



THE LABOR BEAT

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CBM's Public Sector Group Has Two New Partners

Jason Jasmine and **Jonathan Yank** have been named partners at Carroll, Burdick & McDonough LLP. Both Jasmine and Yank have extensive experience in all aspects of public sector labor representation, and both CBM and the Public Sector Group are proud to welcome them as partners.



CBM's "Furloughs" Victory for CCPOA Goes to the Court of Appeal, While the Firm Represents Several Other Associations in the Trial Courts

CBM's San Francisco labor team, led by partners **Gregg Adam** and **Jonathan Yank**, has been heavily involved in litigation challenging the State's so-called "furlough" plan since its inception. The first of these challenges, brought on behalf of the California Correctional Peace

Officers' Association ("CCPOA"), was successful in the trial court and is now pending before the First District Court of Appeal.

On December 30, 2009, CBM obtained on behalf of CCPOA a Writ of Mandate from the Alameda County Superior Court directing the Governor, Department of Personnel Administration ("DPA"), and the State Controller to fully compensate all CCPOA-represented employees at their regular rates of pay. In the trial Court, the CBM team successfully argued on behalf of CCPOA that the Governor and DPA's so-called "self-directed" furlough plan for correctional staff resulted in an illegal salary cut for impacted employees because, due to systematic overcrowding and understaffing in California's prisons, custody employees were unable to take days off (i.e., to "self-direct" their furloughs). In spite of this inability, all employee salaries were nonetheless reduced in an amount commensurate with three days' pay.

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.

The trial court ruled that this caused a *de facto* salary reduction in violation of provisions of the California Government and Labor Codes. The Court ordered that CCPOA-represented employees should receive back pay and, going forward, must be fully compensated at the end of each pay period. The ruling is now before the First District Court of Appeal, with briefing to be completed in May.

CBM's San Francisco and Sacramento offices are litigating additional challenges to the Governor and DPA's "furlough" plan in the Alameda County Superior Court on behalf of the California Statewide Law Enforcement Association, the Association of California State Supervisors, and the International Union of Operating Engineers, Stationary Engineers Local 39. These cases, which raise many of the same arguments that were successful in the CCPOA case, have not yet gone to hearing. The Sacramento labor team, led by partners **Gary Messing** and **Jason Jasmine** also has furlough litigation pending in Sacramento Superior Court on behalf of CDF Firefighters.



CSLEA Defeats Effort to Split the Association in Two

The Sacramento Office of CBM's Public Sector Group, led by partners **Gary Messing** and **Jason Jasmine**, together with **California Statewide Law Enforcement Association (CSLEA) Chief Counsel Kasey Christopher Clark**, just secured an enormous victory for CSLEA against an attack that threatened to split and greatly weaken CSLEA. CSLEA represents about 7,000 individuals, a little less than half of whom are peace officers. The others are non-peace officer public safety employees (i.e., dispatchers, licensing, certain inspectors and investigators). A competing group, calling itself the Peace Officers of California (POC) was

trying to split the peace officers from the non-peace officers. The Public Employment Relations Board (Board) hearing on the proposed "severance", which Messing and Clark handled, stretched multiple weeks and included dozens of witnesses and thousands of pages of exhibits. The briefing, handled by Jasmine, was painstakingly detailed, evaluating dozens of claims and defenses by the parties.

The very thorough decision by Administrative Law Judge Shawn Cloughesy, denied the attempts to split this union, and in so doing adopted every argument CSLEA made.

"We told them this wasn't going to fly at the very beginning," said CSLEA President Alan Barcelona in response to the ALJ's devastating ruling against the severance campaign. "But they still went to great expense and lengths -- including slander, distortion, fabrication, half-truths, and outright lies -- to the discredit of everyone who signed their cards. And all for nothing."

Although POC can appeal the ALJ's decision (by way of a Statement of Exceptions) to the full Board, it is highly unlikely the full Board will reach a different result than the judge.

