CBM CARROLL, BURDICK & McDONOUGH LLP

VOL. 21, NO. 2

THE LABOR BEAT

SAN FRANCISCO OFFICE
44 Montgomery Street, Suite 400
San Francisco, CA 94104-4606
415•989•5900

WALNUT CREEK OFFICE
1676 No. California Blvd., Suite 620
Walnut Creek, CA 94596-4142
925•944•6080

SACRAMENTO OFFICE
1007 7th Street, Suite 200
Sacramento, CA 95814-3409
916•446•LAWS (5297)

LOS ANGELES OFFICE
633 West Fifth Street, 51st Floor
Los Angeles, CA 90071
213•833•4500

CB&M Gets Groundbreaking PERB Complaint Issued on Resumed Obligation for State to Bargain Due to "Changed Circumstances"

CB&M Labor Partner **Gregg Adam** and CB&M Labor Associate **Jonathan Yank** recently persuaded PERB to issue a complaint against the State with respect to its refusal to return to main table negotiations with CCPOA. The State declared impasse in September 2007 and began attempting to implement a three year Last, Best and Final Offer. In December PERB, at CCPOA's request, issued a complaint alleging that a three-year LBFO violates the duty to bargain under the Ralph C. Dills Act. Since then the State has refused to return to the negotiating table notwithstanding that it has been unable to secure legislative approval for LBFO and notwithstanding its declaration of a fiscal state of emergency. CCPOA asserted that these developments created "changed circumstances" under the Act thereby mandating resumed collective bargaining. The State has argued that only a bargaining concession by CCPOA would break the impasse.

Despite denying CCPOA's request for injunctive relief in March, on April 17, 2008, PERB issued a complaint alleging that the State's obligation to bargain resumed on January 30, 2008.

Because PERB does not appear able or willing to order the State to return to the table prior to the beginning of the 2008-09 fiscal year, CCPOA has sought a writ of mandate from the Sacramento County Superior Court requesting such an order. The hearing is presently scheduled for June 6, 2008.

Firefighter Bill of Rights Link

A summary of the entire Firefighters Procedural Bill of Rights Act, together with relevant cases and explanations, can be found on our website at:
http://www.cbmlaw.com/practices/public.asp.

Local Agencies Need to Comply with the APA under FFBOR

By Gary M. Messing

January 1, 2008 marked the date of the adoption of the Firefighters Bill of Rights Act, Government Code §§ 3250 et seq. The Act covers investigations and discipline of firefighters arising out of acts or omissions occurring on or after January 1, 2008.

Under the Act, firefighters are entitled to an opportunity to appeal any punitive action defined under the Act or denial of a promotion on grounds other than merit. Government Code § 3254(b). Punitive action under the Act is defined as "any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment." Government Code § 3251(c). Thus, a written reprimand or more entitles a firefighter to an administrative appeal. Even any action that "could lead to" a written reprimand or more is considered a punitive action subject to appeal rights.

Pursuant to Government Code §3254.5, the administrative appeal must be provided in conformance with the Administrative Procedures Act ("APA"), which sets forth standards and procedural protections regarding obtaining discovery and how the hearing process must be implemented.

State employed firefighters in the CDF Firefighters bargaining unit (Unit 8), in the CSLEA bargaining unit (Unit 7), and the CCPOA bargaining unit (Unit 6), are all governed by the laws and procedures of the State Personnel Board ("SPB"). We believe these are consistent with the APA. During a conversation with Elise Rose, Chief Counsel for the SPB, Ms. Rose indicated that she too believes that the SPB rules are, for the most part, consistent with the APA. However, there are many local agencies where the local rules and procedures may not be in conformance with the APA, and thus, in violation of Government Code §3254.5. Those local rules and procedures will need to be changed in order to comply with Government Code § 3254.5. We anticipate those changes will be made over time, rather than all at once.

Employee groups, other than firefighters, may have the opportunity to take advantage of the new requirements for the firefighters, since it does not make a great deal of sense for local agencies to adopt different rules for firefighters as opposed to other employees who appear before their appeal boards, hearing committees, or civil service commissions.

