

FIRE WATCH

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

APRIL 2022

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Fire Watch is published monthly for the benefit of the clients of Liebert Cassidy Whitmore. The information in *Fire Watch* should not be acted on without professional advice.

FIRM VICTORIES

Hearing Officer Upholds Termination Of Peace Officer Who Threatened Violence Against Coworkers.

LCW Partner **Jennifer Rosner** and Associate **Ashley Sykora** recently prevailed in a peace officer termination appeal. The case concerned a male corporal who had an on-and-off affair with a female corporal while they were off-duty for approximately 10 years. The relationship had been volatile for years. The female corporal complained about the male corporal after he began threatening violence against her and another deputy in the department. The male corporal appeared to believe the female corporal was having an intimate relationship with the deputy. The male corporal was charged with violation of the department’s policy against harassment and workplace violence, as well as conduct unbecoming of an officer.

The male corporal argued that his discipline was disparate treatment because the female corporal also harassed him and used derogatory and profane language in their communications, but only he was being disciplined. He also maintained that his vulgar statements were merely “hyperbole,” and not actual threats.

The hearing officer found that the corporal’s conduct clearly constituted threats and violated numerous department policies, including those prohibiting harassment and workplace violence. The hearing officer stated that “Even if it is unlikely that the Appellant [the male corporal] intended to carry out the threats...such threats constitute totally unacceptable conduct, for which discharge has been recognized as an appropriate penalty.” The hearing officer also found that the male corporal did not submit any evidence that the department treated him disparately. Based on these findings, the hearing officer sustained the termination.

NOTE:

The hearing officer noted that even if disparate treatment had been found it would not have been a reason to deny the termination, absent evidence that the present investigation was fabricated, falsified, or otherwise tainted by grave deficiencies.

LCW Wins Dismissal Of Suspended Peace Officer’s Appeal.

LCW Partner **Suzanne Solomon** and Senior Counsel **Dave Urban** won the dismissal of a suspended peace officer’s appeal from the denial of the officer’s writ petition.

In May 2019, Public Safety Officer David Meinhardt filed a petition for writ of administrative mandate, otherwise known as a writ petition. A writ petition is a tool that a person may use to request a court to review a decision of an administrative body, such as a City Council or Personnel Board. In this case, Officer Meinhardt wanted the trial court to overturn a 44-hour suspension the City of Sunnyvale Personnel Board decided to impose on him.

The trial court upheld the suspension and, on August 6, 2020, issued an order denying Officer Meinhardt's writ petition. This order was served on all parties. On August 14, 2020, Officer Meinhardt was served with the "Notice of Entry of Judgement or Order." Finally, on September 17, 2020, the trial court signed its final judgment. It is from this September 17 judgment that Officer Meinhardt filed his appeal on October 15, 2020.

California Rules of Court at Rule 8.104(a)(1)(A) and (B) says that appeals of writ petitions must be filed within 60 days of the date that either the Notice of Entry, or a file-endorsed copy of the judgment, is served on the party seeking to appeal. The Court of Appeal found in its published opinion that the August 6, 2020 order, which was served on all parties, was a final appealable judgment. Based on the August 6 date, the last possible date for Officer Meinhardt to timely appeal was October 5, 2020, 10 days before Officer Meinhardt filed his Notice of Appeal.

The California Court of Appeal further found that the August 14, 2020 service of the Notice of Entry of Judgment triggered a new 60-day timeline for filing a notice of appeal based on California Rules of Court at Rule 8.104(a)(1)(B). Sixty days from August 14, 2020 was October 13, 2020, two full days before Officer Meinhardt filed his appeal. Even under the later of the two dates, Officer Meinhardt's appeal was untimely and thus barred.

Meinhardt v. City of Sunnyvale (Sunnyvale Department of Public Safety), 2022 WL 702912.

