MASTAGNI LAW BULLETIN

Fall 2011

STOCKTON OFFICER PREVAILS IN USE OF FORCE CASE

By Steven W. Welty

Veteran Stockton police officer William Teague recently was exonerated of excessive force charges after an arbitrator found he used reasonable force in detaining a combative subject. Arbitrator Katherine Harris ordered a five-day suspension overturned and ordered appropriate back pay and benefits because there was no evidence Officer Teague had engaged in unreasonable force.

The Stockton Police Department's use of force instructors were unanimous in the opinion Officer Teague's use of force was reasonable, yet the police chief, Blair Ulring, disregarded the instructors' opinions and based his decision to suspend Teague on the suspect's degree of injury. We embarrassed the Department's so-called expert and established the suspect's injuries were not caused by Officer Teague's use of force.

Officer Uses Fist Strikes to Detain Combative Suspect

In December, 2008, Teague and his partner responded to another officer's radio call for help in detaining a combative suspect. When Officer Teague arrived, he saw two other officers fighting with a suspect who was proned on the roadway. The suspect was yelling and cursing, pushing himself off the ground, and swinging and kicking his legs. One officer was struggling with the suspect's legs and another with his right arm.

While his partner assisted with restraining the suspect's legs, Officer Teague got to his knees and attempted to control the suspect's left arm. He saw the suspect kick one officer in the chest and thought both officers looked fatigued and out of breath from the prolonged fight. Teague also heard one of the officers deploy a Taser and saw the suspect was continuing to ignore commands that he stop resisting.

The suspect suddenly turned his face toward Officer Teague, gathered bloody saliva, and spat at him. Teague reacted to this assault by delivering two or three "power fist" strikes to the suspect's face to prevent him from spitting again. Teague stopped using the strikes when the suspect turned his face away. The officers eventually were able to subdue and handcuff the suspect.

(Continued on page 6)

INSIDE THIS ISSUE:

Monterey Officer Vindicated	2
Solano DSA Wins Grievance	3
Placer DSA Wins PERB Charge	4
BETRAYAL! Bargaining Rights Attacked	8
A President's Perspective	10
Presidential Profile	11
Stockton Officials Misuse Public Funds	12
Pension Reform Proposals	13
Ninth Circuit Finds Taser Use Excessive	14
Lifetime Medical Care Won for Client	16
Santa Clara County CPOA Negotiates New MOU	17
Discipline Settlement Agreements on Unsteady Ground	19
Welcome New Clients!	20
Welcome New Attorneys!	21
Events and Volunteer Work	22

CONGRATULATIONS TO MASTAGNI LAW'S SUPER LAWYERS AND RISING STAR!

Four attorneys from Mastagni, Holstedt, Amick, Miller & Johnsen were selected as 2011 Northern California Super Lawyers and Rising Stars. (See story on page 9.)

1912 I Street Sacramento, CA 95811 • Phone: 916.446.4692 • Fax: 916.447.4614 • www.mastagni.com

MONTEREY POLICE OFFICER VINDICATED AFTER DISHONESTY ALLEGATION OVERTURNED BY CITY MANAGER

By Sean D. Currin

A City of Monterey police officer accused of dishonesty was vindicated by his city manager following a hearing over charges arising from the officer's communications with his sergeant about damage to his motorcycle. The city manager dismissed the dishonesty charge and reduced the penalty imposed on the officer.

Miscommunication Over Repair Causes Discipline

Last June, the Monterey officer was experiencing communication troubles with the radio on his police motorcycle. The radio was emitting a squealing sound, so the officer contacted his watch commander and requested to take his motorcycle to Peninsula Communications for repair. The watch commander agreed but asked the officer to confirm the company would be able to service the radio before he traveled out of the City.

The officer contacted Peninsula Communications and was told that while a technician was not available to service the motorcycle, "someone" would be able to help him. The officer, with his sergeant's permission, headed to the repair shop in Salinas.

While enroute, the officer again experienced trouble with the radio system when he tried to use the PA system to address an unsafe driver. The officer fiddled with the wires under the

(Continued on page 17)

About the Law Firm

Mastagni, Holstedt, Amick, Miller & Johnsen is listed in the Martindale-Hubbell Bar Register of Preeminent Lawyers and carries the "AV" rating in the Martindale-Hubbell Law Directory. The "A" signifies the highest level of legal ability, while the "V" denotes "very high" adherence to the professional standards of conduct, ethics, reliability, and diligence.

David P. Mastagni, John R. Holstedt and Michael D. Amick were named "Northern California Super Lawyers" in 2011. The law firm was ranked sixth in Sacramento in 2010 by the *Sacramento Business Journal* and in 2009 was profiled in *Forbes* magazine.

Year Established

1976

Practice Areas

Labor Law
Fair Labor Standards Act
Civil Litigation & Personal Injury
Workers' Compensation
Labor Negotiations
Disability Retirement
Social Security
Peace Officer Criminal Defense

Production Coordinator

Nicole L. Silverman

Contributors

Sean D. Currin
Jeffrey R.A. Edwards
Jeffrey M. Schaff
Jonathan W.A. Liff
David E. Mastagni
Christopher W. Miller
Mark B. Salvo
Kathleen N. Mastagni Storm
Christina Johnson Petricca
Mark Tyndale
Steven W. Welty

Bulletin Editors

Angela M. Mastagni
Christopher W. Miller
Kathleen N. Mastagni Storm

The Mastagni Law Bulletin is prepared for the general information of our clients and friends. The summaries of recent court opinions and other legal developments may be pertinent to you or your association. Please be aware this bulletin is not necessarily inclusive of all the legal authority you should consider when making your decisions. Thus, while every effort has been made to ensure accuracy, you should not act on the information contained herein without seeking more specific legal advice on the application and interpretation of this information to any particular matter.

SOLANO COUNTY DEPUTY SHERIFFS' ASSOCIATION WINS CTO GRIEVANCE

By Christina Johnson Petricca

Conflicting provisions in a memorandum of understanding over the ability of compensatory time off have yielded a side letter giving Solano County deputies the ability to elect CTO as compensation for overtime accrued while attending court off-duty. The agreement came after the DSA filed a grievance challenging the County's refusal to allow deputies to take CTO in lieu of cash for court overtime.

One provision in the Memorandum of Understanding (MOU) allowed deputies to elect how they were compensated for any hours of overtime worked. Under that section, a deputy could be compensated at one and one-half times the hourly rate of pay in cash or receive CTO for the overtime hours worked. A separate provision of the MOU limited compensation for overtime spent attending court to compensation only, with no provision for compensatory time off.

Solano County previously allowed deputies to receive CTO instead of cash for court overtime but recently had stopped that practice because the MOU language did not provide for it. The DSA and its labor negotiator, Dennis Wallach, attempted to negotiate with the County regarding the discrepancies in the MOU. We filed a grievance when the County refused to move from its position. The grievance alleged court time should be compensated at the same rate of pay as other MOU overtime, including in the form of CTO. The County contended deputies should receive different compensation for each type of work because court time and other overtime were separate provisions in the MOU.

The County denied the grievance but offered to reach a side letter to resolve the issue. The parties agreed to interpret the court overtime provision as including compensation with CTO. The deputies in Solano County are now able to elect CTO for court time.

Our firm's labor negotiators have extensive knowledge and experience in drafting labor agreements and know what language should be included in an MOU to afford the greatest compensation to employees. As this case demonstrated, the wording in an MOU can make some provisions subject to different interpretations. For the Solano County Deputy Sheriffs' Association, the lack of clarity and the conflicting provisions in its MOU worked to the deputies' advantage.

Christina Johnson Petricca is an associate attorney with Mastagni, Holstedt, Amick, Miller & Johnsen. She represents public safety employees and labor associations throughout northern California.

Dennis Wallach is a former Cotati police sergeant and union president who now serves our clients throughout California as a labor consultant and contract negotiator.

GIANTS LAW ENFORCEMENT APPRECIATION NIGHT

L-R: Sean D. Howell; Dan Koontz; President of Elk Grove Police Officers Association; Jonathan W. Liff; David E. Mastagni and Will P. Creger.

