CBM CARROLL, BURDICK & McDONOUGH LLP

VOL. 21, NO. 1

THE LABOR BEAT

SAN FRANCISCO OFFICE
44 Montgomery Street, Suite 400
San Francisco, CA 94104-4606
415•989•5900

WALNUT CREEK OFFICE
1676 No. California Blvd., Suite 620
Walnut Creek, CA 94596-4142
925•944•6080

SACRAMENTO OFFICE
1007 7th Street, Suite 200
Sacramento, CA 95814-3409
916•446•LAWS (5297)

LOS ANGELES OFFICE
633 West Fifth Street, 51st Floor
Los Angeles, CA 90071
213•833•4500

CB&M Says Goodbye to Ron Yank

By Gregg Adam

CB&M recently said goodbye to one of the "founding fathers" of its labor practice, Ron Yank. Ron has been flying the flag at CB&M since 1974 and had an exceptional career as a labor lawyer representing primarily public sector labor unions with an emphasis on law enforcement officers and firefighters. Ron was, for more than thirty years, the outside counsel for the CDF Firefighters and the California Correctional Peace Officers' Association. It was for the latter client that Ron argued in the United States Supreme Court in the early eighties.

Ron was renowned for many of his idiosyncrasies, including, in no particular order, Caesar salads, seven-mile runs, lunch at Perry's in downtown San Francisco and flawless grammar. At his heart, however, Ron was a champion for the rights of working men and women up and down the state of California. As the legal quarterback for his two main state clients, and a vast array of local clients, Ron's tireless advocacy bettered the lives of hundreds of thousands of public employees. While Ron's daily presence around the office will be sorely missed, our practice group looks forward to an exciting future founded on many of the principals Ron instilled in all of us.

Firefighters Bill Of Rights Signed Into Law

By Gary Messing

Effective January 1, 2007, California firefighters will now benefit from a Firefighters Procedural Bill of Rights (FBR) Act. This Act closely resembles the Peace Officers Bill of Rights (POBR).

While the FBR tracks the POBR on numerous procedural details, one area of difference is that it appears that the FBR will only apply to acts taken in the course and scope of employment, while the POBR encompasses an investigation of any misconduct on or off duty by a peace officer. As a practical matter, however, it seems unlikely that employers would have two sets of policies and procedures for investigations, one for on-duty conduct and the other for off-duty conduct.

Another area of difference is with respect to what occurs when an employee is forced to answer questions that might incriminate them. Under the POBR a peace officer should be Mirandized, and if he or she asserts a Fifth Amendment Right to remain silent, the officer can then be ordered to answer questions under pain of insubordination. In contrast, employers questioning firefighters who assert their Fifth Amendment rights must seek and receive a formal grant of immunity from the District Attorney or the U.S. Attorney's Office before questioning the employee. Only after receiving a full grant of immunity, can the employee be ordered to answer questions under pain of insubordination.

While the FBR applies to all permanent firefighters (with the exception of inmate firefighters), it does not apply to probationary employees, in contrast to the POBR. On the other hand, the POBR deals only with what happens at investigations conducted by the employer. The FBR also applies to certifications and licensing agencies, and investigations and actions taken by them against firefighters.

The provision requiring the full grant of immunity was taken as a response to the now pending litigation in *Spielbauer v. County of Santa Clara.* Carroll, Burdick & McDonough (CB&M) is intimately familiar with Spielbauer, and has filed an amicus curiae brief (friend of the court) brief in support of the County of Santa Clara on behalf of the PORAC Legal Defense Fund.

Since the FBR has nearly identical language to the POBR, all of the case law that has developed under the POBR will be applicable immediately to the FBR.

CB&M has prepared training for the firefighters so they can identify and be aware of the rights and issues that may arise under the Act in the near future.

Spielbauer Amicus Brief

The amicus curiae (friend of the court) brief filed on behalf of the PORAC Legal Defense Fund by CB&M is available and can be accessed by anyone through the Carroll, Burdick & McDonough website at: www.cbmlaw.com/practices/public.asp.

New Bill Provides Leave to Military Spouses

By Jason Jasmine

Assembly Bill 392, effective October 9, 2007, provides that employers with more than twenty-five employees must allow the spouse of a returning soldier up to ten days of unpaid leave while the solider-spouse is home on military leave. The employee seeking leave must request the leave within two business days of receiving notice that the military spouse will be on leave, and must submit written documentation that the military spouse will be on leave. The employee must also work an average of twenty or more hours per week. This law also prohibits employers from retaliating against employees for requesting or taking this leave.

City Must Meet and Confer before Deciding to Outsource Services

By Natalie Leonard

In *Rialto Police Benefit Ass'n v. City of Rialto*, 155 Cal.App.4th 1295 (2007), the court of appeal addressed an issue of first impression: Is a city's decision to enter into a contract with the county sheriff for law enforcement services, rather than continue to provide such services through the city's own police department, subject to the meet and confer requirements of the Meyer-Milias-Brown Act ("MMBA") (Gov. Code, § 3500 et seq.).

The court, applying the balancing test used in *Building Material & Construction Teamsters' Union v. Farrell*, 41 Cal.3d 651, 665 (1986) ("*Building Material*"), answered: YES. The MMBA's meet and confer requirements obligated the City of Rialto to meet and confer in advance of its decision to outsource its law enforcement services to the county.