The details of ALJ Cloughesy's 45-page decision, however, reveal much more than just a well-reasoned decision. It highlighted for everyone to see:

- That CSLEA actually serves all of its members better for being a unified mix of sworn peace officers and non-sworn state employees
- That CSLEA's legal team and Legal Defense Fund received rave reviews, even from peace officers in affiliates placed in trusteeship

- How CSLEA's democratic structure was praised
- How CSLEA has achieved a bargaining stature POC could never match
- How CSLEA's pay-parity strategy benefited everyone, instead of a few self-interested wardens
- That CSLEA is effective in more areas than just salary and benefit negotiations
- How POC threw some of its petition-signing members under the bus
- How weak some of POC's arguments were.

The decision found that CSLEA was stronger in many ways due to the combination of peace officers and non-peace officer safety classes in one bargaining unit. The decision also found that CSLEA's representation of individuals was used primarily by the peace officer members and was "satisfactory, if not better" and that most members were "very satisfied about the quality of representation ... and prompt response from CSLEA staff."

The ALJ also focused on the fact that CSLEA has had a long and stable bargaining history with the State, and that it has obtained pay and benefits that only a few other associations have been able to obtain. Further, CSLEA's legislative and political efforts were seen by the ALJ as effective.

Finally, the ALJ found that much of the evidence submitted by POC lacked credibility and support, as opposed to the evidence submitted by CSLEA, which was seen as more credible, persuasive and accurate.

Unfortunately, the leaders of POC do not seem content to accept the initial decision. POC's attorney has indicated his intent to file a Statement of Exceptions and is actively seeking input on theories to challenge what appears to be an airtight decision.



Attack on Retirement: An Update and Call to Join Coalition

Last year, we reported that a judge in the Los Angeles Superior Court threw out the Orange County Board of Supervisors' ("B.O.S.") legal action aimed at repealing part of a pension agreement with the Association of Orange County Deputy Sheriffs ("the Deputy Sheriffs"). The B.O.S contended that a 2001 labor agreement that increased the pension benefits of the Deputy Sheriffs from 2% at 50 to 3% at 50 violated the California State Constitution's prohibitions on deficit spending and gifts of public funds. The B.O.S sought to repeal that agreement along with the increased pension benefits that resulted from it.

Although the B.O.S. lost at the trial court level, they have appealed to the Second District Appellate Court in an effort to overturn the trial court's decision. The parties are in the process of briefing the issues and we will keep you updated on the decision. We expect oral argument to be set sometime in the end of this year.

CBM is committed to fighting any and all attempts to retroactively reduce public employees' pension benefits. Therefore, while we are not directly involved in this case, we intend to file an Amicus Curiae brief on behalf of an existing coalition of public sector unions.

As of the publication of this article, associations with cumulative membership of

over 50,000 public employees have already joined the coalition, including CCPOA, CDF Firefighters, Colusa DSA, CSEA Retirees, Fresno Sheriff's CSA, Marin Professional Firefighters IAFF 1775, Novato PFA, Sacramento County Attorneys' Association, San Francisco MEA, San Francisco POA, San Jose POA, Santa Clara DSA, Santa Cruz MMA, Sunnyvale MMA, Sunnyvale PSOA, Sunnyvale Public Safety Managers Association, and the Tuolumne DSA. There is still time to add your association to the cause.

Any association interested in joining the coalition against the attack on retirement benefits should contact CBM partner Jason Jasmine in the Sacramento Office (916-446-5297). You can also see our website for past issues of the Labor Beat in which we discussed this case, and additional information regarding this case. The direct link to the proper page is: www.cbmlaw.com/areas-of-expertise/public-sector.asp



CBM Prevails for CDF Firefighters in Lawsuit Challenging the State Employers' Calculation of Lump Sum Due for Accumulated Leave Credits

CBM partners **Gary Messing** and **Gregg Adam**, along with associate **Jennifer Stoughton**, recently prevailed in a class action lawsuit on behalf of CDF Firefighters (who represent State Bargaining Unit 8) and their members, challenging the way the state employer currently calculates the lump sum due to Unit 8 members and associated CAL FIRE Supervisors and Managers, for their accumulated leave credits at the time they separate from service (i.e. any voluntary separation including retirement and end of fire season layoffs).