Orange County Attacks Retirement Benefits

By Jennifer S. Stoughton

In light of the uncertain status of Social Security in the coming years and the never-ending rise in medical care costs, "affording" retirement is a hot topic these days. As one of the last remaining groups to have defined benefit plans, public employees are often considered much better positioned to afford retirement compared to their private sector counterparts who often have no employer sponsored retirement plan. This is one of the few areas where public servants' benefits exceed those of private employees and is a crucial factor in a public entity's ability to recruit and retain employees. Law enforcement officers, who have benefited from a change in recent years to the 3% at age 50 pension model, are among the best positioned individuals to afford the ever increasing cost of retirement.

A recent decision by the Orange County Board of Supervisors to file a legal action aimed at repealing part of a pension agreement with the Association of Orange County Deputy Sheriffs may change all of that. At the heart of the case is a 2001 labor agreement that retroactively increased the pension benefits of the Deputy Sheriffs from 2% at 50 to 3% at 50. Orange County recently filed a lawsuit contending that the 2001 agreement was invalid because the retroactive increase violated the California State Constitution's prohibitions on deficit spending and gifts of public funds. Orange County is seeking to repeal the retroactive portion of that agreement along with the increased pension benefits that resulted from it.

Orange County's decision comes on the heels of a similar attempt by the City of San Diego to strip away enhanced pension benefits agreed to in a prior MOU. Although the legal basis for the suit was different, San Diego's lawsuit was tossed out of court numerous times. After years of prosecuting the lawsuit, the only tangible result for San Diego is a two million dollar bill for attorney fees. San Diego has appealed that decision to the Court of Appeal.

CB&M believes that both Orange County and San Diego's attempt to repeal prior labor agreements relating to pension benefits flies in the face of firmly established legal precedent that pension benefits cannot be retroactively reduced. Interestingly, it has been reported that Orange County had to hire four law firms and spend more than a half of a million dollars before it could find a firm that was willing to agree that the claim was legally viable.

Despite the seemingly clear precedent in favor of the Deputy Sheriffs, including the outcome, in the trial court, of San Diego's attempt to file a similar action, a court finding in favor of Orange County could have devastating implications for public sector employees throughout California who have come to rely on their public employers' promise of pension benefits. CB&M is committed to fight **any** attempt to retroactively reduce public employees' pension benefits. We have put together a coalition of unions who are also committed to this cause, and while we are not directly involved in the Orange County case, we intend to file an Amicus Curiae brief on behalf of the coalition when the case reaches the Court of Appeal and beyond. Any union interested in joining the coalition against the attack on retirement benefits should contact CB&M associate **Jason Jasmine** in the Sacramento Office (916-446-5297).

Recent California Supreme Court Decision Eviscerates POBR's Notice Requirement

By Jason Jasmine

For many years, most public agencies throughout the state were in sync with the peace officer associations, in their interpretation that Government Code section 3304(d), required public agencies to provide notice of the level of discipline that was being proposed, within one year of the department's discovery of the allegation of an act, omission, or other misconduct. If the public agency failed to make such a notification within one year, it was prohibited from disciplining the accused officer.

On April 17, 2008, the California Supreme Court turned that understanding on its head, when it agreed with the City of Los Angeles, and concluded that notices under Government Code section 3304(d) must simply provide that the public agency has decided that it might take some type of disciplinary action

against the officer for certain, specified misconduct. *Mays v. City of Los Angeles* (2008) 43 Cal.4th 313.

On April 9, 2008, the California Supreme Court had granted review, after reversal and remand of denial of a petition for writ of mandate following a police officer's termination, in the case of *Quihuis v. City of Los Angeles* (2008) 159 Cal.App.4th 443, *review granted*, 2008 Cal. LEXIS 3861 (2008). However, briefing in this case was deferred, pending a decision in *Mays*, or pending a further order of the Court. The rationale for deferring briefing in *Quihuis* was made clear on April 17, 2008, when the Court, for all intents and purposes, eliminated the notice requirement found in Government Code section 3304(d).

Both *Quihuis* and *Mays* involved situations where police officers were given notices of discipline that did not inform them of the specific level of discipline that was being proposed. In both cases, the officers were subsequently (after the expiration of the limitations period set forth in Government Code section 3304(d)) disciplined. The questions in *Quihuis* and *Mays* were nearly identical, and can be summarized as follows: Does the POBR require that an officer facing discipline be provided with notice of both the alleged offense, and the potential punishment for that alleged offense, within one year of discovery of the alleged misconduct? The court in *Mays* answered no.