NOTE:

In the Court of Appeal's own words, this decision reiterates "the critical importance of determining whether a ruling on a petition for writ of mandate is a final judgment." LCW attorneys can help public agencies make these determinations and ensure timely compliance with legal deadlines.

OFF-DUTY CONDUCT

Officer's Failure To Secure Firearm After Returning Home Made The City Liable.

Marvin Cabuntala, a police officer for the City and County of San Francisco (City), attended a training session in a different county. Officer Cabuntala drove his own vehicle from his home to the training site. Firearms were not allowed at the training, however, he still brought his personal, secondary firearm with him.

When the training was over, Cabuntala drove home and arrived shortly before the end of his scheduled work hours. He did not follow his usual practice of securing his personal, secondary firearm inside his house. Instead, he left the firearm unsecured inside his vehicle.

Later that night, Cabuntala's vehicle was broken into and his personal firearm was stolen. Cabuntala did not realize it was stolen for several days. In the interim, the firearm was used to kill Mayra Perez's son.

The trial court granted the City's motion for summary judgment. The trial court found that Cabuntala was not acting within the scope of his employment, and that the City was not liable. Perez appealed. The California Court of Appeal reversed, reasoning that a jury could reasonably find that the officer's actions were attributable to the City.

An employer may be liable for an employee's conduct if the employee was acting within the scope of their employment. One test courts use to determine if an employee's conduct is within the scope of employment is whether the conduct was: a) required or incident to the employee's duties; or b) reasonably foreseeable to the employer. Here, the Court reviewed whether the City could reasonably foresee that an officer would leave a personal firearm unsecured in a personal vehicle.

The Court noted that the work of policing involves the use of firearms. Firearms are essential to an officer's ability to perform job functions. Even a holstered firearm allows officers to make arrests and carry out other duties with the knowledge they can protect themselves.

The Court noted the San Francisco Police Department allowed officers to carry approved, secondary firearms while on duty and many officers regularly did so. Further, the Department did not require officers to leave those firearms at the police station, so the Department could reasonably assume that officers would transport these firearms during their commute to and from work. The Department also allowed officers to carry handguns while off duty so long as they also carried police identification. Department specialists, like Cabuntala, could also be called to report to an incident at any time and must carry a firearm to respond.

The Court concluded that under these circumstances, the Department could reasonably foresee that one of its officers would negligently fail to secure a Department-approved, secondary firearm upon returning home from work or training. The Court determined that the officer's failure to secure the firearm was therefore within the scope of the officer's employment, thus making the City liable for this officer's negligence.

Perez v. City and County of San Francisco, 75 Cal.App.5th 826 (2022).

NOTE:

In this case, the Department's policy allowed for secondary firearms to be carried both on and off-duty. Departments with similar policies must be sure to require officers to secure those firearms, and impose appropriate punitive action for failure to do so. Training on how to secure firearms is critically important to avoid liability for negligent firearm handling.

LABOR RELATIONS

A Voter-Approved Salary Setting And Impasse Resolution Ordinance Was Unlawful.

In 1988, the voters in the City of Pacifica (City) approved Measure F, an ordinance entitled "Firefighter Dispute Resolution Process Impasse Resolution Procedures: Minimum Wages and Benefits for Firefighters". Measure F lays out the procedures to follow if labor negotiations with the City's firefighters are at impasse. The Meyers-Milias-Brown Act (MMBA) also includes procedures for resolving labor relations impasses between local government employers and their employees. Measure F differed from the MMBA's impasse procedures. For example, Measure F did not require the factfinding board to weigh the factors the MMBA requires, including the interests and welfare of the public and the financial ability of the public agency. In addition, section 3(a) of Measure F required, absent an agreement otherwise, that the top step salaries of fire captains were to be fixed retroactively to July 1 of each fiscal year at an amount not less than the average for the top step salaries of fire captains in five neighboring cities. Measure F also required the salaries of Firefighter-Engineers to be increased proportionately. The City had never used the procedures of Measure F to set compensation.

