

Once the employer is shown to have interfered with its employees' MMBA rights, the burden shifts to the employer to provide a legitimate justification for its conduct. The County argued that it had a legitimate business necessity for the gag order, namely to: (1) ensure the investigation was free from improper collusion or coercion by the subject employee; and (2) treat all employees under investigation the same. The County also said that the gag order was justified because correctional deputies work in dangerous conditions with real threats of violence.

PERB found that the County did not meet its burden of explaining why confidentiality was necessary in this case. First, PERB found that the County's stated concerns were only general and did not specifically apply to Scimeca's case. Second, PERB said the County did not offer any facts to explain why safety would have been compromised if Scimeca had been able to communicate during the investigation, or whether Scimeca's alleged misconduct related to abuse of his authority or to intimidation of employees or inmates. PERB concluded that the County had no particular reason for directing Scimeca not to communicate with his coworkers regarding the investigation. Both PERB and the NLRB have held that generalized or blanket gag orders during investigations are not sufficient to outweigh employee representational rights.

In addition, PERB was not persuaded by the County's argument that it could not provide the basis for its directive to Scimeca because Scimeca refused to waive his privacy rights in his peace officer personnel records. PERB noted that the County could have filed the necessary *Pitchess* motion to attempt to reveal Scimeca's records, but it did not do so.

PERB concluded that the County's gag order interfered with not only Scimeca's rights to discuss the terms and conditions of his employment with co-workers, but also with the right of the CPOA to represent its members in their employment relations with the County.

County of Santa Clara, PERB Decision No. 2613-M (2018).

NOTE:

NLRB and PERB precedents do not allow blanket gag orders. Instead, the employer must first analyze whether in any given investigation: witnesses need protection; evidence is in danger of being destroyed; testimony is in danger of being fabricated; or there is a need to prevent a cover up. Agencies are encouraged to review and update their notices of investigation and administrative leave. LCW's Workbooks, which are available through subscription to the Liebert Library, provide updated notices to help ensure that public agencies are complying with the requirements of this frequently changing area of law. Go to <https://liebertlibrary.com/> for more information.

County Violated MMBA by Refusing Employee's Request for Representation and Disciplining Him for Making the Request.

Joel Madarang was a Custody Recreation Supervisor at the County of San Joaquin's jail. As a Custody Recreation Supervisor, Madarang supervised inmate recreation programs. In 2014, Madarang began conducting bingo games for the female general population inmates on Thursday afternoons. Later, Madarang's supervisor, Kristen Hamilton, emailed him directing him to change the start time of the bingo games from 1:00 p.m. to 10:30 a.m. in order to make room for a new mental health program designed to decrease the recidivism rate.

In the following months, Madarang held numerous bingo games in the morning. However, on three occasions, he held bingo games in the afternoon. Madarang understood that Hamilton had directed him to move the time of the bingo game so as not to interfere with the new mental health program, but he also believed he had discretion to make changes to the recreation schedule. As a result, Madarang did not seek Hamilton's authorization before holding the bingo games in the afternoon.

Hamilton learned that the bingo games Madarang held in the afternoon were affecting the attendance of the mental health program. Hamilton sent Madarang an email asking why he was holding

bingo games in the afternoon when she had directed him to hold them in the morning. After Madarang explained verbally, Hamilton sent a follow-up email expressing her frustrations and directing Madarang to write a memo explaining why he failed to follow her directions and to bring it to her office.

Madarang told Hamilton that he wanted to speak to a union representative first. Hamilton responded that Madarang did not need a union representative for this and that he should just write the memo so she could get his side of the story and correct his behavior. Madarang continued to request a union representative prior to writing the memo.

Hamilton consulted with the jail's custodial captain, who told her that if Madarang wanted to speak with a representative, he should be allowed to bring one when he delivered Hamilton the requested memo. Instead of relaying that information to Madarang, however, Hamilton requested an internal affairs investigation regarding Madarang's refusal. The County placed Madarang on paid administrative leave and investigated the allegations against him. Madarang received a 10-day suspension for insubordination.