In *Sulier v. State Personnel Board* (2004) 245 Cal.App.4th 21, the court applied this principle of law and held that the public agency in question (the California Department of Corrections) complied with the statute because, within one year of initiating the investigation, it served the officer with a notice of ". . . the 'proposed discipline' of "a one step demotion to a Correctional officer."

The *Sulier* rationale was applied and expanded in *Sanchez v. City of Los Angeles* (2006) 140 Cal.App.4th 1069, 1081. To that end, the *Sanchez* court held as follows: "*Sulier* does not stand for the proposition that a timely notice of *some* punitive action makes all substantive punitive action actually imposed timely. Further, such an interpretation would be at odds with the language of the statute, which requires the [public agency] to 'notify the public safety officer of its proposed disciplinary action within that year. . . .' This provision requires the [public agency] to notify the officer of the specific disciplinary action that is being proposed, not merely to advise the officer that *some* disciplinary action is being contemplated."

In *Mays*, the Court attempted to explain why its holding was not inconsistent with the holding in *Sanchez*. However, the Court did conclude that to the extent *Sanchez* was inconsistent with the holding in *Mays*, it was disapproving *Sanchez*. Thus, California's highest court has now clearly held that public agencies are not required to put peace officers on notice of the level of discipline to be imposed, within one year of discovery. Rather, all that is required within that year is that peace officers must be informed that <u>some</u> level of discipline <u>might</u> be imposed.

California Supreme Court Permits Further Erosion of the Confidentiality of Peace Officer Personnel Files

By Jason Jasmine

The privileges and procedures surrounding *Pitchess* motions (codified through the enactment of Penal Code sections 832.7 and

832.8 and Evidence Code sections 1043 through 1045), provide criminal defendants a limited right to discovery of peace officer personnel records in order to ensure "a fair trial and an intelligent defense in light of all relevant and reasonably accessible information." *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1037.

A *Pitchess* motion must describe the type of records of information sought, set forth the materiality thereof to the subject matter involved in the pending litigation and state upon reasonable belief that the governmental agency identified has the records. *People v. Mooc* (2001) 26 Cal.4th 1216. The court must then review the records *in camera* to determine what, if any, information should be disclosed.

The recently decided case of *Chambers v. Superior Court* (2007) 42 Cal.4th 673, however, has created a small loophole in the *Pitchess* process for derivative information – information derived from a *Pitchess* motion. Typically, records disclosed pursuant to a *Pitchess* motion are relatively narrow. Frequently, such information is limited to the name, address and telephone number of a prior complainant, other witnesses, and the date of the incident. A defense attorney can then use that information to develop additional information by, for example, interviewing the complainant and/or other witnesses. That information is considered "derivative" information.

The Court determined that when *Pitchess* "information has been ordered disclosed to counsel who, when later representing a different defendant, succeeds under *Pitchess* in discovering the same complainant information relating to the same officer, counsel may then refer to the derivative information uncovered as part of the earlier follow-up investigation." Thus, the defense attorney is free to use derivative information previously obtained (in a previous case).

The actual holding of the Court in *Chambers* is relatively narrow and not all that surprising. However, it confirms the incremental wearing-away of peace officers' right to confidentiality.

Update on CSLEA's Safety Retirement Battle

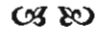
We have previously reported on an ongoing dispute between the California Statewide Law Enforcement Association (CSLEA) and the Department of Personnel Administration (DPA) regarding the implementation of a conversion of several thousand Bargaining Unit 7 employees from miscellaneous to safety retirement. During the week of March 18-21, CSLEA presented its case to Arbitrator **Bonnie Bogue**, that the retirement enhancement provided to convert Unit 7 employees from miscellaneous to safety retirement should also include credit for service previous to July 1, 2004.

CSLEA was represented by CB&M partner **Gary Messing** and CB&M associate **Jason Jasmine**, while CSLEA Chief Counsel **Kasey Clark** and Sr. Legal Counsel **Larry Friedman** also attended to assist with strategy. The DPA was represented by DPA Chief Counsel **Bill Curtis** and Legal Counsel **Tom Dyer**.

