



BRIEFING ROOM

News and developments in employment law and labor relations for
California Law Enforcement Management

DECEMBER 2020

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FIRM VICTORIES

Court Upholds Two Peace Officer Terminations Following Use Of Excessive Force.

LCW Partner **Scott Tiedemann** and Associate Attorneys **Paul Knothe** and **Donald Le** successfully represented a city in a termination appeal involving two peace officers.

On July 5, 2011, multiple officers responded to a report that a man was checking car doors in a parking lot. At first, the man complied with the officers' requests to sit on the curb and to allow them to search his backpack. The interaction devolved into a struggle between the man and three police officers after the man began to resist. During the struggle, the officers swung their batons, struck the man multiple times, and applied prolonged pressure to his body. One officer deployed his taser against the man before using the taser to strike the man in the head multiple times. The man's condition worsened and he died at the hospital several days later.

The city retained an outside agency to investigate the incident. Based on the investigation findings, the chief of police terminated the three involved officers. Two of the officers sought administrative review before separate hearing officers. These two hearings yielded opposite results: one hearing officer recommended that city council uphold the discharge; and the other recommended that city council reverse the discharge.

Ultimately, the city council unanimously upheld the discharge of both officers based in part on a finding that they used excessive force in violation of city policies. The city council found that one of the officers used excessive force when he swung his baton at the man, struck the man in the head multiple times, and applied prolonged body pressure while the man was struggling on the ground. The city council found that the second officer used excessive force when he twice struck the man's head with his knee and repeatedly beat the man's face with a taser.

The two officers then went to court to file petitions for administrative writs of mandamus. The trial court confirmed the city council's decision to terminate both officers. The evidence established that both officers used excessive force. The findings of excessive force supported the city council's decision to uphold the terminations.

The court examined the excessive force findings as to each officer in light of the department's use of force policies. As to the first officer, the court found that swinging a baton at the man was not excessive force; rather it was reasonable conduct to control the man's resistance and to prevent him from escaping. The court also found there was no evidence that the officer struck the man in the head. However, the court found the officer did use excessive force by applying prolonged body pressure to the man because the man informed the officers 10 times he could not breathe and then became unconscious. Given this finding and

the public nature of the incident, the court found that the city council did not abuse its discretion in discharging the officer for excessive force.

As to the second officer, the court found that the evidence showed excessive force. The officer repeatedly beat the man's face with a taser, even though the man was not being aggressive either before or during the tasing that preceded the beating. Given the city's significant interest in maintaining a level of trust between peace officers and the public, the court found that the city council did not abuse its discretion in discharging the second officer for excessive force. Due to this finding, the court did not examine whether the second officer also used excessive force by kneeling the man in the head twice.

For these reasons, the court denied both officers' petitions and confirmed the city council's discharge of both officers.

NOTE:

The use of force at issue in this case was highly-publicized and publicly criticized. LCW is proud to have served as a trusted advisor to the department in making successful disciplinary determinations under these intense circumstances.

Peace Officer's Termination Upheld Following Multiple Uses of Excessive Force.

LCW Partner **Jack Hughes** and Associate Attorneys **Brian Hoffman** and **Savana Manglona** successfully represented a city in a peace officer's termination appeal. The officer violated the police department's use of force policies when he placed his hand around a suspect's throat.

In 2017, a peace officer was involved in three separate use of force incidents. The first occurred when the officer punched a suspect in the head with a closed-fist after the officer perceived the suspect was resisting arrest. The second occurred when the officer punched a suspect in the head after the suspect refused to exit a house. After reviewing both incidents, the department found that the officer did not use the most appropriate force, and decided not to discipline the officer. Instead, the department required the officer to attend a one-on-one refresher training on the department's use of force policies. In May 2017, the department's sergeant and primary use of force instructor administered the refresher training. The sergeant explained less extreme use of force techniques that the officer could use.

Approximately three months later, the officer was involved in third use of force. He slapped a suspect several times after the suspect resisted handcuffs. During the incident, the officer complained over body

worn camera that the slaps were "weak and crappy" and he preferred to punch the suspect in the face. The sergeant later met with the officer to discuss those comments and advised that while the officer was not subject to discipline, his comments were inappropriate and unprofessional.