CDDF-represented employees occupy a unique position in state employment because they work "planned overtime" as part of their regular schedule. That means that the vast majority of CDDF-represented employees work 72 hours per week and are paid at an overtime rate for 19 of those hours. When CDDF-represented employees use leave credits during service, they are paid as if they worked their regular schedule, which includes planned overtime. For instance, a CDDF-represented employee who takes a week off of work is paid as if he/she worked 72 hours that week, not 40. However, when a Unit 8 employee separates from service, those same accumulated leave credits are cashed out as if that employee's regular schedule was 40 hours a week.

Government Code section 19839 requires the State employer to cash out any unused accumulated leave credits balance in a lump sum payment "equal to the amount" the employee "would have been paid had [he/she] taken the time off but not separated from the service." We argued the State's current method for calculating the lump sum due under section 19839 clearly violates the plain language of section 19839 because CDF Firefighter members are getting paid less for their accumulated leave hours when they leave state service than when they use those same leave credits while still employed.

The Court agreed and ruled that the State must include planned overtime when calculating the worth of CDF Firefighters' leave credits in the future. The Court also ruled that the State must pay all members of the class the difference between the amount the State actually paid them for their accumulated leave credits and the amount that CDF Firefighters contended they should have been paid. The parties are currently working to establish the amount of damages owed to all class members.

Although the State will undoubtedly appeal this decision, we believe that the law is on our side and we will prevail in the end. This is a huge victory for our client and we are extremely proud to have succeeded on their behalf.



CBM Scores Huge Victory on Behalf of CDF Firefighters

CDF Firefighters (CDFS) discovered that the State was failing to withhold fair share fees from those retired annuitants performing work within the bargaining unit who chose not to become members of CDFS. When CDFS challenged the State's failure, the State claimed that retired annuitants performing bargaining unit work were not in the bargaining unit; thus, no fair share fees should be withheld.

Represented by CBM Sacramento Labor partners **Gary Messing** and **Jason Jasmine**, CDFS filed an Unfair Labor Practice charge with PERB, alleging both a unilateral change in past practice, and various violations of the Dills Act. After a Complaint was issued, the matter went to a formal hearing. The Chief Administrative Law Judge of PERB issued a Proposed Decision that completely vindicated CDFS's position and ordered the State to make CDFS whole for the fair share fees that should have been deducted, going back to October of 2008.

This case followed a similar victory on behalf of CCPOA, spearheaded by CBM San Francisco Labor Partner **Gregg Adam** and Associate **Jennifer Stoughton**.

Both victories have been challenged by the State, and we are waiting for decisions from PERB, responding to the State's statement of

exceptions challenging the ALJ's proposed decisions. We will keep you posted.



Because Officers Can Don and Doff at Home, Ninth Circuit Denies Compensation; Officers Appeal

Bamonte v. City of Mesa

In Mesa, Arizona, police officers have the option don and doff their uniforms and gear at home, though the department provides changing rooms with lockers and trains officers to don and doff at work for safety reasons. Nearly all officers don and doff at the department. Only motorcycle officers generally don and doff at home, because they begin their shifts as soon as they leave their homes on their motorcycles. Against this backdrop, the officers sued under the Fair Labor Standards Act for compensation for the time they spend donning and doffing.

In a deeply divided 2-1 decision, the Ninth Circuit Court of Appeals denied compensation under the FLSA because the officers had the option to don and doff off-site, which led the court to conclude that the donning and doffing was not integral and indispensable to the officers' principal work activity.

The officers have filed a petition seeking a rehearing *en banc* before an eleven member panel of Ninth Circuit judges. In order to secure permission for this hearing, they must persuade a majority of the twenty-seven active Ninth Circuit judges to vote to grant it.