The parties never disputed the facts. For many years, the City of Rialto provided its own law enforcement services. The Rialto Police Benefit Association ("RPBA") represents both the peace officers and the administrative staff employed to provide those services. When the city decided to outsource in September 2005, the employees were working under an MOU which term ran from January 2004 to December 2005.

On September 15, 2005, the City Administrator requested permission from the City Council to outsource law enforcement services to the county; the city council approved the change on that same day. Also on that same day, the city administrator delivered a letter to the RPBA offering to meet and confer about the effects of this change. The City never offered to meet and confer about whether to outsource law enforcement services.

The RPBA immediately requested and secured a temporary restraining order ("TRO") to stay the outsourcing, arguing that the City failed to honor its duty under the MMBA to meet and confer about whether to outsource services. The trial court agreed with the RPBA, and issued a temporary restraining order. After a hearing, the trial court granted a writ of mandate that set aside the city council's decision and ordered the parties to meet and confer. Ultimately, the parties agreed to a new MOU in which the city agreed not to outsource services for the duration of the MOU. The City also appealed the trial court's decision, resulting in this legal decision.

The Court of Appeal reviewed the trial court's decision de novo because the issue on appeal was a pure issue of law. The governing law here was, of course, the MMBA, which governs labor relations between cities and/or counties and their employees. The MMBA establishes a duty for the city to meet and confer regarding matters within the scope of representation. These matters include "wages, hours and other terms and conditions of employment," but exclude the "merits, necessity or organization of any service or activity provided by law or executive order."

The Court applied the three-part balancing test established in *Building Material* to determine whether this management decision fell within the duty to meet and confer or the exception. 41 Cal.3d at 663. The Court of Appeal applied the test because the city outsourced law enforcement services to "implement a fundamental . . . policy decision," but that policy decision also had a "significant and adverse effect on the wages, hours, or working conditions of the employees."

Therefore, the court determined that the action "is within the scope of representation only if the employer's need for unencumbered decision making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question." (*Building Material, supra*, 41 Cal.3d at p. 660, citing *First National Maintenance Corp., supra*, 452 U.S. at p. 686, and *Berkeley Police Assn. v. City of Berkeley, supra*, 76 Cal.App.3d at p. 937.)

Under the first prong of the three-part test, the court observed that the decision to transfer work outside of the bargaining unit could clearly adversely affect the wages of bargaining unit members, and this factor weighed in favor of requiring meet and confer.

The second prong asks whether the public entity's decision is "excepted from the duty to bargain under the 'merits, necessity, or organization' language of section 3504" as a fundamental managerial or policy decision. The City argued that its decision was a fundamental managerial decision, and was, therefore, exempt from the meet and confer requirement. The court declined to determine whether this was a fundamental managerial decision. Instead, it pointed out that even if it were a fundamental decision, the City would still be subject to a duty to meet and confer under the third prong of the balancing test. Therefore, the court had no need to decide whether this was a fundamental managerial decision.

Finally, the court examined whether the employer's need for unencumbered decision-making in managing its operations was outweighed by the benefit to employer-employee relations of bargaining about the action in question. Here, the court said that the benefits to the employer-employee relations prevailed. The court found that the City did not, as it argued, get out of the business of providing law enforcement services. Instead, it simply changed "vendors" from the city to the county. The court relied upon a staff report prepared for the City Council that pointed to "internal strife, accusation of discrimination and unfair treatment, employee turnover and stress and . . . questions of the ability to provide adequate service levels" and focused on the cost savings to be accomplished by contracting with the county for law enforcement services. The court rejected the City's argument that police-community relations issues motivated the change.

Since the City was still procuring law enforcement services, its duty to meet and confer would not significantly abridge the City's freedom to provide such services. The court cited a long list of cases for the proposition that changes taken to achieve cost savings or otherwise transfer work out of the bargaining unit were well suited to the bargaining process. Indeed, to deny the obligation to meet and confer would be to attack the underpinnings of the bargaining process, allowing a city to avoid its obligation to meet and confer any time they wished to try to cut costs.

This decision clearly establishes strong precedent that municipalities should meet and confer before outsourcing services provided by a union, whether they are law enforcement services, or other city and county services.

Dangerous Staph Infection Threatening Your Health and Safety

By Jennifer Stoughton

One issue that has been dominating the headlines over the past year is a dangerous new form of the common staph infection called

MRSA. MRSA is short for Methicillin-Resistant Staphylococcus Aureus, and is especially dangerous for law enforcement officers whose daily job duties bring them in close contact with citizens and other law enforcement officers. In the wake of the spread of this dangerous and sometimes deadly disease, CB&M has been leading the fight to ensure that employers take the necessary steps to protect the health and safety of their employees.

Here is a quick overview of MRSA in technical medical terms. It is a staphylococcal infection ("staph infection") that is resistant to all commonly prescribed beta-lactum antibiotics including: penicillin, ampicillin, amoxicillin, amoxicillin/clavulate, methicillin, oxacillin, dicloxacilling, nafcillin, cephalosporins, carbapenems, and the monobactams. In layman's terms, MRSA is essentially a staph infection that has mutated so that it is resistant to most antibiotics.

MRSA can cause minor skin or soft tissue infections such as boils, as well as more serious complications such as wound infections, abscesses, pneumonia, and sepsis that can require hospitalization. In the most serious cases, where the infection reaches the heart or lungs, the infection can be life threatening. What makes MRSA so dangerous is that doctors cannot distinguish between a MRSA infection and a typical staph infection by just looking at it. Often, an MRSA infection is mis-reported as a spider bite, and by the time the ailment is recognized as a MRSA infection, it has caused serious health damage to the person infected and/or spread to other people.