In March 2018, the officer was involved in another use of force incident. He placed his hand on a handcuffed suspect's throat, under the chin, using a C-clamp chokehold. A C-clamp chokehold occurs when an officer grabs a suspect by the front of the neck with his hand cupped in the shape of a "C." The officer then squeezes in a clamp-style motion. The department does not teach the C-clamp chokehold because of the heightened risk of serious bodily injury. When the officer used a C-clamp chokehold on the suspect, the suspect reacted with loud choking sounds and yelled, "You're choking me!" and "I can't breathe!" several times. Eventually, other officers placed the suspect in a full-body restraint system to prevent the suspect from moving. The suspect later asked the officer, "You like choking people, huh?" The officer responded, "When they need it." The officer's body camera footage captured this incident. After conducting its use of force review, the city immediately placed the officer on administrative leave.

The city conducted an internal affairs investigation into the officer's use of force. The city determined the officer violated the department's conduct and use of force policies and terminated him. The officer appealed. The officer persistently denied any wrongdoing, including squeezing the suspect's throat or applying any pressure on the suspect's airway.

After a five-day appeal hearing, the Administrative Law Judge (ALJ) found that the level of force the officer used was excessive and improper. The ALJ also found the officer's conduct did not comply with the department's policy and training on use of force. The videos from the officer's body camera showed the officer placing his hand on the suspect's throat more than once, and the suspect instantly choking or gagging. Other officers at the scene also said the officer placed his hands over the suspect's throat and applied pressure. Finally, the officer's comment to the suspect that he only choked people "when they need it" acknowledged his use of force. The ALJ found the department did not abuse its discretion in terminating the officer. This was not an isolated incident, but was the officer's fourth questionable use of force in just over a year. Moreover, the officer's comments indicated an inability to be rehabilitated.

NOTE:

This case illustrates how conducting a thorough investigation and building a solid administrative record helps to protect a city's final disciplinary ruling from

a court challenge. Agencies can count on LCW to be a trusted advisor throughout a peace officer investigation, discipline, and legal challenges.

DISCIPLINE

Court Enforces Sheriff's Department's Agreement To Arbitrate Discipline, Despite Applicability of Contrary Process in CBA.

In December 2015, the San Francisco Sheriff's Department (Department) terminated Deputy Sheriff Douglas Jones for misconduct. The notice of termination, signed by then-Sheriff Ross Mirkarimi stated: "You have a right to appeal this decision. . . . The appeal termination is subject to those procedures provided for in Rule 122 of the Civil Service Commission." Rule 122 of the San Francisco Civil Service Commission Rules contains procedures related to the dismissal of employees "except the Uniformed Ranks of the Police and Fire Departments . . . or as may be superceded [sic] by a collective bargaining agreement[.]"

Jones timely appealed his termination, and the parties selected a neutral arbitrator in accordance with Rule 122. In October 2017, the arbitrator reduced Jones's termination to a written reprimand and directed that he be reinstated with back pay and benefits.

On December 5, 2017, then-Sheriff Vicki Hennessy informed Jones that she would not accept the arbitrator's recommendation for reinstatement and that his termination was final. In support, Sheriff Hennessy referred Jones to the collective bargaining agreement (CBA) between the City and County of San Francisco (City) and the San Francisco Deputy Sheriffs' Association (Association), which provided that an appeals decision is not binding on the Department "when the decision is a recommendation of a reduction in discipline." The CBA also provided that disciplinary grievances could not be submitted to arbitration, but instead had to follow a different appeals procedure outlined in the CBA.

On December 29, 2017, Jones and the Association (collectively "Association") filed a complaint against the City and Sheriff Hennessy to enforce the arbitration award. The Association argued that Sheriff Hennessy rejected the arbitration award pursuant to the CBA even though the Department had directed that Jones's termination appeal proceeded under Rule 122 of the Civil Service Commission. The Association alleged that the City and Sheriff Hennessy were now equitably estopped from relying on the CBA to reject the arbitration award.

The trial court agreed and confirmed the arbitration award. The City appealed on the grounds that Jones was not entitled to equitable estoppel. The California Court of Appeal disagreed and affirmed the trial court's ruling.