Mastagni Law Office celebrated the 7th Annual Law Enforcement Appreciation Night with the San Francisco Giants at AT&T Park. Partial ticket proceeds benefited the Bay Area Law Enforcement Assistance Fund and the California Peace Officers' Memorial Foundation.

PLACER DEPUTY SHERIFFS' ASSOCIATION WINS PERB CHARGE

By Kathleen N. Mastagni Storm

After grueling and contentious negotiations, on December 9, 2010, the Placer County Deputy Sheriffs' Association (PCDSA) and the County of Placer settled an unfair labor practice charge arising from the County's failure to meet and confer in good faith during negotiations for a successor Memorandum of Understanding (MOU).

Mastagni law firm negotiator David Topaz and the PCDSA negotiating team began negotiations for a successor MOU in November 2006. The parties met for nearly two years before calling a break and "cooling off period." In March of 2009, the parties resumed negotiations. Though the County agreed to return to negotiations, from the onset the County was not interested in reaching an agreement. Beginning in about April 2009, the County began engaging in bad faith surface bargaining, in violation of Government Code section 3505.

Under the Meyers-Milias-Brown Act, "meeting and conferring in good faith" is a subjective attitude requiring a genuine desire to reach an agreement, where the parties must make a serious attempt to resolve differences and reach common ground. (Gov. Code § 3505.) Bad faith bargaining is demonstrated through a predetermined resolve not to budge from an initial position. (*Placentia Fire Fighters, Local 2147 v. City of Placentia* (1976) 57 Cal.App.3d 9.) A *per se* violation of the duty to bargain in good faith may be found without determining whether the party lacked a subjective intent to reach agreement when a party's bargaining conduct has a potential to frustrate negotiations and to undermine the exclusivity of the bargaining agent. An employer setting mandatory deadlines for concluding negotiations is also evidence of bad faith.

County Engages in Bad Faith Bargaining

Ignoring its statutory obligations, the County engaged in evasive and dilatory conduct in an attempt to drive the parties to impasse and ultimately, unilateral implementation. The County declared it would only meet ten times and set an arbitrary deadline for the conclusion of negotiations. The County then engaged in a series of stall tactics, such as refusing to timely schedule meetings, failing to make substantive offers and counteroffers, arbitrarily valuing and devaluing economic offers, and refusing to go to mediation. Ultimately, on September 22, 2009, the County unilaterally imposed terms and conditions of employment on the PCDSA.

Throughout negotiations Mr. Topaz and the PCDSA negotiation team objected to the County's conduct, to no avail. In October of 2009, I filed a charge with the Public Employment Relations Board (PERB) alleging the County had engaged in unfair labor practices, including failing to meet and confer in good faith and denying the PCDSA its right to represent its members in employer-employee relations. Though PERB does not have jurisdiction over allegations of unfair labor practices for bargaining units composed solely of Penal Code section 830.1 peace officers, PERB accepted jurisdiction because the PCDSA is a "mixed unit," representing welfare fraud investigators as well as Pen. Code, § 830.1 peace officers.

PERB Issues Complaint, Prompting County to Seek Settlement

Apparently confident PERB would find no wrongdoing, the County and its counsel denied any wrongdoing and rebuffed any settlement discussions. But nearly a year after the initial filing, PERB issued a complaint finding evidence that during the period alleged, March 2009 to September 2009, the County had engaged in multiple unfair labor practices. The PERB determined the County violated its bargaining obligations by only agreeing to meet ten times, setting an arbitrary date for concluding negotiations and refusing to clarify its position by failing to provide any explanation or justification for its concession goal.

Quickly thereafter, the County contacted PCDSA seeking ways to resolve the matter. The County assumed that because the parties meanwhile had reached agreement on a successor MOU, the PCDSA would just drop its charge.

PLACER DEPUTY SHERIFFS' ASSOCIATION WINS PERB CHARGE

In December, 2010 the parties met at PERB for an informal settlement conference and were able to reach a settlement agreement. While the County of Placer and its attorneys refused to admit any wrongdoing, they did acknowledge the County had an obligation to meet and confer in good faith.

According to the settlement, PCDSA members active as of December 14, 2010 received two $300.00 payments. The first was awarded in late December, 2010 and the second in July of this year. The award was capped because the parties reached agreement on an MOU between filing the charge and settling the matter. The settlement also acted as a notice, reaffirming both parties' bargaining rights and obligations. Significantly, the notice posting issued by PERB declared the County cannot set arbitrary deadlines and must clarify its positions at the table. In exchange for the settlement and notice posting the PCDSA agreed to withdraw the unfair labor practice charge.

PCDSA then-President Andrew Scott, the PCDSA negotiating team and David Topaz worked hard to vindicate the members' rights and get the best possible contract in trying economic times. The bargaining team's note-taker, Laurie Bettencourt, kept an excellent record of each meeting, significantly aiding in our success at PERB.

In a message to the membership, then-President Scott stated:

> Thank you for all your support during the negotiations process. While it was a difficult journey, we believe we secured a sound and fair contract for our members. We are also very pleased that the County has affirmed its need to negotiate in good faith and was willing to compensate our membership for the actions that occurred in negotiations.

The PCDSA and the County of Placer are in contract until June 30, 2012. When negotiations begin for a successor MOU, PCDSA expects a level playing field and, if not, it's back to PERB!

Kathleen N. Mastagni Storm is an associate attorney with Mastagni, Holstedt, Amick, Miller & Johnsen. Kathleen represents the Placer County Deputy Sheriffs' Association in labor and disciplinary matters.

David Topaz is a former Sacramento police officer and union president who now serves as a labor consultant and contract negotiator with Mastagni, Holstedt, Amick, Miller & Johnsen.

Mastagni, Holstedt, Amick, Miller & Johnsen is in the Blogosphere!

Please check out our California Law Blog at http://mastagnilaw.blogspot.com/.

You'll find news about recent cases, articles about our ongoing litigation, and occasional commentary on decisions by the Public Employment Relations Board and the California and federal courts.

You can subscribe to the blog by e-mail or RSS feed. There is also a link to our blog at our website, www.mastagni.com. See you in the blogosphere!

WILLIAM TEAGUE: AWARDED FULL BACK PAY AND BENEFITS

(Continued from page 1)

When supervisors arrived on scene, Teague told them about his use of the fist strikes. He also described the use of force in his police report. Both sergeants testified they had no concerns about Teague's use of force the night of the incident. The Department's "in house" instructors also found Teague's use of force reasonable.

Arbitrator Rejects City's Use of Force "Expert"

Faced with the unanimous opinion of the Department's own use of force trainers, the City used a training officer from another county who had never before given expert testimony and was not certified by the Commission on Peace Officer Standards and Training (POST) as an "expert" on use of force. The witness testified Officer Teague's use of force was unreasonable but admitted on cross-examination the distraction strikes could be an appropriate tactic to use against a resisting suspect.

Steven W. Welty and Stockton Police Officer William Teague celebrate the arbitrator's decision supporting Officer Teague's use of force.

David Rose, a widely-recognized use of force trainer and expert who has testified in dozens of administrative and judicial proceedings, testified on Teague's behalf that the use of force was reasonable. He was able to show the use of force was consistent with POST standards, Stockton Police Department policy, and past training received by Teague.

In her decision, the arbitrator credited "Rose's opinion that an officer is only required to select a force option which is reasonable under the circumstances and that the force option selected by the Grievant, i.e., two to three fist strikes at 30-40 percent capacity to the face, was reasonable under these facts and circumstances."

Arbitrator Upholds "Reasonableness" of Teague's Use of Force

California Courts consistently have recognized the difficult position in which peace officers are placed during a use of force incident. In *Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527-528, for example, the court stated, "[t]he question is whether a peace officer's actions were objectively reasonable based on the facts and circumstances confronting the peace officer. The possibility of alternative uses of force is not relevant; there is no requirement to use 'perfect force.'" The test as to whether a use of force is reasonable is "highly deferential to the police officer's need to protect himself and others."

In the case of *Graham v. Connor* (1989) 490 U.S. 386, the U.S. Supreme Court set forth the standard for determining whether an officer's use of force was reasonable. The Court stated, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene." Teague's circumstances fit squarely within the *Graham* case.