MRSA is transmitted through skin-to-skin contact with an infected person or by contact with objects (such as towels, linens or exercise equipment) that have been used or touched by an infected person. MRSA also may be transmitted by persons with MRSA pneumonia coughing up large droplets of infectious particles. A large percentage of the population carries the MRSA bacteria and can transmit the infection even though they do not have any symptoms of MRSA.

In early 2007, Folsom State Prison experienced a dramatic increase in the number of MRSA infections among staff. Many of the individuals infected ended up in the hospital and had to undergo surgery. After multiple attempts to convince the state to institute changes failed, CB&M partners **Gregg Adam** and **Angela Reddock**, and associate **Jennifer Stoughton**, filed a lawsuit against the State employer on behalf of Bargaining Unit 6 (represented by CCPOA) claiming that the State employer failed to protect its employees created an unsafe working condition in violation of Labor Code sections 6400-6404. Amazingly, the State employer did not have an official policy or set of procedures to address the spread of MRSA, and did not believe that any changes were necessary even in the face of undisputed evidence that the number of MRSA infections were increasing. CB&M also filed an official complaint with Cal/OSHA alleging unsafe working conditions relating to the spread of MRSA on a statewide level and requested a remedy that would apply to all 31 correctional facilities across the State.

Although it took six months of litigation with the State employer and countless hours pushing Cal/OSHA to act, the issue seems to be inching towards resolution. On October 30, 2007, Cal/OSHA issued various citations against Folsom State Prison totaling more than $20,000 in fines as well as a comprehensive Special Order. The Special Order essentially ordered CDCR to develop and implement a policy aimed at decreasing the spread of MRSA. The Special Order issued against Folsom State

Prison was the first time Cal/OSHA has issued a Special Order related to MRSA, illustrating the serious nature of the problems uncovered at Folsom State Prison, and subsequently at other institutions.

Unfortunately, the problem is far from solved. Immediately upon receipt of the citations, the State employer appealed them. While the appeal is pending, the State employer does not have to change any of the conditions that Cal/OSHA designated as unsafe. The good news in that Cal/OSHA seems to be taking the issue seriously and has requested that the State employer create and implement a policy aimed at combating MRSA at all prison institutions. Meanwhile, CB&M continues its fight against the State in court to ensure that the State implements all necessary policies as soon as possible in order to prevent the spread of MRSA.

CB&M believes that MRSA is, and will continue to be, a serious problem facing law enforcement officers across the State and is committed to continuing to fight to ensure that employers take the necessary steps and precautions to ensure the health and safety of its employees.

Hanford POA Receives a Substantial Increase

By Richard Pontecorvo, HPOA Past President

The Hanford Police Officers' Association (HPOA) ratified a new contract which provides the largest increases in our history. Over a year in planning and preparations at the direction of our labor relations attorney, **Gary Messing**, of Carroll, Burdick and McDonough LLP (CB&M), contributed significantly to our success. The HPOA has a very good working relationship with Messing, who has represented us in other matters, and the membership has grown to trust his advice.

HPOA members supported every aspect of our plan for negotiation, giving the negotiation team complete decision-making authority at the bargaining table. With this authority, the negotiation team was able to deal effectively with issues concerning every aspect of our membership.

Over the last several years HPOA members have developed close relationships with members of the Hanford City Council. HPOA members were able to discuss important issues affecting the Hanford Police Department, HPOA members and the community in general. The Hanford Police Department has suffered from retention and recruitment problems for several years. The department has not been able to maintain full staffing for any length of time for the last 10 years, during which the department has had to pull officers from Investigations, Gang Task Force, Schools, DARE and the P.O.P team, just to maintain the patrol staffing levels. The HPOA members' efforts to educate members of the City Council on important issues and the outpouring of support from the public undoubtedly played a significant role in our successes at the bargaining table.

With our contract set to expire December 31, 2007, we began negotiations in October 2007. Messing led the negotiation, supported by the HPOA Negotiation Team, which included this author, President Richard Pontecorvo, Treasure Dean Hoover and HPOA member Justin Vallin. After 2 ½ months, we reached agreement with the City on a new contract, which was ratified on January 1, 2008.

The new contract includes a list of enhancements and provides more than 36.3 percent increases in pay for some officers compounded over this three-year contract. Officers in the first year will receive a total of over 10 percent in salary increases. Officers in the second year will receive a total of 4 percent in salary increases and officers with over 10 years of service with the Hanford Police Department will receive a 5 percent longevity step. Officers in the third year will receive a total of 5 percent in salary increases.

Additional increases spread out over the three years include POST incentives that were negotiated back for officers hired after 01-01-01, which provides 5 percent for intermediate certificate and 2.5 percent for advance certificate for a total of 7.5 percent. Specialty incentives were instituted for the Motor officers and Gang Task Force ("GTF") officer. The Motor officers will receive replacement boots and safety sunglasses every two years. GTF officer will receive an additional 5 percent salary increase while assigned to the Gang Task Force.