CSLEA President **Alan Barcelona**, AC-DOJ President **John Miller** and CSLEA lobbyist **Craig Brown**, who were responsible for negotiating the March 11, 2002 agreement that ultimately led to the conversion of several thousand Unit 7 employees from miscellaneous to safety retirement, all testified that the safety

retirement benefit was intended to include previous service. All of the DPA representatives who were responsible for negotiating the agreement also testified it was their understanding the agreement intended to include previous service. The DPA representatives included **Larry Menth**, **Wayne Heine**, all the way up to the then Director of DPA, **Marty Morgenstern**.

The written briefs were submitted on May 13, 2008, and Arbitrator Bogue has indicated that she will have a decision no later than the middle of July.



CSLEA Defeats Attempt to Sever Unit

On November 30, 2007, a group calling itself "Peace Officers of California" ("POC") filed a severance petition, seeking to create a bargaining unit consisting of all job classifications within Bargaining Unit 7 designated as peace officers pursuant to the Penal Code. Currently, Bargaining Unit 7 is made up of both sworn peace officers and non-sworn regulatory employees who enforce the law but are not peace officers. The entire unit is represented by the California Statewide Law Enforcement Association ("CSLEA").

CSLEA asked CB&M to assist it in fighting off the effort to divide the unit into two units – one of peace officers and the other of non-sworn law enforcement personnel. CB&M partner **Gary Messing** and CB&M associate **Jason Jasmine** prepared evidence and argument demonstrating that POC's proof of support was insufficient and inaccurately described the proposed class.

On January 17, 2008, the petition was dismissed based on the fact that POC had not submitted sufficient proof of support. Although POC filed a statement of exceptions challenging that determination, POC was ultimately forced to withdraw both its statement of exceptions and an amended petition that it had filed concurrent with the statement of exceptions.

On March 13, 2008, the Public Employment Relations Board granted POC's withdrawal of its appeal, finding that the withdrawal was in the best interests of the parties and was consistent with the Dills Act.

CSLEA Recoups Unpaid Overtime for DDS Peace Officers

By Kasey Christopher Clark –
CSLEA General Manager/Chief Counsel
(Reprinted with permission)

CSLEA is pleased to report the successful resolution of an ongoing dispute over unpaid overtime compensation for Peace Officers employed at a number of Department of Developmental Services (DDS) facilities.

The recent settlement was triggered by a grievance initially filed on November 8, 2006, by CSLEA Sr. Legal Counsel Dave De La Riva on behalf of Peace Officers employed at Canyon Springs Developmental Center for failure to pay overtime in violation of Article 7.6 of the Unit 7 Contract. Article 7.6k requires that Unit 7 employees who work more than forty (40) hours in a work week be paid in cash or compensated in CTO at time and a half.

Peace Officers at Canyon Springs had been placed on a work schedule of seven 12 hour shifts, (i.e. 84 hours) every two weeks. Therefore, officers were working four overtime hours every other week. However, instead of compensating the officers at an overtime premium rate, the time was considered "extra

hours" and was banked as excess hours at a straight time rate.

As a result of the Canyon Springs grievance, in January 2007, DDS initiated an audit of all of its facilities to determine whether the payment practices were in compliance with the Unit 7 Contract as well as the Fair Labor Standards Act.

On February 23, 2007, CSLEA Legal Counsel Ryan Navarre and I met with DDS representatives in Sacramento to discuss the alternate work schedules at DDS Developmental Centers and how DDS should address centers which were not properly compensating employees for overtime. CSLEA and DDS agreed that practices which were out of compliance had to be corrected and employees needed to be fairly compensated. CSLEA also made it clear that it wanted to work with DDS to find a solution which would allow DDS Peace Officers to maintain their alternative work schedules.

Initially, DDS claimed Peace Officers at Porterville Developmental Center (PDC) were working a Fair Labor Standards Act 7(k) schedule because a 7(k) exemption had been established at PDC. The effect of a 7(k) exemption would have significantly affected the amount of overtime that would have been owed to officers because it permits the calculation of hours worked over a 28 day period rather than a 7 day period.

In order to assess the legitimacy of DDS' claimed 7(k) exemption, CSLEA requested any and all documents that would prove a 7(k) exemption was established. DDS failed to provide such documents and claimed a "defective 7(k)" had been established.

Because federal law requires a clear demonstration a 7(k) schedule has been established via an inclusion in a collective bargaining agreement or through a consistent practice, CSLEA refused to concede DDS had created a 7(k) exemption. CSLEA pressed DDS to conduct an audit dating back to 2004 in order to compute overtime on a 40-hour work week basis.

