Jason Jasmine

In *Medina v. State of California, Department of Justice*, the Sacramento County Superior Court (Case No. 34-2011-80000790) held that a Special Agent for the Department of Justice (“DOJ”) was entitled to review a citizen’s complaint against him contained in his personnel file. The DOJ had taken the position that the Public Safety Officers Procedural Bill of Rights Act (“POBR”) and subsequent case law (namely *Sacramento Police Officers Association v. Venegas* (2002) 101 Cal.App.4th 916), only required the DOJ to make Medina aware of the adverse comments contained in the complaint, but not provide Medina with a copy of the complaint.

The Superior Court determined that although *Venegas* was instructive, the specific question at issue here – whether Medina was entitled to review the actual complaint – was one of first impression. Because the POBR entitles peace officers to have “read and signed the instrument containing the adverse comment” before it is entered into their personnel files, to “inspect” their personnel files, and to file a written response to any adverse comment, the peace officer necessarily must be entitled to inspect the actual complaint.



## Charter Cities Must Implement Firefighter Bill of Rights

By Jennifer Stoughton

In a case with implications for local fire protection employees, the Sixth Appellate District recently ruled that Charter Cities must

implement the Firefighters Procedural Bill of Rights (“FFBOR”), because it is a general law of statewide concern. As one of the first cases interpreting the FFBOR, in *International Assn. of Firefighters Local Union 230 v. City of San Jose* (2011) 195 Cal.App.4th 1179, the Court was faced with two main issues: 1) Does FFBOR apply to charter cities in spite of the home rule doctrine?; and 2) does PERB have exclusive jurisdiction over failures to meet and confer over FFBOR? The Court answered both in the affirmative.

The case arose after the City of San Jose declined the Union’s request to meet and confer over the implementation of FFBOR. The City argued that, as a charter city, it did not have to implement or bargain over the FFBOR because the FFBOR’s new procedures for administrative appeals conflicted with the City’s existing procedures. The City’s argument was based on the “home rule” doctrine which gives chartered cities the power to “make and enforce all ordinances and regulations in respect to municipal affairs, subject only to [the] restrictions and limitations provided in their several charters.” (Cal. Const., art. XI, § 5, subd. (a).)

Although the procedural history of the case was quite complicated, the Court of Appeal issued two holdings that have implications for our clients. With respect to the implementation of the FFBOR, the Court of Appeal found that the City was obligated to implement all of the FFBOR because it is a law of statewide concern that only imposes procedural requirements on administrative appeals of firefighter discipline. Relying on cases involving the implementation of a similar law, the Public Safety Officers’ Procedural Bill of Rights (“POBR”), the Court of Appeal found that the FFBOR does not establish standards for firefighter discipline or otherwise control the terms and conditions of

firefighter discipline. Thus, the City does not lose its ultimate decision making authority over disciplinary matters, and the FFBOR only acts to create a uniform appeals procedure which ensures fair and consistent labor practices throughout the state.

The second important holding the Court issued is that PERB has exclusive jurisdiction over alleged failures to meet and confer over the implementation of FFBOR and therefore the trial court properly denied the Union's Petition to Compel Arbitration over the City's refusal to bargain. The Court noted that PERB is the agency authorized to adjudicate unfair labor practice charges under the Meyers-Milias-Brown Act ("MMBA") and all local agencies and their employees must exhaust the administrative remedies available through PERB before asking a court to intervene in a labor dispute. In this case, the City's refusal to meet and confer regarding its obligation to implement the FFBOR arguably constitutes a violation of the employer's duty to meet and confer in good faith in violation of the MMBA. Therefore, it falls within PERB's exclusive jurisdiction.

Although this is the first in what we think will be a long line of cases that are issued in the coming years interpreting the FFBOR, it confirms the fact that Courts are likely to rely on POBR when deciding FFBOR cases.



### **Fatal Shootings of Peace Officers Increase**

*By Gary Messing*

Fatal shootings of peace officers increased as of July 2011 as peace officers were shot and killed at a much higher rate than previous years. The increase nationally went from 40 in 2008,

to 49 in 2009 and to 59 in 2010 through mid-year. As a result, Attorney General Eric Holder is launching a federal officer safety initiative that requires federal prosecutors to meet with state and local police to ensure they are taking advantage of federal grants for bullet resistant vests, training and other resources.

A lot of the increase may be attributed to cutbacks in budgets for law enforcement agencies. Last year, nearly 70% of law enforcement agencies cutback or eliminated training according to a survey of 608 departments conducted by the Police Executive Research Forum, a law enforcement think tank. Many of the deaths appeared to result from ambushes that occurred as peace officers attempted to serve arrest warrants.



### **Public Pension Benefits Are Subject to Public Disclosure**

*By Gregg Adam*

Public employee pensions are never far from the news these days, nor, seemingly, from the court steps. In a lengthy recent decision, the Third District Court of Appeal in Sacramento ruled that the pensions of retired county employees are public information. The Sacramento Bee, investigating what the court described as the "public outcry" over public sector pensions, had sought the names and pension benefits of all members of the Sacramento County Employees' Retirement Association (after initially only seeking information about retirees receiving more than \$100,000 per year in retirement benefits). Following resistance from the Retirement Association, the newspaper filed a petition for writ of mandate. The trial court concluded the amount of pension benefits were not part of the "individual records of members" and ordered

disclosure of names, ages at retirement and benefits.