Evidence at the hearing established all the officers used various force on the suspect during the take-down and struggle. Officer Teague was entitled to assume the suspect was under arrest for serious crimes or was trying to escape. The suspect was resisting violently; was striking officers with his boot-clad feet; spitting, yelling and cursing; and was ignoring commands to desist. In those "tense, uncertain, and rapidly evolving circumstances," which the arbitrator described as a "fast-moving sequence of events," Teague had to make a split-second decision to prevent further injury to himself and the other officers.

WILLIAM TEAGUE: (*CONTINUED*)

Specifically, he had to decide how best to address the spitting assault so he could focus on the other serious danger, the suspect's right arm. He elected to make several quick fist strikes to the suspect's face at 30-40 percent force. After the second or third strike, the suspect turned his head away and was no longer in a position to spit on Teague. Teague discontinued the strikes and began trying to control the suspect's arm. It is significant to note that Teague was using restraint. He was using 30 —40 percent force. He was not trying to knock the suspect out or trying to injure him. Teague discontinued the strikes as soon as the threat was eliminated.

As the City of Stockton's case unraveled, it became clear the police chief and the internal affairs committee had jumped to conclusions without considering all the facts. Arbitrator Harris ordered full back pay and benefits in a binding arbitration decision. In a fitting summary of the case, she wrote:

> There is not one iota of evidence that the Grievant administered the fist strikes with the intent to injure the suspect. Rather, the totality of the evidence leads to the conclusion that the Grievant was merely doing his best to protect himself from injury and subdue a violent suspect.

Steven W. Welty is a senior associate attorney with Mastagni, Holstedt, Amick, Miller & Johnsen. Steve represents peace officers throughout California in administrative appeals, disability retirement proceedings, and litigation.

Mastagni, Holstedt, Amick, Miller & Johnsen Receives Peer Review Rating from LexisNexis® Martindale-Hubbell®

LexisNexis Martindale-Hubbell has recognized Mastagni, Holsted, Amick, Miller & Johnsen with a Martindale-Hubbell Peer Review Rating™. Mastagni, Holstedt, Amick, Miller & Johnsen was given an "AV" rating from its peers, which means the firm is deemed to have very high professional ethics and preeminent legal ability. Only lawyers with the highest ethical standards and professional ability receive a Martindale-Hubbell Peer Review Rating.

BETRAYAL! THE ATTACK ON PUBLIC EMPLOYEE COLLECTIVE BARGAINING RIGHTS IN CALIFORNIA

By David E. Mastagni

While most labor leaders in the United States have focused their attention on the highly-publicized Midwestern assault on public employee unions, a more subversive, dangerous assault is being waged in virtual obscurity in California.

Anti-labor officials in the Midwestern states have overtly attempted to repeal and limit public employee collective bargaining rights, leading the battle against workers out in the open. Yet in California, many local elected officials who claim to support collective bargaining rights are working quietly behind the scenes to undermine these rights. As a prominent California city manager who claims to be a labor-friendly Democrat put it in presentation materials for the International City/County Management Association, "being tough on labor is now politically correct."

California union-endorsed politicians are hiding behind anti-union groups and law firms to roll back public employee collective bargaining rights through aggressive legal theories. The four most frequent methods of attack are: (1) bypassing bargaining through the ballot initiative process; (2) cutting retiree medical coverage and/or pension benefits for retirees; (3) declaring a fiscal emergency in order to violate the collective bargaining agreements; and (4) using bankruptcy to discharge collective bargaining obligations and impose Draconian cuts in compensation and benefits. In California, formerly supportive officials seek curtailment of bargaining rights through the camouflage of the courts instead of the open legislative process.

Bypassing Negotiations through the Ballot Box

Increasingly, our politicians attempt to avoid bargaining by submitting reductions in compensation and changes to the bargaining process directly to the voters. In an employer-oriented publication, one prominent attorney for public employers recently commented, "more and more cities and counties are turning to their charters to limit or reduce benefits or compensation." At the state and local level, ballot initiatives are being pushed to limit pensions and mandate greater employee contributions. In charter jurisdictions, the politicians and their statewide management groups are asking voters to repeal interest arbitration, thereby easing their ability to impose reductions in pay and benefits. Their attorneys are seeking to overturn *People ex rel. Seal Beach* and other longstanding precedents requiring negotiation over ballot measures affecting matters within the scope of representation.

Voter initiatives seeking to side step the requirements of public sector labor law have brought together strange bedfellows. For example, Jeff Adachi, the San Francisco public defender, brought a measure which would have increased contributions toward pension and health-care costs. He teamed up with corporations and wealthy Republicans, who provided over a million dollars in financial support. Mr. Adachi, a self-identified liberal, justifies his attacks on working people by constructing a false dichotomy, an either/or scenario, in which the public sector can *either* pay its employees the wages and benefits for which they worked *or* provide social benefits and programs to other groups, but not both. Mr. Adachi's dichotomy balances public budgets on the backs of middle-class workers while providing absolutely no assurances the "savings" achieved will not be misspent.

Cutting Retiree Medical and Pension Benefits

Unconscionably, public employers throughout our state are attempting to balance their budgets on the backs of retirees with fixed incomes and limited medical coverage. Ambitious public officials consider retirees an easy target because they are no longer represented. Many public agencies have dramatically reduced or eliminated retiree medical coverage, justifying their actions by manipulating their accounting methods and publicizing misleading unfunded liabilities.

For example, Sonoma County refused to bargain and unilaterally reduced retiree medical from 85 percent employer-funded coverage to a mere $500 per month in employer-funded coverage. Sonoma County officials and their contract attorneys touted this taking in a class titled, "Sonoma County's Success Story: A Template For Negotiating And Implementing Systemic Changes To Relieve

Betrayal! the Attack on Public Employee Collective Bargaining Rights in California

OPEB Liability." Our office has obtained an initial ruling that this very same reduction constituted an unfair labor practice because it affects existing employees; i.e., future retirees.

Public employers also are seeking to eliminate or reduce defined benefit pensions. The newest legal challenges seek to reverse the California Supreme Court ruling in *Kern v. City of Long Beach* holding there is a right to a public pension vested upon performance of substantial work. First, they challenge the vested benefits by arguing only pensions earned up to the date of change are vested but future accruals can be reduced for current employees. Second, they argue collective bargaining agreements or imposed terms of employment can reduce benefits regardless of whether they are vested. These legal assaults are working their way through the California and federal courts.

Declaring Fiscal Emergency to Impair Contracts

Employing a new means of extracting reductions from closed contracts, some city councils and boards of supervisors are declaring a fiscal emergency and exploiting the alleged "emergency" to impair the collective bargaining agreement. This scheme is being promoted as a means of obtaining relief from contractual obligations without the inconvenience and cost of bankruptcy. The employers assert a declaration of an emergency is a legislative act not subject to judicial review. If upheld by the courts, this ploy will render public employee contracts terminable at the will of the governing body. Cities such as Stockton, San Jose and Los Angeles are cavalierly employing this tactic and have been emboldened by a recent appellate decision holding unions cannot grieve contract violations predicated on an emergency declaration.

(Continued on page 18)

Super Lawyers 2011

CONGRATULATIONS TO MASTAGNI LAW'S SUPER LAWYERS AND RISING STAR!

Four attorneys from Mastagni, Holstedt, Amick, Miller & Johnsen were selected as 2011 Northern California Super Lawyers and Rising Stars. David P. Mastagni, John R. Holstedt and Michael Amick have again been recognized by their peers for their professional achievement. In addition, David E. Mastagni has been recognized in Rising Stars, a listing of top lawyers who have obtained recognition and achievement, and are 40 years old or younger, or who have been in practice for ten or fewer years.

A PRESIDENT'S PERSPECTIVE: ASSOCIATION LEADERSHIP AND POLITICAL ACTIVITY

By Mark Tyndale, President of the Sacramento Police Officers Association

Of all the duties performed by police union leaders, political activity is probably the least understood by the rank-and-file members. While most law enforcement officers tend to have personal views that range between the moderate and extreme conservative areas of the political spectrum, the candidates who are often backed by association leaders tend to be more liberal due to stronger public stances on labor issues. I doubt the Sacramento Police Officers Association is the only police union that has vocal members who challenge the political decisions of Association leaders when candidates from the Democratic Party are endorsed. During the political season, one of the most common comments heard from members is, "Why the hell would you back that person?!?"