Under this new contract the City will increase the officers' survivor benefit to Level 4 and provide a retirement benefit of SB 53 (EMPC), by which the City will report the value of the employer-paid members' contributions for computing final compensation for retirement. City agreed to fully pay Level III ballistic vests for officers. The City agreed to increase from a 50/50 split to a 60/40 split on health insurance. Officer will have the opportunity to contribute towards a retirement medical plan. There were various other benefits and language improvements. Some officers will see a total compensation increase of just under 45% during the term of the three-year MOU.

The City and HPOA approached these negotiations as an opportunity to resolve the major concerns of officer retention and recruitment. The HPOA negotiation team and Gary Messing worked hard to achieve the results of this contract. A special thank you is owed to the Hanford City Council and the City negotiation team lead by City Attorney Robert "Bob" Dowd, Chief Carlos Mestas, Mary Lindsey and Tom Dibble, who recognized the problems and were willing to work hard, give up weekends and take the steps towards resolving them.

Contract For Yolo County Attorneys

The Yolo County Attorneys Association chose for the first time to be represented by a professional negotiator at the bargaining table. CB&M Sacramento Labor Partner **Gary Messing** was selected to head the negotiation team, which included Deputy District Attorneys Elizabeth Eaton and Deanna Hays and Deputy Public Defenders Bret Bandley and Josh Kaizuka. The result was a stunning three-year contract with a total increase in compensation of nearly 35%. President Bret Bandley indicated that it was easily the most comprehensive contract the Association had ever obtained.

The salary component, which after compounding amounts to 22.5%, comes in increments of 8% in November of 2007, 2.5% in April of 2008, 8% in November of 2008 and 2.5% in April of 2009. The salary is reduced by an amount equal to a 1% contribution to PERS because the County also agreed to improve the retirement from the 2% at 55 to 2.5% at 55 effective January of 2009.

The MOU was also significant because, for the first time, the County agreed to establish a comprehensive Memorandum of

Understanding that included new guidelines for outside employment which eliminated the "sole discretion of the department head", included scope of agreement and severability provisions, and most important, adopted arbitration for discipline and grievances.

The County also agreed to permit the Association to join a retiree medical plan if the County does not establish one by December of 2008. The County implemented a $25,000 life insurance policy, increased on-call pay, adopted 40 hours of release time per year for Association officers to conduct Association business, increased vacation accrual by 8 hours after 20 years (for a total of 192 hours) and an additional 8 hours after 25 years (for a total of 200 hours), added bereavement leave provisions and an agreement to meet-and-confer commencing in January 2008 for the establishment of a non-supervisory Attorney V within the bargaining unit.

The bargaining team worked extremely well together, and established an excellent relationship with the County's bargaining team. The atmosphere was very conducive to an agreement that was beneficial for both sides.

Sacramento Becomes Battleground Over Retiree Health Benefits

The statewide attack on retiree health benefits for public sector workers is raging in Sacramento County. Recently, Sacramento County unilaterally eliminated a retiree health subsidy program that had been in place for almost 30 years. The program not only gave employees access to health insurance after they left active employment, but also provided a subsidy to help fund participation in that program.

The County tried to make unilateral changes in 2006, but rescinded those changes after CB&M, on behalf of the Sacramento County Attorneys Association ("SCAA") and the Sacramento County Professional Accountants' Association ("SCPAA"), filed Unfair Labor Practice ("ULP") Charges with the Public Employment Relations Board ("PERB"). Because the County rescinded the changes, the PERB Administrative Law Judge ("ALJ") dismissed the ULP charges, on the basis that once the unilateral change was rescinded, the charges were moot. We challenged that decision, contending that the matter was not moot, since the County had not waived the right to make unilateral changes in the future, nor had the County given any indication that it would not try to make such changes. As this issue goes to press, PERB is considering our challenge.

On June 5, 2007, before the ink was dry on the ALJ's decision, the County had once again unilaterally imposed a change that would eliminate the Retiree Health Subsidy, and the ability to participate in the Retiree Health Insurance Program, for all existing employees who retire after May 31, 2007. SCAA and SCPAA, this time in coordination with many other unions representing various bargaining units in Sacramento County, filed new ULP charges, alleging (among other things) that the County violated its duty to meet and confer prior to making unilateral changes.

The County, contrary to virtually all law on the subject, contends that it need not bargain over these changes. According to the County, the changes only impact retirees. In fact, PERB recently confirmed its long-standing precedent that "future retirement benefits for employees are within the scope of bargaining because they are part of an employee's compensation package and therefore related to wages." *Madera*

Unified School District (2007) PERB Decision No. 1907. Contrary to the County's assertions, "future benefits of those still employed are unquestionably within the scope of representation." *Temple City Unified School District* (1989) PERB Decision No. 782. PERB ALJ Bernard McMonigle heard oral argument on January 10, 2008. Briefing is due on February 29, 2008, and a decision is expected shortly thereafter. The matter is being handled by CB&M Sacramento Labor Partner **Gary Messing** and Associate **Jason Jasmine**.

Federal Decision Establishes Presumption of Arbitrability Concerning Retiree Issues

By Erick Munoz

With retirement battles looming, it is worth taking notice of a new opinion issued by the 9th Circuit Court of Appeal. *United Steelworkers of America v. Retirement Income Plan for Hourly-Rated Employees of ASARCO*, 2008 DJDAR 180. The decision affords unions in California a strong tool to arbitrate on behalf of its retirees, and creates a presumption that disputes over retiree issues are arbitrable. In other words, when a union demands arbitration for its retirees, the Court must begin from the standpoint that the union should be given arbitration, and management has the burden to rebut that presumption making it much more difficult for management to claim the issue should not go to arbitration simply because it is on behalf of retirees. Arbitrability allows unions to fight retirement issues on multiple fronts, and to represent a larger group of employees when dealing with retirement issues.