The Court of Appeal described the doctrine of equitable estoppel as: "a person may not deny the existence of a state of facts if that person has intentionally led others to believe a particular circumstance to be true and to rely upon such a belief to their detriment." For equitable estoppel to apply to a government entity, five elements must be present: (1) the entity to be estopped must be appraised of the facts; (2) the entity to be estopped must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; (4) the other party must rely upon the conduct to his injury; and (5) injustice would result from a failure to uphold an estoppel. The City argued that Association failed to establish the third, fourth and fifth elements.

For the third element, the City argued that the Association was not ignorant of the longstanding appeals provisions within the CBA. The Court of Appeal disagreed and held that Jones was ignorant of the true state of facts since the Department advised that his appeal was subject to Rule 122. The Department then carried out the appeal in accordance with Rule 122. Further, the Department had consistently proceeded with deputy termination appeals under Rule 122 for 20 years.

For the fourth element, the City argued Jones incurred no injury because the CBA appeal process was the only process available to him despite the Department's incorrect representations about the applicability of Rule 122. The Court of Appeal disagreed and held by rejecting the arbitrator's award, the Department injured Jones by retroactively depriving him of the ability to arbitrate his termination and then depriving him of employment.

For the fifth element, the City argued there was no injustice to Jones by holding him to the CBA's terms. The Court of Appeal again disagreed. Jones incurred injustice because the City participated in arbitration without objection, and then, only after losing, argued that the underlying agreement to arbitrate was not applicable.

The Court of Appeal affirmed that the City was equitably estopped from challenging its agreement to arbitrate Jones's termination appeal.

San Francisco Deputy Sheriffs' Association v. City and County of San Francisco, 2020 WL 5568553 (2020)

**NOTE:**

This case is unpublished and therefore generally not citable. However, it is an important reminder that employers should review any overlapping disciplinary appeal process rules and select the appropriate rule. This case shows that once an employer selects one appeal process it may be estopped from later denying the applicability of that appeal process.

Sheriff's Termination Appeal Was No Longer Viable After Disability Retirement.

Martin Diero began working for the Los Angeles County Sheriff's Department in 1997. Diero was injured on duty on May 30, 2012, and he continued to work through October 3, 2013, after which he had the first of two surgeries. Diero was not able to return to work following his surgery, and he remained on leave thereafter.

On May 1, 2015, Diero applied to the Los Angeles County Employees Retirement Association (LACERA) for a service-connected disability retirement. Two months later, and before LACERA approved Diero's retirement application, the Department issued Diero a Notice of Intent to Terminate his employment for bringing discredit to him and the Department. After a pre-disciplinary meeting, the Department notified Diero it was terminating his employment effective August 12, 2015. Diero timely appealed the discharge to the Civil Service Commission (Commission), which referred the matter to a hearing officer.

A few months later, while the disciplinary proceedings were pending, LACERA granted Diero's application for a service-connected disability retirement. LACERA later issued a notice to Diero stating that the effective date of his retirement was August 13, 2015, the day after his discharge. Despite having retired, Diero and the Department participated in hearings on Diero's appeal of his discharge. The hearing officer ultimately recommended that Diero's discipline be reduced to a 30-day suspension, and the Commission's agenda included a proposed decision to accept the recommendation.

The Department later filed a motion to dismiss the appeal on the grounds that Diero had retired, and therefore, the Commission lacked jurisdiction over any appeal relating to his employment. The Commission granted the motion, and Diero filed a petition for writ of mandate seeking trial court review of the decision. In the writ petition, Diero asserted, for the first time, that if he were to prevail in his disciplinary appeal and be reinstated, any retroactive salary would change his disability retirement pension. The trial court denied the petition.

On appeal, the court determined that the Commission properly dismissed Diero's appeal. The court reasoned that the Commission's jurisdiction derives from the County's Charter, which defines an employee as "any person holding a position in the classified service of the county." Relying on this language and on previous decisions, the court concluded that Commission has no jurisdiction to order reinstatement or any form of wage relief, to a retired person whose "future status as an employee by definition is no longer at issue." The court affirmed the trial court's decision and awarded the Department its costs on appeal.

Deiro v. Los Angeles Cty. Civil Serv. Comm'n, 56 Cal. App 5th 925 (2020).

NOTE:

This case shows that timing is everything. Local rules may prevent an employee from appealing discipline after the date of disability retirement.