> *"It is not my intention with this article to defend the current public retirement systems, but to highlight the importance of police union leaders effectively communicating the goals of their political activities to their memberships."*

To understand the political efforts of the Association leadership you have to recognize what the goals of the organization are. One of the primary goals of any employee organization is to negotiate the best pay and benefits possible for the employees. This includes retirement benefits and is often referred to as the "total compensation package." Whether it's a municipality, county, or state agency, at some point any contract between the employer and the employee association will have to be approved and ratified by an elected body.

While we may feel like we have more in common with our conservative elected officials in the Republican Party, they are the very source of the most critical attacks on public pensions and pay packages. It is no secret that several bills and initiatives have been launched from Republican sources that would eliminate the current defined benefit retirement plans and replace them with defined contribution plans that are almost always far less lucrative for retired employees. I have never heard a single police officer complain their earned retirement pays them too much money, and yet that is exactly what Republican politicians are saying.

It is not my intention with this article to defend the current public retirement systems, but to highlight the importance of police union leaders effectively communicating the goals of their political activities to their memberships. Retirements offer a clear example of how to justify political endorsements to membership based on the needs of the members of the organization. Cops can be extremely opinionated and bull headed; however, most of them are smart enough to know the value of protecting political efforts that will preserve their pay, benefits, and retirement pensions.

The first step is to create a political candidate endorsement process that addresses specific labor issues and accurately records the candidates' responses. Candidates can be extremely slippery with their responses, but it is important to pin them down. The endorsement process should be friendly on the surface, but be as effective as a criminal interrogation in regards to the specific answers or positions provided by the candidate. If done properly, even candidates who lose any chance of an endorsement leave feeling like they did a good job in the interview because they gave honest answers.

The next step is to choose the candidates who will best serve the needs of the Association among those who are viable. It is very important at this step to be realistic about the political influence of the Association. There are many candidates who promise to do everything the Association leadership wants from them, but realistically have very little chance of getting elected. While it may feel like the right thing is to back them based on principle, it usually results in harming the efforts of the Association. After the election is over it will be important to build a relationship with the winner. It is much easier if the winning candidate was one backed by the Association.

It is also important to get membership involved in the

ASSOCIATION LEADERSHIP AND POLITICAL ACTIVITY (*CONTINUED*)

elections so they can meet the candidates and hear their promises directly. This is usually a monumental challenge for any police labor organization because cops generally shy away from public contact in the communities where they work when their authority is restricted. Those who do not want to walk precincts should at least attend fundraisers and meet the candidates.

The final step for Association leadership is to keep membership updated on the efforts and voting records of the elected officials after the elections. When a specific council member or supervisor backed by the Association champions a cause for them, let the members know their efforts paid off. They also need to be updated on who works or votes against them so they can better understand the importance of political involvement. When they feel like their Association is accomplishing political benefits on their behalf, they will have a much better appreciation for the Association leadership they vote into place.

Mark Tyndale, a veteran of the Air Force, joined the Sacramento Police Department in 1988. He has worked as a patrol officer, a field training officer, a school resource officer, a detective in the Sexual Assault/Child Abuse unit and the Homicide unit. He is one of three Police Department polygraph examiners. Tyndale has served on the Board of Directors of the Sacramento Police Officers Association on and off since 1998 in various capacities. He was formerly the Chair of the Legal Defense Committee and is the current Chair of the Political Action Committee. In 2011, Tyndale was elected President of the Sacramento POA after having served as the Association's Vice President.

PRESIDENTIAL PROFILE: JON RUDOLPH, DSA OF ALAMEDA COUNTY

Jon Rudolph is the President of the Deputy Sheriffs' Association of Alameda County. Jon began his DSA service in November 2005 as a Director at Large, and has also served as both Treasurer and Vice President. He holds the position of Director at Large on the PORAC Board of Directors and the position of Secretary for the Bay Area Chapter of PORAC.

Jon was born in Alabama but raised in Lodi, California. When Jon graduated high school in 1986, he enlisted in the U.S. Army as a Military Police Officer where he served for six years. In June of 1995, Jon was hired by the Alameda County Sheriff's Office as a deputy sheriff. He currently holds that position.

The Deputy Sheriffs' Association of Alameda County was formed and incorporated in 1939. It currently has 930 sworn members, consisting of deputy sheriffs and sergeants. There are nine members on the Board of Directors. The members work in a wide variety of areas, including Patrol Division; two county jails; the Dublin Police Department; Alameda County Transit Services; eight court houses; Transportation; Civil; Coroner's Bureau; Office of Emergency Services; Office of Homeland Security; Oakland International Airport; County Hospital; Oakland Childrens' Hospital; Marine Patrol; Regional Training Center; and as security for Oakland Raiders games and the Alameda County Fair.

President Jon Rudolph

The Deputy Sheriffs' Association of Alameda County represents its members in order to enhance wages, benefits and working conditions of the membership. The Deputy Sheriffs' Association supports Alameda County communities through charitable giving and the promotion of programs that enhance public safety. The Board emphatically supports the belief that its members should work together to attain what is rightfully theirs while remembering they are law enforcement officers dedicated to serving all segments of the community with the pride and caring of professional deputies and sergeants.

THE SAD STORY OF THE MISUSE OF PUBLIC FUNDS FOR STOCKTON CITY MANAGER'S PRIVATE DISPUTE

By David E. Mastagni

Stockton's misplaced fiscal priorities have saddled rank-and-file employees with the burden of paying for the City's largesse. Most recently, the City began funding a private civil suit for their city manager, Bob Deis, under the guise of a cross-complaint against the Stockton Police Officers' Association ("SPOA") over labor issues.

The City's latest legal action is another in a series of unwise financial decisions. While granting City officials eye-popping raises (for example, Deis negotiated over a $54,000.00 raise), the City declared a purported "fiscal emergency" and cut rank-and-file employees' compensation by 20-30 percent. Additionally, Stockton officials drained the general fund, which primarily finances public safety by redirecting public funds to forgive redevelopment loans, provide non-essential governmental services, fund pet projects and subsidize multi-million dollar annual losses from the new marina, arena, and ballpark. After diverting revenues from the general fund, City officials blamed public safety compensation and staffing levels for their mismanaged budget.

Stockton, one of the most dangerous U.S. cities, laid off a quarter of its police and selectively "suspended" labor contracts in order to redirect revenues from public safety to fund other policy preferences, such as art and entertainment. The City asserts a declaration of "fiscal emergency" grants it power to unilaterally suspend contracts and avoid debts without judicial supervision to ensure fairness to all creditors and curb the City's wasteful discretionary spending. For example, despite employing a City Attorney's Office with legal staff, the City is paying millions to two law firms at about $350 per hour to defend its recent actions, adding lawyer costs to the deficit.

SPOA offered to restructure their contract, reducing annual compensation by $10-$12 million and further reducing retirement benefits. Deis rejected the offer and the City Council voted to impair SPOA's contract. SPOA sued. The potential for abuse is obvious. City officials have no motivation to negotiate with SPOA, given the Council's plan to unilaterally impose their desired "structural changes."

Under the Constitution, the government cannot pass a law to impair its contracts unless: (1) an actual emergency is justified by significant and legitimate public purposes; (2) the impairment is reasonable and necessary; and (3) the impairment is temporary and impaired rights are not permanently lost. The standard is a rigorous one and, in the last 35 years, the Ninth Circuit and the Supreme Court have never upheld the impairment of "a financial term of an agreement to which the state entity was a party." The City will not even be able to prove a fiscal emergency. A July 22, 2011, arbitration award held, "the City's June 2010 declaration of an emergency which created an imminent threat to its financial resources was an arbitrary abuse of its discretion." Undaunted, the City threatened to file for bankruptcy and scapegoat the police if it loses in court.

Mastagni, Holstedt, Amick, Miller & Johnsen is in the Blogosphere!

Please check out our California Law Blog at http://mastagnilaw.blogspot.com/.