There were two primary holdings in this case that strongly favor a union seeking to arbitrate issues on behalf of retirees.

First, the 9th Circuit held the arbitration presumption does apply when a Union seeks to compel arbitration on behalf of retired union members. The Court noted that the cases in other circuits which did not apply the presumption arrived at that decision based on the conclusion that disputes involving retirees were not likely to lead to labor disruption. The 9th Circuit, however, ruled that since the Union initiated and supported the action, it was clear that the threat of labor disruption existed. Going forward, the fact that a dispute may involve retirees as opposed to active union members does not remove the presumption of arbitrability.

Second, the 9th Circuit held that the matter was appropriate for arbitration. The Court stated that the determination was "easy" once the arbitrability presumption was applied. The court held that as long as the Union presented a dispute that was "susceptible to an interpretation" that it fell under an arbitration clause, the Union had the right to compel arbitration. This ruling upheld the summary judgment awarded in the court below in the Union's favor – a decisive victory. This case offers an excellent example of how difficult it should be for management to overcome the arbitrability presumption once it is applied.

Given how much money the State is spending in different areas in attempts to cut retirement plans and retiree health plans, this ruling could prove very helpful in the future as unions seek to arbitrate these cutbacks to retiree benefits.

Although this case was decided under federal law, state courts in California will frequently look to federal law under the National Labor Relations Act for guidance when applying California state and local public sector labor law.

Colusa County DSA Signs Contract

By Joe Garofalo, Colusa DSA President

The Colusa County Deputy Sheriffs Association ("DSA") recently signed a 3-year contract, after 10 months of negotiations between the DSA and the Colusa County Board of Supervisors.

The bargaining team, led by DSA attorney, **Gary Messing** of Carroll, Burdick & McDonough LLP, was once again faced with many challenges, but persisted in its efforts to prevent experienced officers from leaving the department, and to help attract quality lateral transfers and academy recruits.

The DSA, like DSA's in many small counties, is made up of a variety of classifications. The DSA's strategy going into negotiations was to get the best contract for everyone represented and not to neglect any classification. That strategy and perseverance was a success. All classifications received a 10 percent salary increase, including partial retro pay. The uniform allowance was increased to $1,000 per year. Night Differential pay was increased from $5.50 per shift to $10 per shift. The DSA also obtained an educational incentive of 2.5% for AA and 5% for BA/BS, along with an increase of roughly 10% in health benefits. Lastly, the DSA was successful in implementing a personnel file purging system.

My thanks go out to all board members, association members and our attorneys, for their patience and diligence during a very challenging process. The DSA will continue to work with its membership and its attorneys, in looking toward our next contract, and ensuring future pay and benefit increases.

Lodi Professional Firefighters Negotiate Lucrative New Contract

The Lodi Professional Firefighters ("LPF") and the City of Lodi have just agreed to a two and a half year deal that will result in salary increases worth at least 16.8% and as much as 18.5% (after compounding). Among the highlights of this agreement:

- 8% Retroactive to July 01, 2007
- 4.5% From January 01, 2008 – December 31, 2008
- 3.5 – 5% COLA based on the CPI effective January 01, 2009
- Vacation days in excess of 6 can be cashed out at straight time.
- The city agrees to meet and confer regarding the possibility of re-negotiating the comparable cities used for salary surveys.

The City of Lodi, as a practice, hires outside representatives to negotiate on their behalf. It is not uncommon to have a different representative each time we negotiate a contract. Each new representative brings a new style, strategy, and philosophy as it relates to bargaining. This particular cycle the City's position was "Total Compensation Bargaining" for salary comparison purposes. The City included a litany of economic items, including incentives, for their total compensation salary comparison.

For purposes of salary comparison with our negotiated survey cities, we historically have used the top step Captain base salary as our benchmark. By including additional forms of compensation it exaggerated and over stated what the top step Captain's actual salary was.

Subsequently this adversely effected LPF's position in our salary comparison survey.

Making things difficult, prior to bargaining with the City, two other bargaining units had settled contracts utilizing the total compensation method for salary comparisons. Most of the time spent bargaining was spent on the issue of total compensation versus salary, as the proper basis for comparisons. Ultimately, however, LPF was successful in getting the City to back off of the total compensation issue.

Another favorable outcome for LPF was that it was able to guarantee the raises. While this might not seem unusual, the bargaining groups that reached agreement prior to LPF agreed that their raises are contingent on the City having a 1% general fund revenue increase. Recently the Deputy City Manager has forecast that the next year and a half will be economically challenging. The City is worried about sales tax revenue as well as their general fund growth.

LPF stresses the need and importance of being prepared before going to the table. The negotiation committee arduously examined comparison cities' MOUs and frequently engaged in strategy sessions. It was LPF's resolve and ability to persuasively argue, using the facts, that persuaded the City to concede on various issues. The LPF was able to foster an amicable working relationship, and in the end, come to an agreement that is fair and equitable for both parties. The Chief Negotiator for LPF was CB&M Labor Representative **Brad Doell**.