PERB found that the County violated the MMBA by refusing to grant Madarang's request for a union representative, and then by disciplining him because of his request. PERB noted that "[a]n employer faced with a valid request for representation has three options. It may: (1) grant the request; (2) discontinue the interview/request for information and investigate through other means; or (3) offer the employee the option of continuing the interview without representation or having no interview at all." PERB noted that Hamilton's order that Madarang draft the memo and bring it to her was well outside an employer's permissible responses to an employee's request for a representative.

PERB also found that by initiating an investigation into Madarang's alleged insubordination after he repeatedly requested representation, the County punished him for making such requests. There was no evidence that Hamilton had considered discipline or sought to involve internal affairs

before Madarang requested a representative. PERB noted that there would not have been an internal affairs investigation or discipline absent Madarang's request for representation. Thus, PERB concluded that the County violated both Madarang and the union's rights under the MMBA.

County of San Joaquin (Sheriff's Dep't), PERB Decision No. 2619-M (2018).

NOTE:

Agencies must allow an employee the right to representation if: the employer seeks to elicit information that the employee reasonably believes could potentially affect the employment relationship; and the employee asks for a representative.

County Violated MMBA by Changing Performance Targets without Consulting the Union.

The County of Kern's Department of Mental Health operates a mental health clinic. Medi-Cal reimburses the Department for some of the services it provides. These reimbursable services are known as "direct services."

Within the Department, six divisions provide direct services to clients. The Adult Care Division generally expected employees to spend 50% of their available time performing direct services, while other divisions generally expected employees to spend 75% of their available time doing so. Division supervisors had discretion to implement a formula for calculating whether employees met these targets. These formulas varied among divisions and supervisors.

In September 2014, the County created a new, Department-wide 75% direct services target and a corresponding Department-wide formula. These policies increased the direct services target from 50% to 75% for the Adult Care Division employees, and standardized the method for evaluating whether employees met their targets.

The County did not provide advance notice of the changes to the union representing Department employees. At a labor-management meeting, the union asked to meet and confer with the County over the new policies. The union also

asked for a copy of the formula the Department was using. A County representative emailed the union a copy of formula previously used by one of the Department's divisions, but not the new, Department-wide formula.

After the union learned the County had implemented the 75% direct services target and the associated Department-wide formula, it demanded that the County stop imposing these changes and that it meet and confer. The County Director of Mental Health advised the union that the County would continue to use the new policies. At no point did the County and the union meet and confer over the changes.

The Public Employment Relations Board (PERB) adopted the decision of the Administrative Law Judge (ALJ) and found that the County violated the MMBA by unilaterally implementing the 75% direct service target and Department-wide formula, without first giving the union the opportunity to bargain. PERB rejected the County's argument that the Department-wide formula was sufficiently similar to its prior practices that the County had no duty to bargain. PERB reasoned that the new formula represented a significant departure for employees working in the Adult Care division who were previously only expected to meet a 50% direct services target. The County also standardized the formula for evaluating whether employees were meeting their targets, which transferred the exercise of discretion from the divisional level to the Department level. Because these changes were not consistent with the County's past practices, the County was required to bargain with the union.

PERB also found that the County did not bargain with the union over the change of policy. The County did not respond to the union's repeated requests to meet and confer over the changes. Further, the County did not provide the union with a copy of the Department-wide formula prior to its implementation. Thus, the County denied the union notice and an opportunity to bargain in violation of the MMBA.

County of Kern, PERB Decision No. 2615-M (2018).

PUBLIC RECORDS ACT

Right to Access Privately Held Records Does Not Establish Constructive Possession for a CPRA Request.

The Los Angeles Police Department (LAPD) contracts with privately owned companies to tow and store impounded vehicles. These tow companies are referred to as Official Police Garages (OPGs). After an LAPD officer contacts an OPG to impound a vehicle, the OPG enters information regarding the impoundment into a database called the Vehicle Information Impound Center (VIIC). The VIIC database is maintained by a private organization comprised of OPGs called the Official Police Garage Association of Los Angeles (OPGLA). The OPG also scans its portion of a form prepared by the LAPD officer into a separate database called Laserfiche, which is owned by an independent document storage company that contracts with OPGLA.