You'll find news about recent cases, articles about our ongoing litigation, and occasional commentary on decisions by the Public Employment Relations Board and the California and federal courts.

You can subscribe to the blog by e-mail or RSS feed. There is also a link to our blog at our website, www.mastagni.com. See you in the blogosphere!

THE SAD STORY OF THE MISUSE OF PUBLIC FUNDS FOR STOCKTON CITY MANAGER'S PRIVATE DISPUTE

In a taxpayer-funded public relations stunt, the City sued SPOA. The City alleged its contract impairment is valid and accused SPOA of committing unfair labor practices by refusing to re-open their contract and purchasing a house near the City Manager as a bargaining tactic. The first claim will already be determined by the police suit without the cost of a countersuit. The second claim is baseless, as a declaration of emergency does not obligate SPOA to renegotiate their contract. The contract states neither party may demand or be required to renegotiate it, and changes can only be made by mutual agreement. The City refused SPOA's settlement efforts, unreasonably demanding the SPOA reopen the entire contract, permitting the City to impose changes.

The first two allegations are an artifice by which the City is attempting to litigate Deis's personal property dispute at taxpayer expense. While most Stocktonians would welcome cops on their street, Deis contends SPOA's purchase of investment property and its accidental damage to an overhanging limb is harassment. Even public officials cannot interfere with the Constitutional right to buy property or claim a right to select their neighbors. Discovery is ongoing over whether public funds were misused for surveillance of the SPOA.

Fed-up citizens packed a City Council meeting on August 9, 2011 to oppose Deis's $25,000.00 raise for the police chief. The Council heard the taxpayers and rebuked Deis on a 4-3 vote. Deis resigned the next week.

David E. Mastagni is a senior associate attorney with Mastagni, Holstedt, Amick, Miller & Johnsen, where he emphasizes in labor and employment law representation.

GOVERNOR BROWN, REPUBLICANS COME OUT WITH NEW PENSION REFORM PROPOSALS

By Jeffrey R.A. Edwards

On October 27, 2011, Governor Brown released a pension plan proposing several changes to existing pension laws, including:

1. Requiring employees make at least half of pension contributions;
2. Mandating three-year averages;
3. Limiting work by retirees;
4. Denying pension benefits to felons;
5. Prohibiting pension holidays;
6. Prohibiting purchase of service credit;
7. Raising the non-safety retirement age to 67; and
8. Introducing a hybrid defined benefits/defined contribution plan.

Most of Governor Brown's proposals apply to new hires. The details and any bill resulting from the proposal will have to be approved by the Legislature before becoming law or reaching the ballot for voter approval.

Less than a week after Brown released his proposal, Republicans unveiled two proposed voter initiatives to go even further. The Republicans' plans would cap employers' contributions at 6 percent for non-safety and 9 percent for safety and shift the risk of higher contribution rates to employees. This could result in employees, even current employees, paying in as much as 25 percent of their salaries. Under this plan, employees who cannot afford to pay that much could switch to a 401(k)-style plan and lose their guaranteed pension.

The Republican plan is sponsored by proponents, including former assemblyman Roger Niello, who failed to attract support for a similar proposal in May. As voter initiatives, these proposals require millions of dollars in financing to get on the ballot and millions more for a campaign. Proponents acknowledge they do not have funding for the initiatives secured.

Jeffrey R. A. Edwards is an associate attorney with Mastagni, Holstedt, Amick, Miller & Johnsen, who concentrates on complex civil litigation and the Fair Labor Standards Act.

NINTH CIRCUIT FINDS TASER USE TO BE EXCESSIVE

By Christopher Miller and Christina Johnson Petricca

In the first significant Taser case since its decision last year in *Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d 805, the Ninth Circuit Court of Appeals has held officers in Seattle and Hawaii used excessive force in deploying Tasers against non-compliant female suspects. (*Mattos* v. *Agarano* (9th Cir. 2011) 2011 WL 4908374.) The court found, however, that both officers were entitled to qualified immunity and were not subject to civil liability.

The *Mattos* decision concerns two cases consolidated by the court because both involved claims for civil rights violations and excessive force based on uses of a Taser in circumstances where the court believed the suspect posed a minimal threat. In the first case, *Brooks v. City of Seattle*, officers used a Taser three times in "drive-stun" mode on a pregnant woman they were attempting to arrest for speeding in a school zone. In the second case, *Mattos*, Maui police used a Taser in dart mode on a woman who appeared to be blocking an officer from arresting her husband at a domestic violence call.

Court Finds Officers Used Constitutionally Excessive Force

As in any case involving a use of force and "qualified immunity," the *Mattos* court asked whether (1) the officers violated the women's constitutional rights by using excessive force; and (2) whether the rights violated were so "clearly established" at the time of the incidents that the officers should have known their actions were unreasonable or excessive.

Any judicial evaluation of a use of force starts with *Graham v. Connor* (1989) 490 U.S. 386, in which the U.S. Supreme Court stated courts are to balance the force used by the officer against the need for that force – i.e., was the officer's use of force objectively reasonable under the circumstances? *Graham v. Connor* identifies three criteria: (1) how severe was the crime? (2) did the suspect against whom force was used pose an immediate threat? and (3) was the suspect fleeing or actively resisting arrest? The courts have given greatest importance to the second question – whether the suspect is an immediate threat to the safety of the officer or others.

Applying *Graham*, the Ninth Circuit found the officers in both the *Brooks* and *Mattos* cases used unreasonable force. In *Brooks*, the court determined the female driver did not pose a threat to the officers when they tased her because her car was stopped, the keys were out of the ignition, and she was "merely" resisting arrest by wrapping her arms around the steering wheel to prevent the officers from arresting her for speeding and refusing to sign a traffic citation. She was tased in rapid succession – three times in less than a minute. The court found the use of the Taser in these circumstances was excessive force.

In the *Mattos* case, the court reiterated the rule it laid out last year in *Bryan v. McPherson* that the use of a Taser in dart mode is an "intermediate" level of force subject to greater scrutiny than other non-lethal uses of force. The court characterized the suspect's obstruction of the officer's attempt to arrest her husband as "momentary", "defensive", and "non-threatening", and decided, therefore, the use of the Taser without warning was excessive and unreasonable.

Court Grants Qualified Immunity because Taser Law Unsettled

Having found the Seattle and Maui officers used excessive force in tasing the two female suspects, the court next addressed whether the officers were entitled to "qualified immunity" from civil liability for their actions. "Qualified immunity" protects officers from liability for excessive force so long as the alleged conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818.) There is no liability for damages arising from a civil rights violation, in other words, if the officers could not have known the suspects had a right protecting them against whatever use of force is in question.

The incidents in *Brooks* and *Mattos* occurred in 2004 and 2006, respectively. The Court found that at the time there were three circuit court cases from other circuits which

TASER USE DEEMED EXCESSIVE (*CONTINUED*)

rejected the notion the use of a Taser constituted excessive force. The Court stated there was no clearly established law at a "high level of generality" from which a reasonable officer would have known his actions were in violation of a constitutional right. The Court granted qualified immunity to the officers in both cases.

It is worth noting the dissenting judges found the officers had *not* violated a constitutional right – i.e., had not used excessive force -- and had acted reasonably under the circumstances while using the least amount of force necessary. The *Bryan v. McPherson* decision is still the operative law in "dart mode" Taser cases in the Ninth Circuit and it is likely there will be fewer decisions upholding Taser deployments in cases of passive or minimal resistance.

The Ninth Circuit decision is available online at http://www.ca9.uscourts.gov/datastore/opinions/ 2011/10/17/08-15567.pdf.

Christopher W. Miller is managing partner of the Labor Department at Mastagni, Holstedt, Amick, Miller & Johnsen. He is a former prosecutor and emphasizes labor and employment law representation and civil and criminal defense of peace officers.

Christina Johnson Petricca is an associate attorney with Mastagni, Holstedt, Amick, Miller & Johnsen. She represents public safety employees and labor associations throughout northern California.

