LIEBERT CASSIDY WHITMORE

FIRE WATCH

News and developments in employment law and labor relations for California Fire Safety Management

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LCW NEWS

FIRM VICTORIES

Peace Officer's Termination Upheld On Multiple Charges, Including Dishonesty.

LCW Partner **Scott Tiedemann** and Associate Attorney **Allen Acosta** prevailed on behalf of a city in a peace officer's termination appeal.

In May 2020, a black man was waiting for friends across the street from a trolley station. A white peace officer detained the man for allegedly smoking and committing fare evasion, which the man denied. When the man attempted to walk away, the peace officer grabbed the man's shirt to prevent him from leaving and repeatedly pushed him into a seated position. The officer claimed that the man smacked his hand. The officer arrested the man for assaulting an officer. The officer failed to activate his body-worn camera until after he grabbed the man's shirt. However, a citizen's video of the arrest was posted online and drew significant negative attention, including public protests.

On the ride to the police station, the officer insulted the man. The man responded that the officer could not admit a mistake. The officer then said the man was "getting another charge" and told dispatch to add a charge for violation of Penal Code Section 148, which prohibits a person from intentionally resisting, delaying, or obstructing an officer from performing lawful duties.

Following an investigation, the chief of police terminated the officer based on five grounds of misconduct: two counts of dishonesty (including an allegation that the peace officer filed a false police report regarding the arrest); failure to comply with the department's body-worn camera policy; discourteous behavior towards an arrestee; and exceeding peace officer powers by detaining the man without reasonable suspicion.

The officer appealed his termination to the city's Personnel Appeals Board, alleging that he detained the man based on reasonable suspicion that the man was smoking and/or committing fare evasion because the man was standing on property owned by the transit agency that operates the trolley. However, the officer admitted that he quickly determined the man was not smoking. A sergeant from the transit agency testified that no one has to pay a fare to stand across the street from the trolley platform. Based in part on the above, the city's Personnel Appeals Board upheld the termination in a unanimous vote. In light of this decision, the officer may file a petition for administrative writ of mandamus with the court to seek further review of his termination.

LCW Wins Grievance Arbitration Regarding "Me Too" Salary Increase Provision.

LCW Partner **Adrianna Guzman** and Associate Attorney **Emanuela Tala** won a grievance arbitration on behalf of a county. At issue was the interpretation of a "me too" salary increase provision in the memorandum of understanding between the county and the union (MOU). The union claimed that the county's actions to increase salaries in two different units triggered the "me too" clause.

The "me too" language was originally added to the MOU in the term prior to the current MOU. The original "me-too" language stated that if the county came to an agreement with another recognized employee organization "that includes an equivalent salary adjustment (i.e., 2% cost of living) for all classifications covered under the agreement, the County will implement the same salary adjustment for all employees covered by this MOU, unless the agreement includes an exchange of a current benefit form."

In the negotiations for the current MOU, the county and the union added new language to the "me too" provision. The new language added the word "range" so that the "me too" clause would be triggered by an "equivalent salary *range* adjustment" in another unit.

The union's witness in the arbitration was not at the bargaining table during negotiations for the previous MOU, but she was at the table for the current MOU. Her testimony was limited to her understanding of the meaning of the "me too" clause. The county's witness, however, drafted the original language and was the county's chief labor negotiator at all times relevant to the "me too" grievance. The county's witness testified that the "me too" language only applied to an across-the-board equivalent salary adjustment, and not to the inequivalent salary increases that were classification-specific as had occurred in two other units.

The arbitrator noted that since the union brought the grievance, it had the burden of proving that the MOU's "me too" salary increase language was triggered. The arbitrator interpreted the MOU in favor of the county.

First, the union claimed that the county's decision to add a new step to one salary range for classifications in another unit triggered the clause. The arbitrator disagreed. He found that the addition of the word "range" in the "me too" clause limited the clause to only those instances when the county increased the number the county assigns to each salary range. The evidence showed that while the county had added a new step to certain ranges, it had not increased any salary range numbers.

Second, the union claimed that the county's action to increase salary ranges for classifications in another unit to maintain market parity with other agencies triggered the "me too" clause. The arbitrator disagreed here too. The parity adjustment was different for each of the classifications. The arbitrator found that since the market parity increases were not equal, they were not the "equivalent salary range adjustment" required to trigger the "me too" clause.

The arbitrator found that the remedy portion of the "me too" clause also supported the county's interpretation because it required "the same equivalent salary range adjustment" be applied to those classifications that the union represented. Therefore, the "me too" language was not meant to cover salary range adjustments that varied from classification to classification.

Note:

This case illustrates how important it is to have witnesses who are not only familiar with the bargaining history, but who were at the table when the MOU provision at issue was negotiated. LCW attorneys are expert in preparing and presenting the agency witnesses who will be critical to winning grievance arbitrations.

DISCIPLINE

Ninth Circuit Affirms That Union May Negotiate Settlements Waiving Rights Of Affected Members Without Their Consent.

An employee with the City of Spokane's (City) Fire Department (Department) filed a complaint with the Human Resources Department alleging workplace misconduct by multiple Department employees, including Don Waller. Upon receipt of this complaint, the City and the union representing Waller and the other identified employees entered into a settlement agreement providing for less severe discipline in exchange for waiver of the union members' rights to administratively appeal the discipline.