En banc hearings are usually reserved for cases that create a circuit split or are otherwise very important. Here, the officers argue that the *Bamonte* decision creates a circuit split because it relied almost completely on one factor -- where the donning and doffing takes place --

whereas past decisions used a multi-factor, context-specific analysis.

Until we know whether the Ninth Circuit will reconsider *Bamonte en banc*, expect future plaintiffs to look to California minimum wage laws and other state theories to secure fair compensation for their work.

Returning to *Bamonte v. City of Mesa*, Judge Johnnie Rawlinson’s majority opinion, affirming summary judgment for the City of Mesa, applied the traditional three prong test identified in *IBP v. Alvarez* but appeared to apply it in a new and narrow way. That test asks: 1) whether the activity constitutes “work (defined as defined as “physical or mental exertion . . . controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer”); 2) whether the activity is an “integral and indispensable” duty; and 3) whether the activity is *de minimis*.” *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005). The court reached prong two before concluding that none of the donning and doffing was compensable.

Under prong one, the majority found that the officers’ donning and doffing might be considered work because it was done at the employer’s direction and for the employer’s benefit.

The majority’s interpretation of prong two spawned a dissent so blistering that the majority spent much of the rest of the decision trying to justify its decision to the dissent. The majority interpreted prong two very narrowly, defining an activity as integral and indispensable when the nature of the work (in this case, police work) required donning and doffing *on the employer’s premises*. The majority denied compensation because: a) officers had the option to don and doff at home; and b) the department derived no

particular benefit from having the officers don and doff onsite.

Judge Gould’s dissent complained bitterly about the analytical approach and the result. He pointed out that the majority essentially created a new rule by giving so much weight to whether the donning and doffing is performed onsite. Prior courts’ analyses considered location as just one of **many** factors when evaluating whether an activity was integral and indispensable to the principal work activity (and therefore compensable). No one factor (including location) had been required to ensure compensation.

Judge Gould would have found that the officers should be paid for the donning and doffing of gear (but not uniforms) because, when looking at all the facts and circumstances in context, the officers donned and doffed specialized gear for the particularized benefit of the employer, regardless of where this work happened. Moreover, even if location was a dispositive factor, Judge Gould would likely have found the activity integral and indispensable because he would look not only the official policy, but also the practical reality that the officers donned and doffed onsite due to safety reasons identified by the employer.

The officers’ Petition for Rehearing *en banc* agrees with the dissent, urging the Ninth Circuit to continue using the broader and more context specific test for when work is integral and indispensable to the principal work activity. Well settled precedent has long established that compensable work can be performed at home. It would not be logical to conclude that work done at home is compensable, unless that work is donning and doffing! We will keep readers posted about whether the Ninth Circuit grants a rehearing.



Sacramento County Strikes Out at the Appellate Court in What Will Hopefully Be its Final Attack on Retiree Health Benefits

For well over two years, we have been reporting on the status of multiple cases at the Public Employment Relations Board (“PERB”), involving Sacramento County’s repeated efforts to unilaterally reduce or eliminate future retiree health benefits for current employees. In spite of two final decisions from PERB in favor of the Sacramento County Attorneys and Accountants (“SCAA” and “SCPAA”), the County refused to admit that it violated black letter labor law regarding unilateral changes to retirement benefits for current employees. The County filed a Petition for Writ of Mandate to the Third District Court of Appeal. The Court summarily denied the County’s Petition. PERB is in the process of demanding County compliance with its order, which will include an award of interest.

This is the fourth time that we have defeated the County on this very argument, but this is the first time the Appellate Court has weighed in. We have repeatedly expressed our frustration with the County’s stubbornness, which has now resulted in an order that will cost the County significantly more than had it simply complied with the law in the first place. CBM Public Sector labor partners **Gary Messing** and **Jason Jasmine** have handled this case from the beginning and will continue to fight the County on behalf of SCAA and SCPAA, to ensure that the PERB order is enforced.