In March 2007, DDS began compiling all relevant paperwork dating back to 2004. There was a great volume of paperwork and many hours were dedicated by DDS staff to gather relevant documents and audit hours worked.

On April 20, 2007, CSLEA and DDS met for settlement conference. DDS attempted to convince CSLEA that despite the fact that there was no evidence of a 7(k) exemption at PDC, there was an understanding it had been a past practice. DDS offered settlement in the amount of $81,885.53. CSLEA requested and was provided all the documents DDS had compiled so that an independent review could be conducted by CSLEA. Our review again confirmed a 7(k) schedule had not been created and the offer was insufficient.

On July 25, 2007, CSLEA and DDS met for further a settlement discussions in an attempt to agree on how to compute the overtime compensation owed to the officers. The parties reached agreement on the formula to be applied in calculating unpaid overtime. An agreement was made that all hours would be converted to CTO and then paid out in cash according to the equivalent hourly rate of the employee at the time the settlement proceeds were paid (as opposed to when the hours were actually worked).

DDS increased its total settlement offer to $152,788.33.

On August 14, 2007 and September 20, 2007, additional meetings were conducted at

DDS Headquarters to clarify the audit and methodology of calculating Peace Officers overtime entitlement.

On September 27, 2007, I sent a letter to DDS proposing settlement which required the inclusion of liquidated (or penalty) damages to be paid for both hours worked before and after the filing of the initial grievance. After several months of waiting for a response from DDS, in February 2008, CSLEA informed DDS if they did not promptly settle the dispute, a complaint would be filed with the Department of Labor.

On March 7, 2008, CSLEA and DDS agreed to a settlement in principle. The settlement agreement included damages for all unpaid overtime hours for the two (2) year period preceding the filing of the grievance, plus 50% of such hours as liquidated damages for the period November 2004 through November 2006, plus 7% interest on the hours worked from the date of the filing of the grievance to the date of settlement payout.

On March 25, 2008, CSLEA and DDS executed the formal settlement agreement. From April 16, 2008 – April 29, 2008, DDS provided additional supporting documents to CSLEA indicating that the settlement agreement would provide officers at PDC with payments amounting to more than $460,000.00.

On April 22-23, 2008, HPAC President Karen Meredith and Board Member Lorenzo Indick, Dave De La Riva, Ryan Navarre and myself, met with PDC Peace Officers to explain the terms of settlement and to sign releases entitling the officers to the proceeds. Most of the officers are entitled to payments in the amount of $7,500 – $15,000 as a result of the settlement.

It is ironic that a grievance for a handful of employees at one location blossomed into a huge recoupment for a significant number of Unit 7 peace officers. Dave De La Riva should be commended for initially identifying the problem, and Ryan Navarre for his dedication in reviewing a vast amount of documents to confirm the methodology for settlement. DDS should also be credited for recognizing its mistake and taking appropriate steps to correct the mistake without resort to litigation.

Red Bluff Firefighters' Persistence Pays Off

The City of Red Bluff Fire Department negotiations have finally concluded, ending a three-year battle between Red Bluff Firefighters Association ("Association") and the City. The Association had gone to impasse three years in a row. The first year the City imposed a 3% increase when the cost of living was in excess of 3.5%. The second and third years the firefighters went without any increases. During that time, CB&M Labor Representative **Richard Reed**, the lead negotiator for the Association, explained to the firefighters the necessity of political activity, and they took it to heart. As a result of the Association's political awareness campaign, new City Council members were elected that were more supportive of the City's firefighters. The support of the citizens of Red Bluff cannot be overstated, as the Association presented over twenty-five thousand signatures to the City Council in support of its negotiations. There was written and vocal support from other fire organizations within the state as far south as Bakersfield. Ultimately, the hard work paid off. The Association obtained a four-year agreement resulting in significant salary increases. The firefighters will receive immediate increases ranging between approximately 12% and 15%, and by the beginning of year 3, all firefighters

will have received salary increases ranging between approximately 25% and 29%, as well as newly agreed upon step increases.

In addition to the base salary increases, the Association also obtained a 5% longevity increase for all employees with 12 years of service, and an enhanced medical plan with significant monthly savings to the firefighters. Under the new medical plan, the firefighters will receive better benefits and will pay between $173 and $232 less per month than they had been paying previously. The Association was also able to eliminate the mandatory use of leave time as well as obtain the ability to sell their excess time back to the city. The contract was ratified by the city council on Tuesday, May 6, 2008.