RETALIATION

Sergeant Failed To Show Causal Connection Between Title VII Protected Activities And Adverse Employment Actions.

In 2015, Sergeant Jeffrey Green of the Phoenix Police Department (Department) sued the City of Phoenix (City). He alleged the City violated Title VII of the Civil Rights Act by retaliating against him for: filing charges with the Equal Employment Opportunity Commission (EEOC); helping a subordinate file a sexual harassment complaint; and refusing to aid his supervisor in conduct violating Title VII.

To establish retaliation under Title VII, an employee must show that: (1) he engaged in protected activity; (2) he experienced an adverse employment action; and (3) his protected activity was a "but-for" cause of the employer's alleged adverse action. Green alleged the following adverse employment actions occurred after he engaged in his protected activities: he had two fitness-for-duty evaluations; and he received a poor performance review.

At trial, a jury returned a \$1.5 million verdict for Green. The City then moved for judgment as a matter of law, which the district court granted, thereby vacating the jury verdict. The district court held that Green failed to show a "but-for" causal connection between his protected activities and the adverse employment actions he later experienced. Green appealed, alleging that he had satisfied the causal connection requirement.

The Ninth Circuit disagreed and affirmed the district court's ruling. The Ninth Circuit held that Green presented no evidence that the supervisor who ordered Green to undergo the first fitness-for-duty examination had any knowledge of Green's alleged protected activities. Green also presented no evidence that his second fitness-for-duty examination was related to any of his purported protected activities. Lastly, the Ninth Circuit found that Green received negative feedback from his supervisors on multiple occasions prior to receiving his negative performance evaluation, and that there was no evidence that the negative evaluation was pretextual.

Green v. City of Phoenix, 823 Fed.Appx. 549 (2020)

NOTE:

Although this case is unpublished and generally not citable, it reaffirms that employees alleging retaliation under Title VII must present specific evidence showing a causal connection between an employee's protected activities and any adverse employment action. An employee cannot show this connection if a decision-maker had no knowledge of the alleged protected activities.

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NEW TO THE FIRM

Megan Nevin is an Associate in Liebert Cassidy Whitmore's Sacramento office, where she represents public sector employers in all aspects of labor and employment law. Megan is an experienced litigator with a proven track record of success in motion practice and trials.

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Michael Gerst is an experienced litigator in Liebert Cassidy Whitmore's Los Angeles office. He has successfully argued several state and federal appellate matters, including before the United States Courts of Appeals for the Ninth, Fifth, Sixth and Third Circuits.

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LCW
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Firm Activities**Consortium Training**

- Dec. 9** **“Workers Compensation: Managing Employee Injuries, Disability and Occupational Safety - Part 2”**
Coachella Valley ERC | Webinar | Jeremiah A. Heisler
- Dec. 9** **“Workers Compensation: Managing Employee Injuries, Disability and Occupational Safety - Part 2”**
San Gabriel Valley ERC | Webinar | Jeremiah A. Heisler
- Dec. 9** **“Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor”**
North State ERC | Webinar | Jack Hughes
- Dec. 9** **“Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor”**
San Joaquin Valley ERC | Webinar | Jack Hughes
- Dec. 10** **“The Meaning of At-Will, Probationary, Seasonal, Part-Time and Contract Employment”**
Bay Area ERC | Webinar | Heather R. Coffman
- Dec. 10** **“Disaster Service Workers - If You Call Them, Will They Come?”**
East Inland Empire ERC | Webinar | Brian J. Hoffman
- Dec. 10** **“Disaster Service Workers - If You Call Them, Will They Come?”**
Imperial Valley ERC | Webinar | Brian J. Hoffman
- Dec. 10** **“Managing COVID-19 Issues: Now and What’s Next”**
San Diego ERC | Webinar | Peter J. Brown & Alexander Volberding
- Dec. 16** **“MOU Auditing and The Book of Long Term Debt”**
Central Valley ERC | Webinar | Kristi Recchia
- Dec. 16** **“Moving Into The Future”**
Gold Country ERC | Webinar | Erin Kunze
- Dec. 16** **“Moving Into The Future”**
Napa/Solano/Yolo ERC | Webinar | Erin Kunze
- Dec. 17** **“Exercising Your Management Rights”**
Central Coast ERC | Webinar | Melanie L. Chaney
- Dec. 17** **“Exercising Your Management Rights”**
South Bay ERC | Webinar | Melanie L. Chaney
- Dec. 17** **“Prevention and Control of Absenteeism and Abuse of Leave”**
LA County HR Consortium | Webinar | Danny Y. Yoo
- Jan. 6** **“Introduction to the FLSA”**
Napa/Solano/Yolo ERC | Webinar | Lisa S. Charbonneau