Interpreting an arguable conflict between the California Public Records Act (“CPRA”) and the County Employees Retirement Law of 1937 – the former broadly requiring disclosure of public records, the latter providing that “individual records of members shall be confidential and shall not be disclosed to anyone” (Government Code section 31532), the appellate court reviewed the development of various public employee retirement systems, the CPRA and various related attorney general opinions, as well as recent case law interpreting other public records act requests involving public employee salaries and benefits. Echoing numerous appellate decisions over the last few years, the court found generally that news media and the public are entitled to disclosure of benefit levels, and more specifically that the phrase “individual records of members” had to be construed narrowly “to mean data filed with [the retirement board] by a member or on a member’s behalf, not broadly to encompass all data held by [the retirement board] that pertains to a member.” [Emphasis in Original.] Hence, the public nature of government pensions in the court’s opinion outweighed any claim of the recipient to privacy regarding the amount.



### **Courts Cannot Compel the Department of Finance to Appropriate Funds for Approved Salary Increases**

*By Jennifer Stoughton*

The Court of Appeal for the Third District recently held that the State Department of Finance has no duty to take any action to get appropriations to fund a salary range increase for excluded state employees approved and recommended by the Department of Personnel

Administration (DPA), even if the increase is mandated by law. The case arose after California Association of Professional Scientists (“CAPS”), who represents employees in supervisory scientific classifications not in a bargaining unit, successfully challenged the salary ranges for 14 supervisory classifications claiming they violated Government Code section 19826’s mandate that DPA establish salary ranges based on the principle of “like pay for like work.” That section requires DPA to ensure salary parity when it can be accomplished without requiring expenditures in excess of current appropriations.

DPA agreed with CAPS that salary adjustments for the 14 positions were necessary and forwarded its recommendations to the Department of Finance to determine if the recommended pay adjustments were within existing salary appropriations, and therefore would not need legislative approval. After the Department of Finance advised that the existing appropriations did not cover the pay increases, CAPS filed a lawsuit against DPA and the Department of Finance seeking declaratory relief and a writ of mandate entitling its members to the salaries approved by DPA. The trial court ruled, in part, in favor of CAPS and ordered the Department of Finance to present the salary increases to the Legislature so that it could consider appropriating the necessary funds.

DPA did not appeal the Court’s decision, so the appeal focused solely on whether the Department of Finance had a duty to seek appropriations from the Legislature to fund DPA’s recommended salary increases. Relying on the plain language of Government Code section 19826, the Appellate Court reversed the Trial Court and found that the Department of Finance cannot be compelled to do anything in aid of the pay adjustments. The Court reasoned

that section 19826 only imposes a duty on DPA and does not require the Department of Finance to do anything, especially not seek appropriations necessary to implement salary adjustments. The Court also held that the Governor was under no obligation to include the recommended pay increases in the proposed budget.

The net result of this decision is that the Legislature, and only the Legislature, can approve salary increases for state employees above current appropriations. Thus, state employee associations representing excluded employees must take the necessary legislative action to ensure that any salary adjustments approved by DPA that exceed current appropriations are approved via the legislative process.



### **CBM Labor Attorneys Present at Multiple Seminars**

**CBM Labor Partner Gary Messing** was asked to speak on a panel of experts in Seattle

for the American Bar Association. The topic is “The Impact of Pension Problems on Collective Bargaining.” The panel also includes the moderator, **Brenda Sutton-Wills**, from the California Teachers Association, **Jun Peng**, a professor from the University of Arizona, and **Robert Smith** from the law firm of Clark Baird Smith. The issue of public pensions as it impacts public sector bargaining is obviously topical and an issue that will be confronting us for quite some time. Gary was also on a panel of experts on the status of public pensions in California in May for the California Bar Association Annual Labor Employment Seminar program in Sacramento.

**CBM Labor Partner Jason Jasmine** recently co-presented a webinar entitled “Labor Law for Employment Attorneys” sponsored by the California Bar Association and geared primarily toward private sector employment attorneys with little public sector labor experience. In November, Jason will be a panelist for CPER’s presentation on public sector due process issues, entitled “Due Process Rules! Before, During and After Termination of Public Employees”.

**IMPORTANT NOTICE  
TO ASSOCIATION BOARD MEMBERS**

CBM updates its Association Board Member list quarterly. To assist us in keeping accurate, up-to-date names of members and their positions on Association Boards, we would ask you kindly to fill out the form below and mail it to our Sacramento office to: **Carroll, Burdick & McDonough LLP, 980 9<sup>TH</sup> Street, Suite 380, Sacramento, CA 95814-3409, Attention: Stephanie Hosey**. If you would like to begin receiving the Labor Beat electronically, please contact Stephanie Hosey at **shosey@cbmlaw.com**. In your request, please note whether you would like to receive both hard copy and an electronic version, or an electronic version only.

CBM thanks all of you for your help.

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