Protecting Firefighter Personnel Records

By Gary M. Messing

Under the Firefighters' Bill of Rights, there is a new and excellent array of provisions that protect firefighter files.

First, under Government Code §§ 3256 et seq., no adverse comment can be placed in your personnel file or "any other file used for any personnel purposes" without the firefighter being able to see and sign the instrument or initial that he/she refused to sign it. This means that Post-Its in a supervisor's file drawer, notes in an electronic file in a supervisor's computer, and the like, are all now personnel files. The act requires notice to the employee of any adverse comment and the right to review and sign it. Under case law applying identical provisions in the Peace Officers Bill of Rights, an index card pertaining to an internal affairs investigation was considered to be a sufficient adverse comment to entitle the employee the right to see and respond to the notation.

Under Government Code § 3256, firefighters have thirty (30) days within which to file a written response to adverse comments entered into a personnel file, and the written response is required to be attached to and accompany the adverse comment. This means that as of January 1, 2008, all firefighters now have the right to inspect their entire personnel file, or any other file used for any personnel purposes, no matter how old those documents may be. It is still an open question as to whether a firefighter has the right to sign and respond to old adverse comments (that pre-date January 1, 2008).

Under Government Code § 3256.5(a), the employer must make personnel files available for inspection by firefighters without retaliation and within reasonable times, on duty and without loss of compensation. Under subsection (b), the employer shall keep a copy of the personnel file and make a copy of the file available to the firefighter within a reasonable time of the request. Subsections (c) and (d) provide procedures for challenging matters that are mistakenly placed in the personnel file. They require a response by the employer either removing or correcting materials in the file, or providing a reason in writing why that will not occur within thirty (30) days of the request.

In order to protect your personnel records, we advise firefighters to inspect and confirm the contents of your personnel file. Obtain a copy of it and have it certified or acknowledged by the person providing it to you that it is complete. Make sure a staple runs from the first to the last page of it. Once you have accomplished this, you will make it extremely difficult for the Department to try to use any material that pre-dates the copy of the personnel file that you

have received, if the documents are not a part of that personnel file and you have not had an opportunity previously to see, sign and respond to those negative comments. In other words, you can protect your personnel file and prevent documents being used against you that are outside of the "official" personnel files maintained by your supervisor.

This procedure is something that you should consider doing annually. By following this procedure, you can protect yourself from adverse actions by creating a record that will allow you to exclude documents from being used against you in adverse actions in the future.

What to Do If There Is a Criminal Investigation or a Critical Incident Involving a Firefighter

By Gary M. Messing

Firefighters who are subjected to questioning after a critical incident where there is a severe injury or death that arises from the performance of a firefighter's duties, have numerous protections now afforded under the Firefighters Bill of Rights. These protections are similar to the protections peace officers in the bargaining unit have enjoyed for decades under the Public Safety Officers Procedural Bill of Rights Act when they are under investigation for critical incidents or for matters that might be criminal.

If you are the subject of an interrogation when there has been a critical incident, or if there is a criminal inquiry, do not discuss your conduct with a job steward or anyone other than an attorney or other person with whom there is a statutory privilege of confidentiality. Examples of other people with whom you share a privilege include religious advisors, such as the clergy, psychologists, psychiatrists and other mental care professionals, spouses, and the like. Your discussions with a job steward or other representative may only be protected for "non-criminal" conduct.

If you have been involved in a critical incident and you are being questioned about your conduct; if you believe you are under criminal investigation, or if you are Mirandized, do not give a voluntary statement without first calling an attorney or a representative who can determine if you will be provided an attorney. When you discuss the matter with a representative, do not share with them details of what occurred. Instead, only provide a general description of the type of conduct for which you believe you are under investigation, such as: criminal negligence arising out of an engine crash, criminal liability for a peace officer-involved shooting, theft due to use of State property, and the like.