Albany Professional Firefighters Get Big Increases

After six months of intense negotiations the Albany Professional Firefighters ("APF") were successful in obtaining a five-year MOU. The negotiating team was lead by CB&M Labor Representative **Richard Reed**, who has represented the APF for several years. The salary increases alone were worth almost 27%, with increases in salary every six months of the contract. The APF also obtained additional benefits in orthodontia care, sick leave cash out, and an increase in their uniform allowance.

The primary issue for the APF was retiree medical, and Mr. Reed and the negotiation team developed a new concept that includes a sixth step in the longevity system that is exclusively for retiree medical payments. The longevity step begins upon firefighters reaching twenty-four years of service and concludes upon retirement. The City's contribution begins at five percent (5%) for the first two years of the agreement and then is increased to seven and one half percent (7.5%) for the remainder of the contract.

The City and a taxpayer group are in the preliminary stages of exploring the possibility of a Public Safety Tax. Also, if Golden Gate Fields racetrack gets approval to place a card room on their grounds, the City will generate revenue from such a change. The City and the APF agreed to re-open the MOU to discuss Salary and Insurance issues should either of these possibilities come to fruition.

CB&M Helps Reverse Unjustified Suspension

After Carroll, Burdick & McDonough attorneys **Gary Messing** and **Scott Burns** established that all charges were without foundation, an arbitrator has reversed a Central California deputy's 24-hour suspension, awarded him back pay, and required all

references to the unjustified disciplinary action removed from his personnel file.

The deputy had been assigned to field patrol duties for only three months when he was wrongly accused of falsifying his time sheets in order to claim unauthorized overtime. Although an investigation found the charge to be untrue, his Department disciplined him on a new charge that he had deliberately delayed completing some of his reports until after the end of his regular shift in order to be paid at the overtime rate. The Department also accused the deputy of insubordination because he had spoken to his partner about one of the cases for which his overtime was being questioned. Attorneys Messing and Burns presented the arbitrator with evidence that the charges were not only without foundation but that the disciplinary action was improperly motivated by the Department's desire to punish the deputy for failing to volunteer for an assignment.

In a written opinion, the arbitrator acknowledged that the disciplinary action might have been undertaken by the Department for improper motives. However, she did not address that issue fully because it was unnecessary to her decision: there was insufficient evidence to support the charges in any event. CB&M established that the deputy's small amount of overtime was less than average and had been approved by his supervisors. Although the Deputy conceded he had difficulty with the Department's report writing software while he was still new to his patrol assignment, none of his supervisors had raised any concerns nor questioned or counseled him about his report writing or time management skills prior to the disciplinary action being taken. The arbitrator characterized the Department's harsh disciplinary action as "extremely negative and inappropriate" since there was no evidence that the deputy would have been unresponsive to constructive criticism had the Department chosen to counsel him or provide further training instead of taking the severe action it did. The arbitrator also noted that at least some of the overtime was made necessary by the Department's own requirement for officers to remain in the field during certain hours or because the deputy was teamed with a more senior deputy at the time. As to the insubordination charge, "it was added based on speculation and assumption," the arbitrator wrote. There was no evidence that the deputy had disclosed any details of his investigation to anyone – he had done no more than confirm the fact that an investigation was taken place, a common and accepted practice in his Department.

The arbitrator ordered the Department to rescind the disciplinary action and replace it with a non-disciplinary instructive memo – noting, however, that there was no evidence of any further problem since the Department's concerns were first brought to the Deputy attention by his Department's hammer-fisted action.

Firefighter Termination Reversed

CB&M Labor Representative **Richard Reed** successfully represented a professional firefighter with the Jenny Lind Fire Protection District who had received a letter of intent to terminate. After a lengthy telephone conversation with the Fire Chief discussing the employee's legal rights, a face-to-face meeting was arranged. The meeting included several fire department officers who were involved with the issues, Mr. Reed and the firefighter. The meeting was productive and at the conclusion, the firefighter was reinstated without any loss of salary or benefits and without any kind of negative reference in his personal file.

Based in part on this matter, the Department has asked Mr. Reed to conduct training sessions for all department personnel regarding employee/employer rights and the proper procedure for disciplinary action. He will also be briefing them on the new Firefighter Bill of Rights that recently became law.

Voluntary Statement in Criminal Investigation Can Subsequently be Used as Basis to Impose Discipline

By Jason Jasmine

A recent case out of the Second Appellate District confirmed what many public sector labor attorneys have assumed for a long time – voluntary statements made by officers during a criminal investigation conducted by their employer can be used against those officers in subsequent administrative actions. *Van Winkle v. County of Ventura* (2007) __Cal.Rptr.3d__, 2007 WL 4500373.

In 2005, the Ventura County Sheriff's Department Internal Affairs Unit ("IAU") was investigating a citizen complaint against Deputy Van Winkle, which alleged that Van Winkle was having an extramarital affair while on duty. During the course of the investigation, the IAU discovered evidence that Deputy Van Winkle committed a criminal offense, by embezzling firearms from a Department-run program. The IAU referred the matter to the Department's Major Crimes Bureau ("MCB"), and stopped its investigation pending the outcome of the criminal investigation.

The MCB has no authority to conduct administrative investigations, and it was shown that the IAU had no input into the conduct of the criminal investigation into Van Winkle's crimes.