LESSONS FROM THE NINTH CIRCUIT'S TASER CASES

With the Ninth Circuit Court's holdings in *Bryan* and *Mattos* in mind, officers should consider the following in deciding whether to deploy a Taser:

- **The subject's overall demeanor**
  - Is the subject hostile or merely distraught?
  - Is the subject verbally or physically threatening officers or others nearby?
  - Is the subject physically agitated?
  - Has the subject made motions toward the officer or others?
  - Is the subject actively or passively resistant?
  - Is the subject generally compliant and/or nonthreatening?
  - Is the subject responding to commands?
  - Is the subject attempting to flee or otherwise evade law enforcement?
- **Whether the subject is likely to be armed**
  - What is the subject wearing?
  - Does the subject have ready access to concealed weapons?
- **The distance between the subject and the officer or others nearby**
- **Whether the subject has an apparent medical condition or claims to have a medical condition that could be affected by deployment of the Taser**
- **The severity of the offense the subject has committed /is suspected of committing**
- **Whether other, less invasive methods of control can be used**
- **Whether the subject has received adequate warning his or her actions are likely to result in being tased, and whether the subject has heard such warnings and has had the time to comply**
- **Whether other officers are nearby or available to assist**

PG&E FOREMAN WINS LIFETIME MEDICAL CARE

By Jonathan W.A. Liff

Calvin Mahaney had been retired from Pacific Gas & Electric for nearly a year before he contacted Mastagni, Holstedt, Amick, Miller & Johnsen in May 2008 regarding the back pain he had been experiencing. Mahaney had labored for PG&E for 35 years in various assignments but had most recently been a foreman performing maintenance at a substation in the San Francisco Bay Area. He had developed chronic low back pain while working for PG&E and it eventually forced him to retire.

During our initial discussion of his case, Mahaney mentioned he had been exposed over the years to a multitude of chemicals and irritants, including asbestos, while working for PG&E. With this in mind, I recommended we include possible pulmonary injury as part of his cumulative trauma claim and filed his Application for Adjudication with the Workers' Compensation Appeals Board.

Not surprisingly, PG&E immediately put Mahaney's claim for benefits on delay and denied his claim shortly before the deadline for making its decision on whether to accept liability. Before doing so, however, PG&E sent Mahaney to its preferred occupational medicine clinic to "treat" his injuries. In his initial report, the occupational medicine doctor included several inappropriate comments about Mahaney and his claim.

Fortunately, I was able to negotiate very favorable Agreed Medical Evaluators to address the orthopedic and pulmonary aspects of Mahaney's case. Both physicians found Mahaney's injuries to have been caused or aggravated by his many years of employment with PG&E.

Clearly unhappy with this outcome, PG&E refused to accept liability for Mahaney's injuries and insisted on taking his deposition and conducting further discovery in an attempt to influence the opinions of the medical evaluators. One of the most contested issues was PG&E's insistence on providing the highly-prejudicial report from the occupational medicine doctor to the evaluators. To that end, PG&E filed for a hearing at the Workers' Compensation Appeals Board, which took place in February 2009. The administrative law judge ruled that PG&E would provide additional medical records and a description of Mahaney's job duties to the evaluating physicians to review. PG&E also was allowed to take Mahaney's deposition a second time.

Despite those additional records and materials, the evaluating doctors remained firm in their opinions. Mahaney had indeed sustained cumulative injuries working for PG&E and had incurred a substantial disability rating and need for lifetime medical care as a result. Faced with these opinions, PG&E made a final effort in the summer of 2009 to fight the case by taking the deposition of the internal medicine specialist who had evaluated Mahaney.

When the deposition did not end successfully for them, PG&E seemed resigned to accepting Mahaney's claim and providing benefits. But when settlement paperwork did not arrive, I requested a court hearing of my own to force the issue. At the hearing in January 2010, PG&E's representative conceded the company finally would have to admit the injury. He requested another 30 days to finalize authority and prepare the requisite paperwork. When that paperwork did not materialize within the promised timeframe, I requested yet another hearing at the Workers' Compensation Appeals Board which was scheduled in March.

This time, however, when PG&E's representative was unable to secure the settlement authority and furnish settlement documents, I set the case for trial in June 2010. This, it seems, was the motivation PG&E finally needed to admit Mahaney's injuries and provide benefits. In the end, he was awarded a disability rating worth over $181,000.00 and a provision of lifetime medical care for not only his back and pulmonary issues, but his heart and cardiovascular system as well. It was a long and challenging case, but the results were unquestionably worth it.

Jonathan W.A. Liff is a senior associate attorney in the Workers' Compensation Department of Mastagni, Holstedt, Amick, Miller & Johnsen.

MONTEREY POLICE OFFICER VINDICATED AFTER DISHONESTY ALLEGATION OVERTURNED BY CITY MANAGER

(Continued from page 2)

radio cover and believed he had fixed the problem. He continued to Peninsula Communications but did not get the bike serviced because he thought he had made the repair himself.

On his return trip to Monterey, the officer stopped at the Monterey County Jail in Salinas to retrieve belly chains he had left there several days before. The stop delayed his return to his duty station as he was unable to locate the chains. The officer returned to his shift that afternoon, unaware his sergeant had concerns about the out-of-town trip.

Supervisor Claims Radio Repair Trip Was a "Ruse"

Later that day, the sergeant learned the officer had stopped at the Salinas jail. Believing the officer had been untruthful about his trip to Peninsula Communications, the sergeant telephoned two employees at the repair shop about the officer's visit. The sergeant tape-recorded those conversations without the employees' knowledge. Contrary to basic investigative protocol, the sergeant even told the witnesses he believed the officer had been untruthful.

The supervisor also obtained a video from the Salinas jail which, unknown to the sergeant, had an incorrect time stamp. Without even trying to verify the accuracy of the video, the sergeant opened an internal affairs investigation on the theory the officer was so distressed over leaving belly chains at the Monterey County Jail that he created an elaborate ruse involving a fake repair at Peninsula Communications to try to retrieve them.

The officer participated fully in the investigation and his memory recall was unwavering. He denied telling the supervisor the bike was repaired at Peninsula Communications. He had mentioned the trip to the Salinas jail to at least two other employees, including another sergeant.

City Manager Suppresses Witness Statements

Nonetheless, the Monterey Police Department sustained a dishonesty allegation against the officer. A sustained finding of dishonesty can ruin an officer's ability to have a career in law enforcement, not just in the City of Monterey but with any prospective agency. We appealed the disciplinary action to the city manager, Fred Meurer, who sat as the hearing officer.

At the hearing, the city manager granted a motion to suppress the witnesses' statements as taken in violation of Penal Code section 632. The supervisor testified repeatedly he could not remember several important facts about the case, including whether he had contacted the witnesses twice and what the content was of a memorandum he wrote about the incident. In the end, the city manager dismissed the dishonesty charge and reduced the disciplinary action to one involving poor communications.

Sean D. Currin is an associate attorney in the Labor Department of Mastagni, Holstedt, Amick, Miller & Johnsen. He represents peace officers in administrative proceedings, grievances and critical incidents.

SANTA CLARA CORRECTIONS NEGOTIATES NEW MOU

By Mark Salvo, Labor Negotiator

In early September of 2011 the Santa Clara Correctional Peace Officers Association (SCCCPOA) retained the services of the Mastagni Law Firm. The SCCCPOA was faced with the imminent imposition of a labor contract by the County, which included a large percentage in salary reduction. Everett Fitzgerald, President of the SCCCPOA, along with the board and lead negotiator, Mark Salvo, persuaded the County Board of Supervisors not to impose a labor contract and instead go back to the table for one last attempt at negotiations. A solid four days was spent negotiating with the County. The final outcome was a two year labor agreement that saved the County $17 million dollars over two years and did not result in a reduction to the hourly rate of pay. This was an amazing accomplishment for the negotiating team given the short period of time.

BETRAYAL! THE ATTACK ON PUBLIC EMPLOYEE COLLECTIVE BARGAINING RIGHTS IN CALIFORNIA (*CONTINUED*)

(Continued from page 9)

The potential for abuse is obvious, as elected officials will have no motivation to engage in the give and take of negotiations as they can unilaterally impose any "structural changes" they desire. In Stockton, our office is litigating the constitutionality of the City's breach of the labor contracts under the Contract Clause of the U.S. and California Constitutions. The government cannot impair contracts unless (1) an actual emergency is justified by significant and legitimate public purposes; (2) the impairment is reasonable and necessary; and (3) the impairment is temporary and impaired rights are not lost. Public employee collective bargaining rights depend on the enforcement of the contract clause.