Although LAPD contracts with numerous OPGs, the terms of each of the contracts are nearly identical. All OPG contracts require each OPG to "provide timely information to the VIIC" and to "participate in the [Laserfiche] System." The OPG contracts also state that all such records are subject to inspection by the City of Los Angeles and must be made available without notice. While the contracts provide that all work product created is City property, the OPG contracts also state that the OPGLA owns the VIIC and Laserfiche data. Cynthia Anderson-Barker submitted a California Public Records Act (CPRA) request to the LAPD seeking the data included in the VIIC and Laserfiche databases. LAPD refused to provide the data, explaining that it was owned by OPGLA and the OPGs. Anderson-Barker filed a petition to compel the City to disclose the data.

The trial court denied Anderson-Barker's petition finding that the City did not possess or control the VIIC or Laserfiche records. The California Court of Appeal also denied the petition.

The Court of Appeal found that the City's right to access the VIIC and Laserfiche data was insufficient to establish constructive possession

for the purposes of the CPRA. The court noted that in order to establish an agency's duty to disclose a record, the person seeking disclosure must show that: (1) the record qualifies as a public record under the CPRA; and (2) the agency is in possession of the record, either actually or constructively. An agency has constructive possession when it has the right to control the record.

The Court of Appeal relied on the U.S. Supreme Court case *Forsham v. Harris* (1980) 445 U.S. 169 to hold that access to data is insufficient to establish constructive possession. In *Forsham*, the Supreme Court explained that in order for information to be disclosable under the federal Freedom of Information Act, the agency must have a possessory interest in the record and that "potential access to the grantee's information" was not enough. The Court of Appeal analogized the CPRA to the Freedom of Information Act and concluded that mere access to privately held information was not sufficient to establish constructive possession.

Anderson-Barker v. Superior Court (City of Los Angeles) (2019) 31 Cal.App.5th 528.

EXCESSIVE FORCE

No Qualified Immunity Where Correctional Officer Administered Strong Blows to Compliant Pretrial Detainee.

In an unpublished decision from the federal Ninth Circuit, the Court held that a correctional officer who struck a pretrial detainee was not entitled to summary judgment on an excessive force claim filed by the detainee.

In reaching its decision, the Court rejected the officer's claim to qualified immunity. The Court found that a material dispute of fact existed as to the detainee's subjective complaints of pain from the incident and whether the officer gave the detainee instructions before striking him.

The Court also disagreed with the officer's assertion that no clearly established law would have informed him that he could not employ the

force used to get the detainee to comply. Because the Court was reviewing a ruling on the defendant officer's summary judgment motion, it was required to view the evidence in the light most favorable to the plaintiff detainee. Viewed in such light, the Court found, the detainee was compliant and did not provoke the officer. The Court observed that:

"The law is clearly established that a reasonable correctional officer cannot administer strong blows upon a compliant pretrial detainee without violating the detainee's right under the Fourteenth Amendment's Due Process Clause to be free from objectively unreasonable force purposely used against him."

Accordingly, the Court affirmed the denial of summary judgment on the excessive force claim against the officer.

Fletcher v. Marquardt (9th Cir., Feb. 15, 2019, No. 17-35862) 2019 WL 643440.

NOTE:

Although this decision was unpublished and arose outside of the employment context, it may aid police agencies in determining whether certain conduct constitutes excessive force for disciplinary purposes.

DISCIPLINARY PROCEEDINGS

Application of Exclusionary Rule in Criminal Proceeding Did Not Require Suppression of Same Evidence at Administrative Hearing.

Officer Ernesto Ramirez, Jr., a correctional officer, was arrested and charged with driving under the influence of alcohol while off duty. Police Officer Jesse Padgett, the arresting officer, had observed Ramirez speed through a private, commercial parking lot and fail to stop at a posted four-way stop. Padgett activated his patrol lights and siren in the parking lot, but Ramirez continued to drive

briefly before pulling over. Padgett drew his weapon when the vehicles came to a stop and effected the arrest after Ramirez failed a field sobriety test.

In the criminal proceeding, the court granted Ramirez's motion to suppress evidence of his detention and arrest, and dismissed the case. An appellate court affirmed the ruling, noting that Officer Padgett turned on his lights and siren to initiate the stop while the vehicles were still in a private parking lot. The appellate court explained that traffic violations are unenforceable on private property unless there is an ordinance permitting traffic violation enforcement on the property and signage on the property to that effect. Because there was no evidence that the exception applied, the appellate court held that the warrantless detention was illegal and that evidence flowing from the detention was subject to suppression.