During the MCB's criminal investigation, Van Winkle was arrested and interviewed by an MCB detective, who advised Van Winkle that he was conducting a criminal investigation, and that it was not an administrative matter, so he could not order Van Winkle to speak. Van Winkle nonetheless waived his Miranda rights, and admitted that he had taken home one of the guns that had been brought to the station for destruction. Although the District Attorney's office declined to prosecute, the Department fired Van Winkle, based on the statements he made to the MCB detective.

Van Winkle filed a petition for injunctive relief pursuant to Government Code section 3309.5, claiming that the Department violated the POBR by obtaining statements from him during the criminal investigation without first giving him the advisements required by the POBR, and by attempting to use statements he made during the criminal investigation to support the decision to terminate him. The trial court agreed with Van Winkle based on dicta in *CCPOA v. State of California* (2000) 82 Cal.App.4th 294, which stated that criminal investigations of law enforcement officers by their employers fall within the POBR.

The appellate court cited Government Code section 3303(i) in holding that the POBR expressly does not apply to "an investigation concerned solely and directly with alleged criminal activities." While the court did not rule out the possibility that if a department were to conduct a sham criminal investigation in order to conduct a disciplinary investigation without affording officers their rights under the POBR, the court held that Van Winkle did not plead any facts showing that this occurred in his case. To the contrary, the court found that the

evidence demonstrated that this was an independent criminal investigation, and that there was no ongoing administrative investigation. This is unlike the *CCPOA* case, where the employer was conducting both a criminal and administrative investigation, and the officers were told that they could be subject to both criminal and disciplinary action for not cooperating. Finally, the appellate court held that the dicta in the *CCPOA* case, which stated that the "criminal investigations referred to in subdivision (i) of section 3303 ... must be ones conducted primarily by outside agencies without significant involvement or assistance by the employer" conflicts with the express language of section 3303 and impedes law enforcement agencies from pursuing their own personnel who commit crimes.

Union Can Recover Attorney's Fees for a POBR Action Where a Significant Benefit Has Been Conferred on the General Public

By Jason Jasmine

In *Riverside Sheriffs' Ass'n v. County of Riverside* (2007) 152 Cal.App.4th 414, Riverside County ("County") informed the Riverside Sheriffs' Association ("Association") that it did not need to comply with the Public Safety Officers' Procedural Bill of Rights Act ("POBR") during a criminal investigation. The Association filed a petition for writ of mandate for a finding that the County violated the POBR by denying deputies the right of representation afforded pursuant to Government Code section 3303(i). The court found that the County's actions did violate the POBR, thus, the court issued an injunction prohibiting the County from violating the POBR. The court, however, also found that the County's actions were not malicious, thus the Association was not entitled to attorney's fees under Government Code section 3309.5, which requires a showing of a malicious violation, in order to recover attorney's fees.

The Association filed a motion for attorney's fees under Code of Civil Procedure section 1021.5 (which permits awards of attorney's fees in matters of significant concern to the general public). The County argued that Government Code section 3309.5 limited the ability to recover attorney's fees for POBR violations to those circumstances where the violation was malicious. The trial court held, and the appellate court confirmed, that Code of Civil Procedure section 1021.5 could also be applied because the POBR provides a significant public benefit in that it fosters stable employer-employee relations and a solid and secure public safety work force. Because the Association undertook the burden of enforcing its members' right to representation, and did not seek a financial recovery in doing so, a recovery of attorney's fees was permitted under Code of Civil Procedure section 1021.5.

Civil Service Commission Cannot Impose Discipline Not Authorized by the MOU

By Jason Jasmine

In the recent case out of the First Appellate District, the court held that the Sonoma County Civil Service Commission, which is an agency of Sonoma County, is bound by the terms of the MOU entered into by the County that sets forth the permissible levels of discipline. *Valencia v. County of Sonoma* (2007) __Cal.Rptr.3d__, 2007 WL 4564979.

The Commission vacated the initial proposed discipline (termination), but imposed

alternative discipline that was not authorized by the MOU. According to the appellate court, the Commission was bound by the MOU, thus, it could only impose discipline consistent with the MOU. Therefore, the appellate court affirmed the trial court's granting of a writ of mandate overturning the discipline imposed by the Commission.

Ignoring Mutual Agreement, Court Gives Clerical Error the Force of Law

By Erick Munoz

In *DPA vs. CCPOA*, 152 Cal App 4th 1193 (2007), the Third District Court of Appeal overruled an express finding by an arbitrator and instead enforced what negotiators on both sides agreed was an error. The court held that the arbitrator overstepped her bounds by ruling in CCPOA's favor and set the award aside.

The litigation arose after CCPOA, represented by CB&M, prevailed in an arbitration with the State employer over CCPOA's Release Time Bank, or "RTB." The RTB is a virtual bank of hours that union members can donate to, and union representatives can draw from, in order to engage in union activities without taking time off work. In the previous negotiations, both sides agreed to delete a rule limiting a cap on the amount of hours that could be stored in the RTB, and amended the MOU accordingly. Unfortunately, the MOU contained another provision limiting RTB hours that neither side remembered to delete and the provision inadvertently remained in the version of the MOU the legislature approved.

The case presented a unique question to the court since it involved the parties actually agreeing that a mutual mistake has occurred. Throughout the litigation, the lead negotiators for CCPOA and DPA both agreed that the limit or "cap" on the accumulation of RTB hours had been mistakenly left in the MOU approved by the legislature. Based on the unanimity of the testimony, the arbitrator agreed with CCPOA that both sides intended to eliminate the limit on RTB hours, and erased the time limit.