Sacramento County Management Association and County Reach Agreement on Representation Election

The Sacramento County Management Association (SCMA) has, for many years, assisted certain managers in Sacramento County with respect to issues of general interest. However, SCMA has not previously been designated the Recognized Employee Organization (REO) for these employees. Recently, SCMA was able to come to an agreement with the County to conduct a representation election that, if successful, will result in SCMA representing almost 900 management-level employees in the County.

SCMA, along with another CBM client, the Sacramento County Attorneys Association (SCAA), are also vying to represent another bargaining unit of approximately 50 attorneys employed by the Sacramento County Counsel’s office.

Jason Jasmine, labor partner in CBM’s Sacramento office, together with **Mike Guiver**, **RoseMary Vaske**, **Brad Buyse**, **Sue Elliott**, and a number of other SCMA representatives, have worked hard in negotiating with the County, obtaining proof of support, coordinating the election, and otherwise preparing SCMA to become the REO. As this issue goes to press, the election has not been conducted. We will provide an update once the results of the election are known.



CDCR Youth Correctional Counselor Reinstated Following Reversal of Termination by SPB

Lina Balciunas Cockrell, labor associate in the Sacramento office of CBM is very pleased to have secured a significant victory on

behalf of CCPOA after a Youth Correctional Counselor and CCPOA member was reinstated to his job upon the State Personnel Board's conclusion there was no evidence to support any of the allegations against him and the SPB dismissed all legal causes for discipline. CDCR had charged **Mike Cazares** with having witnessed an altercation between a ward and another staff member at the N.A. Chaderjian Youth Correctional Facility, failing to restrain the ward following the incident, writing a dishonest report about the incident, collaborating with the other staff in filing a false report and then being dishonest about the incident in his internal affairs interview. Consequently, CDCR terminated Cazares, a 13-year correctional employee with no prior history of discipline.

CDCR introduced evidence at the SPB hearing to demonstrate that the staff member involved and another YCC took some of the wards outside for a recreation period. Cazares stayed behind in the hall to perform room checks on the wards that remained. However, the ward and the other staff at issue apparently never made it out to the recreation yard and instead, remained in the sally port between the dayroom of the hall and the recreation yard.

CDCR introduced a surveillance video showing Cazares and another ward who had stayed behind, watching television in the dayroom. The video also shows that Cazares walked up to the door and looked into the sally port twice before walking back to the counter on the other side of the dayroom when called by the tower officer. CDCR alleged that when Cazares looked into the sally port, he saw the ward and staff engage in a physical altercation, but did nothing to intervene.

CDCR presented evidence showing that when the other staff and ward emerged from the

sally port (about 3 minutes after having entered), the other staff had a bloody lip and told Cazares that the "dude assaulted" him, referring to the ward. The video showed Cazares escorting the ward to his room, unrestrained. CDCR introduced into evidence the report Cazares wrote following the incident, in which he stated that each time he walked over to the sally port, he only saw the staff and the ward talking and did not want to interfere.

The case hinged largely on Cazares's testimony, which the ALJ found credible. Cazares testified that he did not hear any verbal confrontation between the staff and the ward prior to the group going outside for the recreation period because he was away from the hall relieving another YCC. Cazares further testified that he did not see anything unusual occurring in the sally port either time he looked in while the other staff and ward were talking. Cazares said that when the staff and ward emerged from the sally port, they were still talking, calmly with neither one sweating or breathing hard in a manner that would indicate there had just been a physical altercation. The staff had not restrained the ward nor had he activated his alarm. Cazares testified that he gave the ward a verbal order to go to his room and the ward complied, negating the need for physical restraints.

The ALJ noted that the surveillance video did not capture anything that occurred in the sally port, only the dayroom of the hall. The ALJ refused to allow any CDCR witnesses to offer commentary on the video, on the ground that it was inadmissible hearsay. Finally, the ALJ noted that CDCR did not call as witnesses the staff member involved in the alleged altercation, nor the ward involved or any of the wards who had claimed to have witnessed the incident.