Following this settlement, Waller sued the City, alleging that it violated his rights under the Due Process Clause of the U.S. Constitution by denying him the opportunity to pursue post-discipline review. The City sought to dismiss the case on the grounds that the union waived Waller's right to seek post-discipline review in the course of negotiating a settlement of the disciplinary charges he and other union members faced. The district court agreed. Waller appealed and the Ninth Circuit affirmed the district court's decision.

The Ninth Circuit held that the district court properly granted the dismissal. The Ninth Court found that a long-standing legal principle supports that unions are free to negotiate settlements without the affected members' consent, even if the settlement waives rights that the members would have otherwise had, such as appeal rights.

Waller v. City of Spokane, Washington, 830 Fed.Appx. 952 (9th Cir. 2020)

Note:

This case reaffirms that a union has broad authority to negotiate settlements that waive a union member's rights. LCW attorneys are skilled in all parts of the disciplinary process, including settling cases when appropriate.

FLSA

U.S. DOL Opinion Letter Says Certain Travel Time Between Home Office And Employer's Offices Is Not Work Time Under The Continuous Workday Rule.

On December 31, 2020, the U.S. Department of Labor (DOL) issued an opinion letter about whether an employer must pay for travel time for an employee who chooses to work from a home office part of the day and from the employer's office for part of the day.

Under the continuous workday rule, the time period from the beginning of an employee's work duties to the end of those activities on the same workday is compensable work time. The continuous workday rule applies once the employee begins the first task that is integral and indispensable to the tasks she was hired to perform. Travel that is part of an employee's principal activity, such as travel between worksites, is generally considered to be part of the day's work and is compensable.

The DOL opinion letter highlighted two categories of travel time that are not compensable under the continuous workday rule.

First, travel is not compensable if the employee is off duty. For example, an employee starts work at the employer's office, travels to a personal appointment (parent-teacher conference), and then completes the work day at home. In this case, the DOL opinion letter found that the employer need not pay for the time the employee spent traveling to and from the conference. The employee is free to use the time for her own purposes (the parent-teacher conference) and is therefore off duty even during the commuting time. The employee is not paid for this travel because she has been completely relieved of work duties and is traveling for her own purposes on her own time.

Second, travel is not compensable if the employee is engaged in normal commuting. For example, an employee works at home from 6-8 a.m., goes to a doctor's appointment from 9-10 a.m., drives to the employer's office at 11, and drives home at 6 p.m. in the evening. As in the first example, the employee is off duty when she travels to and from the doctor's appointment and when she attends the appointment. Although she did start work at home before her travel to the doctor, she was completely freed from work duties once she started traveling to the doctor and she could use the entire time traveling for her own purposes. Such off-duty travel is not compensable under the continuous workday rule. When she traveled from the employer's office to her home at the end of the workday, it was normal commute time that need not be compensated.

The DOL concluded that when an employee arranges for her work day to be divided into a block worked from home and a block worked from the employer's office, separated by a block reserved for the employee for her own purposes, the reserved time is not compensable, even if the employee uses some of that time to travel between her home and the employer's office.

Note:

Under this opinion letter, employees who telecommute from their home office for part of the day and travel to the employer's offices on the same day could be engaged in the normal home to work commute. Normal home to work travel is not compensable work time under the FLSA.

DISCRIMINATION

Employee Could Not Establish That Reduction In Force Was Discriminatory.

David Foroudi worked as a senior project engineer at The Aerospace Corporation (Aerospace). Foroudi's supervisors counseled him regarding deficiencies in his performance and warned him that failure to improve could result in corrective action. Under the collective bargaining agreement, Aerospace management assigned all bargaining unit employees, including Foroudi, to a value ranking based on their performance. "Bin 1" contained the highest-ranked employees and "bin 5" contained the lowest. In 2010 and 2011, Foroudi was ranked as bin 5.

In late 2011, Aerospace learned that its funding would be significantly impacted by Department of Defense budget cuts. In response, Aerospace began implementing a company-wide reduction in force (RIF). The pool of eligible employees was divided into those ranked in bins 4 and 5 in 2011; new employees who were unranked; and employees on displaced status. Management then ranked RIF-eligible employees based on several criteria, including bin ranking, performance issues, and skills and expertise. Foroudi's managers ultimately selected him for the RIF because he was in the lowest ranking bin, he did not have a strong background in algorithmic applications for GPS navigation, and he had received prior performance counseling. Aerospace notified Foroudi he would be laid off in March 2012. In Foroudi's division, one laid off employee was in his 80's, two were in their 70's, 17 were in their 60's, 46 were in their 50's, 24 were in their 40's, and

six were in their 30's. Foroudi's duties were given to an employee who was 14 years younger than Foroudi and who was considered an expert in GPS technology.

In January 2013, Foroudi filed a charge with the California Department of Fair Employment and Housing (DFEH) alleging discrimination, harassment, and retaliation because of his age, association with a member of a protected class, family care or medical leave, national origin, and religion. He also filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC). More than one year later, Foroudi filed an amended DFEH charge alleging that he was laid off because of his protected statuses.

In August 2014, Foroudi and four other former Aerospace employees filed a civil complaint against Aerospace, alleging among other claims, age discrimination in violation of the Fair Employment and Housing Act (FEHA). The complaint also alleged that Aerospace used the RIF as pretext to hide its motivation to terminate Foroudi because of his age, and that the RIF had a disparate impact on employees over the age of 50. In January 2015, the employees filed an amended complaint to add a cause of action under the Federal Age Discrimination in Employment Act and class action allegations.