U.S. Supreme Court to Determine Validity of California Law Restricting Use of State Funds to Influence Union Organizing Campaigns

By Scott Burns

Union membership in the private sector has declined substantially during the past 30 years. Among the many factors leading to the decline have been aggressive efforts by employers to influence employees targeted by union organizing campaigns. This issue has been brought into renewed focus by a major case now pending in the United States Supreme Court – *Chamber of Commerce v. Brown.* (Docket 06-939) The United States Chamber of Commerce and a consortium of employers seek to overturn two California state laws preventing

businesses from using state funds to assist, promote, or deter union organizing efforts.

In September, 2000, the California legislature passed Assembly Bill 1889, a bill promoted heavily by organized labor. Two provisions of that bill are the source of the litigation. Government Code sections 16645.2 and 16645.7 prohibit private employers who receive state funds from using the funds to assist, promote, or deter union organizing campaigns. State contractors and grant recipients are permitted to use their own money for labor-oriented speech, but must keep careful records documenting that they kept their funds segregated from state funds. Violators can face suits either by private taxpayers or the state attorney general and could be required to pay treble damages and attorney fees. The author of the bill, Senator Gil Cedillo, explained that his motive for introducing the legislation "was to prevent unscrupulous contractors from using state money to block unionization by California janitors."

In 2002, the U.S. Chamber of Commerce and several employers sued to prevent enforcement of the law and argued that the laws both interfered with employer free speech rights and were preempted by the National Labor Relations Act (NLRA). The federal district court agreed, finding that federal law pre-empted the California statutes under the Supreme Court's 1976 decision in *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission* (1976) 427 U.S. 132, which forbids states from regulating activity Congress meant to leave "to the free play of economic forces." The court issued an injunction prohibiting the state from enforcing the new laws. In 2004, a three-judge panel of the 9th U.S. Circuit Court of Appeals in San Francisco agreed with the district court decision, adding that the law was also pre-empted under several other Supreme Court rulings that bar states from regulating activities covered by the NLRA. The new laws were then reviewed by the full 9th Circuit sitting en banc. The full Court reversed the prior rulings and upheld the validity of the two statutes. (*Chamber of Commerce of the United States v. Lockyer* (2006) 463 F.3d 1076).

The 9th Circuit noted that the new laws do not prohibit employers from influencing union activities, just from using state funds to do so. Employers are still free to express their views on unionizing with their own funds. Rejecting *Machinists*' pre-emption argument, the Court held that state spending decisions "by definition [are] not controlled by the free play of economic forces." The Court also concluded that the NLRA does not give employers an express right to participate in union organizing campaigns and that the additional accounting required to comply with the laws' segregation provisions was not so burdensome as to interfere with the employers' first amendment free speech rights.

The U.S. Supreme Court granted the Chamber's petition for certiorari in 2007 and heard oral argument in the case on March 17, 2008. The U.S. Chamber of Commerce and the Bush administration argued that the facially neutral language of the new laws is an artifice and that California is simply trying to silence employers who are resisting union organization efforts. They say that position isn't permitted by federal labor law, which allows employers to be involved as long as they don't threaten reprisals. The companies also contend that California's law violates the NLRA's safe harbor provisions for anti-union speech, and is therefore preempted.

The State of California contends that the laws simply seek to ensure that the state doesn't subsidize an employer's pro- or anti-union

activities, allowing California to maintain a neutral position in labor disputes. The State's attorneys argued that the laws do not alter the rights of employers to discourage unionization, but merely guarantee that such speech is not funded by the state – a necessary measure to prevent taxpayer money from influencing workers' decisions on whether to unionize. Moreover, the state argued, the Chamber's 2002 challenge was premature since there was little evidence of how the law would actually work in practice, and the lower court injunction prevented further analysis.

The outcome of the case could affect attempts by other states to restrict use of state money for union-related activities. California's law has been followed by similar attempts in other states, including New York, which passed a more limited version. Union activists and pro-union lawmakers elsewhere have been waiting to see the outcome of the California case before deciding how to proceed. The Court, in recent terms, has demonstrated an increasingly strong pro-business proclivity. At the same time, in non-labor contexts, the Court has also demonstrated a commitment to principles of federalism and state sovereignty. Oral argument was bruising to both sides and the Court's direction was not clearly apparent.

Seismic Shift in Public Employees' Strike Rights Leaves a Shifting Road Ahead

By Erick Munoz

While the law is often accurately characterized by outsiders as a slow moving and seldom changing monolith, there do remain times when such a structure can change course quickly. This became apparent in *City of San Jose v. Operating Engineers Local Union No. 3* (2008) 160 Cal App 4th 951, a Court of Appeal opinion recently published in the Sixth District. In *San Jose* the Court was faced with a question that up until then seemed well settled law: Can a Court grant an injunction sought by a public agency against its striking employees, when the employees' work affects the public health and safety?