In 2019, an impasse in negotiations occurred between the City and the Pacifica Firefighters Association (PFFA). PFFA then petitioned the court to require the City to follow Measure F.

The trial court denied the petition, finding that Measure F was preempted by state law and constituted an unlawful delegation of power. The California Court of Appeal affirmed.

The Court first determined section 3(a) of Measure F unlawfully delegated the Pacifica City Council's power to set compensation to the voters. As a general law city, Pacifica must follow Government Code Section 36506, which provides, "By resolution or ordinance, the city council shall fix the compensation of all appointive officers and employees." Section 3(a), however, unlawfully delegated the City's mandatory duty to set salaries to the voters.

Next, the Court determined that Measure F undermined the City's authority under the MMBA at Government Code Section 3505.7 to unilaterally impose its last, best, and final offer if negotiations and impasse procedures failed. While Section 3505.7 does not require a public employer to unilaterally impose, it gives a public employer the right to do so. Section 3505.7 thereby preserves the public employer's discretion to determine the ultimate outcome of the negotiations. Measure F's provisions conflict with Section 3505.7 by limiting that discretion. The Court concluded that the MMBA preempts Measure F and therefore the City was entitled to implement its last, best, and final offer in the event of impasse.

Pacifica Firefighters Association v. City of Pacifica, 2022 WL 871260.

NOTE:

The fact that Pacifica is a general law city was a critical factor in the Court's decision. While a general law city must follow the Government Code's requirements, a charter city has authority to govern itself as to municipal affairs. A city charter could, for example, expressly give voters the right to set salaries of city employees. The Court found that a general law city like Pacifica, conversely, had to follow the Government Code and thus lacked any authority to delegate salary setting to the electorate.



Welcome To LCW!

We are pleased to announce that James E. “Jeb” Brown and Matt Doyle have joined our team!



Jeb Brown has joined our Los Angeles office as Senior Counsel, effective January 3, 2022. Jeb, a Riverside, Calif. native, most recently served as Riverside County’s Chief Assistant County Counsel where he supervised more than 30 attorneys representing multiple County departments —including the Probation, Fire and Sheriff’s Departments.

“We are elated that Jeb is joining LCW. His expertise in litigation and extensive background counseling public safety agencies mesh particularly well with our firm’s long-standing history serving public agencies—including cities, counties and law enforcement agencies,” said LCW Managing Partner J. Scott Tiedemann. “Collectively, we are all excited to welcome Jeb to the firm and look forward to great collaboration and the continued service of these important clients.”

Matt Doyle has joined our Los Angeles office as Senior Consultant, effective March 16, 2022.

Matt most recently served as the City of Glendale’s Director of Human Resources where he oversaw a comprehensive human resources operation consisting of labor and employee relations, recruitment and selection, classification and compensation, benefits, training, health services and workers’ compensation.

“Matt’s extensive public sector experience make him an ideal fit for LCW. We are thrilled that Matt is joining us and are all excited to welcome him to the firm,” said LCW Managing Partner J. Scott Tiedemann. “We look forward to his contributions to our Labor Relations and Management Training practices and know that his experience in all facets of public sector Human Resources Management will be a huge benefit to our clients across the state.”





**LCW Employment
Law Seminar**

April 27, 2022

Did you miss the 2022 LCW Conference? Don't worry - we've got you covered!

We're thrilled to announce that registration is now open for the Virtual Employment Law Seminar taking place on April 27, 2022.

Don't miss out on a sampling of 2022 LCW Conference sessions presented live in a virtual format; they will also be available on-demand! Attendees will have full access to 12+ sessions through May 28 to watch at their leisure.


Sessions include:

- A Legal Tune Up to Get, and Stay, in Peak Legal Shape
- Managing a Remote or Hybrid Workforce
- Navigating Key Labor Relations Topics in Bargaining
- The Impact of Diversity, Equity and Inclusion Efforts on Employment Litigation

Register Today!