After a federal court dismissed the employees' disparate impact and class allegations because they were not included in the DFEH charge, the matter was remanded to California superior court. Foroudi subsequently contacted the DFEH and EEOC to amend his charges to include class and disparate impact allegations, but the superior court did not let Foroudi file an amended civil complaint.

Aerospace then moved to dismiss Foroudi's case. Aerospace claimed that he could not establish a prima facie case of age discrimination, nor provide substantial evidence that Aerospace's reasons for the RIF were a pretext for age discrimination. Foroudi argued that discriminatory intent was evident because: 1) he was more experienced and qualified than the younger employee who took over his work; 2) his statistics showed the RIF had a disparate impact on older workers; 3) Aerospace did not rehire him after he was laid off; and 4) his managers gave "shifting" reasons for selecting him for the RIF. The superior court found in favor of Aerospace. Foroudi appealed.

The California Court of Appeal affirmed the superior court's ruling. First, the court upheld the decision to deny Foroudi the opportunity to amend his complaint. The court noted that the EEOC did issue Foroudi a new right-to-sue letter after the federal court remanded the case. But, the exhaustion of EEOC remedies did not satisfy the requirements for Foroudi's state law FEHA claims. While Foroudi attempted to add the class claims to the DFEH charge, he did so more than three years after the DFEH had permanently closed his case and nearly two years after he filed his civil complaint. Foroudi could not argue his charge including the class and disparate impact claims "related back" to his prior DFEH charge because he was asserting new theories that could not be supported by his prior DFEH charge. Accordingly, Foroudi could not show he exhausted his administrative remedies as to his class and disparate impact claims.

Next, the court agreed to enter judgment in favor of Aerospace. The court reasoned that even assuming Foroudi could establish a prima facie case, Aerospace had legitimate, nondiscriminatory reasons for Foroudi's termination that Foroudi could not show were pretextual. Aerospace's evidence showed it instituted the company-wide RIF after learning it faced potentially severe cuts to its funding and selected Foroudi using standardized criteria.

The court found that Foroudi could only proceed by offering "substantial evidence" that Aerospace's reasons for terminating Foroudi were untrue or pretextual and that Foroudi had not meet this burden. For example, the court noted that he was not replaced by a younger employee. Rather, Aerospace eliminated Foroudi's position and created a new position that combined Foroudi's former duties with the duties of an existing employee. Further, the court noted that for Foroudi's statistical evidence to create an inference of intentional discrimination, it had to "demonstrate a significant disparity" and "eliminate nondiscriminatory reasons for the apparent disparity." The statistical evidence Foroudi offered did not account for the age-neutral factors that were considered in connection with the RIF, such as an employee's experience, performance, and the anticipated future need for the employee's skill.

For these reasons, the Court of Appeal affirmed the superior court's ruling and awarded Aerospace its costs on appeal.

Foroudi v. Aerospace Corp., 57 Cal.App.5th 992 (2020).

Note:

Given the impacts of the COVID-19 pandemic, many employers have reduced their workforces. State and federal laws prohibit discrimination in the RIF process. Public agencies should ensure they are evaluating employees according to standardized criteria that are not age-related to avoid claims that they are discriminating against employees 40 and above.

LABOR RELATIONS

MOU Provision Allowing Purge Of Negative Personnel Records Over One Year Old Violated The Public Policy Supporting The State's Merit System.

The California Department of Human Resources (State) had a memorandum of understanding ("MOU") with the International Union of Operating Engineers (the Union) regarding terms and conditions of employment for State employees classified as bargaining unit 12. MOU Article 16.7(G) said that "materials of a negative nature" placed in an employee's personnel file shall, at the request of the employee, "be purged ... after one year." This provision did not apply to "formal adverse actions" as defined in the Government Code or to "material of a negative nature for which actions have occurred during the intervening one year period."

In 2014 and 2015, an employee in bargaining unit 12, referenced as B.H., reviewed his personnel file at the Department of Water Resources (DWR) and requested that materials of a negative nature be purged. In March 2016, DWR disciplined B.H. by reducing his salary by 10% for one year. This discipline was based on various acts or omissions between 2013 and the end of 2015. To support the discipline and demonstrate that B.H. received progressive discipline, DWR referenced numerous counseling and corrective memoranda that contained negative material in the notice of disciplinary action. The dates of these memoranda ranged from 2007 to 2015.

After B.H. appealed his discipline, the parties reached an agreement to settle the disciplinary action. In the settlement agreement, B.H. agreed to accept a 10% salary reduction for six months and waive his right to challenge his disciplinary action in any other proceeding. During the settlement discussions, the Union filed a grievance alleging the DWR violated MOU Article 16.7 by relying on prior corrective action to discipline B.H. since the memoranda on file for more than one year should have been purged. The parties were unable to resolve the dispute and participated in arbitration. The arbitrator found the State violated the MOU and ordered the State to "cease and desist" from violating Article 16.7.

The State subsequently sought trial court review of the award. In its lawsuit, the State argued the award should be vacated because the arbitrator's interpretation of Article 16.7 violated public policy by undermining State departments' ability to take appropriate disciplinary action based on progressive discipline. The State also argued the arbitrator's interpretation of Article 16.7 would interfere with the State Personnel Board's constitutional duty to review disciplinary action. The trial court disagreed and found that the arbitrator correctly interpreted the MOU. The State appealed.