Until this opinion became officially published in March of this year, the answer would have been a clear yes. Courts had routinely granted such injunctions and in fact had even awarded damages against striking employees in many such cases in the past. Those rulings relied upon, and strengthened, the holding of the California Supreme Court in *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal 3d 564. In *County Sanitation* the Court held that public employees could strike, but then carved out an exception – strikes were unlawful if it was shown that "such a strike creates a substantial and imminent threat to the health or safety of the public." In turn, prior to *San Jose*, the prevailing legal wisdom was that public employees engaged in labor tied to public safety or health could not strike. That is, their strikes were unlawful under *County Sanitation* because their strikes would impact public welfare. Surprisingly, the *San Jose* Court devoted only ten lines of its opinion to this threshold question, focusing instead on whether the Public Employee Relations Board ("PERB") had jurisdiction. The Court concluded that PERB did have initial jurisdiction, and therefore upheld the lower Court's decision to send the case to PERB.

So, does this mean cops can strike? No, not quite. A pair of cases struggling with the same issue in the First Appellate District will soon be decided. This could lead to an extension of the rationale in *San Jose*, a conflict

between the two appellate courts, and possible appeal to the California Supreme Court in either case. Regardless of the potential outcomes, it would be premature and counterproductive to make any decisions regarding labor actions now, since the legal picture could shift focus dramatically in the near future.

It is, however, a far different landscape for deciding on labor actions for public employee unions. Under *San Jose*, PERB, not the courts, will be making determinations on the legality of strikes. PERB may punt the decision back to the courts by seeking an injunction, but PERB seldom resorts to seeking injunctive relief in the courts. Further, if PERB avoids making the determination, by shifting the responsibility back to the courts, this would seem to undermine the rationale of *San Jose*.

Finally, PERB is a different animal than the courts. The rules and regulations governing PERB, the remedies available, and a number of other elements make PERB cases very different from cases pursued in the court system. If and when PERB is called upon to decide the legality of a labor action, or proposed labor action, an intriguing question will be raised: Will PERB make such determinations based on the established common law precedent or will PERB create new guidelines based on its knowledge of public sector labor law? Public employees should follow these outcomes closely, and of course, we will report on the legal ramifications of the other two cases once they are decided.

Profile of CB&M Paralegal Keith A. Domingo

Keith A. Domingo began working for CB&M in April of 2008. Keith obtained his undergraduate degree in Psychology from Stanford University and completed the Paralegal Studies Program at California State University Hayward.

Prior to working at CB&M, Keith was employed as a Senior Paralegal at Safeco Insurance Company in Fairfield doing research, drafting briefs and motions, appearing at administrative law hearings, and performing a variety of other tasks. Keith has over 15 years experience as a Paralegal and has been involved in numerous areas of law including, workers' compensation, personal injury, civil litigation, criminal law, family law, and construction defect.

Keith is native to the San Francisco Bay Area, having been raised in Pittsburg, California. He currently resides in Vallejo with his wife Sonya and two children, Isabella (age 10) and Nikolos (age 15). In his free time, Keith enjoys listening to music, writing poetry, and tackling various home improvement projects. Keith and his wife are also very active volunteering at various fundraising activities for their son's school.

Keith has a history of representing employees rights in the worker's compensation arena and he looks forward to working with the Public Sector Group in protecting the rights of employees in a new arena.

IMPORTANT NOTICE
TO ASSOCIATION BOARD MEMBERS

CB&M 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 kindly ask you to fill out the form below and mail it to our Sacramento office to: **Carroll, Burdick & McDonough LLP, 1007 7TH Street, Suite 200, Sacramento, CA 95814-3409, Attention: Jacqueline Morris**.

CB&M thanks all of you for your help.

NAME OF ASSOCIATION _____

PRESIDENT _____

VICE PRESIDENT _____

TREASURER _____

SECRETARY _____

CBM CARROLL, BURDICK & McDONOUGH LLP
1007 7th Street, Suite 200
Sacramento, CA 95814-3409

CBM-SF\SF405236.3

50