Finally, the ALJ acknowledged that Cazares's testimony at the hearing was consistent with his statements to internal affairs investigators and his written report. Thus, the ALJ concluded that CDCR failed to sustain its burden to prove the charges and the penalty of termination must be reversed. Cazares was reinstated to his position and awarded back pay plus interest from the date of his termination.



PERB Issues Another Unfair Labor Practice Complaint on Behalf of SCPAA Against the County of Sacramento

In what has become a common refrain in this publication, we are pleased to announce that the Public Employment Relations Board has issued yet another Complaint against the County of Sacramento in response to the Sacramento County Professional Accountants Association's (SCPAA) Unfair Labor Practice charge.

This time, the Complaint was issued in response to the County's unilateral imposition of furloughs on accountants within SCPAA. The stated basis for the County's imposition of furloughs is a compensation parity clause which ties SCPAA-represented accountants with certain unrepresented employees. Because those employees received furloughs, the County contended it could furlough SCPAA-represented accountants on the basis of compensation parity. This, in spite of the fact that it is only the hours of work that have changed – not the employees' salaries or other benefits.

CBM Sacramento Labor Partner **Jason Jasmine** is representing SCPAA at PERB. It appears that a formal hearing will be set for sometime in August. We will keep you apprised of the progress of this matter.



Mixed Law Enforcement Units Still Covered by PERB

By Marie Tenny

Governor Schwarzenegger recently vetoed Senate Bill 656 ("SB 656"). SB 656 would have amended the Meyers-Milias-Brown Act ("MMBA") to explicitly exempt bargaining units comprised of a mix of peace officers and other employees from the Public Employment Relations Board's ("PERB") jurisdiction. The introduction and veto of this bill arguably clarifies that the current exemption does not apply to mixed bargaining units. Thus, mixed unit labor organizations may continue to file their grievances before PERB.

Existing law establishes PERB as the means to resolve disputes and enforce the statutory rights of employees under MMBA. However, Government Code section 3511 in the MMBA exempts persons that qualify as "peace officers as defined in Section 830.1 of the Penal Code" from PERB's jurisdiction and may bring disputes in the courts. It has been somewhat unclear under the statutory language of section 3511, however, whether a mixed bargaining unit comprised of both 830.1 peace officers, who are exempt from PERB, and other employees (such as Dispatchers, Community Services Officers and Crime Scene Investigators) who are covered by PERB, is subject to PERB's jurisdiction. PERB has asserted jurisdiction over mixed units when the issue affects the entire bargaining unit, but individual peace officers in a mixed unit may file unfair labor practice cases in the courts.

SB 656, which was supported by the Peace Officers Research Association of California ("PORAC"), would have exempted mixed units, comprised of a majority of peace officers, from the jurisdiction of PERB. The California State Association of Counties and the

Regional Council of Rural Counties (“CSAC”) opposed SB 656 because it “believed that it is inappropriate to extend what is now a narrow exemption from PERB for peace officers to a larger group of miscellaneous employees.” Schwarzenegger vetoed the bill because it treats non-peace officer employees differently if they are in an organization with a peace officer majority. He concluded that these non-peace officer employees should not be allowed to “circumvent the existing dispute resolution process that currently exists through the Public Employment Relations Board.”



Police Officers Responding to Child's 911 Call Reporting Domestic Violence Against Mother Did Not Use Excessive Force by Deploying Taser Against Alleged Victim to Get Past Her to Arrest Husband

By Jonathan Yank

In this case, plaintiff Jayzel Mattos pursued claims in the federal District Court for Hawaii under 42 U.S.C. § 1983, asserting that she was subjected to excessive force in violation of her 4th Amendment rights when she was given a five-second taser burst by Maui police officers who were responding to a domestic violence call at her home. The officers were responding to a 911 call by her daughter reporting that her mother and Troy Mattos were engaged in a physical altercation and were throwing things at one-another. As the officers moved to arrest the intoxicated husband, Jayzel Mattos blocked and pushed one of the officers. In order to diffuse the situation and reach the husband, one of the officers subdued Mrs. Mattos with his department-issued taser.