The merit principal of State civil service employment mandates that: "In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination." Under this merit principle, State employees are to be recruited, selected, and advanced under conditions of political neutrality, equal opportunity, and competition on the basis of merit and competence. MOU's, even when approved by the Legislature, may not contravene the merit principle.

The court noted that enforcing Article 16.7 as the arbitrator had interpreted it would impermissibly undermine the State merit principle. This is because the State would be unable to retain, consider or rely on negative material in counseling and corrective memoranda older than one year old after a file-purge request. The court reasoned that these documents memorialize an employee's ongoing work performance, provide warnings of areas needing improvement, and may have a material bearing on subsequent disciplinary decisions. Purging these records would substantially undermine that State's ability to make fair and fact-based evaluations of employee performance and take disciplinary action based on merit. For these reasons, court concluded the arbitrator's decision violated public policy.

Further, the court concluded the arbitrator's interpretation would interfere with the State's ability to carry out progressive discipline, which is required by the State Personnel Board. The court noted that the DWR had extensively documented B.H.'s behavior over the years with counseling and corrective memoranda. However, under the arbitrator's interpretation, that evidence had to be removed and could not be used or relied on to support the disciplinary action or to verify that progressive discipline occurred. If B.H. exhibited similar work deficiencies in the future warranting disciplinary action, DWR would have no record that it followed progressive discipline. Finally, the State Personnel Board could not confirm whether the DWR followed progressive discipline rules if the purge was permitted.

Thus, the court determined the trial could should have vacated the arbitrator's award.

Dep't of Human Res. v. Int'l Union of Operating Engineers, 2020 WL 7395171 (Cal. Ct. App. Dec. 17, 2020).

Note:

The court explicitly limited its opinion to the one-year purge policy: "We offer no opinion whether a three-year provision . . . would survive the same public policy challenge against which the MOU provision in this case—with its one-year provision—did not." As a result, it remains unclear whether an MOU provision requiring the purging of negative material after more than one year would violate the public policy supporting the State's merit system.

PERB Rules County Impermissibly Surface Bargained Revisions To Class Specifications.

The County of Sacramento's Department of Airports has approximately 11 Airport Operations Dispatchers II, and three Airport Operations Dispatchers Range B. According the job description for the Airport Operations Dispatcher I/II classification, all dispatchers must have no criminal history, a valid California Driver License, meet certain physical requirements, and pass a background check. All dispatchers must perform a variety of communications functions, including receiving, evaluating, and responding to requests for emergency and non-emergency services.

In 2016, the County's Emergency Medical Services Agency notified the County that any dispatch units accepting calls for emergency medical assistance would be required to use an updated dispatch procedure. It also required all emergency medical dispatchers to obtain and maintain an Emergency Medical Dispatch (EMD) certification. To obtain an EMD certification, an emergency medical dispatcher must: 1) be 18 years of age or older; 2) possess a high school diploma or general education equivalent; 3) possess a current, basic Healthcare Provider Cardiac Life Support card; and 4) complete an approved training course.

After receiving notice of the new procedure, the County initiated a classification study to determine whether to revise the Airport Operations Dispatcher I/II classification to include the EMD certification requirement. The County notified United Public Employees, Inc. (Union), the union representing the Airport Operations Dispatcher I/II class specification, of the classification study and offered to meet and confer over the revisions and the certification requirement.

After the parties agreed to several class specification revisions, the County withdrew the changes asserting it was not required to bargain the EMD certification requirement. Throughout the course of the negotiations, the Union sought a wage increase based on the certification requirement. However, the County rejected the Union's proposals, stating that the wage proposals should be raised during the negotiations for the parties' successor memorandum of understanding (MOU), which were occurring simultaneously. The Union asked to continue discussions regarding the wage issue, but the County left the negotiations table. While the County later indicated it remained willing to engage in effects bargaining, the Union did not request it. The County subsequently implemented the EMD certification requirement, but did not revise the Airport Operations Dispatcher I/II class specification.

The Union then filed an unfair practice charge, alleging the County failed to meet and confer in good faith over revisions to the class specification. The Administrative Law Judge (ALJ) issued a proposed decision concluding the County made an unlawful unilateral change to the terms and conditions of the dispatchers' employment, even though the Union's unfair practice charge never included a unilateral change allegation. The County filed exceptions to the ALJ's decision.

The Public Employment Relations Board (PERB) concluded it was improper for the ALJ to analyze the case under the unilateral change theory. PERB noted that a complaint alleging a unilateral change – a per se violation of the Meyers-Milias-Brown Act (MMBA) – typically alleges that the respondent changed a policy without affording the exclusive representative prior notice or an opportunity to meet and confer over the change or its effects. While the Union did not allege that the County changed the policy without providing the union notice or an opportunity to meet and confer over the change or its effects, PERB noted that this omission did not necessarily foreclose consideration of the unilateral change theory. However, the Union neither amended its complaint nor demonstrated that the unalleged violation doctrine had been satisfied. Further, at no point during PERB's investigatory or hearing processes did the Union raise an independent unilateral change theory. Thus, PERB concluded the County did not have sufficient notice that a unilateral change theory would be litigated in this case.