The appellate court also agreed both sides negotiated a deletion of the cap, and that the case involved a clerical error. Despite this, the court enforced the cap. The court stated that since the arbitrator deleted the cap after the legislature had approved the MOU, the arbitrator was infringing on the right of the legislature to oversee spending. This logic would normally carry some weight, since it likely would be improper for an arbitrator to make an award that somehow changed the level of spending in a document that the legislature had previously approved. If, for example, the legislature had approved an MOU with a certain level of retirement benefits and an arbitrator awarded a higher level of benefits after the fact, it would arguably be improper. Such an award would increase the amount of State spending without legislative oversight.

Under these facts, however, this argument is a stretch. RTB hours are by definition already in the budget, since they are donated by employees who are entitled to the hours as part of their compensation. One employee donating days off to another employee has zero impact on State spending.

This was a puzzling and disappointing decision, but it will likely be applied very narrowly in the future and is not likely to drastically affect future public employee bargaining. Under the ruling in the case, the parties' intentions still carry significant weight in interpreting a MOU. In fact, in a section of

the opinion it chose not to publish, the Court agreed with CCPOA and stated that having the document remain true to the parties' intentions, if clearly discernable, does justify modifying an MOU. The only limit they placed on such alterations was the possible effect on spending that such alterations may have. Otherwise, the parties' intentions will still carry the day when interpreting an MOU.

Profile of CB&M Associate Jennifer S. Stoughton

Jennifer S. Stoughton. Jennifer began working at CB&M in August of 2006 after obtaining her law degree from the University of California at Davis, King Hall School of Law. At UC Davis, Jennifer focused her legal education on labor and employment and was the managing editor for the UC Davis Law Review. Jennifer obtained her undergraduate degree in Political Science/Public Law from University of California at San Diego, and spent her junior year studying at University of Sussex in England.

Since coming to CB&M, Jennifer has worked on a wide variety of labor issues including simultaneously prosecuting an administrative complaint with Cal/OSHA over the spread of MRSA in correctional institutions across the State and instituting a lawsuit against the State on the same issue. Jennifer has drafted trial court and appellate court briefs on various issues, and appealed administrative agency decisions. Jennifer has also represented many local law enforcement officers at Internal Affairs Investigations.

Although still relatively new to the Public Sector Group, Jennifer looks forward to many years of working to protect the rights of employees.

In subsequent issues of the Labor Beat, we will be profiling other attorneys in the CB&M Public Sector Group.

CB&M Welcomes Three New Labor Representatives to the Team

Laurence ("Larry") Crabtree has more than 33 years of professional experience in the California fire service. He retired as a full time professional Battalion Chief of the largest fire department in the State. During the intervening years he served in union positions representing employees statewide, and in a non-uniformed capacity as an appointed upper level manager in the department's headquarters. For 6 years, Crabtree was the CDF Firefighters State Rank & File Representative, then became the Chief of Labor Relations for the California Department of Forestry & Fire Protection (now Cal Fire), a position he held for more than 5 years. He has negotiated contracts worth several millions of dollars. In addition to bargaining, his experiences include representation at the Public Employment Relations Board (unit modifications, unfair practice charges, impasse determination), California State Personnel Board (disciplinary hearings and policy development), mediations and arbitrations.

Richard Reed began his career in the fire service in 1967 with Stanislaus County at Empire Fire Protection District. He was promoted to the rank of Captain. Mr. Reed was instrumental in bringing the IAFF Union into the department and served his brother and sister firefighters as Association and Union President. He received a medical retirement in June 1999 due to a work related back injury. During his fire service career, Mr. Reed began another career in the field of labor relations, and has now been representing public employees and employee associations for over 27 years. He

has extensive negotiation experience representing firefighters and other public sector employees. He is well versed in the Fair Labor Standards Act, the Meyers-Milias-Brown Act, and employees' rights in disciplinary and termination proceedings.

Brad Doell began his fire service career at the Mokelumne Rural Fire Protection District protecting the town of Lockeford and Victor as a volunteer in 1994 and became a full time firefighter in 1995. He promoted to the rank of Captain and was responsible for organizing the paid staff and affiliating with the I.A.F.F. by joining Local 1243. During that time, he was the Shop Steward and negotiated two contracts. In 2001, he was hired by the Lodi Fire Department, and currently holds the rank of Engineer. He has been the Secretary of the Lodi Professional Firefighters (LPF) for 4 years and was recently elected to another 2-year term. In that capacity, he is responsible for records keeping, labor relations, grievance handling, and bargaining. To date, he has negotiated two contracts with the LPF, and has begun to negotiate contracts for other CB&M clients.

CB&M is proud to welcome these three new members of our team.

IMPORTANT NOTICE
TO ASSOCIATION BOARD MEMBERS

CB&M updates its Association Board Member list quarterly. To assist us in keeping accurate, up-to-date names of members and their positions on Association Boards, we would kindly ask you to fill out the form below and mail it to our Sacramento office to: **Carroll, Burdick & McDonough LLP, 1007 7TH Street, Suite 200, Sacramento, CA 95814-3409, Attention: Jacqueline Morris**.

CB&M thanks all of you for your help.

NAME OF ASSOCIATION _____

PRESIDENT _____

VICE PRESIDENT _____

TREASURER _____

SECRETARY _____

CBM CARROLL, BURDICK & McDONOUGH LLP
1007 7th Street, Suite 200
Sacramento, CA 95814-3409