The officers moved for summary judgment on the basis of qualified immunity.

The District Court ruled that material questions of fact existed as to whether the officers’ use of the taser was constitutionally reasonable and denied the motion. The officers appealed.

In *Mattos v. Agarano*, 590 F.3d 1082 (9th Cir. 2010), the 9th Circuit Court of Appeals reversed and dismissed the lawsuit. The Court noted that the use of a taser represents a serious bodily intrusion that can amount to a Fourth Amendment violation. However, the Court recited the established rule that, in analyzing alleged Fourth Amendment “excessive force” claims, courts must balance the seriousness of the bodily intrusion against the relevant government interests. In this case, the Ninth Circuit panel noted that there were several important government interests to weigh against the bodily intrusion, including: (1) the government interest in protecting the officers’ safety (in the setting of a dangerous domestic violence call); (2) the need to arrest an intoxicated and potentially-dangerous suspect who might otherwise cause harm to others; and (3) the government interest in preventing interference with an arrest. According to the Court, these interests outweigh the serious bodily invasion to Mrs. Mattos and foreclosed any potential claim alleging an unconstitutional intrusion.



PERB Asserts Authority to Award Attorneys’ Fees for Untimely ULP Charge Brought in Bad Faith

By Lina Balciunas Cockrell

Rarely is an award of attorneys’ fees and costs part of a decision on an unfair labor practice charge by the California Public Employment Relations Board. However, PERB recently reinforced its authority to make such an award where the circumstances merit in the case

of *Alhambra Firefighters Association, Local 1578 v. City of Alhambra* (2009) PERB Dec. No. 2037-M.

In *Alhambra*, the union brought an unfair labor practice charge alleging that the city unilaterally changed its policy regarding the location of personnel records without giving the union prior notice or the opportunity to bargain. In response, the city denied the charge and claimed that it was untimely, that is, that the union knew or should have known of the conduct complained of more than six months prior to the charge.

The case went to hearing and both sides filed closing briefs. At the hearing, the city gave notice that it would seek sanctions against the union for bringing a frivolous charge. The ALJ concluded that there was ample evidence the union knew or should have known that the personnel files were kept not only in the city's personnel office (allegedly the established practice) but also in the fire department. In coming to this conclusion, the ALJ found the testimony of the union representatives at the hearing "inherently contradictory, illogical and unreasonable" and did not credit them. The ALJ determined that any reasonable person would know or should have known, as early as four years before the charge was filed, that the fire department maintained its own set of personnel records. Thus, the statute of limitations had run and the charge was untimely.

The ALJ then noted that an award of attorneys' fees and costs is appropriate "where a case is without arguable merit, frivolous, vexatious, dilatory, pursued in bad faith or otherwise and abuse of process." Citing *Hacienda La Puente Unified School District* (1998) PERB Dec. No. 1280. Most of the cases where PERB awards fees and costs generally involve parties who have defied PERB order or

have continued to file charges over matters previously dismissed. However, the ALJ concluded that by filing a charge complaining of conduct which it knew or should have known occurred well before the charge was filed, making completely unmeritorious arguments to the contrary and then admitting that at least one of its representatives lied under oath in order to save the case demonstrated that the charge was brought in bad faith.

The ALJ acknowledged that as a result of the union's charge, the city was required to defend the complaint, attend the settlement conference, participate in two days of hearing and prepare a post-hearing brief. The city repeatedly warned the union of its intent to seek sanctions and yet, the union continued to proceed with the charge. Accordingly, the ALJ concluded that the case completely fit the *Hacienda* standard for an award of attorneys' fees and costs in that it was without arguable merit, frivolous, vexatious, dilatory, pursued in bad faith and an abuse of process.