While PERB determined the Union could not establish a unilateral change theory, it nonetheless determined that the County violated its bargaining obligations under the MMBA by surface bargaining over the revisions to the class specification. PERB first noted that the County was obligated to negotiate about the addition of the EMD certification requirement. PERB reasoned that changes to job specifications, including certification requirements and other qualifications, are within the scope of representation unless the changes at issue do no more than is required to comply with an externally-imposed change in the law. The County attempted to invoke this exception since the Emergency Medical Services Agency required the certification, but PERB concluded that the exception did not apply. PERB found that the Emergency Medical Services Agency was a County entity, so it did not qualify for the externally-imposed law exception. In addition, PERB found that the underlying state Emergency Medical Services Act did not set an inflexible standard or ensure immutable provisions that would negate the County's duty to bargain with the Union.

Next, PERB also concluded that the County was required to bargain with the Union regarding its wage proposals. While the County argued that the Union was required to make its wage proposals in successor MOU negotiations, PERB disagreed. PERB noted that the Union's wage

proposals were made in response to the County's proposed revisions to the class specification, which included a new training and certification requirement. PERB reasoned it would be "patently unfair under these circumstances" to allow the County to propose new terms and conditions of employment within the scope of representation while simultaneously preventing the Union from making integrally related counterproposals. Indeed, such conduct would constitute prohibited "piecemeal" bargaining tactics. Thus, once the County proposed revised class specifications, it was obligated to negotiate at the same table any proposals by the Union on related matters within the scope of representation.

Having concluded that the County was required to bargain over the revisions to the class specification and the Union's wage proposals, PERB determined that the County had surface bargained. PERB noted that the ultimate inquiry in surface bargaining cases is whether the totality of the conduct was sufficiently egregious to frustrate negotiations or avoid agreement. PERB reasoned the County exhibited a take-it-or-leave it attitude by taking the position the EMD certification requirement was not negotiable and repeatedly rejecting the Union's attempts to discuss a wage increase tied to the change in the class specification. Further, the County implemented the EMD certification requirement without first bargaining with the Union to impasse or agreement. For these reasons, PERB found the County surface bargained in violation of the MMBA.

United Public Employees v. County of Sacramento, PERB Decision No. 2745-M (2020).

Note:

The typical remedy for surface bargaining includes an order to cease and desist from negotiating in bad faith and from interfering with protected rights. Further, if an employer implements changes to terms and conditions within the scope of representation without first reaching a bona fide impasse in negotiations, PERB orders the employer to restore the status quo. Here, PERB ordered the County to cease and desist from negotiating in bad faith and to restore the conditions that existed prior to the County's surface bargaining.

A Manager's Emails Praising An Employee's Criticism Of Union Interfered With Union's MMBA Rights.

California Public, Professional and Medical Employees, Teamsters Local 911 (Union) represents five classifications of lifeguards in two bargaining groups at the City of San Diego. At all relevant times, the Union and the City were parties to a single memorandum of understanding (MOU) covering both units.

The City's Police Department receives all emergency 911 calls. Prior to December 2016, the City's police dispatchers would transfer certain emergency calls to one communications center to dispatch firefighters and paramedics, and to a separate center to dispatch lifeguards.

On December 15, 2016, the City changed its policy to require dispatchers to first route inland water rescue calls to the firefighters and paramedics. Under the new policy, dispatchers began to send firefighters as the primary responders to certain calls to which lifeguards had previously responded. The Union perceived this change caused a loss of bargaining unit work and filed a grievance. The Union also protested the policy change in letters to the City Councilmembers and the City's Fire Chief in January and February 2017.

In March 2017, the Union claimed at its press conference that the new dispatch policy had contributed to the drowning of a young child. Soon afterward, the City held its own press conference to present its view of the tragedy. At a morning briefing after the Union's press conference, the City's Lifeguard Chief told the lifeguards that Department management was "displeased" at the Union's performance at the press conference and that each lifeguard participant would be held accountable. A Marine Safety Lieutenant emailed other lifeguards from his personal email account using the subject heading "Lifeguard Union Fail" and indicating that the Union's press conference had let down City lifeguards and sullied their reputation. The Lifeguard Chief responded to the Marine Safety Lieutenant by email to praise him for his leadership.

In June 2017, the City and the Union executed a settlement agreement requiring the Union to dismiss the 2016 dispatch policy grievance. In exchange, the City agreed to rescind the new dispatch policy and restore the status quo that existed prior to December 2016. Additionally, the parties agreed to meet and confer in accordance with the Meyers-Milias-Brown Act (MMBA) on the mandatory subjects of bargaining, including the dispatch procedure for inland water rescue.

Thereafter, the parties met to negotiate on several occasions. The City's initial proposal for a new dispatch procedure largely mirrored the procedure the City had agreed to rescind under the grievance settlement agreement. The Union responded by filing an unfair practice charge. While the parties continued negotiating, they were never able to reach an agreement. The City maintained the same dispatch policy it had followed prior to the grievance.

During this same time, the Union and the City were also disputing the makeup of the City's special search and rescue teams and their deployment to Hurricane Harvey. The Union's spokesperson held another press conference to protest what he considered to be the Fire Chief's action

to block a City search and rescue team from responding to that hurricane. The City issued its own press statement in response. The Fire Chief then decided to reduce lifeguard representation on one of the City's special search and rescue teams because he did not believe the lifeguards had all of the necessary skills or experience for emergency operations.

Following this press conference, the same Marine Safety Lieutenant emailed an internal distribution list with the subject heading "Union Fail Part V." In this email, the Marine Safety Lieutenant referenced a letter from another city's fire chief that criticized the Union's comments at the press conference. He also wrote that based on the Union's actions, lifeguard representation on a particular search and rescue team was being reduced 40%. The Lifeguard Chief once again praised the Marine Safety Lieutenant via email. The Fire Chief then reduced lifeguard representation on the team in question from 11 lifeguards to seven. The City later promoted the Marine Safety Lieutenant to a position in another unit.