Declaring Chapter 9 Bankruptcy

In order to gain leverage to force unilateral concessions, public employers are increasingly threatening to file bankruptcy if the unions successfully overturn their fiscal emergency claims and contract impairment in the courts. In what amounts to extortion at the bargaining table, public officials and their contract attorneys openly warn they will file for Chapter 9 bankruptcy and scapegoat the unions if their demands are not met.

Despite the disastrous results visited upon the City of Vallejo when it declared bankruptcy, some employers and management attorneys are promoting a bankruptcy agenda, stating public entities can discharge their labor obligations on an expedited basis through Chapter 9 proceedings. These same attorneys are paid over $900 per hour with our tax dollars to bankrupt our local governments and then move on to teaching classes and publishing propaganda on abusing bankruptcy proceedings to avoid labor obligations.

Like the Wall Street executives paying themselves lavish bonuses from bailout monies, these anti-union officials and department heads provide themselves excessive compensation and benefit packages, lavish raises, and hire outside labor and bankruptcy attorneys at exorbitant rates ranging from $350 to $925 an hour. These politicians add these inflated legal costs on top of the concessions already demanded of the unions. In many jurisdictions, public officials do not seek concessions in good faith. Instead, they push a personal marketing agenda, enhancing their prominence and opportunities for speaking engagements by promoting novel methods to break public employee unions and impose concessions. These efforts are intended to balance city and county budgets at the expense of middle class Americans while concealing their mismanagement and misplaced priorities.

To survive this economic crisis, the labor movement must present a unified front and push back against the employer-sponsored attacks on basic democratic rights. First and foremost, we must defeat these legal attacks on our collective bargaining rights in the courts. Politicians must also be held accountable for their actions. Politicians seeking private-sector union endorsements and financial contributions cannot be permitted simultaneously to engage in aggressive union-busting in the public sector, hiring anti-union law firms to promote controversial legal theories to roll back collective bargaining rights for them.

The labor movement must work collectively to enact legislation to strengthen collective bargaining. For instance, Senate Bill 931 would prohibit public agencies from using public funds to pay outside consultants or legal advisors to bust unions. Assembly Bill 646 would limit employers' pre-determined strategies to impose on unions by requiring neutral mediation and fact-finding at impasse. Legislation is needed to limit the ability of public employers to declare bankruptcy without proper oversight. This is the moment we must fight the hardest to preserve collective bargaining for public employees in California.

David E. Mastagni is a senior associate attorney with Mastagni, Holstedt, Amick, Miller & Johnsen. *This article first appeared in the June 17, 2011, edition of the* Sacramento Valley Union Labor Bulletin.

NEW DECISION PUTS DISCIPLINE SETTLEMENT AGREEMENTS ON UNSTEADY GROUND

By Jeffrey R.A. Edwards and Jeffrey M. Schaff

In a case that is a cautionary tale for all parties to discipline settlement agreements, the Fourth District Court of Appeal has upheld the termination of a police officer despite his department's agreement to settle his discipline case for a 160 -hour suspension. (*Ferguson v. City of Cathedral City* (2011) 197 Cal.App.4th 1161.) The court's decision was based on a botched attempt by the officer's attorney to prevent the officer's resignation by declaring the settlement agreement "null and void".

Thomas Ferguson, a City of Cathedral City police officer, was arrested in 2006 and charged with soliciting a prostitute. His department proposed termination, but at Ferguson's pre-disciplinary hearing the parties reached a settlement agreement. Under its terms, the officer would serve a 160-hour suspension and waive his rights to an administrative appeal, in exchange for the City rescinding his dismissal. The agreement included a provision stating the employee would resign if he was convicted of violating certain Penal Code sections or lost his ability to carry a firearm.

The officer later heard the Department had been contacting the District Attorney's office about his criminal case. As a result, his lawyer sent a letter to the Department, which read in part:

> [I]t has come to our attention that . . . [the] Police Department has been in contact with the San Bernardino District Attorney's office. This certainly gives the appearance that there was and has been an attempt to influence the DA's decision as to how the office would prosecute this case if at all . . . [d]ue to the department[']s efforts to undermine [the officer's] agreement he *now considers the agreement* including the condition that he resign in the event he is convicted of or pleads guilty to any related offense *null and void*. (Emphasis added.)

Despite efforts by a second attorney to withdraw the letter, the court found the letter was an "unequivocal repudiation of the separation agreement," and therefore the officer was in anticipatory breach of the agreement.

Under the doctrine of anticipatory breach, when one party to a contract repudiates the contract, the other party has two options. First, the City could have ignored the letter and waited until the officer failed to perform his side of the bargain; i.e., waited until he was convicted of an offense that invoked the resignation provision. The City's second option was to terminate the contract.

The City chose to treat the letter as a repudiation of the agreement, thereby terminating the separation agreement. It then announced it was proceeding with the discipline case and terminating the officer.

The court rejected the officer's "11th-hour argument" the letter was not an anticipatory breach of the agreement and upheld the termination, noting the agreement was void once the City chose to treat the letter as a repudiation of the agreement. The court also noted the City did not deprive the officer of due process by failing to hold a second *Skelly* meeting after choosing to proceed with termination. Although the City attempted to schedule a second *Skelly*, the court stated one was not required.

Ferguson v. City of Cathedral City has lessons for law enforcement managers, attorneys and peace officers. The parties should be mindful of the language used in a settlement agreement to avoid ambiguities subject to multiple interpretations. Likewise, conduct contrary to the settlement agreement can be misconstrued, resulting in repudiation. Even the appearance of repudiation may result in the agreement being declared null and void.

Jeffrey M. Schaff and Jeffrey R. A. Edwards are associate attorneys in the Labor Department of Mastagni, Holstedt, Amick, Miller & Johnsen.

Mr. Schaff, a former deputy public defender, represents public safety officers against disciplinary actions and criminal prosecutions.

Mr. Edwards' focus is complex civil litigation and the Fair Labor Standards Act.

WELCOME NEW CLIENTS!

Mastagni, Holstedt, Amick, Miller & Johnsen is privileged to welcome to its growing list of clients the following public safety and public employee labor associations. We look forward to working with the association presidents and their executive boards in legal defense and labor negotiations for many years to come.

SANTA CLARA COUNTY CORRECTIONAL POA

The **Santa Clara County Correctional Peace Officers Association**, representing 750 correctional officers working in facilities operated by the Santa Clara County Department of Corrections, has retained Mastagni, Holstedt, Amick, Miller & Johnsen for legal defense, civil litigation and contract negotiations. We are very pleased to be working with **President Everett Fitzgerald** and the SCCCPOA board on grievances, litigation and pending discipline matters. Labor negotiator Mark Salvo, along with the board and President Fitzgerald, recently reached a new contract with the County. (See "Santa Clara Correctional Officers Negotiate New MOU", p. 17 .)

ALPINE COUNTY DEPUTY SHERIFFS' ASSOCIATION and ALPINE COUNTY LAW ENFORCEMENT MAMAGEMENT ASSOCIATION

The **Alpine County Deputy Sheriffs' Association** and the **Alpine County Law Enforcement Management Association** have retained Mastagni, Holstedt, Amick, Miller & Johnsen for collective bargaining and discipline defense. **President Chris Harutoonian** of the DSA and LEMA **President Rob Levy** will use the firm's labor consultant, Mark Salvo, in upcoming contract negotiations with the County. Mr. Salvo looks forward to working with both Associations.

SISKIYOU COUNTY DEPUTY SHERIFFS' ASSOCIATION

The **Siskiyou County Deputy Sheriffs' Association**, led by **President Michael Karges**, has designated Mastagni, Holstedt, Amick, Miller & Johnsen for legal defense through PORAC LDF. The SCDSA has also retained the firm for contract negotiations and other legal services. Labor negotiator David E. Topaz looks forward to negotiating a collective bargaining agreement with the County.