United State Supreme Court Clarifies the Standard Applied to Excessive Force Claims Under the Eighth Amendment

By Jennifer Stoughton

On February 22, 2010, the United States Supreme Court ruled that, when analyzing whether an inmate has satisfactorily plead an excessive force claim under the Eighth Amendment, Courts can only look at what a plaintiff claims was *the nature of the force used* against him/her rather than allegations about the *extent of the injury* sustained. *Wilkins v. Gaddy* (2010) 130 S.Ct. 1175.

The case arose after a North Carolina prisoner filed suit claiming that he was

“maliciously and sadistically” assaulted without provocation by the defendant correctional officer. The plaintiff alleged that the defendant “snatched [the plaintiff] off the ground and slammed him onto the concrete floor then proceeded to punch, kick, knee and choke [him] until another officer had to physically remove him from Wilkins.” As a result of these alleged actions, the plaintiff claimed that he sustained a litany of seemingly insignificant physical injuries including a bruised heel, lower back pain, increased blood pressure, migraine headaches, dizziness, as well as psychological trauma and mental anguish including depression, panic attacks and nightmares of the assault.

On its own motion, the District Court dismissed the lawsuit for a failure to state a claim under the Eighth Amendment because it characterized the plaintiff’s alleged injuries as *de minimus* (i.e. insignificant). The Court pointed out that there was no indication that the plaintiff had even required medical attention. The United States Court of Appeals for the Fourth Circuit later affirmed the ruling.

The Supreme Court reversed, holding that under prior high court precedent, the proper analysis is whether the claimant alleged sufficient facts about the type of the force against him/her. “[T]he use of excessive physical force against a prisoner may constitute cruel and unusual punishment even when the inmate does not suffer serious injury” and courts must look to see if there are sufficient allegations to establish “whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” When the intent is to maliciously or sadistically cause harm, contemporary standards of decency (and therefore the Eighth Amendments proscriptions against cruel and unusual punishment) are

always violated regardless of the extent of the claimant’s injuries.

The Court, however, noted that, while it cannot be the only factor considered, the extent of the harm suffered by a plaintiff can be relevant to establish how much force was used. For instance, an inmate who complains of a push or a shove that causes no discernable injury almost certainly fails to state a claim for excessive force under the Eighth Amendment. Therefore, the Court held that the automatic dismissal of the plaintiff’s claim based solely on the extent of the injuries alleged was improper.

Because the Ninth Circuit has already adopted the standard espoused in *Wilkins v. Gaddy*, this ruling does not signal a significant shift in the legal framework for evaluating excessive force claims against California public safety officers. (See *Oliver v. Keller* (9th Cir. 2002) 289 F.3d 623) However, lest any lower court misunderstand its prior rulings, the Supreme Court left little doubt that the focus of such claims must be on the type of the force used by public safety officers and whether it was “malicious or sadistic”. Given the Court’s clear direction in this case, we are confident that this standard will be applied to all future suits alleging violations of the Eighth Amendment. As a practical matter, this ruling confirms the continued difficulty of litigating these types of lawsuits quickly and with little expense because even claims for seemingly minor injuries may not be able to be disposed of short of trial.



Profile – Marie Tenny

Marie Tenny recently joined the Public Sector Group in March 2010, after practicing law for almost two years in San Francisco. Her prior experience involved complex civil litigation, including patents, false advertising,

antitrust, and contract disputes. Marie graduated from New York University School of Law in May 2008 and received her B.S. degree in psychology from Truman State University in 2005. In law school, Marie worked on civil rights litigation with the NYU United States Supreme Court clinic and mediated small claims court disputes. Marie grew up in the Midwest but fell in love with life on the West coast. She grew up camping every summer with her grandparents and still loves hiking and

exploring caves with her dad. Marie enjoys discovering local restaurants especially sushi places. She's excited to join the team and is looking forward to providing Carroll Burdick & McDonough's clients with effective and efficient representation in all their labor and employment issues.



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