The Union then amended its unfair practice charge to allege the City violated the MMBA by: 1) negotiating in bad faith during the negotiations required under the grievance settlement; 2) retaliating against the Union and the employees it represents for protected activities; and 3) sending emails that constituted unlawful interference with MMBA rights.

The Public Employment Relations Board (PERB) addressed each of the Union's allegations in turn. First, PERB concluded that the City did not bargain in bad faith in the negotiations following the grievance settlement. PERB noted that the City adequately explained its proposals and showed flexibility in its approach from the outset. In addition, multiple City witnesses testified that the City indeed reverted to the pre-grievance dispatch policy pursuant to the settlement agreement. PERB dismissed the Union's bad faith bargaining claim.

Second, PERB considered the Union's retaliation claim. To establish a prima facie case of retaliation, the charging party has the burden to prove that: 1) one or more employees engaged in an activity protected by a labor relations statue that PERB enforces; 2) the respondent had knowledge of the protected activity; 3) the respondent took adverse action against one or more employees; and 4) the respondent took the adverse action "because of" the protected activity. If the charging party meets its burden, the responding party then has the opportunity to prove that it would have taken the same action absent protected activity.

PERB found the Union could establish a prima facie case. But, PERB ultimately concluded the City could prove that it would have taken the same action, even absent the Union's protected activities. PERB found that an email from the Marine Safety Lieutenant to the California Office of Emergency Services Fire and Rescue Chief, more than any protected activity, caused the Fire Chief to reduce lifeguard representation on one of the City's special search and rescue teams.

Lastly, PERB concluded that two emails the Lifeguard Chief sent to the Marine Safety Lieutenant praising him for the "Union Fail" emails constituted unlawful interference. To establish a prima facie interference case, a charging party must show that a respondent's conduct tends to or does result in some harm to protected MMBA rights. First, PERB found that the emails linked the reduction of Union work to the Union's press conference. Second, PERB reasoned that lifeguards learning of these emails could infer that they might avoid adverse action or obtain preferential treatment if they opposed Union leadership. PERB found that this was especially true in light of the Lifeguard Chief's statement that lifeguards participating in the first press conference would be held accountable.

California Public, Professional and Medical Employees, Teamsters Local 911 v. City of San Diego, PERB Decision No. 2747-M (2020).

Note:

This case demonstrates that unfair practice charges often involve numerous distinct claims and incidents. Management can avoid interference charges by not praising employees for opposing an employee organization's leadership.

DISABILITY RETIREMENT

Psychological Injuries From A Failure To Receive Promotion Were Not Related To Job Duties.

In early 2010, the County of Los Angeles dissolved its Office of Public Safety and its functions were absorbed by the County's Sheriff's Department (Department). As part of the merger process, Edward Marquez, an officer in the Office of Public Safety, applied for a deputy sheriff position with the Department. In June 2010, Marquez was promoted on the condition that he pass a background check, medical and psychological examination, and polygraph interview. The Department's psychologist concluded that Marquez was psychologically unfit to be a deputy sheriff and better suited for the position of custody assistant. The psychologist's determination was based in part on her a review of Marquez's history of discipline. That history included discipline related to a conviction for driving under the influence and pulling over his ex-girlfriend to issue a citation for personal reasons.

Marquez appealed his disqualification from the deputy sheriff position, but accepted the custody assistant position in July 2010 while his appeal was pending. In September

2010, the County notified Marquez that his appeal had been denied. Ten days later, Marquez began a medical leave. Marquez never returned to work and never worked as a custody assistant.

In October 2010, Marquez filed a request for service-connected disability retirement with the Los Angeles County Employees Retirement Association (Association) pursuant to Government Code section 31720. Marquez claimed he was permanently incapacitated for the positions of custody assistant and deputy sheriff based on psychiatric injuries caused by his "demotion" from deputy sheriff to custody assistant. Marquez's injuries allegedly resulted in a chronic pain disorder and insomnia. Following multiple psychological assessments, the Association denied Marquez's request, and determined that he was not permanently incapacitated from the performance of his job duties. Marquez appealed the Association's decision and requested an administrative hearing.

At the administrative hearing, the referee considered the results of Marquez's psychological assessments and determined that Marquez was permanently incapacitated from performing his duties due to his psychological condition. The referee also determined that Marquez's injuries arose out of employment because they related to his disqualification from the deputy sheriff position. However, the referee found that Marquez did not sustain the injuries "in the course and scope of employment" because they were not related to his performance of job duties and were instead related to the selection process for a possible promotion to deputy sheriff. On these grounds, the referee recommended that the Association deny Marquez's request for service-disability retirement and instead grant him a nonservice-connected disability retirement on the basis of psychological disability. The Association adopted the referee's findings. Marquez filed a petition for writ of mandate, alleging that his psychological incapacity was service connected.

The trial court ordered the Association grant Marquez's request for a service-connected disability retirement. The trial court found that Marquez's psychological injury occurred in the course of his employment because he was required to undergo a fitness-for-duty examination as a condition of continued employment when the Office of Public Safety merged with the Department. The Association appealed. The California Court of Appeal disagreed, holding that the trial court erred.
The Court of Appeal described the requirements for an employee to qualify for service-connected disability retirement under Government Code section 31720 as follows: "Marquez was required to establish that his incapacity is a result of injury or disease arising out of and in the course of the member's employment, and such employment contributes substantially to such incapacity." The Court of Appeal further noted that for an injury to occur "in the course of" employment, the employee must have been doing "those reasonable things which his … employment expressly or impliedly permits him to do."