Separately, Ramirez was terminated from his employment for trying to gain favor during the arrest by using his status as a correctional officer, carrying a concealed weapon off duty while intoxicated, and being dishonest during his investigatory interview. At the administrative appeal proceeding, Ramirez moved to exclude all evidence obtained during the internal affairs investigation. Ramirez argued that because the criminal court found his detention was unreasonable, evidence underlying his termination was fruit of the poisonous tree. Ramirez's motion to suppress the evidence was denied, leading Ramirez to file a writ petition.

In an unpublished decision, the Court of Appeal rejected Ramirez's position that the exclusionary rule barred evidence of his conduct in the administrative appeal proceeding. The Court

explained that applying the exclusionary rule in the administrative context requires, among other things, that doing so will advance the purpose of the rule, i.e., to deter the constitutional violation at issue. Here, the Court observed that the unlawful detention arose when Officer Padgett activated his patrol lights and siren and drew his weapon, all of which occurred before Officer Padgett knew Ramirez was a correctional officer. As such, Officer Padgett could not have foreseen the possibility of a subsequent disciplinary proceeding and been deterred by the possibility that evidence of Ramirez's misconduct would be excluded from the proceeding.

The Court also indicated that "the social costs associated with excluding the evidence here weighs in favor of denying Ramirez's motion to suppress," noting that public agencies "must be able promptly to investigate and discipline their employees' betrayals of [public] trust" and that the conduct of police officers in their personal lives must be beyond reproach.

Ramirez v. State Personnel Board (Cal. Ct. App., Feb. 27, 2019, No. C080298) 2019 WL 948970.

NOTE:

Although this case is unpublished and non-citable, it reflects a general reluctance by the courts to extend the exclusionary rule to administrative proceedings.



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Firm Activities

Consortium Training

- March 19 **“An Agency’s Guide to Employee Retirement” & “Human Resources Academy II”**
North San Diego County ERC | Temecula | Frances Rogers
- March 20 **“Unconscious Bias”**
NorCal ERC | Webinar | Suzanne Solomon
- March 20 **“Leaves, Leaves and More Leaves” & “Public Service: Understanding the Roles and Responsibilities of Public Employees”**
Sonoma/Marin ERC | Rohnert Park | Kelly Tuffo
- March 20 **“The Art of Writing the Performance Evaluation” & “File That! Best Practices for Document and Record Management”**
Ventura/Santa Barbara ERC | Thousand Oaks | T. Oliver Yee
- March 21 **“Workplace Bullying: A Growing Concern” & “Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor”**
Orange County Consortium | Brea | Danny Y. Yoo
- March 21 **“Administering Overlapping Laws Covering Discrimination, Leaves and Retirement”**
San Mateo County ERC | Redwood City | Richard Bolanos & Jessica Tyndall
- March 27 **“The Future is Now - Embracing Generational Diversity and Succession Planning” & “Nuts and Bolts: Navigating Common Legal Risks for the Front Line Supervisor”**
Bay Area ERC | Santa Clara | Erin Kunze
- March 27 **“Managing the Marginal Employee”**
Gold Country ERC | Webinar & Placerville | Kristin D. Lindgren
- March 28 **“Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor” & “Leaves, Leaves and More Leaves”**
Central Valley ERC | Hanford | Che I. Johnson
- April 3 **“Administering Overlapping Laws Covering Discrimination, Leaves and Retirement”**
Central Coast ERC | Pismo Beach | Richard Goldman & Michael Youril
- April 3 **“Workplace Bullying: A Growing Concern” & “Human Resources Academy I”**
Gold Country ERC | Citrus Heights | Suzanne Solomon
- April 3 **“Maximizing Performance Through Evaluation, Documentation and Corrective Action”**
Humboldt County ERC | Arcata | Kristin D. Lindgren
- April 4 **“The Future is Now - Embracing Generational Diversity and Succession Planning”**
Humboldt County ERC | Arcata | Kristin D. Lindgren
- April 4 **“The Art of Writing the Performance Evaluation” & “Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor”**
Napa/Solano/Yolo ERC | Fairfield | Gage C. Dungy
- April 4 **“Leaves, Leaves and More Leaves” & “Technology and Employee Privacy”**
West Inland Empire ERC | Diamond Bar | Mark Meyerhoff