Upcoming Webinar!

Don't Leave Money on the Table—How to Recover \$\$\$ from the Federal Government for Your Agency's COVID Leave Payments and Other COVID Costs



**Monday, April 11, 2022
10:00am - 11:00am**

[Register here!](#)



Upcoming Webinar!

**FLSA For Public
Safety**

**May 6, 2022
10am - 11am**

[Register here!](#)

Firm Activities

Consortium Trainings

- Apr. 7** **“Managing the Marginal Employee”**
Central Valley, Gold Country, Mendocino County & San Deigo ERCs | Webinar | Jennifer Rosner
- Apr. 7** **“The Art of Writing the Performance Evaluation”**
Coachella Valley, Gateway Public, North San Diego County, San Mateo County & West Inland Empire ERCs | Webinar | Stephanie J. Lowe
- Apr. 7** **“The Future is Now - Embracing Generational Diversity and Succession Planning”**
Bay Area & East Inland Empire ERCs | Webinar | T. Oliver Yee
- Apr. 13** **“Disability Interactive Process”**
Central Coast ERC | Webinar | Jennifer Rosner
- Apr. 13** **“Finding the Facts: Disciplinary and Harassment Investigations”**
Central Valley, Coachella Valley & Imperial Valley ERCs | Webinar | Shelline Bennett
- Apr. 13** **“Maximizing Performance Through Documentation, Evaluation and Corrective Action”**
Napa/Solano/Yolo, North San Diego County & San Joaquin Valley ERCs | Webinar | Joel Guerra
- Apr. 14** **“Labor Code 101 for Public Agencies”**
Sonoma/Marin ERC | Webinar | Michael Youril
- Apr. 14** **“Maximizing Supervisory Skills for the First Line Supervisor - Part 1”**
Los Angeles County Human Resources Consortium | Webinar | Laura Drottz Kalty
- Apr. 14** **“Workplace Bullying: A Growing Concern”**
San Gabriel Valley ERC | Webinar | T. Oliver Yee
- Apr. 20** **“Navigating the Crossroads of Discipline and Disability Accommodation”**
North State & South Bay ERCs | Webinar | Che I. Johnson
- Apr. 20** **“Supervisor’s Guide to Understanding and Managing Employees’ Rights: Labor, Leaves and Accommodation”**
San Diego ERC | T. Oliver Yee
- Apr. 21** **“Human Resources Academy I”**
Monterey Bay & San Mateo County ERCs | Webinar | Erin Kunze
- Apr. 21** **“Prevention and Control of Absenteeism and Abuse of Leave”**
Humboldt County, NorCal & Orange County Consortium | Webinar | T. Oliver Yee
- Apr. 26** **“Moving Into the Future: Telecommuting and Remote Work”**
Ventura/Santa Barbara ERC | Webinar | Erin Kunze
- May 4** **“Maximizing Supervisory Skills for the First Line Supervisor Part 1”**
Bay Area, Central Valley, Gateway Public, San Joaquin Valley & South Bay ERCs | Webinar | Heather R. Coffman & Nicholas M. Grether
- May 5** **“Exercising Your Management Rights”**
Coachella Valley & Napa/Solano/Yolo & North San Diego County ERCs | Webinar | Kevin J. Chicas