The Court of Appeal held that Marquez's psychological injuries did not arise in the course of his employment because the connection between the Department's decision not to promote Marquez and his subsequent disabling psychological condition was too attenuated. Although Marquez incurred psychological distress as a result of failing to receive promotion to deputy sheriff, the Court of Appeal noted that the decision not to promote and Marquez's reaction to that decision did not occur in connection with Marquez's job duties.

The Court of Appeal reversed and remanded the matter back to the trial court. The Court of Appeal ordered that on remand the trial court should determine whether Marquez is entitled to service-connected disability retirement based on any other factors.

Marquez v. Los Angeles County Employees Retirement Association, 2020 WL 6882209 (2020).

Note:

This case is unpublished and therefore generally not citable. However, it is an important reminder that disability retirement cases are highly fact specific. LCW attorneys specialize in advising public agencies regarding retirement law.

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LABOR RELATIONS CERTIFICATION PROGRAM

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New to the Firm

Chelsea M. Desmond is an Associate in LCW's Los Angeles office where she defends public agencies against a wide variety of employment claims brought under state and federal law, including discrimination, harassment, and retaliation based on race, gender, sexual orientation, disability, and whistleblower retaliation.

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Yesenia Z. Carrillo is an Associate in LCW's Fresno office where she advises clients on employment law matters, including employee contracts, settlement agreements, retention policies, wage and hour compliance and employment handbooks.

She can be reached at 559.256.7816 or ycarrillo@lcwlegal.com.

Firm Publications

To view these articles and the most recent attorney-authored articles, please visit: **www.lcwlegal.com/news.**

Senior Counsel **David Urban** and Associate **Kristin Lindgren** recently wrote "Ruling Says Unruh Act Does Not Apply to School Districts," which was published in the *Daily Journal* on Nov. 27, 2020. The piece explores whether public school districts constitute "business establishments" under the Unruh Civil Rights Act.

Managing Partner **J. Scott Tiedemann** and Associate **Brian Hoffman** explored whether the Fourth Amendment applies to a police shooting if the suspect escapes in the "High Court to Rule Whether Bullets Always Qualify as a Seizure", which was published in the Nov. 6, 2020 issue of the *Daily Journal*. The article highlights the Oct. 14 oral argument in *Torres v. Madrid* that was presented to the U.S. Supreme Court, which clarifies what constitutes a seizure under the Fourth Amendment.

Partner **Shelline Bennett** and Associate **Lars T. Reed** penned "Best Practices for Accommodating Nonconforming Gender Identities in the Workplace" for *HR News*. The article defines the term "nonbinary", explores the increase in individuals who do not identify as cis gender, highlights legal protections for nonbinary individuals and provides advice on how to create welcoming workspaces for persons who are gender nonconforming.

Managing Partner **J. Scott Tiedemann**, Partner **Jennifer Rosner** and Associate **Lars T. Reed** recently wrote "CPCA Public Safety Annuitants" for the Winter 2020 edition of the *California Police Chief Magazine*. The piece highlights the current police talent drain caused in part by increased police scrutiny and COVID-19 and addresses the need to hire retirees. The trio share critical information regarding staffing, benefits, compliance, and more that CalPERS retirees need know during post-retirement work.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

Jan. 13 **"Labor Negotiations from Beginning to End"**
Central Valley ERC | Webinar | Che I. Johnson

Jan. 13 **"Current Developments in Workers' Compensation"**
Ventura/Santa Barbara ERC | Webinar | GMK Attorney

Jan. 14 **"Managing the Marginal Employee"**
LA County HR Consortium | Webinar | Christopher S. Frederick

Jan. 14 **"Public Sector Employment Law Update"**
East Inland Empire ERC | Webinar | Richard S. Whitmore

Jan. 14 **"Public Sector Employment Law Update"**
San Diego ERC | Webinar | Richard S. Whitmore

Jan. 14 **"Public Sector Employment Law Update"**
West Inland Empire ERC | Webinar | Richard S. Whitmore

Jan. 20 **"A Guide to Implementing Public Employee Discipline"**
North State ERC | Webinar | Stephanie J. Lowe

Jan. 20 **"A Guide to Implementing Public Employee Discipline"**
South Bay ERC | Webinar | Stephanie J. Lowe

Jan. 21 **"Employees and Driving"**
San Joaquin Valley ERC | Webinar | Michael Youril

Jan. 27 **"Public Sector Employment Law Update"**
Coachella Valley ERC | Webinar | Richard S. Whitmore

Jan. 27 **"Public Sector Employment Law Update"**
Gold Country ERC | Webinar | Richard S. Whitmore

Jan. 27 **"Public Sector Employment Law Update"**
San Gabriel Valley ERC | Webinar | Richard S. Whitmore

Jan. 27 **"Public Sector Employment Law Update"**
Ventura/Santa Barbara ERC | Webinar | Richard S. Whitmore

Jan. 28 **"Maximizing Performance Through Evaluation, Documentation and Corrective Action"**
Bay Area ERC | Webinar | Christopher S. Frederick