April 10	“Human Resources Academy I” & “Workplace Bullying: A Growing Concern” North State ERC Red Bluff Kristin D. Lindgren
April 10	“Legal Issues Regarding Hiring and Promotion” & “Human Resources Academy II” San Gabriel Valley ERC Alhambra Christopher S. Frederick
April 11	“Preventing Workplace Harassment, Discrimination and Retaliation” Gateway Public ERC South Gate Jenny-Anne S. Flores
April 11	“Workers Compensation: Managing Employee Injuries, Disability and Occupational Safety” Imperial Valley ERC Brawley Jeremy Heisler, Goldman Magdalin & Krikes
April 11	“Nuts & Bolts Navigating Common Legal Risks for the Front Line Supervisor” LA County HR Consortium Los Angeles Danny Y. Yoo
April 11	“Public Service: Understanding the Roles and Responsibilities of Public Employees” Monterey Bay ERC & San Mateo County ERC Webinar Heather R. Coffman
April 11	“Introduction to the FLSA” South Bay ERC Inglewood Jennifer Palagi
April 16	“Navigating the Crossroads of Discipline and Disability Accommodation” & “Legal Issues Regarding Hiring and Promotion” North San Diego County ERC Vista Mark Meyerhoff
April 17	“Public Sector Employment Law Update” & “Human Resources Academy II” Central Valley ERC Los Banos Shelline Bennett
April 17	“Managing the Marginal Employee” & “Difficult Conversations” NorCal ERC Alameda Casey Williams
April 17	“Preventing Workplace Harassment, Discrimination and Retaliation” Orange County Consortium Fountain Valley Ronnie Arenas
April 18	“Human Resources Academy II” & “Leaves, Leaves and More Leaves” San Joaquin Valley ERC Ripon Gage C. Dungy
April 23	“Case Study for Managing Illnesses or Injuries” & “The Disability Interactive Process” Bay Area ERC Hayward Morin I. Jacob
April 25	“Difficult Conversations” & “Managing the Marginal Employee” Mendocino County ERC Ukiah Casey Williams

Customized Training

March 19	“Preventing Workplace Harassment, Discrimination and Retaliation” Port of Stockton Stockton Jack Hughes
March 20	“Preventing Workplace Harassment, Discrimination and Retaliation” City of Stockton Gage C. Dungy
March 20	“Legal Issues Update” Orange County Probation Santa Ana Christopher S. Frederick
March 20,27	“Preventing Workplace Harassment, Discrimination and Retaliation” City of Carlsbad Stephanie J. Lowe

March 22	“Laws and Standards for Supervisors” Orange County Probation Santa Ana Laura Drottz Kalty
March 23	“Preventing Workplace Harassment, Discrimination and Retaliation” City of Newport Beach Christopher S. Frederick
March 27	“Preventing Workplace Harassment, Discrimination and Retaliation” City of Lynwood Kevin J. Chicas
March 27	“Preventing Workplace Harassment, Discrimination and Retaliation” Silicon Valley Clean Water Redwood City Casey Williams
March 28	“Preventing Workplace Harassment, Discrimination and Retaliation and Ethics in Public Service” City of Rocklin Kristin D. Lindgren
April 3	“Preventing Workplace Harassment, Discrimination and Retaliation” City of Stockton Kristin D. Lindgren
April 3	“Training Academy for Workplace Investigators: Core Principles, Skills & Practices for Conducting Effective Workplace Investigations” County of Merced Merced Shelline Bennett
April 3	“The Art of Writing the Performance Evaluation” Housing Authority of the City of Alameda Alameda Casey Williams
April 12	“Preventing Workplace Harassment, Discrimination and Retaliation” County of San Luis Obispo San Luis Obispo Christopher S. Frederick
April 16	“Introduction to the Fair Labor Standards Act” Zone 7 Water Agency Livermore Lisa S. Charbonneau
April 17	“Maximizing Supervisory Skills for the First Line Supervisor” City of Stockton Kristin D. Lindgren
April 17	“Preventing Workplace Harassment, Discrimination and Retaliation” Orange County Mosquito and Vector Control District Garden Grove Christopher S. Frederick
April 17	“Maximizing Supervisory Skills for the First Line Supervisor” Port of Oakland Oakland Heather R. Coffman
April 23,24	“Preventing Workplace Harassment, Discrimination and Retaliation” Conejo Recreation and Park District Thousand Oaks Danny Y. Yoo
April 24	“Preventing Workplace Harassment, Discrimination and Retaliation” City of Stockton Gage C. Dungy
April 24	“Legal Issues Update” Orange County Probation Santa Ana Christopher S. Frederick