- May 5** “Legal Issues Regarding Hiring”
Gold Country ERC | Webinar | Monica M. Espejo
- May 25** “Employees and Driving”
Humboldt County & Ventura/Santa Barbara ERCs | Webinar | James E. Oldendorph
- May 11** “Maximizing Supervisory Skills for the First Line Supervisor Part 1”
Monterey Bay, North State, Orange County, San Diego, San Gabriel Valley & San Mateo County ERCs | Webinar | Heather R. Coffman & Nicholas M. Grether
- May 12** “Maximizing Supervisory Skills for the First Line Supervisor - Part 2”
Los Angeles County Human Resources Consortium | Webinar | Laura Drottz Kalty
- May 18** “Maximizing Performance Through Documentation, Evaluation and Corrective Action”
East Inland Empire & West Inland Empire ERCs | Webinar | Michael Youril
- May 19** “Maximizing Supervisory Skills for the First Line Supervisor Part 2”
Bay Area, Central Valley, Gateway Public, San Joaquin Valley & South Bay ERCs | Webinar | Heather R. Coffman & Nicholas M. Grether
- May 25** “Family and Medical Care Leave Acts”
Central Coast & Imperial Valley ERCs | Webinar | Che I. Johnson
- May 25** “Maximizing Supervisory Skills for the First Line Supervisor Part 2”
Monterey Bay, North State, Orange County, San Diego, San Gabriel Valley & San Mateo County ERCs | Webinar | Heather R. Coffman & Nicholas M. Grether
- May 26** “Managing the Marginal Employee”
North San Diego County ERC | Webinar | Stephanie J. Lowe

Customized Trainings

- Apr. 4 & 5** “Preventing Workplace Harassment, Discrimination and Retaliation”
City of Palm Springs | Alison R. Kalinski
- Apr. 6** “Workplace Bullying: A Growing Concern”
City of Santa Rosa | Heather R. Coffman
- Apr. 6&13** “Preventing Workplace Harassment, Discrimination and Retaliation”
City of Stockton | Webinar | Michael Youril
- Apr. 7** “Ethics in Public Service”
County of San Luis Obispo | Webinar | Yesenia Z. Carrillo
- Apr. 12** “Maximizing Supervisory Skills for the First Line Supervisor - Part 1”
Office of the District Attorney | Santa Ana | I. Emanuela Tala
- Apr. 13** “Maximizing Supervisory Skills for the First Line Supervisor - Part 2”
Office of the District Attorney | Santa Ana | I. Emanuela Tala
- Apr. 19** “Maximizing Supervisory Skills for the First Line Supervisor - Part 1”
City of Stockton | Webinar | Shelline Bennett
- Apr. 19, 21, 22 26 & 28** “Preventing Workplace Harassment, Discrimination and Retaliation”
San Ramon Valley Fire Protection District | Heather R. Coffman

- Apr. 20** **“Maximizing Supervisory Skills for the First Line Supervisor - Part 2”**
City of Stockton | Webinar | Shelline Bennett
- Apr. 25** **“Maximizing Performance Through Documentation, Evaluation and Corrective Action”**
County of Monterey, Health Department | Webinar | Heather R. Coffman
- Apr. 26** **“Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor”**
Office of the District Attorney | Santa Ana | Danny Y. Yoo
- Apr. 26** **“PDL, Lactation Laws, etc..”**
Riverside County District Attorney’s Office | Jennifer Palagi
- Apr. 27** **“The Art of Writing the Performance Evaluation”**
Office of the District Attorney | Santa Ana | T. Oliver Yee
- Apr. 28** **“Employment and/or Legislative Update”**
California Sanitation Risk Management Authority (CSRMA) | Webinar | Kevin J. Chicas
- Apr. 28** **“Maximizing Performance through Documentation, Evaluation and Corrective Action”**
Office of the District Attorney | Santa Ana | T. Oliver Yee
- May 5** **“Preventing Workplace Harassment, Discrimination and Retaliation”**
County of San Luis Obispo | Webinar | Yesenia Z. Carrillo
- May 6** **“Preventing Workplace Harassment, Discrimination and Retaliation”**
San Ramon Valley Fire Protection District | Heather R. Coffman
- May 17** **“Maximizing Performance Through Evaluation, Documentation, and Corrective Action”**
City of Stockton | Webinar | Che I. Johnson
- May 18** **“Maximizing Performance Through Evaluation, Documentation, and Corrective Action”**
Port of Oakland | Lisa S. Charbonneau
- May 19** **“Preventing Workplace Harassment, Discrimination and Retaliation”**
Housing Authority of the City of Alameda | Webinar | Yesenia Z. Carrillo
- May 24** **“The Art of Writing the Performance Evaluation”**
Port of Oakland | Lisa S. Charbonneau
- May 25** **“FLSA”**
Los Angeles World Airports (LAWA) | Webinar | Elizabeth Tom Arce
- May 26** **“Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor”**
California Sanitation Risk Management Authority (CSRMA) | Webinar | Heather R. Coffman