Jan. 28 **"Maximizing Performance Through Evaluation, Documentation and Corrective Action"**
North San Diego County ERC | Webinar | Christopher S. Frederick

Feb. 3 **"Managing COVID-19 Issues: Now and What's Next"**
Orange County | Webinar | Peter J. Brown & Alexander Volberding

Feb. 3 **"Difficult Conversations"**
South Bay ERC | Webinar | Stacey H. Sullivan

Feb. 4 **"File That! Best Practices for Employee Document and Record Management"**
Gateway Public ERC | Webinar | James E. Oldendorph

Feb. 4 **"File That! Best Practices for Employee Document and Record Management"**
San Gabriel Valley ERC | Webinar | James E. Oldendorph

Feb. 4 **"Navigating the Crossroads of Discipline and Disability Accommodation"**
Imperial Valley ERC | Webinar | Jennifer Rosner

Feb. 10 **"Supervisor's Guide to Understanding and Managing Employees' Rights: Labor, Leaves and Accommodations"**
Central Coast ERC | Webinar | Jack Hughes

Feb. 10 **"Supervisor's Guide to Understanding and Managing Employees' Rights: Labor, Leaves and Accommodations"**
Napa/Solano/Yolo ERC | Webinar | Jack Hughes

Feb. 10 **"Supervisor's Guide to Understanding and Managing Employees' Rights: Labor, Leaves and Accommodations"**
Ventura/Santa Barbara ERC | Webinar | Jack Hughes

Feb. 10 **"Prevention and Control of Absenteeism and Abuse of Leave"**
North State ERC | Webinar | Brian J. Hoffman

Feb. 11 **"The Art of Writing the Performance Evaluation"**
East Inland Empire ERC | Webinar | I. Emanuela Tala

Feb. 11 **"The Art of Writing the Performance Evaluation"**
San Joaquin Valley ERC | Webinar | I. Emanuela Tala

Feb. 11 **"Maximizing Supervisory Skills for the First Line Supervisor - Part 1"**
LA County HR Consortium | Webinar | Kristi Recchia

Feb. 11 **"Human Resources Academy I"**
San Diego ERC | Webinar | Kristi Recchia

Feb. 17 **"The Art of Writing the Performance Evaluation"**
Central Valley ERC | Webinar | Stephanie J. Lowe

Feb. 17 **"Administering Overlapping Laws Covering Discrimination, Leaves and Retirement Part 1"**
Gold Country ERC | Webinar | Richard Bolanos & Richard Goldman

Feb. 25 **"The Future is Now - Embracing Generational Diversity & Succession Planning"**
North San Diego County ERC | Webinar | Christopher S. Frederick

Feb. 25 **"Managing the Marginal Employee"**
Humboldt County ERC | Webinar | Erin Kunze

Feb. 25 **"Managing the Marginal Employee"**
San Mateo County ERC | Webinar | Erin Kunze

Feb. 25 **"Supervisor's Guide to Public Sector Employment Law"**
Coachella Valley ERC | Webinar | Ronnie Arenas

Feb. 25 **"Supervisor's Guide to Public Sector Employment Law"**
Ventura/Santa Barbara ERC | Webinar | Ronnie Arenas

Customized Training
Our customized training programs can help improve workplace performance and reduce exposure to liability and costly litigation. For more information, please visit www.lcwlegal.com/events-and-training.

Jan. 13 **"Ethics in Public Service"**
Chino Basin Water Conservation District | Webinar | Stacey H. Sullivan

Jan. 14 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Costa Mesa | Webinar | I. Emanuela Tala

Jan. 20 **"The Brown Act"**
City of Buena Park | Webinar | Erin Kunze

Jan. 21 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Hesperia | Webinar | Joung H. Yim

Jan. 27 **"Law and Standards or Supervisors"**
Orange County Probation Department | Webinar | Mark Meyerhoff

Feb. 8 **"Ethics in Public Service"**
City of Bellflower | Webinar | Stephanie J. Lowe

Speaking Engagements

Jan. 13 **"Telecommuting Policies: Hot Topics & Key Issues To Consider"**
Channel Islands Public Management Association-Human Resources (CIPMA-HR) Webinar | Webinar | Alexander Volberding

Jan. 29 **"Public Sector Employment Law Update"**
County Personnel Administrators Association of California (CPAAC) Central Valley Meeting | Webinar | Shelline Bennett

Feb. 3 **"Supervising & Managing Employees After COVID-19: Navigating Employee Leave Rights and Teleworking & Other Accommodation Requests"**
Public Agency Risk Managers Association (PARMA) Annual Conference | Webinar | Jennifer Rosner

Feb. 9 **"Annual Employment Law Update: Recent Cases and Trends"**
California Special District Association (CSDA) Webinar | Webinar | Che I. Johnson

Feb. 18, 19 **"LCW Annual Conference"**
LCW Conference 2021 | Virtual

Seminars / Webinars
For more information and to register, please visit www.lcwlegal.com/events-and-training/webinars-seminars.

Jan. 21, 28 **"Nuts & Bolts of Negotiations"**
Liebert Cassidy Whitmore | Webinar | Kristi Recchia & Laura Drottz Kalty

Feb. 2 **Introduction to Labor Negotiations for New Elected Officials**
Liebert Cassidy Whitmore | Webinar | Peter J. Brown & Kelly Tuffo

Feb. 25 **"PERB Academy"**
Liebert Cassidy Whitmore | Webinar | Kristi Recchia & Adrianna E. Guzman

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