Speaking Engagements

March 28	“Legal Update” County Personnel Administrators Association of California (CPAAC) Lodi Gage C. Dungy
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- March 29 **“Legal Update”**
NORCAL-HR Spring Conference | Pacific Grove | Gage C. Dungy
- April 8 **“FLSA Update”**
National Public Employer Labor Relations Association (NPELRA) Annual Training Conference | Scottsdale | Lisa S. Charbonneau
- April 8 **“Propelling Your District Forward in Challenging Situations”**
Special District Leadership Academy (SDLA) Spring Conference | San Diego | Stephanie J. Lowe
- April 9 **“Executive Briefing: What Police Chiefs Need to Know About Labor Relations and Personnel Issues”**
California Police Chiefs Association (CPCA) Becoming a Police Chief | Sacramento | Morin I. Jacob
- April 9 **“Defining Board & Staff Roles and Relationships”**
SDLA Spring Conference | San Diego | Stephanie J. Lowe
- April 11 **“Legal Update”**
SCPMA-HR | Long Beach | J. Scott Tiedemann
- April 12 **“Post *Janus* Case Developments and Legislation”**
California Lawyers Association’s (CLA) Labor and Employment Law Section Annual Public Sector Conference | Sacramento | Che I. Johnson & Scott Kronland & Sheena Farro
- April 24 **“Human Resources Boot Camp for Special Districts”**
California Special Districts Association (CSDA) | Simi Valley | Joung H. Yim

Seminars/Webinars

- March 19 **“Train the Trainer Refresher: Harassment Prevention”**
Liebert Cassidy Whitmore | San Francisco | Erin Kunze
- March 21 **“Communication Counts!”**
Liebert Cassidy Whitmore | Roseville | Jack Hughes & Kristi Recchia
- April 8 **“Mandated Ethics for Public Officials”**
Liebert Cassidy Whitmore | Webinar | Michael Youril
- April 10 **“Your Managers Just Organized – What Do You Do? Labor Relations & Your EERR”**
Liebert Cassidy Whitmore | Webinar | Che I. Johnson
- April 12 **“Train the Trainer: Harassment Prevention”**
Liebert Cassidy Whitmore | Los Angeles | Christopher S. Frederick
- April 15 **“Cafeteria Plan Compliance – Mid-Year Election Changes and More”**
Liebert Cassidy Whitmore | Webinar | Heather DeBlanc & Stephanie J. Lowe
- April 23 **“Best Practices for Conducting Fair and Legally Compliant Internal Affairs Investigations (Day 1)”**
Liebert Cassidy Whitmore | Citrus Heights | Jack Hughes & Suzanne Solomon
- April 24 **“Best Practices for Conducting Fair and Legally Compliant Internal Affairs Investigations (Day 2)”**
Liebert Cassidy Whitmore | Citrus Heights | Jack Hughes & Suzanne Solomon



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“The Thin Blue Line” authored by Managing Partner [J. Scott Tiedemann](#) and Associate [Sarah R. Lustig](#) of our [Los Angeles](#) office, appeared in the January 25, 2019 issue of the *Daily Journal*. “Changes to Sexual Harassment Laws Could Open California Employers to Increased Liability” quote by Partner [Jesse Maddox](#) of our [Fresno](#) office, appeared in the February 1, 2019 issues of the *Orange County Register* and the *San Gabriel Valley Tribune*. “Police in Ventura County Cope With Requests for Personnel Records That Are Now Public” quote by [J. Scott Tiedemann](#) Managing Partner of our [Los Angeles](#) office, appeared in the February 22, 2019 issue of the *Ventura County Star*.

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