Speaking Engagements

- Apr. 5** **“The Ethical and Transparent Fire District: Ethics in Public Service”**
Fire Districts Association of California (FDAC) Annual Conference | Napa | Lisa S. Charbonneau
- Apr. 5** **“Preventing Workplace Harassment, Discrimination and Retaliation”**
FDAC Annual Conference | Napa | Jennifer Rosner
- Apr. 28** **“Social Media and Privacy: Managing Risk and Strategic Best Practices”**
County Counsels’ Association (CCA) Civil Law and Litigation Conference | Monterey | J. Scott Tiedemann & James E. Brown

- May 2** **“Tangled Up: When Your Consultant Is Your Employee - How to Determine if a CalPERS Retiree or Anyone Else is Your Employee or an Independent Contractor”**
Western Region International Public Management Association Human Resources (IPMA-HR) Annual Training Conference | Anaheim | Steven M. Berliner
- May 3** **“Labor and Employment Litigation Update”**
League of California Cities 2022 City Attorneys’ Spring Conference | Carlsbad | Geoffrey S. Sheldon
- May 3** **“IRS Proposes Affordable Care Act Penalties Against Public Agencies - What You Should Do Now!”**
Western Region IPMA-HR Annual Training Conference | Anaheim | Heather DeBlanc
- May 4** **“The Tension Between the Right to Privacy and Police Technology”**
League of California Cities 2022 City Attorneys’ Spring Conference | Carlsbad | James E. Brown & Neil Okazaki
- May 4** **“Defining Board & Staff Roles and Relationships - Day 1”**
Special District Leadership Academy (SDLA) Webinar | Webinar | TBD
- May 5** **“Frequent FLSA Liability Risks in Public Agencies”**
League of California Cities 2022 City Attorneys’ Spring Conference | Carlsbad | Brian P. Walter
- May 5** **“Defining Board & Staff Roles and Relationships - Day 2”**
SDLA Webinar | Webinar | TBD

Seminars/Webinars

- Apr. 11** **“Don’t Leave Money on the Table—How to Recover \$\$\$ from the Federal Government for Your Agency’s COVID Leave Payments”**
Liebert Cassidy Whitmore | Webinar | Alexander Volberding & Marcus Wu
- Apr. 14** **“Peace Officer Personnel Records Management”**
Liebert Cassidy Whitmore | Webinar | Geoffrey S. Sheldon
- Apr. 21** **“The Public Employment Relations Board (PERB) Academy - Part 1”**
Liebert Cassidy Whitmore | Webinar | Adrianna E. Guzman
- Apr. 27** **“LCW Employment Law Seminar”**
Liebert Cassidy Whitmore | Webinar | J. Scott Tiedemann
- Apr. 28** **“The Public Employment Relations Board (PERB) Academy - Part 2”**
Liebert Cassidy Whitmore | Webinar | Adrianna E. Guzman
- May 6** **“FLSA for Public Safety”**
Liebert Cassidy Whitmore | Webinar | Richard Bolanos
- May 19** **“Trends & Topics at the Table - Part 1”**
Liebert Cassidy Whitmore | Webinar | Jack Hughes
- May 26** **“Trends & Topics at the Table - Part 2”**
Liebert Cassidy Whitmore | Webinar | Jack Hughes