Jan. 7	“Managing the Marginal Employee” Bay Area ERC Webinar Ronnie Arenas
Jan. 7	“Managing the Marginal Employee” Gateway Public ERC Webinar Ronnie Arenas
Jan. 7	“Current Developments in Workers’ Compensation” Imperial Valley ERC Webinar Richard Goldman
Jan. 7	“Current Developments in Workers’ Compensation” San Mateo County ERC Webinar Richard Goldman
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 Richard Goldman
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. 14	“Managing the Marginal Employee” LA County HR Consortium Webinar Christopher S. Frederick
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

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.

Dec. 7 **“Skelly Training”**
City of Bakersfield | Webinar | Che I. Johnson

Dec. 8 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Glendale | Webinar | Jenny Denny

Dec. 8 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Stockton | Webinar | Shelline Bennett

Dec. 8 **“Ethics in Public Service”**
City of National City | Stacey H. Sullivan

Dec. 9 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Stockton | Webinar | Kristin D. Lindgren

Dec. 11 **“Harassment/Diversity Training”**
City of Clovis | Webinar | Che I. Johnson

Dec. 11 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
Town of Truckee | Webinar | Jack Hughes

Dec. 14 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Tracy | Webinar | Erin Kunze

Dec. 15 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
Mojave Water Agency | Apple Valley | I. Emanuela Tala

Dec. 15 **“Preventing Workplace Harassment, Discrimination and Retaliation in the Workplace”**
City of Redwood City | Webinar | Kristin D. Lindgren

Dec. 15 **“Key Legal Principles for Public Safety Managers - POST Management Course”**
Peace Officer Standards and Training - POST | San Diego | Stefanie K. Vaudreuil

Jan. 5 **“Key Legal Principles for Public Safety Managers - POST Management Course”**
Peace Officer Standards and Training - POST | San Diego | Mark Meyerhoff

Jan. 6 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
ERMA | Webinar | Michael Youril

Jan. 6 **“FLSA”**
Los Angeles World Airports (LAWA) | Webinar | Elizabeth Tom Arce

- Jan. 13** **“Ethics in Public Service”**
Chino Basin Water Conservation District | Webinar | Stacey H. Sullivan
- Jan. 21** **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Hesperia | Joung H. Yim
- Jan. 27** **“Law and Standards for Supervisors”**
Orange County Probation Department | Webinar | Mark Meyerhoff

Speaking Engagements

- Dec. 7** **“FLSA Hot Topics & Legal Updates”**
League of California Cities 2020 Municipal Finance Institute | Webinar | Richard Bolanos & Lisa S. Charbonneau
- Dec. 8, 9** **“2020 Government Tax and Employee Benefits Webinar”**
Government Tax Seminars (GTS) Annual Government Tax and Employee Benefits Webinar | Webinar | Heather DeBlanc
- Dec. 10** **“Telecommuting Policies”**
California Special District Association (CSDA) Webinar | Webinar | Alysha Stein-Manes
- Dec. 11** **“Negotiating Retirement and Health Benefits in Tough Economic Times”**
League of California Cities 2020 Municipal Finance Institute | Webinar | Steven M. Berliner & Michael Youril & Robert Neuber
- Dec. 15** **“Legal Update”**
International Public Management Association for Human Resources (IPMA-HR) Sacramento-Motherlode Webinar | Webinar | Shelline Bennett
- Dec. 16** **“Legal Update”**
International Public Management Association for Human Resources (IPMA-HR) Central California Chapter | Webinar | Shelline Bennett
- Dec. 17** **“The Diverse and Inclusive City”**
League of California Cities 2020 City Clerks New Law & Elections Seminar | Webinar | Anthony Suber & Shelline Bennett

Seminar/Webinars

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

- Dec. 15** **“2021 Legislative Update for Public Agencies”**
Liebert Cassidy Whitmore | Webinar | Geoffrey S. Sheldon

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