SOLEDAD POLICE OFFICERS' ASSOCIATION

President Jose Rodriguez and the **Soledad Police Officers' Association** are the latest Monterey Peninsula peace officers to turn to Mastagni, Holstedt, Amick, Miller & Johnsen for representation in labor negotiations and legal defense. The firm will provide representation through the PORAC Legal Defense Fund and represent the association in upcoming negotiations over a successor MOU.

ARCATA POLICE ASSOCIATION

We are pleased to welcome the **Arcata Police Association** to the Mastagni, Holstedt, Amick, Miller & Johnsen client list for labor negotiations and legal defense. Dennis Wallach worked with **President Bob Martinez** and his negotiating team in mediation with the City of Arcata over a new MOU. Welcome Arcata PA!

MENDOCINO COUNTY DEPUTY SHERIFFS' ASSOCIATION

The **Mendocino County Deputy Sheriffs' Association** and **President Dan Edwards** have retained Mastagni, Holstedt, Amick, Miller & Johnsen for legal defense and labor representation. Judith Odbert already has handled significant discipline cases for the MCDSA and Dennis Wallach will assist the association in negotiating a new contract.

WELCOME NEW ATTORNEYS!

CHRISTINA JOHNSON PETRICCA

Christina Johnson Petricca is an associate attorney in the Labor Department. Her practice focuses on the Public Safety Officers Procedural Bill of Rights and the Meyers-Milias-Brown Act. She is a PORAC LDF panel attorney and represents clients in disciplinary matters, grievances, unfair labor practices, and officer-involved shootings. Christina also advises both private and public sector unions on a variety of labor and employment related matters. During law school she was on the Dean's Honors list, and worked as a law clerk in the CalPERS Legal Office and for the California Department of Personnel Administration.

MATTHEW J. PERKINS

Matthew J. Perkins is an associate in the Workers' Compensation Department at Mastagni, Holstedt, Amick, Miller & Johnsen. He represents employees in Workers' Compensation matters, including hearings, trials, and appeals. Prior to joining the firm in June 2011, Matthew was a legal research attorney at the Placer County Superior Court. He worked primarily on civil law & motion matters—writing tentative rulings, providing research to judicial officers and communicating with attorneys. He also spent some time working on probate cases and doing other legal research.

JEFFREY M. SCHAFF

Jeffrey M. Schaff is an associate attorney with the Labor Department of Mastagni, Holstedt, Amick, Miller & Johnsen. As a former deputy public defender and private defense attorney, Jeffrey has developed a strong reputation with judges and prosecutors while maintaining his unwavering belief in his clients' rights. Jeffrey represents public safety clients in criminal and administrative proceedings.

GABRIEL M. QUINNAN

Gabriel M. Quinnan is an associate attorney in the Labor Department. Gabriel represents peace officers and fire fighters in disciplinary investigations and administrative proceedings. Before joining the firm, Gabriel was a solo practitioner in Sacramento. He also served as assistant public defender and deputy public defender in Placer and El Dorado Counties, as well as the state of Alaska.

ERIC D. LEDGER

Eric D. Ledger is an associate attorney in the Workers' Compensation Department of Mastagni, Holstedt, Amick, Miller & Johnsen. Eric aggressively represents employees in all Worker's Compensation matters. Before practicing law, Eric was a Russian linguist and intelligence analyst with the U.S. Air Force for eight years.

JUDITH A. ODBERT

Judith A. Odbert joined Mastagni, Holstedt, Amick, Miller & Johnsen as a senior attorney in the Labor and Employment Department. Previously, Judith was the supervising assistant public defender in the Sacramento County Public Defender's office. During her 25-year career, Judith has handled litigation and trials including homicides, sexual assaults, gang enhancements, aggravated assaults, domestic violence and general felony practice.

CHARITY EVENTS

9/11 MEMORIAL RUN

Pat Cook, SAFF, Local 522 Secretary –Treasurer; Andy Angell, Local 522 District Director; Michael Bonham, retired Sacramento City Fire Dept. Captain; and Chuck Ingram, Local 522 Metro Director.

Adam Storm, Dan Osier, Stryder Morissette and Jesse Harrel at the finish line of the 9/11 Memorial Run.

CSLEA GOLF TOURNAMENT

Barry Cooper, Cosumnes Community Services Fire Dept.; Andy Angell, SAFF Local 522 District Director; Tony Donoghue; and Bill Hutto, Stockton POA.

STAR 6 MEMORIAL RUN

Adam, Kathleen, and Katherine Storm with Christina and Nick Petricca at the Star 6 Memorial Run.

THE STAR 6 FOUNDATION

The **STAR 6 FOUNDATION** is affiliated with the Sacramento County Deputy Sheriffs' Association. The Foundation serves to provide financial assistance, grief counseling, and other peer support for the families of fallen members of the Sacramento County Sheriff's Department and surrounding law enforcement agencies.

Participating in the STAR 6 Foundation's Memorial Run is a great way to honor and remember those officers who are no longer with us and to support the family members they left behind.

— Christina Johnson Petricca

EVENTS and VOLUNTEER WORK

MONTEREY GOLF TOURNAMENT

Kevin Oakley, Monterey County DSA; Tom Matheny, Alameda County DSA; Bob Jarvis; and Tony Donoghue.

SACRAMENTO AREA FIRE FIGHTERS LOCAL 522 GALA

John and Veronica Tribuiano with Kathleen and Adam Storm at the 522 Gala.

Sacramento City Fire Dept. Captain Dave Dolson and Alan Davis at the 522 Gala.

ATTORNEY VOLUNTEER WORK

BJ Pierce

BJ Pierce volunteers at the Sacramento Employment Law Clinic, where she advises and represents members of the community who cannot afford an attorney on a variety of employment and labor law issues. She also volunteers in the ABA's Project Salute program, which assists veterans in obtaining their federal benefits.

Jeffrey R.A. Edwards

Jeffrey R.A. Edwards coaches the UC Davis School of Law's team in the Robert F. Wagner Labor and Employment Moot Court Competition held annually in New York. He also acts as a volunteer judge in King Hall's appellate advocacy class and the Gordon D. Schaber Competition, a moot court competition for Sacramento area high school students. Jeff has also been a support person for Casa Jane Addams, a community of Jesuit Volunteers in Oak Park serving underprivileged women and children and participates in Christmas Promise with the Schwartz-Levi American Inn of Court.

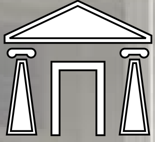
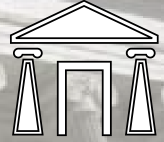
Jeffrey M. Schaff

Jeffrey M. Schaff stays connected to the community by teaching law students at the University of Pacific McGeorge School of Law. As an adjunct professor of Mock Trial Skills, Mr. Schaff trains these students to advocate effectively for their client's while adhering to the rules of court and law. This experience gives Mr. Schaff the opportunity to work closely with other professors, professionals, and judges to ensure tomorrow's lawyers are prepared for the courtroom.

Mr. Schaff also assists a number of non-profits as an advisory counsel. Whether assisting in obtaining their 501(c)(3) status or securing financing Mr. Schaff helps these non-profits make Sacramento a better community.

MASTAGNI, HOLSTEDT, AMICK, MILLER & JOHNSEN

A PROFESSIONAL CORPORATION

Providing Comprehensive Legal Representation to Peace Officers and Their Families for 37 Years and Counting

Ranked Among "Top 10 Law Firms" in the Sacramento Business Journal

Personal Injury • Wage and Hour Law • Contract Negotiations
Catastrophic Injuries • Workers' Compensation • Social Security Disability
Employment Law • Negligence • Motor Vehicle and Aviation Accidents
Products Liability • Public Safety/Employee Labor Law

Air Fleet and 24-Hour Pilots Allow Immediate Availability

1912 I Street, Sacramento, CA 95811
916.446.4692 Toll Free 800.852.7581
Other locations in San Francisco, Visalia, Stockton and Pleasanton
www.mastagni.com

Making a false or fraudulent workers' compensation claim is a felony subject to up to five years in prison or a fine of up to $50,000 or double the value of the fraud, whichever is greater or by both imprisonment and fine.